

Cartel Leniency in Canada: Overview

Mark Katz and Dajena Pechersky

Originally published in Practical Law Country Q&A 2022
(a publication of Thomson Reuters)

Cartel Leniency in Canada: Overview

by Mark Katz and Dajena Pechersky, Davies Ward Phillips & Vineberg LLP

Country Q&A | Law stated as at 01-Jul-2022 | Canada

A Q&A guide to cartel leniency law in Canada.

The Q&A is part of the global guide to cartel leniency. Areas covered include an overview of leniency and immunity, the applicable procedure, relevant regulatory authorities, and conditions to be satisfied. Also covered are immunity from civil fines to individuals, the scope of leniency, circumstances when leniency may be withdrawn, leniency plus, confidentiality and disclosure, whistleblower tools and protections, and proposals for reform.

Regulation

1. What laws provide for a leniency programme and which regulatory authority administers it? Is there any published guidance?

Applicable Laws and Guidance

The Competition Bureau of Canada (Bureau) operates immunity and leniency programmes (collectively, programmes) with respect to criminal offences under the Competition Act of Canada, (*R.S.C., 1985, c. C-34*) (Competition Act). The immunity programme offers the opportunity to receive complete immunity from prosecution to parties that are "first in" to disclose an offence. The leniency programme offers the potential of lenient treatment on sentencing even if a party is not eligible for full immunity.

Regulatory Authority

The programmes are administered jointly by the Bureau, which is headed by the Commissioner of Competition (Commissioner), and by the Public Prosecutions Service of Canada (PPSC), which is headed by the Director of Public Prosecutions (DPP). The Bureau is responsible for investigating alleged violations of the Act's criminal offences, referring cases to the PPSC for prosecution, and making recommendations to the PPSC to grant immunity or leniency to qualifying applicants. The PPSC has exclusive authority to prosecute alleged criminal offences under the Act and to enter into immunity or leniency (plea) agreements with qualifying applicants.

Guidance

The Bureau has issued a detailed description of the programmes in its Bulletin on Immunity and Leniency Programs under the Competition Act (Immunity and Leniency Bulletin). The Immunity and Leniency Bulletin is available at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html and discusses, among other things:

- The requirements an applicant must satisfy to obtain immunity or leniency.
- The steps that must be followed in each process.
- The treatment of individual officers, directors and employees.
- Timing considerations.
- Issues such as confidentiality, international co-operation and withdrawal of immunity/leniency for failure to comply with an immunity or leniency agreement.

Scope of Application

2. What infringements of competition law does the leniency programme cover?

The Bureau has both an immunity programme and a leniency programme.

The Bureau's immunity programme is available to applicant companies or individuals that can demonstrate that they were a party to a criminal offence under Part VI of the Competition Act. The principal criminal offences under Part VI are:

- The conspiracy offence, which prohibits agreements between competitors (and potential competitors) to engage in price-fixing, market allocation or output restrictions, and from 23 June 2023, will prohibit wage-fixing and no-poaching agreements between parties (not limited to competitors) (*section 45, Competition Act*).
- The bid-rigging offence (*section 47, Competition Act*).
- Certain offences involving false or misleading representations and deceptive marketing practices (*sections 52 to 55.1, Competition Act*).

The Bureau's leniency programme is only available to applicant companies or individuals that can demonstrate that they were a party to the Competition Act's "cartel offences", which essentially consist of the conspiracy offence (*section 45, Competition Act*) and bid-rigging offence (*section 47, Competition Act*), and excludes offences involving misleading representations and deceptive marketing practices.

The "party" to an offence also includes a party that "aided and abetted" or "counselled" the commission of one or more of the offences, contrary to sections 21, 22 or 22.2 of the Criminal Code of Canada (Code).

