

Cartel Enforcement and Sanctions Under Canada's *Competition Act*

Mark Katz

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DAVIES

Outline

1. Cartel Offences – An Overview
2. Enforcement Framework
3. Immunity/Leniency
4. Sentencing/Sanctions
5. The Bureau Regains its Enforcement "Mojo"
6. Conclusion: Is There a "Sea-Change" in Canadian Cartel Enforcement?



OVERVIEW OF CANADA'S CARTEL OFFENCES

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not disclosed to the person calling for bids or tenders at or before the time when any bid or tender is submitted or withdrawn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

Enforcement Authorities

- 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

Investigative Powers

- Bureau has extensive compulsory powers to investigate alleged violations of the Act:
 - Search and seizure (including computers, smart phones, pdas, etc.)
 - Production of records
 - Examinations under oath
 - Written responses under oath
 - Wiretaps
- Judicially authorized on basis of *ex parte* applications

IMMUNITY/LENIENCY

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 (to date): 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)

First Applicant	Eligible for recommendation of full immunity from prosecution including with respect to current officers, directors, employees who cooperate
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

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

Sentencing – Process

- Bureau provides sentencing recommendations to PPSC
- Cartel sentences are typically negotiated between PPSC and accused as part of plea arrangement
- Joint submissions on plea and sentencing made to court
 - These are on the public court file
- Court retains ultimate discretion, although rare to question or differ from recommended sentence
 - *Maxzone* case an exception of sorts

Sentencing – Results

- 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

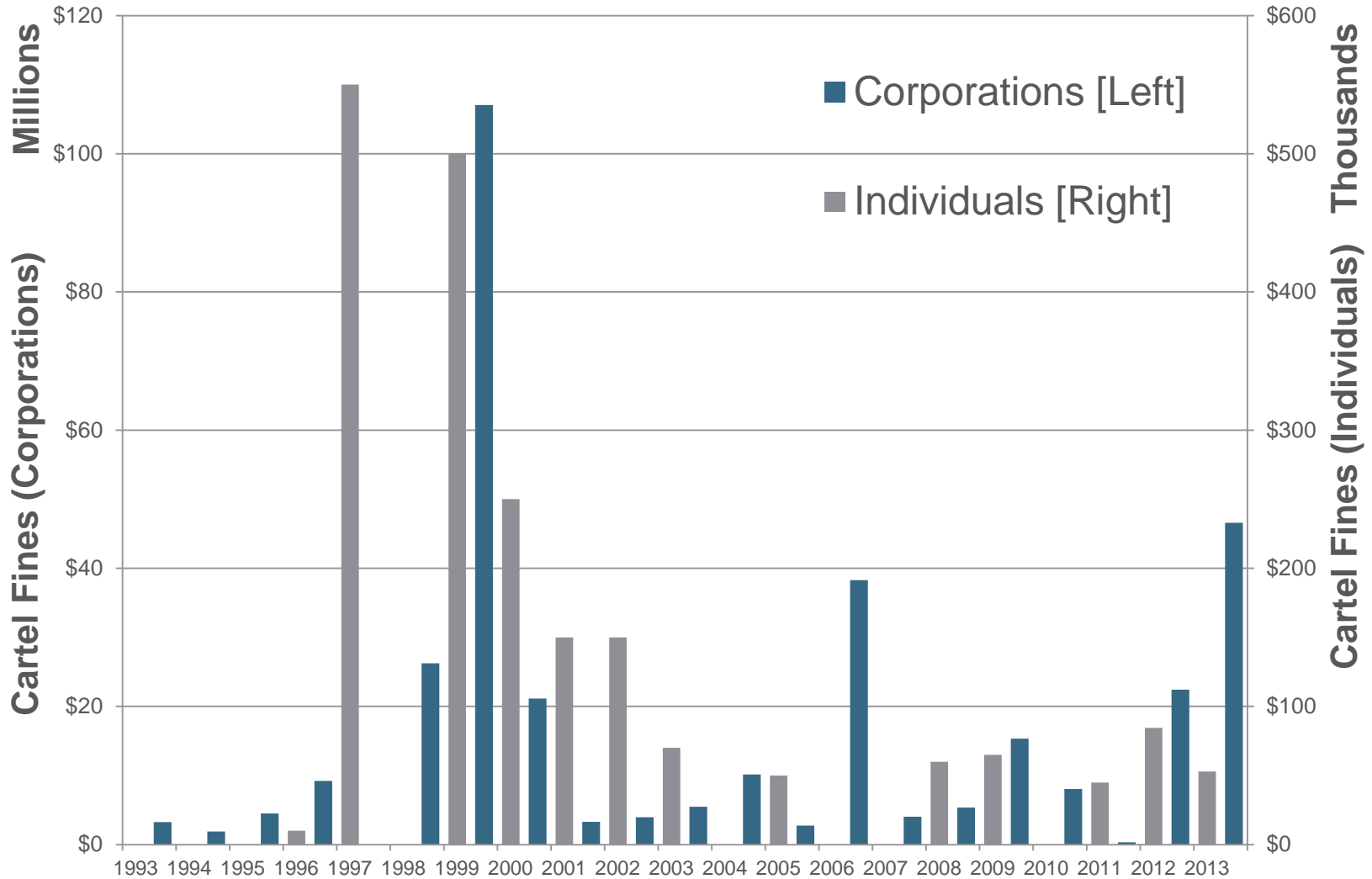
THE BUREAU REGAINS ITS ENFORCEMENT "MOJO"



