



The year of the guideline

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2007 was the year of the guideline. The Competition Bureau issued six guidelines and bulletins, some in draft, some in final form:

- A new bulletin and FAQ implementing revisions to the Bureau's Immunity Program.
- A revised bulletin outlining the Bureau's approach to confidentiality.
- An Outline Consent Agreement for divestitures in merger cases to complement the Merger Remedies Bulletin.
- Draft guidelines on predatory pricing.
- A draft bulletin on search warrants.
- A draft guide on environmental claims.
- "Single-step" approach
- Wider eligibility criteria
- No restitution requirement
- Revocation rules clarified

Single-step approach

The old Immunity Program followed a two-step approach. Immunity applicants would first be given a "provisional grant of immunity" (PGI) after making a hypothetical proffer of information. The PGI would be replaced by a final immunity agreement towards the end of the process, after the Bureau was satisfied with the extent of cooperation.

The revisions streamline the program by doing away with the PGI. Now, immunity applicants will enter into a final immunity agreement right after making a hypothetical proffer of information. The immunity agreement will require the applicant to cooperate fully and disclose all non-privileged information, evidence and records relating to their anti-competitive conduct.

Wider eligibility criteria

The Bureau has loosened the eligibility criteria somewhat. Before, an applicant would be disqualified if it was the "instigator" or "leader" of a conspiracy, or if it was the sole beneficiary of the anti-competitive conduct.

Both of these disqualifying criteria have been removed from the program. However, applicants and individuals involved coercing others to be a party to the illegal activity will be disqualified, as will applicants who are the only party to an offence (this can arise in price maintenance cases, for example).

No restitution requirement

The new Immunity Bulletin

The *Competition Act* provides for serious criminal penalties. For instance, participants in conspiracies can be fined up to \$10 million and jailed for five years. The Bureau's Immunity Program allows individuals and corporations that have participated in a cartel or other criminal activities to obtain complete immunity from prosecution in exchange for cooperating fully with the Bureau's investigation. Although the required cooperation is time consuming and costly, immunity is a fantastic deal for those corporations that have obtained it.

Not surprisingly, the Immunity Program has been a great success. The Bureau describes it as its "single most powerful means of detecting criminal activity".

In 2007, the Bureau tweaked its Immunity Program following extensive consultations.¹ Key features of the revised program include:

The old program required the applicant to make restitution for its anti-competitive conduct. In practice, however, the growth of class actions targeting participants in conspiracies has led to restitution being dealt with through civil actions, and not the Immunity Program. This practice has now been formalized by the removal of the restitution requirement from the program.

Revocation rules clarified

Immunity is not a “free ride”; the Director of Public Prosecutions (DPP) can revoke immunity from applicants that do not cooperate fully with the Bureau. In practice, the Bureau has only resorted to revocation in extreme cases. The DPP has never revoked immunity from a corporation, and has only revoked immunity from two individuals. In the US, the Antitrust Division of the Department of Justice has attempted to revoke immunity from only one corporation, Stolt-Nielsen SA—and this attempt failed when the court dismissed the charges against Stolt-Nielsen.²

The revisions to the Immunity Program formalize the revocation process. The Bureau will discuss the situation with the applicant and provide the applicant with a reasonable opportunity to improve its performance before recommending to the DPP that it revoke immunity. The bulletin also provides that the DPP shall give 14 days notice of a proposed revocation. Revocation only affects the non-cooperating party. For example, if a corporation’s immunity is revoked, its employees who are cooperating will not lose their immunity. Similarly, employees who refuse to cooperate can be carved out of the corporation’s immunity agreement.

One of the requirements of the Immunity Program is for an applicant to disclose all offences under the *Competition Act* that it has been involved in. In its revisions, the Bureau clarified that an applicant that exercises reasonable due diligence, but misses an offence, will not see its immunity revoked; it is only where an applicant knows about the offence and fails to disclose it.

Confidentiality Bulletin

The *Competition Act* says that inquiries under the act must be conducted in private. Section 29 prohibits the Bureau from disclosing most of the

information it receives as part of its investigations, with six exceptions. The Bureau can disclose information:

- to other Canadian law enforcement agencies.
- “for the purposes of the administration and enforcement” of the *Competition Act*.
- if the person who provided it agrees.
- if the information is already public.
- to the Minister of Transport, on request of the minister, in the case of mergers of transportation undertakings, such as airlines.
- to the Minister of Finance, on request, in the case of mergers of certain financial institutions, such as banks.

The new *Confidentiality Bulletin* states that the Bureau’s general policy is to minimize the extent to which confidential information is communicated to other parties, and outlines the Bureau’s policy and practice in relation to each of these statutory exceptions.³

Disclosure to Canadian law enforcement agencies

The Bureau interprets “law enforcement agency” broadly as including any federal or provincial authority that enforces acts or regulations that provide for criminal, civil, or administrative sanctions. The bulletin outlines four situations in which the Bureau will share information with another Canadian law enforcement agency:

- where the Bureau has information about an apparent criminal offence;
- to obtain the assistance of the other agency;
- on express request of the other agency; and
- to combat mass marketing fraud and deceptive marketing practices.

