

Canada

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

Canada has only one statute governing all aspects of competition law: the federal Competition Act (the Act). The Act is administered and enforced by the commissioner of competition (the commissioner) who serves as the head of the Competition Bureau (the Bureau), a unit of Industry Canada.

The commissioner is responsible for investigating and enforcing alleged breaches of the Act. The criminal matters branch of the Bureau, consisting of the senior deputy commissioner, two assistant deputy commissioners and 41 officers, investigates all matters relating to cartels and conspiracies. The Bureau is supported by a team of approximately 20 lawyers from the Public Prosecution Service of Canada who are responsible for the conduct of prosecutions under the Act. Canada's attorney general has ultimate discretion and authority to initiate criminal proceedings under the Act, and the discretion of the attorney general is effectively exercised by the director of public prosecutions (DPP). In practical terms, cartel prosecutions are initiated only upon the commissioner's recommendation to the DPP. Although the criminal provisions of the Act relating to cartels and conspiracies date back to 1889, until the 1960s successful prosecutions were rare. Prosecutions have become significantly more frequent since amendments to the Act were adopted in 1986 and the Supreme Court of Canada clarified the law in a 1992 decision. Numerous cartels have been uncovered and cases resolved through the use of an immunity programme that was promulgated in September 2000 and revised in October 2007.

2 What is the substantive law on cartels in the jurisdiction?

Section 45 of the Act forms the core of Canadian cartel law. This provides that everyone who conspires, combines, agrees or arranges with another person:

- to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product;
- to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof;
- to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property; or
- to otherwise restrain or injure competition unduly [...]

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years or to a fine not exceeding C\$10 million or to both.

Under the current law, price-fixing or market-allocation conspiracies are not per se illegal in Canada. Rather, the Act prohibits only those conspiracies that have serious or 'undue' competitive effects, as determined under a 'partial rule of reason' analysis. There is no statute of limitations for section 45 offences. As with most other criminal offences, a conviction under the Act requires the prosecution to prove beyond a reasonable doubt both the *actus reus* (illegal acts) and the *mens rea* (guilty mind) of the offence.

The *actus reus* is established by demonstrating that: the accused was a party to a conspiracy, combination, agreement or arrangement; and the conspiracy, combination, agreement or arrangement, if implemented, would be likely to prevent or lessen competition unduly. In determining whether the agreement would or did cause an 'undue' lessening of competition, the court will consider the structure of the market and the behaviour of the parties. Proof of the *mens rea* of the offence is also a two-part test. First, the prosecutor must demonstrate that the accused subjectively intended to enter into the agreement and had knowledge of its terms. Second, the prosecutor must establish, using an objective test, that a reasonable business person would or should have known that the likely effect of the agreement would be to cause an undue lessening of competition.

While section 45 investigations traditionally have focused on price fixing and market allocation, the section is broadly worded. Potentially, it could catch other forms of cooperation among competitors, including behaviour such as joint ventures and strategic alliances, for which some care is required. The Act also prohibits Canadian corporations from implementing directives from a foreign corporation for the purpose of giving effect to conspiracies entered into outside of Canada (section 46), bid rigging (section 47) and both horizontal and vertical price maintenance (section 61).

3 Are there any industry-specific offences and defences?

The Act creates two industry-specific offences, one for professional sports and the other for financial institutions. With respect to professional sports, the Act prohibits conspiracies to limit unreasonably the opportunities for any person to participate in a professional sport or to negotiate with the team or club of his or her choice in a professional league. Unlike other sectors, conspiracies among federal financial institutions are per se offences – no lessening of competition must be proven. Any agreement among such institutions with respect to interest rates, service charges, and the amount and conditions of loans is an offence. However, there are exceptions for the sharing of credit information and other matters.

Various sectors and activities are excluded from the operations of the Act. These include labour relations, fishermen, shipping conferences, securities underwriting and amateur sport. Professional associations may rely on subsection 45(7) of the Act as a complete defence to combining to provide a service that maintains standards of competence and integrity reasonably necessary to protect the public.

