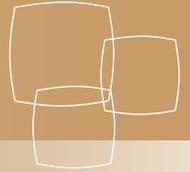




Competition Bureau  
Canada

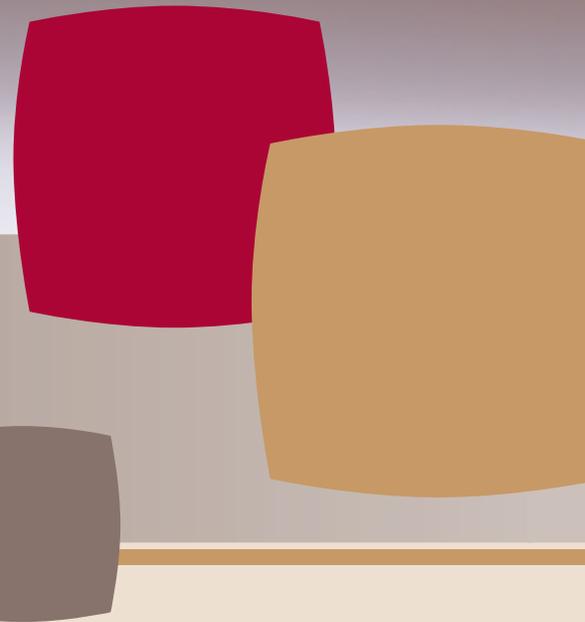
Bureau de la concurrence  
Canada

**Bulletin**



# Leniency Program

*Competition Act*



This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

**This publication replaces the following Competition Bureau publications:**

Bulletin — [Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases](#), March 25, 2009

**For information on the Competition Bureau's activities, please contact:**

Information Centre  
Competition Bureau  
50 Victoria Street  
Gatineau QC K1A 0C9

Tel.: 819-997-4282

Toll free: 1-800-348-5358

TTY (for hearing impaired): 1-800-642-3844

Fax: 819-997-0324

Web site: [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca)

This publication can be made available in alternative formats upon request. Contact the Competition Bureau's Information Centre at the numbers listed above.

**Permission to reproduce**

Except as otherwise specifically noted, the information in this publication may be reproduced, in part or in whole and by any means, without charge or further permission from the Competition Bureau provided due diligence is exercised in ensuring the accuracy of the information reproduced; that the Competition Bureau is identified as the source institution; and that the reproduction is not represented as an official version of the information reproduced, nor as having been made in affiliation with, or with the endorsement of the Competition Bureau. For permission to reproduce the information in this publication for commercial redistribution, please e-mail [droitdauteur.copyright@tpsgc-pwgsc.gc.ca](mailto:droitdauteur.copyright@tpsgc-pwgsc.gc.ca).

Cat. No. lu54-32/2010E-PDF

ISBN 978-1-100-16984-2

60816

2010-09-29

*Aussi offert en français sous le titre Le programme de clémence.*

## PREFACE

This Bulletin sets out the factors and principles that the Bureau considers in making a recommendation to the Public Prosecution Service of Canada (“PPSC”) for lenient treatment in the sentencing of individuals or business organizations accused of criminal cartel offences under the *Competition Act* (“Act”).

A transparent and predictable Leniency Program complements the Bureau’s Immunity Program and supports the effective and efficient enforcement of the Act. Individuals and business organizations are more likely to come forward, cooperate, and plead guilty (rather than litigate) when they are aware of the relevant leniency considerations and when they are confident that the Bureau will follow them in its leniency recommendations to the PPSC. In developing the Leniency Program, we have considered the significant input received from our stakeholders and the best practices of foreign jurisdictions that have adopted leniency policies.

While the Bureau cannot guarantee specific sentencing outcomes in cartel cases, this Bulletin sets out the principles that the Bureau will follow in developing leniency recommendations to the PPSC. I am confident that the Information Bulletin on the Leniency Program will advance the transparency and predictability of the Bureau’s enforcement policies and practices, while promoting the effective deterrence of criminal cartel activity in Canada.

Melanie L. Aitken  
Commissioner of Competition

## INTERPRETATION

This Bulletin establishes the Bureau's general approach to applying the Leniency Program in respect of criminal cartel offences under the *Competition Act* ("Act"). This Bulletin supersedes all previous statements of the Commissioner or other officials of the Competition Bureau regarding the administration of the Leniency Program, and should be read in conjunction with the Leniency Program's Frequently Asked Questions.

This Bulletin cannot provide a comprehensive review of all issues that may arise in a given situation pertaining to a leniency applicant. The guidelines in this Bulletin are not intended to restate the law or to constitute a binding statement of how the Commissioner or the PPSC will exercise discretion in a particular situation. The enforcement and prosecutorial decisions of the Commissioner and the PPSC respectively, and the ultimate resolution of issues, will depend on the particular circumstances of the matter in question.