Recent Cases and Trends

3. What notable recent cases have applied the leniency programme?

The Bureau has long considered the programmes to be its most effective tool for detecting, investigating, and prosecuting cartel conduct affecting Canada. For example, the programmes have featured prominently in several key cartel cases in Canada over the last decade and a half:

- In 2021, the Bureau announced that it had laid charges against multiple companies and individuals in connection with an alleged conspiracy to rig bids for condominium refurbishment services in the Greater Toronto Area. The Bureau's case included information from parties that were granted immunity from prosecution in exchange for co-operation.
- In 2020, the Bureau settled with a leniency applicant in a case involving an alleged bid-rigging on municipal infrastructure contracts in the province of Quebec. The party, which had co-operated with the Bureau and the PPSC, was fined CAD300,000 for its involvement.
- In 2017, Loblaw Companies and its parent company George Weston secured immunity from prosecution by coming forward and co-operating in an alleged bread price-fixing scheme. Other parties have apparently also applied for leniency. This case is ongoing, with the identity of the leniency applicants not yet known, and no charges yet laid.
- In 2013, after Cadbury Adams Canada provided details of an alleged price-fixing conspiracy in the chocolate confectionery products industry in Canada in 2007 in exchange for immunity, criminal charges via direct indictment were laid against three companies-Nestlé Canada, Mars Canada and ITWAL Limited-and three individuals-Robert Leonidas (former President of Nestlé Canada), Sandra Martinez (former President of Confectionery for Nestlé Canada) and David Glenn Stevens (President and CEO of ITWAL). Hershey Canada. pleaded guilty to a criminal charge of price-fixing and was fined CAD4 million. Hershey Canada co-operated with the Bureau's investigation and the Bureau recommended that it receive lenient treatment in return. Charges were eventually stayed against the other parties.
- In December 2009, the Bureau began a bid-rigging investigation after it learned of anti-competitive activity in the auto parts industry by way of its immunity programme. A number of companies also co-operated under the Bureau's leniency programme. The investigation related to a series of international conspiracies and bid-rigging agreements among various auto parts suppliers relating to parts that were used in vehicles manufactured and sold in Canada and elsewhere. The Bureau co-operated closely with its international counterparts throughout its investigation, which resulted in 13 guilty pleas and more than CAD86 million in fines, including several of the largest bid-rigging fines ever imposed by the courts in Canada, between April 2013 to October 2018.
- In 2005, the Bureau began an investigation into the supply of IT services to two government departments on ten contracts worth about CAD67 million, following a tip from Public Works and Government Services Canada officials. Criminal charges were laid against 14 individuals and seven companies in 2009. Two leniency applicants came forward and pleaded guilty. The PPSC prosecuted the nine defendants who elected for a jury trial. In 2014, the jury found the defendants not guilty of all 60 charges of bid-rigging and conspiracy as the PPSC failed to prove that bid-rigging had taken place.

However, the number of immunity/leniency applications has declined significantly in recent years. For example, in the last full fiscal year for which data is available (1 April 2021 to 31 March 2022), the Bureau only issued two immunity markers (down from four the previous year) and no leniency markers (the same as the previous year).

The decline in immunity/leniency applications, which is not a strictly Canadian phenomenon, may be the product of several factors, including increasingly onerous co-operation obligations, exposure to class actions for damages (even for immunity recipients), and the Bureau/PPSC's poor track record in litigating contested cases (thereby diluting the incentive to co-operate). It also may be simply a matter of the cyclical nature of cartel enforcement.

Regardless of the reason(s), the decline in immunity/leniency applications has led the Bureau to reconsider whether it should be relying so heavily on the programmes as the cornerstone of cartel enforcement in Canada. Steps that the Bureau has taken to lessen this reliance include:

- Information-sharing with domestic public agencies.
- Outreach to procurement authorities.
- The use of algorithms and analytics on bid data to identify evidence of bid-rigging.
- The development and promotion of tip-lines and whistleblower protections.
- Increased resources for intelligence gathering and proactive case selection.

Availability of Leniency

Administrative Liability

4. Is full immunity from administrative penalties available? What conditions must be met for immunity to be granted?

The Bureau's immunity programme offers eligible applicants the opportunity to claim full immunity from prosecution. Unlike the Bureau's leniency programme, immunity applicants are not required to plead guilty to and publicly acknowledge participation in unlawful cartel conduct.

