

# Plea Agreements in Cartel Cases Under Canada's Competition Act

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Call on Settlements

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# Outline

1. Cartel Offences – An Overview
2. Immunity/Leniency
3. Sentencing/Sanctions
4. The Plea Agreement Process
5. Recent Developments



# OVERVIEW OF CANADA'S CARTEL OFFENCES



DAVIES

# Cartel Offences

- Canada was first jurisdiction to introduce criminal law against cartels (1889)
- Law remained largely unchanged until 2009, when significant amendments made to the conspiracy offence
- Considered to be "pillar" of Canadian competition law and top enforcement priority

# Cartel Offences (cont'd)

- Two main cartel offences
  - **Conspiracy:** Agreements or arrangements with competitors
    - To fix prices at which products are supplied
    - To allocate markets
    - To control production or supply
  - **Bid-rigging:** Agreements or arrangements
    - Not to submit a bid
    - To withdraw a bid
    - To submit a bid agreed upon between bidders

where the agreement or arrangement is not disclosed to the person calling for bids or tenders at or before the time when any bid or tender is submitted or withdrawn

# Cartel Offences (cont'd)

- *Per se*:
  - Do not need to prove anti-competitive effects
- "Agreement" is defined very broadly
  - Includes tacit understandings
  - Can be inferred on basis of circumstantial evidence
  - Agreement need not be implemented
- No statute of limitations
- Limited "ancillary restraints" defence for conspiracies

# Cartel Offences (cont'd)

- Significant penalties
  - Imprisonment for a term not exceeding 14 years
  - Conspiracies: Fine not exceeding \$25 million per count
  - Bid-rigging: Fines in the discretion of the court
- Prohibition orders
- "Follow-on" civil litigation
- Other consequences:
  - Disqualification from bidding on public contracts
  - Employee dismissal/demotion
  - Extradition

# Enforcement

- Competition Bureau ("Bureau") is responsible for administering and enforcing the Competition Act (the "Act")
- Bureau investigates alleged criminal offences under the Act (such as cartel offences) but does not prosecute
- Prosecution of criminal offences is responsibility of Public Prosecutions Service of Canada ("PPSC")
  - Upon referral by the Bureau
- PPSC also responsible for deciding immunity/leniency applications/negotiating plea agreements





# IMMUNITY/LENIENCY

DAVIES

# Immunity/Leniency

- Bureau's immunity/leniency programs are a major element of its effort to detect/prosecute cartels
  - 2011: 18 immunity applications/19 leniency applications
  - 2012: 18 immunity applications/13 leniency applications
  - 2013: 17 immunity applications/8 leniency applications
- Applications are made to the Bureau but final decision is made by the PPSC taking into account the Bureau's recommendation
- Treatment depends on timing of approach: "race to the authorities"

# Immunity/Leniency (cont'd)

<b>First Applicant</b>	<b>Eligible for recommendation of full immunity from prosecution including with respect to current officers, directors, employees who cooperate</b>
Second Applicant	Eligible for recommendation of 50% reduction in fine and no separate charges against current officers, directors, employees who cooperate
Third Applicant	Eligible for recommendation of 30% reduction in fine but no automatic recommendation of leniency for current officers, directors, employees
Subsequent applicants	Subject to negotiation

# Immunity/Leniency (cont'd)

- Immunity/leniency applicants must agree to cooperate with investigation/prosecution at own expense
  - Disclosure of all information, evidence and documents within possession or control
  - Secure cooperation of current and former directors, officers and employees
- Leniency applicants must agree to plead guilty and face prosecution in Canada at end of process
- No protection from private damage actions in either case



# SENTENCING/ SANCTIONS

DAVIES

# Sources

- Canada does not have formal sentencing guidelines for *Competition Act* offences (or others)
- General sentencing principles set out in *Criminal Code*
- Competition-specific criteria developed in case law
- Bureau's Leniency Bulletin sets out its approach to sentencing recommendations