The Bulletin and FAQs are living documents and represent a general framework. Principles may evolve or change and exceptional circumstances will be taken into account. The Bureau may revisit certain aspects of this Bulletin in the future in light of experience, changing circumstances and court decisions.

This Bulletin does not provide legal advice. Readers should refer to the Act when questions of law arise and obtain legal advice if necessary. If a party wishes to seek a binding written opinion from the Commissioner on the applicability of the Act to proposed business conduct, it may do so under section 124.1 of the Act<sup>1</sup>.

---

<sup>1</sup> A written opinion provided under section 124.1 of the Act is binding on the Commissioner if all the material facts have been submitted by or on behalf of an applicant for an opinion and such facts are accurate. For more information on binding written opinions, including the Bureau's fees and service standards for the preparation of such opinions, please see: Competition Bureau, *Competition Bureau Fee and Service Standards Policy* (Ottawa: Industry Canada, March 2003), available online at [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca).

# TABLE OF CONTENTS

- 1. INTRODUCTION..... 6
- 2. ROLES OF THE COMMISSIONER, THE DIRECTOR OF PUBLIC PROSECUTIONS, THE PUBLIC PROSECUTION SERVICE OF CANADA AND THE COURTS ..... 7
  - 2.1 The Commissioner of Competition ..... 7
  - 2.2 The Director of Public Prosecutions and Public Prosecution Service of Canada ..... 7
  - 2.3 The Courts ..... 7
- 3. LENIENCY IN SENTENCING UNDER THE LENIENCY PROGRAM ..... 8
  - 3.1 Conditions for Eligibility ..... 8
  - 3.2 Full, Frank, Timely and Truthful Cooperation..... 8
  - 3.3 Reduction of the Recommended Fine — The “Leniency Discount” ..... 9
  - 3.4 Determination of Aggravating or Mitigating Factors ..... 9
  - 3.5 Immunity Plus, Evidence of a Broader Conspiracy and Other Considerations ..... 10
  - 3.6 Impact of Leniency on Directors, Officers, Employees and Agents ..... 10
  - 3.7 The Leniency Process..... 11
    - 3.7.1 Initial Contact/Marker Request ..... 11
    - 3.7.2 The Proffer ..... 11
    - 3.7.3 Leniency Recommendation to the PPSC ..... 12
    - 3.7.4 The Plea Agreement ..... 12
    - 3.7.5 Full Disclosure..... 12
    - 3.7.6 Court Proceedings ..... 13
- 4. CANCELLATION OF MARKER AND WITHDRAWAL FROM THE PROGRAM ..... 13
- 5. INTERNATIONAL CRIMINAL ANTI-COMPETITIVE ACTIVITY ..... 14
- 6. TREATMENT OF INFORMATION ..... 14
  - 6.1 Legal Privilege..... 14
  - 6.2 Confidentiality ..... 15
  - 6.3 Sharing with Competition Authorities in Other Jurisdictions ..... 16
  - 6.4 Private Actions..... 16
- 7. CONCLUSION ..... 16
- 8. HOW TO CONTACT THE COMPETITION BUREAU ..... 17
- APPENDIX I — THE CONSPIRACY AND BID-RIGGING PROVISIONS OF THE *COMPETITION ACT* ..... 18



## 1. INTRODUCTION

1. The Competition Bureau (“Bureau”) is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* (“Act”). The Bureau’s enforcement of the Act contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choices.
2. This Bulletin communicates the Bureau’s Leniency Program for cartel cases<sup>2</sup>. The Program is designed to support effective enforcement of the Act. A transparent and predictable Leniency Program complements the Bureau’s Immunity Program<sup>3</sup>.
3. Under the Leniency Program, the Bureau will recommend to the Public Prosecution Service of Canada (“PPSC”)<sup>4</sup> that qualifying applicants be granted recognition for timely and meaningful assistance to the Bureau’s investigation and any subsequent prosecution. While leniency candidates are not eligible for a grant of immunity under the Bureau’s Immunity Program, their early admission and cooperation respecting their role in a cartel offence can earn them a substantial basis for lenient treatment in sentencing.
4. The Leniency Program sets out the factors that guide the Bureau in making a leniency recommendation to the PPSC for qualifying individuals and business organizations that cooperate in a timely fashion and plead guilty to cartel offences under the Act.

---

2 For the purposes of this Bulletin, cartel offences include conspiracy (i.e., notably section 45, but also sections 48 and 49 of the Act), foreign directives (i.e., section 46 of the Act) and bid-rigging (i.e., section 47 of the Act). These provisions are set out in Appendix I.