To be eligible, an applicant must be the first to disclose the offence in question to the Bureau or be the first to come forward before the Bureau has sufficient evidence to refer the matter to the DPP for prosecution. The immunity applicant also cannot have coerced others to be a party to the offence. In particular, where there is evidence that the party pressured unwilling participants to be involved in the offence, the party will not qualify for immunity. The coercion can be either express or implied. This may include, but is not limited to, making threats of reprisals or taking retaliatory measures against other business organisations or individuals unless they participate in the illegal conduct. In addition, the immunity applicant must:

- Terminate its participation in the illegal activity.
- Maintain confidentiality throughout the immunity process.

- Provide complete, timely and ongoing co-operation during the Bureau's investigation at its own expense. This means, for example, that the immunity applicant must:
 - conduct an exhaustive internal investigation and make full, complete and truthful disclosure of all non-privileged information, evidence and records in its control relating to the offence for which immunity is sought (immunity will only be granted if there is credible and reliable evidence to establish the offence);
 - disclose any other offences under the Competition Act in which it may be involved;
 - take all lawful measures to secure the co-operation of current and former directors, officers, and employees (provided it would not jeopardise the investigation and with the consent of the Bureau or DPP).

5. Is there a sliding scale of available leniency from administrative penalties?

The Bureau's leniency programme allows parties to apply for lenient treatment on sentencing even if not eligible for full immunity for prosecution. Leniency is only available in respect of the Competition Act's cartel offences, the principal ones being the conspiracy and bid-rigging offences.

To qualify for leniency in the above circumstances, the party must apply before the DPP has filed charges against a party to the alleged offence. The party must also:

- Demonstrate that it was a party to a relevant offence.
- Terminate its participation in the illegal activity.
- Co-operate in a timely manner, at its own expense, with the Bureau's investigation and any subsequent prosecution by the DPP of other participants.
- Agree ultimately to plead guilty to the offence in court.

Successful leniency applicants are eligible for a "leniency co-operation credit" (LCC) of up to 50%, that is, up to a 50% reduction in the fine that otherwise would have been recommended (which is typically based on the party's volume of commerce of the implicated product over the relevant time, subject to adjustment for certain aggravating and mitigating factors). The amount of the credit will depend on the Bureau's assessment of the value of the leniency applicant's co-operation to the Bureau's investigation.

It should be noted that, as a result of amendments to the Competition Act passed on 23 June 2022, there is no longer any cap on the fines that a court can impose for violations of the section 45 conspiracy offence; fines are now stated to be "in the discretion of the court" which is the same standard that has been applied in bid-rigging cases under section 47 of the Competition Act. Prior to this amendment, the ceiling on fines for the conspiracy offence was CAD25 million (per count). In practice, however, the Bureau rarely sought or obtained fines exceeding that amount.

Although the timing of the leniency application will be an important factor in the Bureau's assessment of the value of an applicant's co-operation, it will not be determinative. This is a significant recent change to the leniency programme. Previously, the first leniency applicant could expect an LCC of up to 50% but subsequent applicants were only entitled to an LCC of up to 30%. The change in approach has been criticised for creating uncertainty by moving away from a relatively predictable standard to one in which the Bureau has too much discretion.

6. Is immunity or leniency for administrative penalties available to individuals? If so, what conditions apply?

Individuals are liable to prosecution for criminal offences under the Competition Act, with possible sanctions including both fines and imprisonment. Therefore, individuals (for example, employees) are equally entitled to apply for immunity or leniency on their own behalf if they have engaged in criminal conduct in violation of the Competition Act. To qualify, they must admit their knowledge of or participation in the criminal conduct and co-operate with the Bureau.

7. Is immunity or leniency available for companies and/or its employees in relation to criminal prosecution? What are the implications for employees when an undertaking has been granted immunity or leniency?