While the Act provides no general statutory exemption for regulated activities, the courts have created a common law 'regulated conduct' defence. Economic activity is exempt from the Act when the federal or provincial legislature has conferred on a body the power to regulate the industry and the body has exercised that power. A technical bulletin clarifying the Bureau's enforcement procedure in this area was released in June 2006.

4 Does the law apply to individuals or corporations or both?

The Act applies to both individuals and corporations and charges are often laid against both a corporation and its senior officers or directors. On conviction, a person is subject to a fine of up to C\$10 million or up to five years' imprisonment per count, or both. The stated policy approach of the commissioner is to recommend the prosecution of the most senior culpable individuals involved in an offence. While fines and charges have been levied against individuals, experience over recent years does not demonstrate that individual prosecutions will be pursued invariably, even for parties who may be highly culpable.

5 Does the regime extend to conduct that takes place outside the jurisdiction?

To take jurisdiction over activities occurring outside of Canada, a Canadian court must find that it has both 'subject-matter' or substantive jurisdiction with respect to the alleged offence and personal jurisdiction over the accused person.

Substantive jurisdiction

The Supreme Court of Canada's 1985 decision in *R v Libman* sets out the following test for substantive jurisdiction:

This country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here [...] all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada.

The issue of substantive jurisdiction over conduct taking place outside Canada with effects in Canada has not been specifically canvassed in a contested criminal proceeding. Some uncertainty remains regarding the jurisdiction of Canadian courts over such conduct.

The commissioner has demonstrated a willingness to adopt an expansive interpretation of *Libman*. Foreign producers of fax paper, sorbates, bulk vitamins and other products have pleaded guilty to a violation of section 45 for price-fixing and market-allocation agreements that occurred wholly outside Canada but were specifically directed at Canadian markets, prices and customers. The Bureau can be expected to argue that a foreign cartel that impacts Canadian consumers triggers substantive jurisdiction.

Personal jurisdiction

The general principle governing a Canadian criminal court's assumption of personal jurisdiction is that a person who is outside Canada and not brought by any special statute within the

jurisdiction of the court is prima facie not subject to the process of that court. If there is no special statutory provision for the service of a summons outside the jurisdiction, then the court does not have jurisdiction and cannot try the accused, unless the person is present in Canada or voluntarily returns to the jurisdiction of the court. For persons who are not resident in Canada, a summons compelling attendance before a Canadian court cannot be served abroad for an offence under the Act. If no service has occurred, then Canadian courts will not have jurisdiction.

The case of foreign corporations with no Canadian presence or assets in Canada is more complex. Where the accused is a corporation, a notice of an indictment must be served on the corporation pursuant to the Criminal Code by delivering it to 'the manager, secretary or other executive officer of the corporation or of a branch thereof'. Service upon the Canadian 'affiliate' of a foreign corporation is unlikely to be sufficient, given that an affiliate is a separate legal person and service outside of Canada on a foreign corporation is not specifically authorised. However, a corporation which does not have a branch in Canada may still be properly served if one of its executive officers is present in Canada to carry on the business of the corporation. If there is a Canadian affiliate of a foreign corporate conspirator, a prosecution may also be instituted against the local subsidiary under section 46 of the Act, regardless of whether charges under section 45 are pursued against the foreign parent.

Extradition

Persons located in the United States can be extradited to Canada pursuant to the Canada-US Extradition Treaty, which permits each state to request from the other extradition of individuals who are charged with, or have been convicted of, offences within the jurisdiction of the requesting state. While extradition will only be granted for offences punishable by imprisonment for a term of more than one year, section 45 of the Act qualifies because it provides for jail terms of not more than five years. Extradition to Canada from the UK is also possible as a result of the recent adoption of legislation in that country criminalising cartel activity. The procedure for extradition requires the Canadian government to make a formal request for extradition under the applicable treaty. If the individual has not been convicted, then the request documentation would have to include an arrest warrant. This procedure has been used for offences under the Act at least once. In *Thomas Liquidation* – a misleading advertising case – the US authorities accepted a Canadian government request for extradition and issued a warrant for the arrest of an officer of the accused corporation who was individually charged under the Act.