3 The Bureau’s Immunity Program is available online at [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html).

4 The PPSC is the federal government organization responsible for prosecutions on behalf of the Attorney General of Canada. The PPSC was created by the *Director of Public Prosecutions Act* on December 12, 2006. It replaced the former Federal Prosecution Service of the Department of Justice. The PPSC is independent from the Department of Justice and reports to Parliament through the Attorney General of Canada. The Director of Public Prosecutions (“DPP”) is the head of the Public Prosecution Service and the PPSC represents the DPP in proceedings before courts of criminal jurisdiction in Canada.



## 2. ROLES OF THE COMMISSIONER, THE DIRECTOR OF PUBLIC PROSECUTIONS, THE PUBLIC PROSECUTION SERVICE OF CANADA AND THE COURTS

### 2.1 The Commissioner of Competition

5. The Commissioner<sup>5</sup> has independent authority to administer and enforce the Act. The Bureau and the PPSC work closely together throughout the Bureau's investigation and in the subsequent prosecution and sentencing phases of a cartel case<sup>6</sup>. In matters of sentencing and, by extension, leniency, the Bureau may only make recommendations to the PPSC. The PPSC has independent discretion to accept or to reject the Bureau's recommendations. However, the *Federal Prosecution Service Deskbook* ("FPS Deskbook")<sup>7</sup> provides that the PPSC should consult with the Bureau and give due consideration to its recommendations.

### 2.2 The Director of Public Prosecutions and Public Prosecution Service of Canada

6. Criminal prosecutions under the Act are the responsibility of the PPSC, and the Director of Public Prosecutions ("DPP") has the sole authority to grant leniency to a party implicated in an offence under the Act. The FPS Deskbook guides the conduct of federal prosecutors and provides that the PPSC should consult with the Bureau regarding its assessment of the public interest<sup>8</sup>. It is in the public interest to avoid unnecessary litigation with its attendant costs and uncertainties while, at the same time, ensuring that parties are held responsible for their criminal activities. The PPSC plays the lead role throughout case resolution discussions.

### 2.3 The Courts

7. Following a guilty plea and conviction under the Act, the PPSC and defence counsel will make a sentencing submission to the court. The determination of the sentence to be imposed is at the sole discretion of the court, and a judge is not bound by a joint sentencing submission. To this end, a judge has the sole authority to determine an appropriate sentence. Nevertheless a judge will depart from a joint sentencing submission only where accepting

---

5 For the purposes of this Bulletin, the terms "Commissioner" and "Bureau" are used interchangeably, as appropriate to the topic discussed.

6 The *Memorandum of Understanding between the Commissioner of Competition and the Director of Public Prosecutions* ("Bureau-DPP MOU") sets out the respective roles and responsibilities of the Bureau and DPP and highlights the significant degree of consultation and cooperation between the two with respect to criminal matters under the Act. The Bureau-DPP MOU is available online at [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03227.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03227.html).

7 The FPS Deskbook (created by the former Federal Prosecution Service of the Department of Justice Canada and currently applied to the PPSC) is available online at [www.ppsc-sppc.gc.ca](http://www.ppsc-sppc.gc.ca).

8 In particular, see sections 15.3.2.1 and 56.4 of the FPS Deskbook.

the submission would be contrary to the public interest, and bring the administration of justice into disrepute<sup>9</sup>. This is a high threshold and is intended to foster confidence in an accused, that the joint sentencing submission will be respected by a sentencing judge.



## 3. LENIENCY IN SENTENCING UNDER THE LENIENCY PROGRAM

### 3.1 Conditions for Eligibility

8. The Bureau recommends immunity from prosecution only for the first business organization or individual<sup>10</sup> to apply under the Immunity Program for a marker (i.e., the immunity applicant). However, other parties to cartel activity (i.e., business organizations or individuals) that come forward to resolve their liability and cooperate with the Bureau's investigation and any subsequent prosecution by the PPSC may qualify for leniency in sentencing<sup>11</sup>.

9. The Bureau will make a recommendation for leniency in sentencing to the PPSC when the individual or business organization:

- (a) has terminated its participation in the cartel;
- (b) agrees to cooperate fully and in a timely manner, at its own expense, with the Bureau's investigation and any subsequent prosecution of the other cartel participants by the PPSC; and,
- (c) agrees to plead guilty.

10. The timeliness of a leniency applicant's cooperation is important. Where the Bureau has referred the results of its investigation to the PPSC for the purposes of a prosecution, the Leniency Program will no longer be available to an individual or business organization seeking to resolve criminal liability under the Act in regards to that investigation.

### 3.2 Full, Frank, Timely and Truthful Cooperation

11. Under the Leniency Program, applicants are required to provide full, frank, timely and truthful cooperation. Timely cooperation means an early request for leniency, as well as when and how quickly an applicant cooperates with the Bureau's investigation once a leniency application is initiated. Timely cooperation is of paramount importance to the Bureau's determination of

---

<sup>9</sup> While this is the current threshold in Ontario (see: *R. v. E. (R.W.)* (2007), 2007 ONCA 461, 221 C.C.C. (3d) 244, 225 O.A.C. 317, 86 O.R. (3d) 493), the threshold in other provinces may vary slightly.