Circumstances

Immunity and leniency are available for companies and/or their employees in relation to criminal prosecution (*see Question 2*). If a company qualifies for a recommendation of immunity, the Bureau will also make that same recommendation for current directors, officers, and employees who admit their knowledge of or participation in the criminal conduct and co-operate with the Bureau. The Bureau may also recommend immunity for former directors, officers and employees, and agents who admit their knowledge of or participation in the criminal conduct and co-operate with the Bureau. However, recommendations of immunity for these former directors, officers, employees and agents are made on a case-by-case basis.

At the request of a company that is a first-in leniency applicant (first after the immunity applicant), the Bureau will recommend that no charges be laid against its current directors, officers and employees provided that such individuals admit to knowledge of or participation in the illegal conduct and can provide timely and complete co-operation with the Bureau's investigation. Leniency may also apply, but is not assured, to agents and former directors, officers and employees who meet the criteria.

For a company that is a second or subsequent leniency applicant, the Bureau may or may not recommend that the current directors, officers or employees be charged. This will depend on all the available evidence, particularly the individual's role in the offence, whether he or she benefited personally from the conduct, and whether the individual is a recidivist.

If an individual does not admit his or her knowledge of or participation in the illegal conduct, fails to co-operate with the Bureau's investigation, or is found to have engaged in obstruction, the Bureau may recommend to the DPP that the individual be excluded from the corporate applicant's immunity or plea agreement.

Application Proceedings

8. When should an application for leniency be made?

The Bureau's recommendation in the Immunity and Leniency Bulletin is that parties should apply for immunity or leniency, as soon as they believe they are implicated in an offence under the Competition Act.

However, parties should not make this decision lightly and before properly considering all the relevant factors and consequences. This is especially true for parties that understand they are not eligible for full immunity from prosecution. Relevant considerations in this regard include:

- The strength of the internal evidence of illegal conduct.
- The potentially onerous costs of co-operation.
- Uncertainty as to the LCC that may be obtained and the treatment of officers, directors and employees.
- The requirement to plead guilty and subsequent exposure to class actions for damages.
- The actual prospects of conviction if the matter is contested.

9. What are the procedural rules for leniency applications?

Relevant Authority

While the DPP has the ultimate authority to grant immunity or leniency, applications for immunity or leniency are made to the Bureau.

Applicant

Anyone can request a marker, whether it is an individual on their own behalf, or management or in-house counsel on behalf of a company. However, parties typically retain external counsel with expertise in these matters to make their immunity and leniency marker requests.

Informal/Confidential Guidance

While a prospective applicant can obtain confirmation on whether a marker is available for immunity or leniency with respect to particular conduct (*see below, Markers*), it is not possible to obtain informal guidance on whether an applicant will qualify for immunity or leniency before making an application.

Form of Application

No formal written application is filed with the Bureau. The applicant will provide relevant information in connection with its application, which, in practice, is done orally by the relevant legal counsel (see *Question 10*). Marker requests are made by telephone and by stating that an immunity or leniency marker is being sought. The proffer, as further discussed below, is provided orally.

Markers

Receipt of a marker confirms the availability of immunity or leniency but does not signify that immunity or leniency will be granted; that will depend on whether the applicant meets all the conditions for eligibility described under *Question 4 to 6*.

Marker requests typically involve a telephone call by the legal counsel to the appropriate Bureau official. For an immunity marker, the call must be made to either the:

- Deputy Commissioner, Cartels Directorate (in the case of cartel offences such as conspiracy and bid-rigging).
- Deputy Commissioner, Deceptive Marketing Practices Directorate (in the case of misleading representations and deceptive marketing practices).

Since leniency applications can only be made with respect to cartel offences, marker requests must be made to the Deputy Commissioner, Cartels Directorate.

Marker requests can be made on the basis of a limited hypothetical disclosure which nonetheless must be specific enough to identify the:

- Offence.
- Products at issue (including sub-products).
- Timeframe at issue.

The identity of the applicant need not be disclosed at this stage.

The Bureau will typically advise whether a marker is available within a few days of receiving the request. Only one immunity marker is available in any given case. In the case of leniency applications, the Bureau will also advise of the applicant's position in the "leniency line".

The identity of the applicant must be disclosed on issuance of the marker.