6 Are there any proposals for change to the regime?

In July 2007 the government announced the creation of a competition policy review panel. This panel is currently undertaking a process of public consultations and will report to the government in June 2008. One of the issues raised in the panel's consultation paper is whether changes should be introduced to the conspiracy provisions; one possible change would be the introduction of a 'two-track' system that would treat some agreements criminally, while taking a non-criminal approach to other types of agreements, including strategic alliances, in which anti-competitive behaviour would be sanctioned by administrative monetary penalties.

Investigation
7 What are the typical steps in an investigation?

The Bureau routinely commences informal investigations in response to complaints by marketplace participants, strategic analysis of public information or the evidence of informants. If such an investigation leads the commissioner to believe, on reasonable grounds, that a criminal offence has been committed, the commissioner will launch a formal inquiry under section 10 of the Act. Commencement of an inquiry empowers the commissioner to exercise formal powers, for example, searches or orders to compel the production of evidence. After evidence is obtained during an inquiry, the commissioner decides whether to discontinue the inquiry or refer the case to the DPP for prosecution. If the inquiry is discontinued, the commissioner must make a written report to the minister of industry. This report must summarise the information obtained from the inquiry and the reasons for its discontinuance. In addition, the commissioner is required to commence an inquiry in response to a directive from the minister of industry or by an application in proper form by six residents of Canada. Although a directive from the minister or a 'six-resident application' cannot compel the commissioner to take any particular enforcement proceedings, the requirement of a written report to the minister upon the discontinuance of an inquiry ensures that the commissioner will closely examine the facts in such cases. Consequently, the target of the inquiry may be required to incur substantial costs and inconvenience in connection with such an inquiry, even though no formal charges are ever laid. While some Bureau investigations have been resolved expeditiously (initiation to initial resolution in under two years), others have taken an extended length of time depending on the complexity of the investigation and the availability of effective investigative resources.

8 What investigative powers do the authorities have?

During an inquiry, the commissioner has extensive powers to obtain information not in the public domain by means of search warrants, orders for the production of records and even wiretaps. These statutory powers supplement information supplied voluntarily by marketplace participants or enforcement agencies in other jurisdictions.

Search warrants

These can be obtained by means of an ex parte court order under section 15 of the Act. Under that section, the commissioner must establish that there are reasonable grounds to believe that a criminal offence has been committed and that relevant evidence is located on the premises to be searched. Preventing access to premises or otherwise obstructing the execution of a search warrant is a criminal offence and the commissioner may enlist the support of the police if access is denied. The Act expressly provides for access to and the search and seizure of computer records, and permits applications to the court to set the terms and conditions of the operation of a computer system. Bureau investigators have downloaded data stored outside of Canada in the course of searches of computer systems located in Canada, although there continues to be some controversy as to the precise limits of the authority granted by a warrant authorising a search of computer systems.

Documents that are subject to solicitor-client privilege cannot be immediately seized by officers under a search warrant. The Act contains a special procedure for sealing such documents and for

determining the validity of privilege claims within a limited time. The Act also contains a provision requiring the commissioner to report to the court to retain seized documents. Because the affected company can ultimately request a retention or privilege hearing, and because evidence procured through an illegal search can be excluded at trial, the courts have ruled that search warrant orders cannot be appealed. However, such an order can be set aside in special circumstances such as a material non-disclosure or misrepresentation in the affidavit supporting the commissioner's ex parte application, or the fact that the inquiry giving rise to the order has ended by the attorney general laying criminal charges. While relatively few searches have been undertaken in cartel cases in the past few years, there has been a recent upsurge in search activity by the Competition Bureau.

Wiretaps

The commissioner also has the power to intercept private communications without consent through electronic means – in other words, to use a wiretap. This power is restricted to conspiracy, bid-rigging and serious deceptive marketing investigations, and requires prior judicial authorisation. The first use of wiretaps as an investigative tool led recently to the laying of criminal charges under the telemarketing provisions of the Act, an area that has been the subject of vigorous enforcement activity on the part of the Bureau.