<sup>10</sup> While the terms "business organization" and "individual" are used throughout this document, these references are intended to refer to the terms "person" and "organization" as they are defined in s. 2 of the *Criminal Code*.

<sup>11</sup> All discussions regarding the Leniency Program are premised on the assumption that a marker under the Immunity Program is no longer available. The Immunity Program will apply to individuals or business organizations who wish to cooperate with the Bureau if a marker has not yet been granted to an applicant under the Immunity Program.

the leniency discount it will recommend to the PPSC in respect of any applicant. Moreover, full and prompt cooperation at an early phase in the Bureau’s investigation will likely secure a recommendation by the Bureau for a more substantial mitigation of the sentence than cooperation at a later phase.

### **3.3 Reduction of the Recommended Fine — The “Leniency Discount”**

12. In establishing the base level of an appropriate fine recommendation, the Bureau generally uses a proxy of 20 percent of the cartel participant’s affected volume of commerce in Canada.

13. The first leniency applicant is eligible for a reduction of 50 percent of the fine that would otherwise have been recommended, provided that the applicant meets the requirements of the Leniency Program, including providing full, frank, timely and truthful cooperation.

14. When an applicant is not the first to come forward under the Leniency Program, a recommendation for a reduction in sentence may nonetheless be available. The second leniency applicant is eligible for a reduction of 30 percent of the fine that would have otherwise been recommended by the Bureau to the PPSC. The 30 percent reduction is premised on the leniency applicant meeting all of the conditions of the Leniency Program to the satisfaction of the Bureau.

15. Subsequent leniency applicants may benefit from reductions to the fine that would have otherwise been recommended, provided that such applicants meet and continue to meet all the conditions of the Leniency Program. The actual amount of the reduction that a subsequent applicant is eligible to receive will depend on when the applicant sought leniency compared to the second-in applicant and the timeliness of its cooperation. As a rule, later leniency applicants will not be eligible for a greater leniency discount than earlier applicants.

### **3.4 Assessment of Aggravating or Mitigating Factors Within the Leniency Process**

16. In developing a sentencing recommendation to the PPSC, the Bureau will have regard to aggravating and mitigating factors.

17. Aggravating and mitigating factors<sup>12</sup> apply to both accused individuals and business organizations. The 20 percent proxy associated with the applicant’s cartel conduct will be increased or reduced based on the presence of aggravating or mitigating factors. The weight ascribed to each aggravating or mitigating factor in a given case is determined according to the facts of the case. After the 20 percent proxy has been increased or reduced to account for any aggravating or mitigating factors, the leniency discount will be applied (e.g., 50 percent for first leniency applicants).

---

<sup>12</sup> For more information on aggravating and mitigating factors, and how they factor into sentencing recommendations, please consult the *Criminal Code* (sections 718, 718.1, 718.2, and 718.21) and sentencing case law — in particular the sentencing case law with respect to s. 45 matters under the Act.

### **3.5 Immunity Plus, Evidence of a Broader Conspiracy and Other Considerations**

18. If a leniency applicant discloses evidence of conduct constituting a further criminal offence under the Act unknown to the Bureau, the applicant may be eligible for Immunity Plus status<sup>13</sup>. If the leniency applicant meets the requirements set out in the Immunity Program regarding the newly-disclosed offence, the Bureau will recommend that the PPSC grant the applicant immunity from prosecution with respect to the newly-disclosed offence. In addition, for second-in and later leniency applicants, the Bureau will recommend that any individuals qualifying under the Leniency Program be afforded further lenient treatment in respect of the offence for which leniency is being sought. In recognition of the leniency applicant's full cooperation in reporting the further offence, the Bureau will typically recommend that an additional five to 10 percent be added to the applicant's leniency discount.

19. If a leniency applicant's cooperation reveals that the scope of the initial cartel offence for which leniency is being sought is broader (e.g., in terms of the duration of the offence) than previously identified by or known from the Bureau's investigation or from other cooperating parties, the Bureau will not use that information against the applicant when determining a leniency recommendation.

20. Other relevant considerations may affect the Bureau's leniency recommendation, depending on the circumstances.

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

21. At the request of the first-in leniency applicant that is a business organization, the Bureau will recommend that no separate charges be laid against the applicant's current directors, officers or employees, provided that such individuals cooperate with the Bureau's investigation in a full, frank, timely and truthful fashion. Agents and former directors, officers and employees implicated in the offence will also typically qualify for leniency provided that they offer to cooperate with the Bureau's investigation and any subsequent prosecution. The Bureau will make a determination regarding agents and former directors, officers, and employees on a case-by-case basis, for example, depending on the current employment status of such individuals (i.e., if they are currently employed by another party to the offence).