# Principles of Sentencing

- Purpose of sentencing includes:
  - To denounce unlawful conduct
  - To deter the offender and other persons from committing future offences (specific and general deterrence)
  - To maintain and encourage competition
- Key principles include:
  - Sentences should be proportional to the gravity of offence and degree of responsibility of accused
  - There also should be similar sentences for similar offences committed by similar offenders in similar circumstances
  - Offender should not be deprived of liberty if less restrictive sanctions are appropriate in the circumstances
  - Penalty should not be a "mere license fee"

# Principles of Sentencing (cont'd)

- Relevant factors (aggravating/mitigating) include:
  - Role of the accused in offence
  - Advantage realized by the accused as a result of offence
  - Degree of planning and complexity of offence
  - Efforts to conceal conduct
  - Was accused involved in prior offence?
  - Cooperation with authorities (including attornment to jurisdiction)
  - Ability to pay
  - Restitution to victims
  - Any penalty imposed by accused company on complicit employees
  - Compliance efforts



# Approach of Competition Bureau

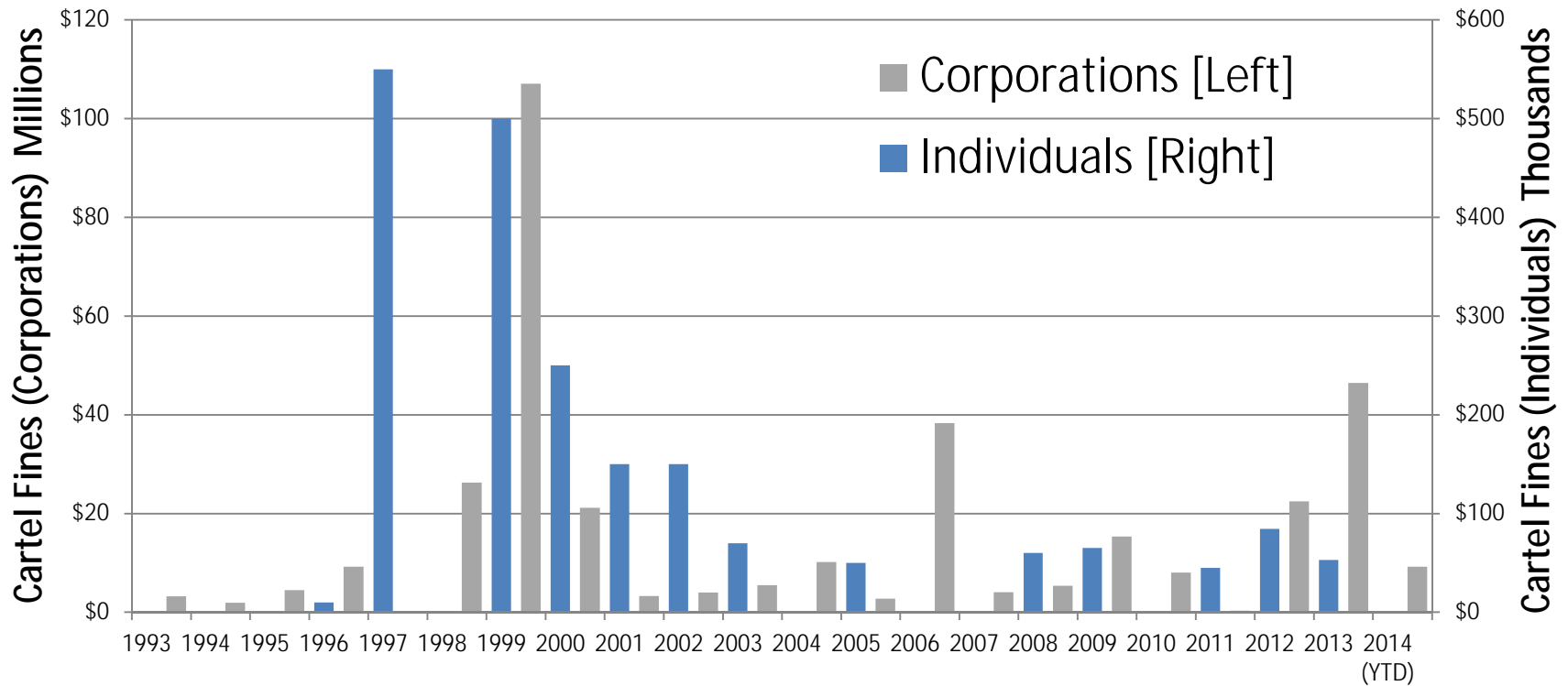
- Bureau focus is on economic harm of conduct
- Generally use "volume of commerce" (VOC) calculation as proxy
  - Can include direct and indirect revenue
- Typical approach is to use 20% of VOC as starting point
  - 10% represents imputed "overcharge"
  - 10% represents deterrence factor
- A different multiplier or proxy can be used where appropriate, e.g.:
  - Will not rely solely on VOC as proxy in cases of market allocation cartels (where no Canadian VOC) or bid-rigging (for unsuccessful cover bid)
  - Possible to offer evidence that overcharge was less than 10% or that steps have been taken re compliance to offset 10% deterrence factor