Production orders

As an alternative or, frequently, in addition to executing a search warrant, the commissioner may require the production of documents and other records and may also compel a corporation to prepare written returns of information under oath, within a certain period of time, by virtue of an order under section 11 of the Act. On a section 11 application, the commissioner need only satisfy the court that an inquiry has been initiated and that a person is likely to have relevant documents in his possession or control. Section 11 of the Act can also be used to compel witnesses who have relevant information to testify under oath for the purpose of answering questions related to the inquiry. Under the Act, no testimony obtained from a person under a section 11 order can be used against that person in any subsequent criminal proceedings. This limitation is consistent with decisions of the Supreme Court of Canada establishing use and derivative use immunity for persons compelled to give evidence under statutory powers of investigation. On the other hand, where an individual employee of a corporation has been compelled to give evidence under section 11, the evidence is generally considered admissible against the accused corporation.

Under subsection 11(2), a Canadian corporation that is an affiliate of a foreign corporation may be ordered to produce records held by its foreign affiliate. The precise scope of this 'long-arm' authority has never been judicially tested, but in recent production orders, it has been invoked by the Bureau.

International cooperation

9 Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

In international cartel cases, the Bureau will often cooperate closely with other competition agencies, either through formal procedures or informally. Formal procedures involve the invocation of mutual legal assistance treaties (MLATs) with the US and numerous other countries or, less formally, reliance on competition cooperation agreements, such as those with the US, the EU,

Australia, New Zealand and Japan. Furthermore, there may be very wide-ranging informal contacts among Canadian and foreign investigative agencies on common issues during an inquiry. While they have been used sparingly, the MLAT arrangements permit Canada and cooperating countries to undertake formal procedures in their own jurisdictions to obtain evidence for a foreign investigation. These arrangements also permit Canadian and other antitrust enforcement agencies to coordinate their enforcement activities, exchange confidential information and meet regularly to discuss case-specific matters. There appears to have been informal coordination of (but otherwise independent and parallel) investigations into numerous international cartels, including the air cargo and freight forwarders investigations, along with numerous coordinated investigations in past international cartel cases. This form of cooperation has been very successful and appears likely to be the norm in future investigations into cartels affecting North America. Canada has been a key participant in the recent, closely coordinated, multi-jurisdictional investigations into products involving plastics, rubber chemicals and air cargo.

- 10** How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

In light of the MLAT and the Canada–EU and Canada–US accords, a company defending a cartel investigation that has multi-jurisdictional implications, and particularly one involving the US or the EU, should be highly sensitive to the potential involvement of the Canadian Competition Bureau. A coordinated defence strategy is increasingly critical to a fully effective strategy, and the timing of approaches to the regulators in each jurisdiction should be considered carefully. The exposure of key individuals to prosecution in Canada is a factor of particular concern in developing a coherent strategy.

Adjudication

- 11** How is a cartel matter adjudicated?

As cartel matters are prosecuted as indictable criminal offences, they are adjudicated in any of the regular provincial courts of superior jurisdiction or in the Federal Court – Trial Division. Procedure in these prosecutions is governed by the Criminal Code and, where matters are adjudicated in the provincial courts, the provincial court's Rules of Criminal Procedure. Proceedings against individuals are normally taken in the provincial superior courts, which have well-established procedures for dealing with custodial sentences, probation and the like.

- 12** What is the appeal process?

There is an automatic right of appeal from any conviction under the Act to a provincial Court of Appeal or the Federal Court of Appeal, as the case may be. The decision of a court of appeal may be appealed to the Supreme Court of Canada, but only if the Supreme Court grants leave to do so.

- 13** With which party is the burden of proof?

In cartel cases, as in most other criminal matters, the onus is on the prosecution to prove every element of the offence beyond a reasonable doubt. Although ordinary rules of evidence apply, the Act expressly provides for the admissibility of statistical evidence that might not be admitted in some other criminal cases. Under the Act, a corporation has no right to a jury trial.