22. Where the first leniency applicant is an individual applying independently (i.e., implicating his or her current or former employer), leniency will be accorded in the same manner as if the individual were covered by an employer's leniency application. That is, if the individual meets the eligibility requirements of the Leniency Program and provides full, frank, timely and truthful cooperation, the Bureau will recommend that the individual not be criminally charged.

---

<sup>13</sup> Details of Immunity Plus may be found in the Bureau's Immunity Program, available online at: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html).

23. For the second and any subsequent leniency applicant, current and former directors, officers, employees and agents may be charged depending on their role in the offence. When making its recommendation to the PPSC as to whether a director, officer, employee or agent should be charged, and any applicable fine or custodial sentence, the Bureau will consider all of the available facts and circumstances in respect of such an individual's participation in the offence<sup>14</sup>. Directors, officers, employees and agents who are charged but who cooperate fully under the Leniency Program, independently or under the umbrella of the leniency application of their employer, may be eligible to be evaluated by the Bureau as to whether they meet the conditions necessary to receive a lenient treatment recommendation from the Bureau.

### 3.7 The Leniency Process

#### 3.7.1 Initial Contact/Marker Request

24. Under the Bureau's Immunity Program, marker requests for immunity for cartel offences must be made to the Senior Deputy Commissioner of Competition, Criminal Matters Branch ("SDC"). Likewise, an application to the Bureau's Leniency Program must be made to the SDC. Typically, an applicant's legal counsel makes the contact with the Bureau. The applicant should provide sufficient information to enable the SDC to determine if a leniency "marker" is available. Specifically, the applicant should provide a description of the product(s) subject to the cartel activity. When making the initial request for a leniency marker, the applicant may provide information on a hypothetical basis. Where leniency is available, the SDC will advise the applicant of the Bureau's Leniency Program and of the applicant's place in the marker queue (i.e., should there be previous leniency applicants). A leniency applicant who receives a marker will be allowed a fixed amount of time to confirm its intention to participate in the Leniency Program (within four business days). During this time, the marker holds the applicant's specific place in the queue. Once participation in the program is confirmed, the applicant will have 30 calendar days during which to complete its proffer to the Bureau setting out the evidence of its participation in the cartel and the cooperation that will provide the basis for the Bureau's recommendation for leniency.

#### 3.7.2 The Proffer

25. During the proffer the leniency applicant must reveal its identity and describe in detail the anti-competitive activity, including the participants to the offence, the nature of the agreement, the affected volume of commerce in Canada and any other factors relevant to culpability. A proffer is typically made by the leniency applicant's legal counsel and all information provided will be treated as settlement privileged. In preparing the proffer, leniency applicants are expected to conduct thorough internal investigations to locate all relevant

---

<sup>14</sup>The Bureau takes into account a number of considerations when developing sentencing recommendations for individuals. These include the role and extent of involvement of the individual who participated in the offence, the degree to which the individual personally benefited from the offence (e.g., through advancement, salary increases, performance bonuses, etc.), and whether the individual has been previously sanctioned for cartel offences in Canada or another jurisdiction and whether the individual has a criminal record.

evidence, wherever such evidence may be located, whether in Canada or elsewhere. This evidence may be in the form of records, witness testimony or any other source of information that will assist the Bureau's investigation.

### 3.7.3 Leniency Recommendation to the PPSC

26. The Bureau will advise the PPSC of the evidence that the leniency applicant has proffered. The Bureau will make its leniency recommendation to the PPSC only after an applicant has completed its proffer and provided all relevant information pertinent to leniency and sentencing for that applicant. The Bureau can make a timely and supportable leniency recommendation to the PPSC in respect of sentencing only if it receives a complete and timely proffer. The PPSC retains full discretion whether to follow the Bureau's recommendation, but will give the Bureau's recommendation due consideration.

### 3.7.4 The Plea Agreement

27. Plea discussions with the leniency applicant are conducted and led by the PPSC. The Bureau typically attends to assist the PPSC with any details about the leniency applicant's cooperation and the value of such cooperation provided to the Bureau's investigation. A successful resolution of negotiations between the leniency applicant and the PPSC will result in a plea agreement between the two parties<sup>15</sup>.

28. The plea agreement reached with the PPSC will be conditional on the full and timely cooperation of the leniency applicant, and others covered under its terms, with the ongoing investigation and any related prosecution. The plea agreement will require the leniency applicant to provide full, frank, timely and truthful disclosure of all non-privileged information, records or other materials in its possession, under its control or available to it, wherever located, that in any manner relate to the anti-competitive conduct for which leniency is sought.

### 3.7.5 Full Disclosure

29. A leniency applicant is expected to complete its production of evidence, information, records, and other materials to the Bureau as soon as possible after the plea agreement is concluded. Individuals covered by the plea agreement will attend interviews and testify in prosecutions of the other parties to the cartel, as required. Leniency applicants that are business organizations must facilitate the cooperation of current directors, officers, and employees, as well as any agents or former directors, officers and employees covered by the plea agreement.