Canada – A Cartel Pushover?

- Despite its established cartel enforcement pedigree, Canada is often seen to be lagging behind in level of sanctions imposed
- In 2012, were a total of CDN \$22.5 million in corporate cartel fines imposed in Canada/no individuals imprisoned
- By comparison, approximately US \$1.3 billion in corporate cartel-related fines obtained by DOJ in United States/43 individuals imprisoned

Cartel Penalties: 1993 - 2013



Canada – A Cartel Pushover? (cont'd)



- Another indicator is the almost total absence of contested cases in recent years
- 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)
 - Failed to meet burden of proving market impact ("undue lessening of competition")
 - Prosecutions subsequently came to a virtual halt

Canada – A Cartel Pushover? (cont'd)



- Another factor – general reluctance of Canadian courts to impose significant penalties for "white collar" crimes:

"[T]he prosecutorial conditions in Canada and the courts themselves seem reluctant to impose fines or jail times to the full extent the law allows. All too often, individuals guilty of white-collar offences get off easy"

Melanie Aitken, former Commissioner of Competition, September 20, 2012

Signs of a New Approach

- Amendments to conspiracy offence in 2009:
 - Elimination of requirement to prove "undue lessening of competition"/ introduction of *per se* offence
 - Focus on "hard core" cartel conduct
 - Increase in penalties (maximum fines and prison term)

Signs of a New Approach (cont'd)

- Statements by Chief Justice Crampton of Federal Court of Canada in *Maxzone*:
 - Cartels "ought to be treated at least as severely as fraud and theft, if not even more severely than those offences"
 - "[A]chieving effective ... deterrence requires that individuals face a very real prospect of serving time in prison if they are convicted of having engaged in [cartel] conduct"

Signs of a New Approach (cont'd)

- Amendments to *Criminal Code* (2012):
 - Judges can no longer impose conditional sentences for conspiracy or bid-rigging
 - Harder to obtain pardon after conviction
- New procurement policies
 - Banned from bidding on federal government contracts if convicted of conspiracy/bid-rigging even if cooperate and plead guilty
 - New memorandum of understanding between Bureau and Public Works and Government Services Canada (PWGSC)
 - Similar "debarment" policies in province of Quebec

Signs of a New Approach (cont'd)

- Bureau launches Whistleblowing Initiative
 - Encourages members of the public to voluntarily disclose evidence of criminal cartel conduct
- Tougher stance on immunity/leniency applications (e.g., more rigorous enforcement of timelines)
- Record bid-rigging fine paid by Yazaki Corporation (\$30 million)

Signs of a New Approach (cont'd)

- Increase 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

Looking Ahead

- Competition Commissioner John Pecman asserts that there has been a "sea- change" in Canadian cartel enforcement
- Too soon to tell, but Bureau's Criminal Branch seems energized with "one of their own" now at the helm
- Current issues for Canadian cartel enforcement:
 - Is leniency now a less attractive option (e.g., debarment/impact of *Maxzone* on disclosure)?
 - Will Bureau pursue individuals and insist on jail sentences (likely more of an issue for domestic cartels)?
 - Are trials the new norm?

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