Sanctions

- 14** What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

Given their status as the most serious indictable offences under the Act, cartel prosecutions attract very significant individual and corporate fines and imprisonment, together with prohibition orders made after a conviction. Courts have emphasised that, in the competition law context, fines must be large enough to deter powerful companies and must not become simply a cost of doing business. C\$10 million is the highest fine to date for a single count conspiracy. This amount (the statutory maximum) was imposed for the first time in January 2006. However, it is common for the prosecution to proceed on multiple counts. As a result, the commissioner has obtained multimillion-dollar fines following guilty pleas in a number of conspiracy cases. These include the highest fine in the history of Canadian criminal law, C\$50.9 million, against F Hoffmann-La Roche in the vitamins case. In addition, as noted, an individual may be subject to a term of imprisonment of up to five years.

- 15** What civil or administrative sanctions are there for cartel activity?

Cartel cases are prosecuted under the criminal provisions of the Act and are subject to the criminal sanctions of fines, imprisonment and prohibition orders. It is also possible for the prosecution to seek a prohibition order to inhibit future repetition of the offence. For cases that do not fall into the traditional hard-core cartel pattern, it would appear to be open to the commissioner to bring an application for joint abuse of a dominant position. Such applications would be heard before the Competition Tribunal, an administrative body which considers the evidence on a civil standard of a balance of probabilities. Currently, the Competition Tribunal cannot impose fines or imprisonment under this provision of the Act, although it can make an order enjoining any activity that would constitute an abuse of dominant position.

- 16** Are private damage claims or class actions possible?

Section 36 of the Act grants private parties the right to recover in the ordinary civil courts any losses or damages suffered as a result of a breach of the criminal provisions of the Act. The Act expressly provides that a prior conviction for an offence is, in the absence of any evidence to the contrary, proof of liability. As a result, private actions for recovery are most often commenced following a conviction or guilty plea by an accused. However, there are no conditions precedent to a private action under the Act, and the absence of a conviction, or even the refusal of the commissioner to commence an inquiry, do not bar or provide a valid defence to such an action.

Class actions are also possible and are now a virtual certainty in multiple provinces in Canada following a conviction under the Act. A vigorous and effective plaintiffs' bar has evolved in Canada, and this is a rapidly developing area of practice.

- 17** What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated?

In recent years, fines imposed under the Act's conspiracy provisions have increased exponentially. The inquiry into the bulk vitamins industry generated nearly C\$100 million in fines. Other significant inquiries include graphite electrodes (C\$24.9 million

total fines), lysine (C\$17.6 million total fines) and, recently, carbonless sheet paper (C\$37.5 million total fines).

Fines against individual corporate defendants in each of these recent conspiracy inquiries often have been in excess of C\$10 million. For example, F Hoffmann-La Roche, BASF and Rhône-Poulenc paid fines of C\$50.9 million, C\$18 million and C\$14 million respectively, for price-fixing and market-allocation offences involving the bulk vitamins cartel. The Archer Daniels Midland Company paid C\$16 million for its participation in the lysine and citric acid conspiracies. In 2006, Domtar, Cascades and Unisource each paid fines of C\$12.5 million in relation to two carbonless sheet conspiracies.

Individuals have been sentenced to up to one year imprisonment and have been subject to fines of up to C\$550,000. The Federal Court of Canada imposed a fine of C\$250,000 on a senior executive for his role in the international bulk vitamin conspiracies. Another senior executive was sentenced to a nine-month prison term and 50 hours of community service for his role in a conspiracy to fix prices and allocate markets with respect to animal feed additives.