The Bureau notes that disclosure to other Canadian law enforcement agencies is rare, except to combat fraudulent and deceptive marketing practices.

Disclosure “for the purposes of administration or enforcement of the act”

The bulletin outlines the situations that trigger this exception. In brief:

- The Bureau can communicate information as part of its investigation, for example, to obtain and verify information.
- The Bureau can communicate information as part of court or Tribunal proceedings.
- The Bureau can share information with foreign competition authorities when obtaining assistance from them or coordinating enforcement actions with them. The Bureau has agreements with several foreign competition authorities that provide for information sharing and confidentiality.
- The Bureau can communicate the results of its investigations in publications such as its annual report and in technical backgrounders. The Bureau takes care not to publish confidential information, however.

Outline Consent Agreement

The Bureau published an Outline Consent Agreement⁴ that is intended as a template for consent agreements for resolving competition concerns raised by proposed mergers. It complements the Bureau's *Information Bulletin on Merger Remedies in Canada*.⁵ The agreement contains templates for many of the common provisions in such agreements, such as hold separates, divestitures, and trustee sales.

Predatory Pricing Guidelines

The draft *Predatory Pricing Enforcement Guidelines*⁶ sets out a unified framework for dealing with predatory pricing, whether under the criminal predatory pricing provision (paragraph 50(1)(c)) or the abuse of dominance provisions (sections 78 and 79). The draft guidelines are the result of the evolution of the Bureau's thinking on predatory pricing over the last decade.

Key aspects of the Bureau's approach to predatory pricing include:

- Predatory pricing complaints will generally be analyzed under the abuse of dominance provisions rather than the criminal provisions, at first. The criminal pricing provisions will be invoked in egregious cases, such as using predatory pricing in furtherance of cartel activity.
- The Bureau begins by looking at the market power of the alleged predator and the profitability of the victim. Evidence that the alleged predator has market power and that the victim's business suffers reduced profitability or is unprofitable suggests that the predatory pricing may lead to a lessening of competition.
- The next step to determine whether the alleged predator's prices are below its "avoidable costs". Avoidable costs are costs that could be avoided if the firm chose not to sell the product in question. Costs can be avoided by shedding the cost or redeploying the production inputs to other uses.
- The "business justification defence" recognizes that there may be a good reason for pricing below avoidable costs, such as selling obsolete product. The Bureau also recognizes a "meeting the competition" defence, that is, an incumbent firm is entitled to match its rival's prices, even if those prices are below the incumbent's avoidable costs.
- Finally, the Bureau asks whether the low pricing policy will increase the market power of the alleged predator to the extent that it can likely recoup its losses. If so, the practice is likely substantially to lessen or prevent competition.

Search Warrants Information Bulletin

The *Competition Act* contains provisions for the Commissioner to apply for search warrants to search premises, including computer systems. The draft *Information Bulletin on Sections 15 and 16 of the Competition Act*⁷ outlines the Bureau's approach to search warrants. Key aspects of this approach include:

- Search warrants are the Bureau's investigative tool of choice when investigating suspected cartels and mass marketing fraud.
- The Bureau will ask the judge granting the search warrant to seal the information if its disclosure would subvert the ends of justice, for example, if disclosure would reveal the identity of an informant or compromise the investigation.
- Searches are conducted by a team of at least two Bureau officers led by a team leader.
- The search team may seal filing cabinets and restrict access to computer systems to prevent destruction of evidence.
- While the search team can start right away, they may agree to wait until senior management or legal counsel arrive.
- The team leader will attempt to reach mutually agreeable on-site procedures for handling solicitor-client privilege claims. If a blanket claim of privilege is made, the records will be sealed and removed. Electronic records may be reviewed later by counsel.
- The search team may question individuals at the premises about the layout of the premises or the location of records; but they can also question them for the purpose of gathering evidence.
- The search team may agree to allow copying of seized records onsite.
- It is a serious offence to impede the search or destroy evidence.
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Environmental Claims

In March, the Bureau released a draft guide, *Environmental Claims: A Guide for Industry and Advertisers*. The guide is a collaborative effort between the Bureau and the Canadian Standards Association and is based on the International Standards Organization's standard for environmental labels and declarations (ISO 14021).



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¹ Competition Bureau, *Immunity Program under the Competition Act*, October 2007, Competition Bureau, *Policy Backgrounder: Adjustments to the Immunity Program*, October 2007, Competition Bureau, *Responses to Frequently Asked Questions*, October 2007, all collected at http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/h_02000e.html

² See *Antitrust Division's conduct in revoking immunity "fundamentally unfair"*, http://www.agolaw.com/litigatorca.asp?file=archive/reslibrary_archives_stolt20080123_content

³ Competition Bureau, *Communication of Confidential Information Under the Competition Act*, 2007, <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01277e.html>

⁴ Competition Bureau, *Outline Consent Agreement*, 2007, <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02310e.html>

⁵ Competition Bureau, *Information Bulletin on Merger Remedies in Canada*, September 2006, <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02170e.html>

⁶ Competition Bureau, *Predatory Pricing Enforcement Guidelines*, draft, October 2007, <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02469e.html>

⁷ Competition Bureau, *Information Bulletin on Sections 15 and 16 of the Competition Act*, draft, April 2007, <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02299e.html>