30. The Bureau may, under some circumstances, request that a leniency applicant disclose evidence relevant to the Bureau's investigation before the plea agreement has been concluded. Applicants who are asked to disclose records and facilitate the cooperation of individual

---

<sup>15</sup> The publication of a sample template plea agreement by the PPSC is forthcoming and will be available on the PPSC website at [www.ppsc-sppc.gc.ca](http://www.ppsc-sppc.gc.ca)

witnesses before the plea agreement is concluded will be assured that the information will not be used directly against them and will be treated as either confidential or settlement privileged, depending on the facts.

### 3.7.6 Court Proceedings

31. Following the conclusion of the plea agreement, the PPSC will set a date with counsel for the leniency applicant for filing of the information and the plea before the court. The PPSC and counsel for the leniency applicant will make a joint sentencing submission based on the Statement of Admissions, as the basis for the plea and sentence. The Statement of Admissions will set out a sufficient factual basis to enable the court to make a determination that an offence has been committed.

32. The Bureau will not recommend that the PPSC delay the filing of the information at the request of the leniency applicant, unless there are compelling reasons to do so and provided that the Bureau's investigation or the PPSC's prosecution of other parties to the offence will not be impeded. The PPSC has independent discretion when deciding whether or not to delay the filing of an information.



## 4. CANCELLATION OF MARKER AND WITHDRAWAL FROM THE PROGRAM

33. If a proffer is not completed within 30 calendar days from the date of the marker, and if no extension has been granted, or where the Bureau is informed by the PPSC that plea discussions are terminated because the parties are unable to reach an agreement, the Bureau may cancel the leniency applicant's marker.

34. Should a leniency applicant have its marker cancelled or alternatively withdraw from the Leniency Program at any time before concluding the plea agreement, the applicant can be assured that information provided under the Leniency Program will not be used directly against it and will be treated as either confidential or settlement privileged, depending on the facts. However, the Bureau is free to use information provided by a leniency applicant to pursue its investigation and any such evidence derived directly or indirectly therefrom may be used in any subsequent prosecution of the parties to the offence.



## 5. INTERNATIONAL CRIMINAL ANTI-COMPETITIVE ACTIVITY

35. A leniency applicant should be aware that, when the cartel conduct involves other countries, the Bureau may be aware of the offence in Canada as a result of a foreign investigation. Leniency applicants may consider approaching each jurisdiction's competition law authority in an effort to secure an advantage under all available leniency or immunity programs. However, an applicant whose business activities have a substantial connection to Canada should make its contact with the Bureau a priority. The Bureau will not afford any special consideration to a leniency applicant solely because it has been granted immunity or another form of favourable treatment in another jurisdiction.



## 6. TREATMENT OF INFORMATION

### 6.1 Legal Privilege

36. All information provided during the proffer and plea agreement stages of the Leniency Program, including witness interviews and records created for the purpose of the proffer or plea negotiations and the plea agreement itself will be treated as settlement privileged.

37. Information provided by the leniency applicant in the course of the proffer or plea agreement discussions may be used by the Bureau to pursue its investigation. Nonetheless, such information will not be used directly against the leniency applicant or its cooperating individuals and will be treated by the Bureau as confidential. To this end, the Bureau's policy on confidentiality, as discussed in the next section, will apply.

38. As part of the leniency applicant's ongoing cooperation obligations, once the plea agreement is concluded, all information provided by the leniency applicant prior and pursuant to the plea agreement may be used by the Bureau in its investigation and by the PPSC in any subsequent prosecution against other parties to the offence.

39. The Bureau may take the position that public interest privilege, as well as other legal privileges, apply to information provided by the leniency applicant either before or after the conclusion of the plea agreement, depending on the particular circumstances at hand.

## 6.2 Confidentiality

40. The Bureau's policy on confidentiality is over and above that provided in section 29 of the Act<sup>16</sup>. There are certain limited exceptions to the Bureau's assurance of confidentiality, which are similar to those included in the Bureau's Immunity Program. The Bureau treats the identity of a leniency applicant or any information provided by the applicant as confidential, except where:

- (a) disclosure is required by law;
- (b) disclosure is necessary to obtain or maintain the validity of a judicial authorization for the exercise of investigative powers;
- (c) disclosure is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- (d) the party has agreed to disclosure;
- (e) there has been public disclosure by the party;
- (f) disclosure is necessary to prevent the commission of a serious criminal offence; or
- (g) in the case of information other than the leniency applicant's identity, where disclosure of such information is for the purpose of the administration or enforcement of the Act.