Sentencing

18 Do sentencing guidelines exist?

The commissioner has not published formal sentencing guidelines, but the jurisprudence on sentencing for conspiracies has established the following factors for consideration:

- the size and influence of the accused, both specifically in the conspiracy and, more generally, in terms of market share, sales and volume of commerce. Fines are often between 20 and 30 per cent of sales over the duration of the conspiracy, with higher fines for conspirators that are late to resolve their exposure;
- the role of the accused in the offence, including whether it initiated or resisted participation in the offence;
- the duration of the conspiracy;
- the geographical scope of the market;
- the nature of the product;
- consciousness of illegality or wilfully criminal conduct and efforts to conceal that conduct; and
- factors in mitigation such as the extent of cooperation with the Crown, restitution, the timeliness of cooperation and ability to pay.

The Criminal Code requires sentencing judges to consider sentences imposed on similar offenders in similar circumstances and it is possible to project an appropriate fine level from the significant number of recent fines imposed in Canada. However, most recent fines have been the result of plea agreements, rather than contested sentencing decisions.

19 Are sentencing guidelines binding on the adjudicator?

Any guidelines published by the commissioner are not binding on the courts that adjudicate cartel matters. While plea agreements are an important element of Canadian practice, the prosecution and the defence cannot fetter the sentencing discretion of the convicting court by agreement. In practice, however, fine levels agreed between prosecutors and defence lawyers are expected to be approved, unless there is some unexplained and seriously disproportionate outcome.

Leniency or immunity programmes

20 Is there a leniency or immunity programme?

The commissioner's bulletin entitled 'Immunity Program under the Competition Act' sets out the circumstances in which the commissioner will make a recommendation of immunity. This bulletin reflects the current practice of the commissioner and, by extension, the DPP. The Bureau has also released 'FAQs' to elaborate on areas of practice under the programme. The current bulletin and FAQs were published in October 2007 and replace the former versions of these documents.

21 What are the basic elements of a leniency or immunity programme?

The Bureau's programme offers immunity or leniency in exchange for a party's cooperation with the Bureau's investigation, subject to certain minimal requirements. A corporation or an individual may apply for immunity. Consistent with the fair and impartial administration of the law, the commissioner will recommend to the DPP that immunity be granted to a party in the following situations:

- where the Bureau is unaware of an offence, and the party is the first to disclose it; or
- where the Bureau is aware of an offence and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the DPP.

The requirements for a grant of immunity are that:

- the party must terminate its participation in the illegal activity;
- the party must not have coerced others to be part of the illegal activity;
- the party must provide complete and timely cooperation throughout the course of the Bureau's investigation;
- the party must not be the only party involved in the offence; and
- if the first party fails to meet the requirements, a subsequent party that does meet the requirements may be recommended for immunity.

While the commissioner's policy does not legally bind the DPP or the attorney general, who has the exclusive authority to grant immunity in competition cases, there is a high degree of predictability that, on a party's compliance with the policy, a recommendation by the commissioner would be followed. The DPP's policy directives to Crown prosecutors make specific reference to the commissioner's programme. Moreover, the lawyers attached to the Bureau normally conduct the prosecutions under the Act and advise on the conduct of an investigation and it appears that no recommendation for immunity in a competition case has ever been rejected.

22 What is the importance of being 'first-in' to cooperate?

If a party is 'first-in' and the Bureau is unaware of the offence, or the party is the first to come forward before there is sufficient evidence to warrant the referral of the matter to the DPP, it will be granted immunity if the requirements set out above are met. However, the party must be 'first-in' in Canada; being first elsewhere will not suffice and in two cases, parties that obtained immunity in the US were required to plead guilty in Canada because they failed to apply in time in Canada. The Bureau will not afford any special consideration to a party solely because it has been granted immunity or favourable treatment in another jurisdiction.

23 What is the importance of going second? Is there an 'immunity plus' or 'amnesty plus' option?

A party will not be eligible for immunity if the Bureau has been made aware of the offence by another, earlier applicant for immunity. However, the second party to offer to cooperate will, as a practical matter, be considered for favourable treatment and may, if the first party fails to fulfil the requirements of the immunity programme, still be able to request immunity. The second party will qualify for a reduced penalty, especially if the Bureau does not yet have sufficient evidence to warrant a referral to the DPP. Other conspirators who seek to resolve their exposure later in the investigation will have a significantly reduced ability to negotiate favourable terms, with regard to both fine levels and the exposure of culpable individuals.

