

# AN OVERVIEW OF THE COMPETITION BUREAU'S NEW IMMUNITY AND LENIENCY PROGRAMS

14 November 2018

---

On Sept. 27, the Competition Bureau and the Public Prosecution Service of Canada (PPSC) announced the revised Immunity and Leniency Programs to enhance the Bureau's ability to detect, investigate, and prosecute anti-competitive conduct that violates the provisions of the Competition Act and the Criminal Code. The Programs provide incentives for parties who come forward to seek immunity or leniency in return for their cooperation in any Bureau investigation or subsequent PPSC prosecution of others involve in the anti-competitive conduct.

The Programs were updated in an effort to keep pace with changes in the way organizations and individuals behave with respect to competition. The Programs improve transparency and predictability for applicants and increase the incentives for those who come forward first.

Notable changes to the Programs include:

- Automatic coverage under a corporate immunity agreement for all directors, officers and employees will no longer be provided. Instead, individuals will be required to demonstrate their knowledge of or participation in the unlawful conduct and their continuing willingness to cooperate with the Bureau's investigation.
- Evidence will now be provided to the Bureau earlier in the process, i.e. at the front end of the investigation, allowing both the PPSC and the applicant to be better prepared for any subsequent prosecution. Only after disclosure is complete will final immunity or leniency be granted.
- Documentary and testimonial evidence will be provided under a Grant of Interim Immunity until either Program is completed. The Programs will be completed when the applicant's cooperation and assistance is no longer required.

- Witness interviews may be done using audio or video recording and may be taken under oath.
- Every leniency applicant may now be entitled to a leniency cooperation credit of up to 50%, which is applied to the base fine. Rather than providing credit on a first-come, first-served basis, the amount of credit awarded will also be based on the value of the applicant's cooperation with the Bureau's investigation.

The Bureau will continue to review the effectiveness of the Programs and update them as necessary in light of changing circumstances and the outcomes of court decisions.

**Continue reading below or skip to the [Immunity program](#) or [Leniency program](#) »**

This overview outlines the roles and responsibilities of the Bureau and the DPP, the requirements for an applicant seeking immunity or leniency, the impact of corporate immunity or leniency on the organization's officers, directors, employees, or agents, as well as the steps of each process and the effect of any failures to comply with the requirements of any immunity or plea agreements.

## Cooperation Required

The Bureau requires cooperation from each organization or individual seeking immunity or leniency which may include:

- Confidentiality to ensure the integrity of the investigation, to ensure that evidence is not destroyed, and that targets of the investigation do not become aware of investigative steps
- An exhaustive internal investigation in order to reveal any and all conduct that may constitute an offence under the act and in which the applicant may have been involved
- Full, complete, and truthful disclosure of any non-privileged information, evidence and records in its possession, under its control, or available to it
- Cooperation from any witnesses, including directors, officers, and employees suspected of being involved in an offence
- Financial commitment including all costs related to document production, translation and travel

## The Immunity Program

### Introduction

A party implicated in domestic or international unlawful conduct that violates the Act may offer to cooperate with the Bureau and request immunity. Employees of an organization may approach the Bureau on their own behalf. Immunity may only be granted to a party who is eligible for immunity. If the party does not qualify but continues to cooperate, then the Bureau may make a recommendation to the DPP under the Leniency Program.

A party should come forward as soon as they believe they are implicated in an offence. The Bureau will only grant immunity to the first party to come forward. The Act applies whether or not the applicant supplies products directly or indirectly in, from or into Canada. A party may request to seek immunity regardless of whether it supplies products directly or indirectly into Canada.

Before any immunity agreement is finalized, the Bureau and DPP will carefully examine an applicant's immunity request and subsequent cooperation to ensure the organization has complied with the Immunity Program's requirements. An applicant is required to provide timely, complete, and ongoing cooperation throughout the Bureau's investigation and any subsequent prosecution.

## **Eligibility for Immunity**

The Bureau will recommend to the DPP that immunity be granted where:

1. The Bureau is unaware of an offence: the applicant is the first to disclose all elements of the offence; or
2. The Bureau is aware of an offence: an applicant is the first to come forward before the Bureau gathers sufficient evidence to refer the matter to the DPP.

In order for a recommendation for immunity to be made, the applicant must demonstrate that an offence took place and provide reliable evidence that demonstrates all of the elements of the offence. An applicant will be ineligible for a grant of immunity where there is evidenced it coerced other parties into an illegal activity. Where the applicant is the only party to an offence, e.g. in cases of false or misleading statements, the applicant will not be eligible for immunity.