Information/Evidence

Applicants must provide the Bureau with evidence that makes out the offence for which immunity or leniency is sought; this includes both documentary and testimonial evidence.

Oral Statements

Information proffered in support of an application for immunity or leniency is, in practice, delivered orally (*see Question 10, Proffers*). Proffers are usually read out by an applicant's counsel based on a scripted statement.

Short-form Applications

Not applicable.

10. What are the applicable procedures and timetable?

The Immunity and Leniency Bulletin contains a detailed description of the procedural rules, processes and timetables governing immunity and leniency applications for criminal offences under the Competition Act.

See below for a brief summary of the key elements.

Markers

The first step under both the immunity and leniency programmes is to obtain a "marker" from the Bureau (*see Question 9, Markers*).

Proffers

Once a marker is granted, the applicant has 30 calendar days to provide the Bureau with a detailed statement or "proffer" describing the unlawful conduct. This process is often referred to as "perfecting" the marker. In certain circumstances, for example, where the Bureau is considering investigative steps such as a dawn raid, the Bureau may require the applicant to make its proffer earlier within the 30-day period.

Proffers are generally delivered verbally by the legal counsel and on a "without prejudice" basis. There is no requirement to submit a written statement and it is not the practice in Canada to submit proffer statements in writing.

Proffers must provide a comprehensive description of the unlawful conduct, demonstrating each element of the offence at issue. Appendix 2 of the Immunity and Leniency Bulletin sets out in detail the Bureau's information requirements for proffers. Generally, the proffer must detail:

- The conduct at issue.
- The applicant's role in the conduct.
- The connection of the unlawful conduct to Canada (in the case of international cartels).
- All the supporting evidence and witnesses that can be made available at that time.

It is also not uncommon for the Bureau to seek to interview potential witnesses or examine documents at the proffer stage. The Bureau and DPP may insist that any such interviews be video recorded. In the case of absent revocation of an immunity or leniency grant for non-compliance (*see Question 11*), the Bureau and DPP will not use information provided by an applicant against it for enforcement purposes.

Applicants are under an ongoing obligation to update their proffers as new information comes to light. They also must respond promptly to follow-up questions from the Bureau.

The Bureau has been very strict in recent years in enforcing the 30-day proffer requirement. Requests for extensions must be made without delay and be supported by legitimate reasons and a detailed proposed work plan for completion of the proffer. The Bureau will not accept delays solely because the applicant has commitments to other jurisdictions. In some cases, the Bureau may insist that the applicant undertake to complete the proffer by a fixed date with an acknowledgement that the marker will automatically lapse if that deadline is missed.

The Bureau will consider a proffer to be complete when it has received sufficient information to make a comprehensive recommendation to the DPP with respect to immunity/leniency.

Recommendations/Grants

Immunity. At the completion of the proffer of an immunity applicant, the Bureau will decide whether or not to recommend that the DPP issue a Grant of Interim Immunity (GII). The GII is a conditional immunity agreement that sets out what the applicant must do for the DPP to issue a final grant of immunity, which essentially is to complete the process of full and truthful disclosure on a timely and ongoing basis. Appendix 3 of the Immunity and Leniency Bulletin contains template GII agreements for corporations and individuals.

The Bureau's policy is for the GII disclosure process to be completed within six months from the grant of interim immunity. Unwarranted delays may be regarded by the Bureau as a breach of the GII.

The Bureau will make its recommendation regarding final immunity once it is of the view that the applicant has completed its obligations under the GII. The decision of whether to grant final immunity, like the decision to issue a GII, is that of the DPP alone, although due consideration will be given to the Bureau's views. In order to reach a plea agreement, the DPP expects a sufficient evidentiary foundation permitting it to determine that the proposed plea, including the proposed leniency credit, is factually and legally sound and in the public interest.

The DPP will not normally finalise a grant of immunity until criminal proceedings relating to the offence have concluded (including lapse of appeal periods) or the Bureau and DPP do not believe that further assistance from the applicant is necessary. This approach has been criticised for unfairly leaving immunity applicants in what is potentially a lengthy state of limbo.