The concept of 'immunity plus' is addressed in the FAQs. Parties that are not the first to disclose conduct to the Bureau may nonetheless qualify for immunity if they are the first to disclose information relating to another offence. If the company pleads guilty to the first offence for which it has not been granted immunity, its disclosure of the second offence will be recognized by the Bureau and the DPP in their sentencing recommendations with respect to the first offence.

24 What is the best time to approach the authorities when seeking leniency or immunity?

To increase its likelihood of obtaining immunity or lenient treatment, a party should approach the authorities as soon as legal counsel have information indicating that an offence has been committed. In situations involving multiple jurisdictions, a party whose business activities have a substantial connection to Canada should consider contacting the Bureau either prior to, or immediately after, approaching foreign competition law authorities.

25 What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

The Bureau treats as confidential – and will not inform other competition agencies with which it may be cooperating – both the identity of a party requesting immunity and any information obtained from that party. No other party will receive a commitment of non-disclosure to foreign competition agencies. The only exceptions to this policy are:

- when disclosure is required by law;
- when disclosure is necessary to obtain or maintain the validity of a judicial authorization for the exercise of investigative powers;
- when disclosure is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers
- where the party has agreed to disclosure
- when there has been public disclosure by the party;
- when disclosure is necessary to prevent the commission of a serious criminal offence.

With respect to private actions, the Bureau's policy is to provide confidential information only in response to a court order. In the event of such an order, the Bureau will take all reasonable steps to protect the confidentiality of the information, including by seeking protective court orders.

26 What is needed to be a successful leniency or immunity applicant?

The requirements for a successful grant of immunity are set out in question 21. In particular, it should be noted that there is no specific evidentiary standard that must be met by an immunity applicant.

27 Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

Canada has a bifurcated approach to criminal cartel enforcement: the Bureau investigates anti-competitive conduct, and when the Bureau has developed sufficient evidence of a cartel offence it will refer the matter to the DPP with recommendations on prosecution. While the Bureau may make recommendations to the DPP with respect to the severity of any penalty or obligation to be imposed on parties that cooperate in cartel investigations, the DPP retains the ultimate discretion concerning sentencing submissions presented in court. As discussed in question 19, the prosecution and defence cannot fetter the sentencing discretion of the convicting court by agreement.

28 What is the effect of leniency or immunity granted to a corporate defendant on its employees?

If a company qualifies for immunity, all present directors, officers and employees who admit their involvement in the illegal activity as part of the corporate admission, and who provide complete, timely and ongoing cooperation, will qualify for the same recommendation for immunity. Agents of a company and past directors, officers and employees who offer to cooperate with the Bureau's investigation may also qualify for immunity. However, this determination will be made on a case-by-case basis and immunity is not automatic for agents or past employees. Even if a corporation does not qualify for immunity – for example, if it coerced others to participate – past or present directors, officers and employees who come forward with the corporation to cooperate may nonetheless be considered for immunity as if they had approached the Bureau individually.

While immunity may be revoked where a party fails to comply with the Immunity Program requirements, the revocation will only apply to the non-cooperating party. A company's immunity can be revoked while its cooperating directors, officers, employees and agents retain their protection. Likewise, an individual's immunity can be revoked while the individual's employer company remains covered.

29 What guarantee of leniency or immunity exists if a party cooperates?

An immunity agreement will be binding on the DPP as long as the party to whom immunity has been granted meets all of its obligations under the agreement. However, as indicated, a recommendation for a reduced penalty in exchange for a guilty plea and cooperation is not binding on the court. Canadian law does not provide for a conditional guilty plea that can be withdrawn if the DPP's recommendation is not accepted by the court, although a court will depart from a jointly recommended sentence only if the recommendation is a significant departure from the norm in comparable cases.