## **Impact on Directors, Officers, Employees, and Agents**

If an organization qualifies for immunity, all current directors, officers, and employees who

admit their knowledge of or participation in the offence may qualify for the same recommendation for immunity. The Bureau will decide whether to make a recommendation for the individuals involved on a case-by-case basis. A director, officer, or employee must admit to their knowledge of or participation in the offence and commit to providing complete, timely, and ongoing cooperation with the Bureau's investigation and any subsequent prosecution. If the organization does not qualify for immunity the individual may still qualify for immunity as though they had approached the Bureau on their own.

## **Immunity Process (4 Steps)**

### **Step 1: Immunity Marker**

The applicant must make initial contact with the Bureau. This is known as the "immunity marker". The immunity marker guarantees the applicant's place at the front of the line, subject to the applicant satisfying the requirements of the Immunity Program. A new immunity marker will be granted for each offence. An immunity marker may be granted for offences in which liability arises from aiding or abetting an offence contract to section 21 of the Criminal Code.

The Bureau recommends that a request for an immunity marker be made by telephone and that applicant begins the call by clearly stating that they are making an "immunity marker call". A potential immunity applicant may provide the Bureau with a hypothetical situation during the immunity marker call. At a minimum, the call must identify the nature of the unlawful conduct committed in respect of a specified product or business interest. Further, the applicant's identity does not need to be disclosed. The Bureau will inform the applicant as soon as possible, usually within a few days, whether an immunity marker is available. Upon issuance of the immunity marker, the applicant is required to identify itself to the Bureau.

### **Step 2: Proffer**

Once the immunity marker is granted, the applicant has 30 days to "proffer" to the Bureau a detailed statement describing the unlawful conduct. The proffer must provide the Bureau with sufficient understanding of the relevant conduct, the context in which it occurred, and the evidence available to support the allegations. Failure to meet the submission deadline for a proffer, including any deadline extensions, can result in the immunity marker being revoked. The proffer is generally provided on a "without prejudice" basis and will not be

used by the Bureau in any subsequent investigation of the immunity applicant.

The Bureau will not accept a proffer that contains any speculation as to the applicant's role in the unlawful conduct. The Bureau will accept both oral and written proffers. To assist with the timing of the Bureau's investigation, the Bureau may request that the applicant make its proffer before the 30 day period is over and to provide documentary evidence and access to witnesses before the proffer is completed. Any records provided to the Bureau will be treated as confidential and privileged. The Bureau will not return records to the applicant.

### **Step 3: Grant of Interim Immunity**

On the basis of the Bureau's recommendation, based on the proffered information and their own investigation, the DPP may issue a Grant of Interim Immunity (GII) to the immunity applicant. The GII details the organization and/or individuals covered by the agreement, the records and witnesses to be made available, how information provided by the immunity recipient will be treated, the continuing obligations of the immunity applicant, and under what circumstances the agreement can be revoked. Neither the Bureau nor the DPP will use the information against the applicant or the individuals included in the application.

The Bureau recommends that counsel confirm that each affiliate implicated in the conduct and whether each individual is prepared to admit his or her knowledge of or participation in the conduct as well as their willingness to cooperate in a complete, timely and ongoing manner. All current directors, officers or employees, will be included under the GII unless they fail to admit their knowledge of or participation in the conduct or they fail to cooperate. Identified agents or former directors, officers or employees may be considered for inclusion on a case by case basis. The Bureau may recommend to the DPP the removal individuals who either had no knowledge of nor participated in the conduct and the removal of any individuals unwilling to cooperate.

After an immunity applicant enters into a GII, the applicant must complete the full disclosure process. The disclosure process can be expensive and time-consuming. The applicant must be prepared to dedicate the resources necessary to support an expeditious and thorough investigation. At this stage, the topics addressed by an applicant will generally be the same as those addressed at the proffer stage, but will be covered in greater detail and further supported by records and testimonial evidence. A schedule for disclosure should be negotiated with the Bureau at the beginning of the immunity process,

although the Bureau has indicated that the process should take no longer than six months to complete. Unwarranted or unapproved delays may result in the revocation of the immunity marker.

During this step witnesses may be interviewed about criminal activity that may impact their credibility as a witness, including past convictions and pending charges. Before the DPP offers immunity they must be satisfied that the applicant disclosed all information that could affect their credibility. Witness interviews may be recorded by audio or video technology and may be used at the recommendation stage of the process to make recommendations to the DPP.

Within 30 days of the GII being issued, claims of privilege over any must be disclosed to the Bureau along with the specific legal privilege being claimed and the nature of the records over which the privilege is being claimed. Any disputes over privilege claims may be resolved through an independent counsel to handle the specific claim. Where an independent counsel is not appropriate, the court may assist the parties to resolve the dispute.