Leniency. The Bureau will decide whether or not to recommend that the DPP grant leniency to an applicant based on the Bureau's assessment of the value of the co-operation and evidence provided. The DPP then has the independent discretion to determine whether the proposed grant of leniency is factually and legally sound and in the public interest.

Unlike the immunity process, there is no interim or conditional grant of leniency. Once the DPP determines that leniency should be granted, a plea agreement will be negotiated setting out the terms of leniency, including the obligation to continue to provide full, complete and truthful disclosure as well as ongoing co-operation in the Bureau's investigation and any proceedings against other parties. A leniency applicant will be expected to complete full disclosure within six months after signing the plea agreement.

Entering the Plea

This stage only applies to leniency applicants.

The DPP and legal counsel for the leniency applicant will agree on a court date and consult with each other on the drafting of an Agreed Statement of Facts and Joint Sentencing Submissions to be filed with the court. These will serve as the basis for the plea and recommended sentence, and will set out the details of the offence and factors relevant to sentencing, including the affected volume of commerce.

The plea is public and is ordinarily taken in open court. The Agreed Statement of Facts and Joint Sentencing Submissions are filed on the court record and are also public. For this reason, Agreed Statements of Facts and Joint Sentencing Submissions are typically the product of detailed negotiations as leniency applicants will be acutely aware that these documents will be used against them in ensuing class action litigation.

While the court has the exclusive authority to determine sentences, judges will generally not depart from the jointly recommended sentence except where persuaded that to agree to the joint recommendation would bring the administration of justice into disrepute or otherwise be contrary to the public interest. This rarely, if ever, occurs.

Withdrawal of Leniency

11. In what circumstances and at what stage of the proceedings can leniency be withdrawn? What implications does the withdrawal of leniency from one company have for other applicants?

At any stage of the process, if the Bureau believes that a party has not met its obligations under the programmes, it will typically first discuss its concerns with the party. Possible issues include:

- Consistent failure to meet deadlines.
- Consistent failure to provide full disclosure of relevant information.
- Failure to arrange for witness co-operation.
- Revelations of obstruction, such as providing misleading evidence or destruction of evidence.
- In the case of leniency specifically, it is also possible that the applicant will ultimately decide it does not wish to plead guilty to an offence.

If these issues cannot be resolved, the Bureau will take appropriate steps. For example, in cases where only a marker has been granted, the Bureau may cancel the marker. In that case, the applicant that is next in line (if any) will assume the cancelled marker.

Where immunity (interim or final) or leniency has been granted, the Bureau may recommend to the DPP that the grant of immunity or leniency be revoked. Assuming the DPP agrees, it will provide the party with a minimum of 14 days' notice to remedy the problem or face revocation.

Revocation will only affect a non-compliant party. For example, a corporation's immunity or leniency can be revoked while co-operating directors, officers and employees remain protected. The reverse also applies.

Where a marker or grant of immunity or leniency is revoked due to non-compliance, the DPP may use any information provided by the party for the purposes of a prosecution and will consider any privilege that may have applied to be waived.

In addition to situations of non-compliance, the Bureau may also withdraw a marker if it believes that an applicant for immunity or leniency has not provided sufficient information to demonstrate that there was an offence committed under the Competition Act (the Bureau may also ask the applicant to voluntarily withdraw the marker on its own). However, in this case, any information provided to the Bureau by an applicant whose marker is cancelled will not be used directly against that party.

Finally, the Bureau and DPP may also decide not to proceed further with a prosecution based on the internal exercise of discretion. In those cases, the immunity or leniency granted to a party will be held in abeyance pending a possible decision to re-commence enforcement proceedings against non-co-operating parties.

Scope of Protection

12. What is the scope of leniency protection after it has been granted?

The scope of protection under the programmes is limited to the impugned conduct in respect of products and markets defined in the immunity or plea agreement. It does not extend to any other infringements subsequently discovered, (unless an immunity or leniency marker is also applied for and obtained in respect of the additional infringements).