# Approach of Competition Bureau (cont'd)



- Adjustments to VOC proxy:
  - Leniency discounts (50%/30%/etc.)
  - "Immunity Plus" discount (5-10%)
  - Aggravating factors/mitigating factors
- Bureau will consider pursuing individuals based on factors such as:
  - Role and level of participation in offence
  - Recidivism
  - Degree to which profited from conduct
  - Whether individual punished in other jurisdictions

# CONSPIRACY PENALTIES: 1993 – 2014 (YTD)



# Cartel Penalties (cont'd)

- Largest single fine for conspiracy conviction – CDN \$48 million (F. Hoffman La Roche)
- Largest single fine for bid rigging conviction – CDN \$30 million (Yazaki Corporation)
- Largest single fine in domestic cartel – CDN \$12.5 million (carbonless paper)
- Largest single fine for individual – CDN \$550,000
- Imprisonment – Ø
  - No "custodial" sentences
  - Have been "conditional" sentences to be served in community/community service

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# THE PLEA AGREEMENT PROCESS

DAVIES

# Plea Agreements

- Plea agreements are the life blood of Canadian cartel enforcement
- Prior to 1995, there were approximately 60 contested cartel-related prosecutions in Canada
- This number fell to 3 between 1996 and 2012
  - Resulted in 1 conviction and 2 dismissals at preliminary inquiry
- What happened?
  - Bureau/Crown suffered major defeat in 1995 (*Freight Forwarders* case)
  - Prosecutions subsequently came to a virtual halt
  - Resolutions essentially limited to plea agreement settlements

# Plea Agreement (cont'd)

- Very recent uptick in contested proceedings:
  - Chocolate cartel: 3 companies and 3 individuals charged with price fixing
  - Quebec gas cartel: 3 companies and 1 individual convicted at trial
  - Ventilation bid-rigging (Montreal): Charge dismissed at preliminary inquiry/on appeal
  - Sewer bid-rigging (Montreal): Preliminary inquiry in April 2014
  - IT bid-rigging (federal government): Committed to trial after preliminary inquiry/on appeal
- Vast majority of cartel cases still resolved by way of plea agreement

# Plea Agreements - Process

- Bureau provides sentencing recommendations to PPSC
- Plea then negotiated between PPSC and accused
  - Penalty
  - Plea agreement
  - Materials to be filed in court (principally Agreed Statement of Facts)
- Joint submissions on plea and sentencing made to court
  - Plea agreement not filed publicly
- Court retains ultimate discretion on sentence, although rare to question or differ from joint recommendation





RECENT DEVELOPMENTS  
– A DISINCENTIVE TO  
SETTLEMENT?

# To Plea or not to Plea?

- Generally speaking, two disincentives to settle:
  - Exposure to private actions for damages (usually class proceedings)
  - Costs of ongoing co-operation with investigation/prosecution
- Could be decisive in marginal cases

# Are There Now More Incentives Not to Settle?



- Have recent developments tipped the balance against plea agreements?
  - *Maxzone* decision and risk of greater disclosure in Agreed Statement of Facts
  - New federal policy disqualifying parties from bidding on government contracts if convicted of cartel offence, even by way of plea
  - Supreme Court of Canada decisions upholding right of indirect plaintiffs to sue for damages
  - Unavailability of "conditional sentences" for cartel offences
  - Bureau determination to prosecute individuals

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