## **Step 4: Final Grant of Immunity**

The Bureau will make its recommendation to the DPP once the applicant has satisfied its obligations under the GII. Failure to comply with the terms of the GII may lead to the Bureau recommending to the DPP that the GII be revoked. Where the DPP determines that the applicant has failed to fulfill the terms and conditions of the GII, the DPP will provide the applicant with at least 14 days to remedy the failure before revoking the GII.

Revocation of the GII will affect only the individual or organization that otherwise fails to comply with the GII. An organization's coverage under the GII can be revoked while its cooperating directors, officers, employees or agents who are covered under the GII retain their protection. Likewise, it is possible for an individual's coverage under the GII to be revoked while the organization remains covered.

# **THE LENIENCY PROGRAM**

## **Introduction**

The Leniency Program is intended to provide a predictable and transparent resolution for parties who offend the Act's cartel provisions, including bid rigging and conspiracy, when

an immunity marker is not available. Once the Bureau has referred the results of its investigation to the DPP for prosecution, the Leniency Program will no longer be available to either an organization or an individual. More credit will be given to a leniency applicant who makes an early and timely disclosure to the Bureau.

## Eligibility for Leniency

The Bureau will only recommend leniency to the DPP if the following elements are satisfied:

- a. The party has terminated its participation in the cartel and ceased any unlawful conduct.
- b. The party has agreed to cooperate fully and in a timely manner.
- c. The party has demonstrated that it was a party to the offence.
- d. The party agrees to plead guilty.

Like the Immunity Program, the party must show that the conduct constituted an offence under the Act and provide credible and reliable evidence to support all of the elements of the offence.

## Determining the Recommended Fine

Generally the Bureau uses the following equation to determine its recommended fine for an organization which has engaged in anti-competitive behaviour:

Recommended fine = Base fine  $\pm$  (net effect of aggravating and mitigating factors) - leniency cooperation credit

The Bureau determines the base fine by first determining the volume of commerce affected by the cartel behaviour. Once the relevant volume of commerce is identified and the base fine is determined, the Bureau will apply the net effect or any aggravating and mitigating factors, the leniency cooperation credit, and the immunity plus credit, if applicable. The aggravating and mitigating factors come from Part XXIII of the Criminal Code and include:

- a. any advantage realized by the organization as a result of the offence;
- b. the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- c. whether the organization has attempted to conceal its assets, or convert them, in order

- to show that it is not able to pay a fine or make restitution;
- d. the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- e. the cost to public authorities of the investigation and prosecution of the offence;
- f. any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
- g. whether the organization was - or any of its representatives who were involved in the commission of the offence were - convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- h. any penalty imposed by the organization on a representative for their role in the commission of the offence;
- i. any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
- j. any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence, i.e. implementation of a corporate compliance program.

The Leniency Cooperation Credit is a credit based on the value of the leniency applicant's cooperation and can be valued up to 50% of the base fine. The Bureau will consider its ability to advance its investigation and will look to factors such as the timing of the leniency application, the timeliness of disclosure, the availability, credibility, and reliability of witnesses, and the relevance of any of the applicant's records.

If a leniency applicant discloses evidence of conduct constituting a criminal offence other than the one it made the application for and that the Bureau was unaware of, the leniency applicant may be eligible for "Immunity Plus" status. This means that the Bureau will recommend that the DPP grant the applicant immunity for the newly discovered offence. Second-in and later applicants would only receive leniency for the additional offence. The Bureau will typically recommend an additional 5-10% be added to the Leniency Cooperation Credit.

## **Impact of Leniency on Directors, Officers, Employees and Agents**

For the first-in leniency applicant, the Bureau will recommend that no new charges be brought against the applicant's current directors, officers, or employees. The Bureau will also recommend that the current directors, officers, and employees be brought into the plea agreement. Former directors, officers, and employees may qualify for leniency if they



admit their knowledge of or participation in the unlawful conduct and are willing to cooperate with the Bureau's investigation and any subsequent prosecution. For second-in and later applicants, current and former directors, officers, employees and agents may be charged with the offence depending on their role in the unlawful conduct. When the Bureau makes its recommendation to the DPP, the Bureau will take into account all available facts and circumstances in relation to the individual's participation in the offence.

When recommending a sentence for an individual, the Bureau will take into account a number of factors including the role and extent of involvement of the individual, the degree to which the individual benefitted, and whether the individual has been previously sanctioned for offences in Canada and abroad.

## **Leniency Process (7 Steps)**

The first two steps of the leniency process are similar to the first steps of the immunity process. First, the leniency applicant must obtain a "leniency marker" from the Bureau acknowledging the date and time of the applicant. Next, the leniency applicant must make a proffer detailing the unlawful conduct, the leniency applicant's role, and the effect of the unlawful conduct in Canada. If the proffer is not completed within 30 days from the date of the marker, the Bureau will cancel the applicant's leniency marker.