13. Does the competition authority offer any further reduction in fines for an undertaking's activities in one market if it is the first to disclose restrictive agreements and practices in another market (leniency plus)?

A successful leniency applicant can obtain complete immunity from penalties (under the immunity Programme) in relation to another criminal offence which is unknown to the Bureau if it is the first to disclose such illegal conduct. The Bureau may also recommend that they receive an additional "immunity plus" discount of 5% to 10% for any fine to be imposed for the original offence for which they are given leniency.

14. Does the grant of leniency affect a third party's ability to bring a follow-on damages action against a leniency applicant?

The granting of immunity or leniency does not prevent a third party from launching a civil action for damages.

This is a particular concern for leniency applicants since they must plead guilty as part of the leniency arrangement. Under section 36 of the Competition Act, civil claimants can rely on a guilty plea to establish the culpability of defendants, thereby limiting a proceeding solely to the question of damages.

Confidentiality and Disclosure

15. What are the rules relating to confidentiality during a leniency application?

Identity and Information Disclosure

The Bureau treats immunity and leniency requests as highly confidential. An applicant's identity, and any information provided by the applicant, will generally not be disclosed by the Bureau except in the following cases:

- Disclosure is required by law.
- Disclosure is necessary to obtain a search warrant or other compulsory process (though the Bureau will generally seek sealing orders).
- Disclosure is required to co-operate with other Canadian law enforcement authorities (for example, the police or RCMP).
- The applicant has agreed to disclosure.
- The applicant has publicly disclosed the information.
- Disclosure is necessary to prevent a serious criminal offence.
- Disclosure of information (other than the applicant's identity) is required for the purpose of the administration or enforcement of the Competition Act.

Disclosure to Accused Parties

Notwithstanding the general confidentiality protections described above, it is critical that applicants for immunity or leniency understand that, if a prosecution is commenced and charges are laid against non-co-operating participants in the offence, the DPP will be required under Canadian law to disclose factual information received by the Bureau to those accused parties, for

example, documents and data provided by the party to the Bureau (although not materials relating to the negotiation of the settlement which are privileged). Therefore, any protections from disclosure are qualified to that important extent.

Disclosure to Civil Claimants

It is also potentially possible that information provided to the Bureau may be disclosed to civil claimants.

The Bureau's general policy is not to disclose information from its files to claimants in civil actions, but it will do so if required to by court order. The law in this regard remains unsettled, with some courts ordering disclosure in certain circumstances and others not, so the risk of disclosure is there.

Further, even if claimants in civil proceedings cannot obtain information from the Bureau, they can seek production of information provided to the Bureau directly from the immunity/leniency recipients themselves.

From time to time, foreign claimants may also seek to obtain such information from defendants in Canada for the purposes of non-Canadian litigation. The typical process is to do so under the applicable rules in the foreign jurisdiction and via any Canadian defendant's relevant foreign affiliate.

Confidentiality Requests

The Bureau's position is that a co-operating party's identity as well as any information that might tend to identify them are not subject to informer privilege, which is a near absolute bar on disclosure of identity. However, this is contrary to a recent case where the court held that two co-operating witnesses were confidential informers (*Sobey's Inc v Canada (Commissioner of Competition)*, 2018 ONSC 6301). Therefore, the ultimate legal position is uncertain.

16. What are the rules concerning disclosure of statements made in support of a leniency application?

Domestic Submissions and Domestic Discovery

The immunity/leniency process in Canada is conducted on a "paperless" basis. As such, there are no written statements in support of immunity/leniency applications.

See [Question 15](#) in respect of the treatment of other information provided by applicants to the Bureau as part of the immunity/leniency process.

Domestic Submissions and Foreign Discovery

The Bureau treats the identity of immunity and leniency applicants or any information provided by the applicants as confidential, except where disclosure is required by law or the party has agreed to disclosure (see [Question 15, Identity and Information Disclosure](#)).