41. As discussed above, all information provided by a leniency applicant up until the plea agreement is concluded will be treated as settlement privileged. Nonetheless, recourse to investigative powers, such as search warrants and production orders, can be of utmost importance to the Bureau's investigation. To this end, where the Bureau applies to the court for the authorization of investigative powers and information provided by the leniency applicant must be disclosed to the issuing court as part of the Bureau's obligation to provide full and frank disclosure, the Bureau will make an application to seal the information so that it remains confidential until settlement privilege no longer applies. In cases where the Bureau seeks authorization for investigative powers and needs to rely on information provided by a leniency applicant which is not subject to settlement privilege, the Bureau will take all reasonable steps to ensure that the name of the leniency applicant remains confidential until charges are laid.

42. A leniency applicant is required to keep its contact with the Bureau confidential. An applicant should not disclose its leniency application to any person, other than his or her counsel, without the consent of the Bureau, which will not be unreasonably withheld. Depending on the circumstances, the Bureau may also ask that the leniency applicant obtain the consent of the PPSC. Where disclosure of a leniency application is required by law (e.g., in the case of required securities filings), the leniency applicant must give notice to and consult with the Bureau on how

---

<sup>16</sup> Section 29 is the provision in the Act that deals with the communication of information in the possession or control of the Bureau, whether it was provided voluntarily or obtained by court order. The section prohibits communicating both the information and the identity of any persons who provided it, subject to limited exceptions, which include: 1) to a Canadian law enforcement agency; 2) for the purposes of the administration or enforcement of the Act; 3) information that has been made public; and 4) information that has been authorized for communication by the person who provided the information.

to protect the Bureau's interests regarding the ongoing investigation into the cartel activity in light of the disclosure requirement. The leniency applicant shall give notice of any such disclosure requirement to the Bureau as soon as it becomes aware of the requirement.

### **6.3 Sharing with Competition Authorities in Other Jurisdictions**

43. The Bureau will not disclose the identity of a leniency applicant or the information provided by that applicant to any foreign law enforcement agency without the consent of the applicant or unless required by law (e.g., in response to an order of a Canadian court of competent jurisdiction). As part of a leniency applicant's ongoing cooperation, absent compelling reasons, the Bureau will expect a waiver authorizing the communication of information with those jurisdictions to which the applicant has made similar applications for immunity or leniency.

### **6.4 Private Actions**

44. The Bureau's policy with respect to private actions under section 36 of the Act is to disclose the identity of, or any information provided by, a leniency applicant 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 and the identity of the leniency applicant, including seeking protective court orders.



## **7. CONCLUSION**

45. The Bureau encourages the public to inform itself of the Bureau's policies and programs designed to facilitate conformity with the provisions of the Act. Anyone wishing to apply for leniency in cartel cases should contact the Senior Deputy Commissioner of Competition (Criminal Matters Branch) at 819-997-1208. For further information, visit the Bureau website at [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca) or contact the Bureau toll-free at 1 (800) 348-5358.



## 8. HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

### Web site

[ [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca) ]

### Address

[ Information Centre  
Competition Bureau  
50 Victoria Street  
Gatineau, Quebec  
K1A 0C9 ]

### Telephone

[ Toll-free: 1-800-348-5358  
National Capital Region: 819-997-4282  
TTY (for hearing impaired) 1-800-642-3844 ]

### Facsimile

[ 819-997-0324 ]



## APPENDIX I — THE CONSPIRACY AND BID-RIGGING PROVISIONS OF THE *COMPETITION ACT*

### Conspiracy

45.(1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding \$25 million, or to both.

(3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

- (a) that person establishes, on a balance of probabilities, that
  - (i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and
  - (ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and
- (b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

(5) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement

- (a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

- (b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
- (c) is in respect only of the supply of services that facilitate the export of products from Canada.

(6) Subsection (1) does not apply if the conspiracy, agreement or arrangement

- (a) is entered into only by companies each of which is, in respect of every one of the others, an affiliate; or
- (b) is between federal financial institutions and is described in subsection 49(1).

(7) The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

(8) The following definitions apply in this section.

“competitor” includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c).

“price” includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product.

R.S.C. 1985, c. C-34, s. 45; R.S.C. 1985, c. 19 (2<sup>nd</sup> Supp.), s. 30; S.C. 1991, c. 45, s. 547, c. 46, s. 590, c. 47, s. 714; S.C. 2009, c. 2, s. 410.

### **Where application made under sections 76, 79, 90.1 or 92**

45.1 No proceedings may be commenced under subsection 45(1) against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92.

R.S.C. 1985, c. 19 (2<sup>nd</sup> Supp.), s. 31; S.C. 2009, c. 2, s. 410.

### **Foreign directives**

46.(1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which

communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.

### **Limitation**

(2) No proceedings may be commenced under this section against a particular company where an application has been made by the Commissioner under section 83 for an order against that company or any other person based on the same or substantially the same facts as would be alleged in proceedings under this section.