30 What are the practical steps in dealing with the enforcement agency?

The immunity process typically involves the following steps:

Initial contact

Anyone may initiate a request for immunity in a cartel case by communicating with the senior deputy commissioner of competition, criminal matters or the deputy commissioner of competition, fair business practices. Certain information will need to be provided, usually through a hypothetical disclosure, to determine whether the Bureau is already investigating. The party may be granted a 'marker' if the Bureau does not yet have an investigation open in the industry sector. The Bureau may require the applicant to perfect its marker without delay.

Proffer

If the party decides to proceed with the immunity application, it will need to provide a detailed description of the illegal activity and to disclose sufficient information for the Bureau to determine whether it might qualify for immunity. At this stage the Bureau may request an interview with one or more witnesses, or an opportunity to view certain documents, prior to recommending that the DPP grant immunity. If the Bureau determines that the party demonstrates its capacity to provide full cooperation and that it meets the requirements of the immunity programme, it will present all relevant proffered information and a recommendation regarding the party's eligibility under the programme to the DPP. The DPP will then exercise its independent discretion to determine whether to grant the party immunity from prosecution.

Immunity agreement

If the DPP accepts the Bureau's immunity recommendation after full disclosure, the DPP will execute an immunity agreement that will include all of the party's continuing obligations.

Full disclosure and cooperation

After the party enters into an immunity agreement with the DPP, it will be required to provide full disclosure and cooperation with the investigation and any ensuing prosecution.

31 Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

No.

Update and trends

The new immunity bulletin and FAQs published in October 2007 represent a positive development as they are expected to increase the clarity and predictability of the immunity programme.

Defending a case**32** May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

As individual employees can be charged with an offence under the Act as well as the company, there is a potential conflict of interest if counsel acts for both the company and any employees targeted by the commissioner. For example, an employee may wish to obtain immunity in exchange for testimony against the corporation or the corporation may wish to claim that the employee's actions were not authorised by management. Counsel for a corporation must caution employees that he or she acts for the company alone and, if they believe that their interests may conflict with the company's, they should obtain independent legal advice. Counsel for the company will be free to act for both the corporation and the employee, if they both consent to a waiver of the conflict of interest and agree that no information provided by one party can be confidential against the other. However, the prosecutor or investigators may resist joint representation if there is a risk of divergent interests.

33 May counsel represent multiple corporate defendants?

Again, there is a potential conflict of interest among multiple corporate defendants and very complex issues arise. However, on occasion, large firms have acted for multiple defendants where the defendants have consented and appropriate confidentiality and conflicts management arrangements have been established between lawyers at the firm engaged in the matters. These arrangements have usually occurred where the parties concerned have been involved in related conspiracies, but the defendants

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were not in a situation of actual conflict. As a matter of current practice, prosecutors will be highly unlikely to participate in joint resolution discussions involving multiple parties.

34 May a corporation pay the legal costs of and penalties imposed on its employees?

It is possible for a corporation to indemnify an employee for legal costs and fines incurred as a result of a criminal investigation or conviction. While most indemnity agreements or insurance policies contain exclusions for deliberate wrongdoing, there is no law prohibiting such indemnification if the corporation chooses to do so. However, a convicting court, on one occasion, ordered a corporation not to pay the fine imposed on an individual employee.

Getting the fine down

35 What is the optimal way in which to get the fine down?

In Canada, plea negotiations in criminal matters are a well recognised and accepted aspect of practice. The single most effective

consideration in negotiating a plea agreement and sentencing recommendation is the stage in the investigation at which the party decides to come forward. Even where there are serious aggravating elements – instigation, multiple charges, obstruction or previous convictions – if the party comes forward before the investigation is complete and at an early enough stage to provide valuable assistance to the investigators for the prosecution of other parties, a reduced fine or leniency for exposed individuals may be negotiated. The rule of thumb in competition offences is that, as a proportion of the affected volume of commerce, the later the settlement, the higher the fine. Other substantive factors are also important: the capacity to pay a fine, the existence or not of an effective corporate compliance programme together with the degree of management awareness of the actions of individual participants and passive or reluctant participation as opposed to instigation of the offence, are among the important elements in a consensual settlement of the company's exposure to prosecution.

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