The Bureau may also proactively intervene in foreign jurisdictions to prevent the disclosure of information related to its investigations. For example, it intervened in *Vitamins Antitrust Litigation*, 2002 US Dist. LEXIS 25815 (Dec. 18, 2002), a

US case involving multi-district civil litigation regarding claims that had previously been investigated by several foreign competition authorities, including the Bureau. The Bureau intervened as an *amicus curiae* in opposition to the claimants' motion to compel the defendants to produce all documents provided to the Bureau, among other foreign anti-trust authorities, in the course of their investigations. The court denied the claimants' motion in part with respect to certain documents related to the Canadian investigation, including the executed plea agreement and related documents.

Foreign Submissions and Domestic Discovery

To the extent that the information in question is in the possession of the defendant (which is likely since the defendant presumably had it in the first place to provide to the foreign anti-trust authority) it would be subject to disclosure in the ordinary course from the defendant itself. If the claimants wanted to compel the foreign anti-trust authority to disclose the information in question, they would have to bring a motion in the foreign jurisdiction to compel production. The mechanism would vary depending on the jurisdiction in question.

17. Can privilege claims over material created during an internal investigation conducted by a leniency applicant be maintained, where the material is requested by the national competition authority as part of the leniency application process?

Privilege can be maintained over documentary materials prepared by counsel which are subject to solicitor-client or litigation privilege (for example, interview notes or summary memoranda). While counsel's work product is privileged and does not need to be disclosed, there is no privilege over the underlying facts, which must be disclosed.

Inter-agency Co-operation

18. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?

The Bureau regularly co-operates with the competition authorities of foreign jurisdictions in the investigation and prosecution of cross-border cartels. This is accomplished under both formal agreements (such as treaties and Memoranda of Understandings) and informal contacts.

To facilitate cross-border co-operation, the Bureau will expect immunity and leniency applicants to provide waivers allowing the communication of information with foreign authorities, including the identity of the applicant.

Examples of co-operation include co-ordinating enforcement steps with foreign authorities (such as the simultaneous commencement of dawn raids/search and seizures) and deciding which authority will take the principal lead in negotiating a plea.

Whistleblowers

19. Are there any whistleblower tools for individuals to report competition violations/cartels?

Whistleblower Tools

Given the decline in formal immunity/leniency applications (see [Question 3](#)), the Bureau encourages individuals with knowledge of criminal offences to contact it directly to report suspected illegal conduct. The Bureau offers the ability to contact it online (at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03167.html) as well as through various "hotlines" (such as 1-800-348-5358).

Whistleblower Protection

To encourage "whistleblowing" of this nature, section 66.1 of the Competition Act requires the Bureau to protect the confidentiality of the whistleblower's identity. Section 66.2 of the Competition Act further prohibits employers from retaliating against employees that are whistleblowers, for example, by dismissing, suspending, demoting, disciplining or harassing them.

There are no reported cases under either of these provisions.

20. Is there a reward for individuals who report competition violations/cartels?

There are no financial rewards or incentives for whistleblowers.

Proposals for Reform

21. Are there any proposals for reform?

The programmes were recently revised, and the new version of the Immunity and Leniency Bulletin was issued in September 2018. As such, there are no current proposals for additional reform.

Several of the reforms introduced have arguably made the programmes less attractive to prospective applicants, which is likely a factor in the decline of applications overall. These include several features of the programmes described above, such as the GII, which now increases uncertainty about whether immunity will ultimately be granted; and making leniency credits dependent on the Bureau's subjective assessment of the value of co-operation rather than the order in which applicants come forward.

Contributor Profiles

Mark Katz, Partner

Davies Ward Phillips & Vineberg LLP

T +416 863 5578

E mkatz@dwpv.com

W www.dwpv.com/

Professional and academic qualifications. Ontario Bar, 1989

Areas of practice. Competition; anti-trust; foreign investment.

Dajena Pechersky, Associate

Davies Ward Phillips & Vineberg LLP

T +416 367 7616

E dpechersky@dwpv.com

W www.dwpv.com/

Professional and academic qualifications. Ontario Bar, 2018

Areas of practice. Competition; anti-trust; foreign investment.

END OF DOCUMENT