R.S.C. 1985, c. C-34, s. 46; R.S.C. 1985, c. 19 (2<sup>nd</sup> Supp.), s. 32; S.C. 1999, c. 2, s. 37.

### **Definition of “bid-rigging”**

47.(1) In this section, “bid-rigging” means

- (a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or
- (b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.

### **Bid-rigging**

(2) Every person who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both.

### **Exception**

(3) This section does not apply in respect of an agreement or arrangement that is entered into or a submission that is arrived at only by companies each of which is, in respect of every one of the others, an affiliate.

R.S.C. 1985, c. C-34, s. 47; R.S.C. 1985, c. 19 (2<sup>nd</sup> Supp), s. 33.; S.C. 2009, c. 2, s. 411.

## **Conspiracy relating to professional sport**

48.(1) Every one who conspires, combines, agrees or arranges with another person

- (a) to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or
- (b) to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league

is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

## **Matters to be considered**

(2) In determining whether or not an agreement or arrangement contravenes subsection (1), the court before which the contravention is alleged shall have regard to

- (a) whether the sport in relation to which the contravention is alleged is organized on an international basis and, if so, whether any limitations, terms or conditions alleged should, for that reason, be accepted in Canada; and
- (b) the desirability of maintaining a reasonable balance among the teams or clubs participating in the same league.

## **Application**

(3) This section applies, and section 45 does not apply, to agreements and arrangements and to provisions of agreements and arrangements between or among teams and clubs engaged in professional sport as members of the same league and between or among directors, officers or employees of those teams and clubs where the agreements, arrangements and provisions relate exclusively to matters described in subsection (1) or to the granting and operation of franchises in the league, and section 45 applies and this section does not apply to all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons.

S.C. 1974-75-76, c. 76, s. 15.

## **Agreements or arrangements of federal financial institutions**

49.(1) Subject to subsection (2), every federal financial institution that makes an agreement or arrangement with another federal financial institution with respect to

- (a) the rate of interest on a deposit,
- (b) the rate of interest or the charges on a loan,

- (c) the amount or kind of any charge for a service provided to a customer,
- (d) the amount or kind of a loan to a customer,
- (e) the kind of service to be provided to a customer, or
- (f) the person or classes of persons to whom a loan or other service will be made or provided or from whom a loan or other service will be withheld,

and every director, officer or employee of the federal financial institution who knowingly makes such an agreement or arrangement on behalf of the federal financial institution is guilty of an indictable offence and liable to a fine not exceeding ten million dollars or to imprisonment for a term not exceeding five years or to both.

### **Exceptions**

(2) Subsection (1) does not apply in respect of an agreement or arrangement

- (a) with respect to a deposit or loan made or payable outside Canada;
- (b) applicable only in respect of the dealings of or the services rendered between federal financial institutions or by two or more federal financial institutions as regards a customer of each of those federal financial institutions where the customer has knowledge of the agreement or by a federal financial institution as regards a customer thereof, on behalf of that customer's customers;
- (c) with respect to a bid for or purchase, sale or underwriting of securities by federal financial institutions or a group including federal financial institutions;
- (d) with respect to the exchange of statistics and credit information, the development and utilization of systems, forms, methods, procedures and standards, the utilization of common facilities and joint research and development in connection therewith, and the restriction of advertising;
- (e) with respect to reasonable terms and conditions of participation in guaranteed or insured loan programs authorized pursuant to an Act of Parliament or of the legislature of a province;
- (f) with respect to the amount of any charge for a service or with respect to the kind of service provided to a customer outside Canada, payable or performed outside Canada, or payable or performed in Canada on behalf of a person who is outside Canada;
- (g) with respect to the persons or classes of persons to whom a loan or other service will be made or provided outside Canada;
- (h) in respect of which the Minister of Finance has certified to the Commissioner that Minister's request for or approval of the agreement or arrangement for the purposes of financial policy and has certified the names of the parties to the agreement or arrangement; or
- (i) that is entered into only by financial institutions each of which is an affiliate of each of the others.

### **Definition of “federal financial institution”**

(3) In this section and section 45, “federal financial institution” means a bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*, a company to which the *Trust and Loan Companies Act* applies or a company or society to which the *Insurance Companies Act* applies.

### **Where proceedings commenced under section 76, 79, 90.1 or 92**

(4) No proceedings may be commenced under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92.

R.S.C. 1985, c. C-34, s. 49; R.S.C. 1985, c. 19 (2<sup>nd</sup> Supp.), s. 34; S.C. 1991, c. 45, s. 548, c. 46, ss. 591, 593, c. 47, s. 715; S.C. 1993, c. 34, s. 51; S.C. 1999, c. 2, s. 37, c. 28, s. 153, c. 31, s. 49(F); S.C. 2009, c. 2, s. 412.