### **Step 3: The Leniency Recommendation**

After considering the relevant information, the Bureau will advise the DPP of the leniency applicant's role in the cartel. The Bureau will conduct an assessment of the cooperation and evidence on which it will provide a recommendation with respect to the terms of the plea. The DPP has independent discretion to accept or reject to the Bureau's recommendation.

### **Step 4: The Plea Agreement**

The plea agreement struck between the DPP and the leniency applicant establishes the terms and conditions under which the applicant will be recommended to be provided with leniency in sentencing. Plea discussions with the leniency applicant are conducted and led by the DPP. The plea agreement will be conditional on the complete, timely, and ongoing cooperation of the leniency applicant, and any others named in the plea agreement, with the ongoing investigation and any subsequent prosecution.

In order to reach a plea agreement, the DPP expects a sufficient level of evidence to be produced in order to determine that the proposed plea is factually and legally sound and in the public interest. Any ability to pay claims made by the leniency applicant will be considered by the Bureau. A claim must be supported by persuasive evidence before any reduction in the fine or adjusted pay schedule is granted.

If the leniency applicant fails to meet the terms and conditions of the plea agreement before a plea is entered in court, the Bureau may recommend to the DPP that the plea agreement be revoked. The DPP will provide 14 days' notice to the leniency applicant to remedy its failures before terminating the plea agreement. If an organization's plea agreement is revoked, cooperating directors, officers, employees and agents may retain their protection. Likewise, if an individual's coverage is revoked, the organization may remain covered.

## **Step 5: Full Disclosure**

The Bureau will seek to obtain copies of records and interview witnesses. The Bureau's investigation is an intense process normally conducted within a six month period. Leniency applicants should be prepared to allocate considered resources to assist the Bureau by providing information, records, and other evidence as soon as possible after the plea agreement is concluded. A leniency applicant that provides false or misleading information to the Bureau or fails to cooperate in accordance with its obligations under the plea agreement may face revocation of the plea agreement. The leniency applicant may also face false criminal charges under sections 64 and 65 of the Act for obstructing the Bureau's inquiry or examination.

All information provided during the pre-plea agreement steps of the Leniency Program, including witness interviews and records created for negotiations or the plea agreement will be subject to settlement privilege. The information will not be used by the Bureau against the leniency applicant and will be treated by the Bureau as confidential. Additionally, the Bureau may take the position that public interest privilege applies to the information provided by the leniency applicant.

## **Step 6: Entering the Plea**

The DPP and counsel for the leniency applicant will make a joint sentencing submission

based on an Agreed Statement of Facts, which serves as the basis for both the plea and the recommended sentence and is filed with the court. The purpose of the statement of Facts is to set out a sufficient factual basis to enable the court to make a determination that an offence has been committed and that the recommended sentence is appropriate. The leniency applicant will be required to make the plea in open court. The plea and any documents substantiating the plea are public.

## Step 7: Ongoing Cooperation and Testimony

The leniency applicant is required to continuously cooperate with the Bureau and the DPP for the amount of time specified with the terms of the plea agreement.

## Conclusion

The revised Immunity and Leniency Programs seek to apply pressure on groups of organizations or individuals engaging in cartel activity or other anti-competitive conduct. The Bureau has established short deadlines that, given the large amount of records intended to be disclosed by immunity or leniency applicants, may lead to intense investigations and negotiations between the Bureau and any organization or individual coming forward. Experienced competition and anti-trust counsel is vital at every stage of either Program to ensure that the organization does not fall offside of the terms and conditions of any agreement entered into by the DPP and the organization and/or individual.

---

NOT LEGAL ADVICE. Information made available on this website in any form is for information purposes only. It is not, and should not be taken as, legal advice. You should not rely on, or take or fail to take any action based upon this information. Never disregard professional legal advice or delay in seeking legal advice because of something you have read on this website. Gowling WLG professionals will be pleased to discuss resolutions to specific legal concerns you may have.

---

**Related** [Competition Law & Antitrust](#)

## Authors

### Quin Gilbert-Walters

Associate - [Ottawa](#)

 Email

[quin.gilbert-walters@gowlingwlg.com](mailto:quin.gilbert-walters@gowlingwlg.com)

 Phone

+1 613-786-0043

 vCard

Quin Gilbert-Walters

## Ian Macdonald

Partner - Toronto

 Email

ian.macdonald@gowlingwlg.com

 Phone

+1 416-369-4602

 vCard

Ian Macdonald