



# PERSPECTIVE

## Canadian Government Restricts Availability of Conditional Sentences ("House Arrest")

March 14, 2012

*New Law Applies to Competition Act Cartel Offences  
May Limit Flexibility and Incentives for Leniency Arrangements*

Almost three years ago, significant amendments were made to Canada's *Competition Act*<sup>1</sup> ("the Act") that substantially raised the stakes for parties caught participating in cartel conduct affecting Canada. These amendments were expected to lead to an escalation in cartel prosecutions and increased sanctions for individuals. Despite considerable initial speculation on the potential impact of the new law, the full implications are not yet clear almost two years later. Yesterday, adding further uncertainty to the implications of engaging in cartel conduct, Bill C-10, the Canadian government's omnibus crime bill, received Royal Assent. Bill C-10 brings into law far-reaching amendments that fundamentally change important aspects of Canada's criminal justice system, including restricting the availability of conditional sentences ("house arrest") for individuals engaged in cartel conduct in Canada.

### Background

As a result of amendments enacted on March 12, 2009, fundamental changes to the Act's conspiracy provisions came into effect in March 2010, replacing the Act's old conspiracy offence (which required agreements to have an undue or unreasonable impact on competition) with a new *per se* criminal offence for agreements between competitors to fix prices, restrict production or allocate sales, customers or territories. The potential penalties for engaging in cartel conduct were increased to up to 14 years imprisonment and a fine of up to \$25 million per count.

The Competition Bureau ("the Bureau") announced the first conviction under the new law on January 6, 2012. Domfoam International Inc. and Valle Foam Industries (1995) Inc. were charged with, and pleaded guilty to, four counts of conspiracy under the Act: two charges under the new conspiracy provision of the Act for price-fixing from March to July 2010, for which the companies were fined a total of \$2.5 million, and two charges under the former conspiracy provision for price-fixing from January 1999 to March 2010, for which the companies were fined a total of \$10 million. No individual sanctions were sought in this case.<sup>2</sup>

However, the Bureau has said that it is committed to pursuing sanctions against individuals implicated in cartel conduct. In the Bureau's view, holding corporate executives and employees personally responsible for anticompetitive conduct is an effective way to deter such behaviour. In an address to the Canadian Bar Association's Annual Competition Law Fall Conference in 2010, the Commissioner of Competition said "[m]ore frequently, we are seeking jail time for individual conspirators, and we are encouraged that the recognition is growing among courts and prosecutors that cartel conduct is equally deserving of true criminal sanctions. The inquiry as to whether a custodial sentence should be sought is always a case-specific exercise, and any request must be supported by a robust factual record. That said, we do believe that custodial sentences are an important and effective tool in addressing cartels."<sup>3</sup>

Indeed, of the 29 individuals sentenced for cartel offences since 1998, 21 were sentenced in 2009 alone.<sup>4</sup> To date, sanctions against individuals have been restrained by judicial reluctance in Canada to impose more severe penalties in white collar cases.<sup>5</sup> Since 1998, 22 individuals were required to pay fines ranging between \$10,000 and \$250,000 and seven individuals were given conditional prison sentences.

Such conditional sentences allowed the individuals to serve time "in the community" (a form of "house arrest"). Of the seven individuals who received conditional sentences, all of them were for terms of one year or less.

### **Bill C-10**

Nevertheless, the tide may be turning towards stricter penalties for individuals who commit white-collar crimes in Canada, including offences contrary to the Act. On March 13, 2012, Bill C-10, the Canadian government's omnibus crime bill, received Royal Assent. This bill further increases the potential risks for individuals participating in "*per se*" cartel offences. Of particular importance are the changes to section 742.1 of the *Criminal Code*, which restricts the availability of conditional sentences for offences punishable by a maximum of 14 years or life. (Prior to these amendments, a conditional sentence could be imposed when an offence was not punishable by a mandatory minimum sentence and the court handed down a prison sentence of less than two years.)

With the coming into force of Bill C-10, an individual convicted and sentenced to prison under the Act's conspiracy provision (as well as bid rigging (s. 47), false or misleading representations (s. 52), and deceptive notice of winning a prize (s. 53)) no longer has the ability to serve his or her sentence in the community.

To date, contested cartel prosecutions in Canada have been rare. As a practical matter, one result of Bill C-10 may be that individuals charged with cartel offences will be more likely to contest charges through to a full trial, rather than settle with a plea agreement and agree to plead guilty, unless the Bureau and the Public Prosecution Service of Canada (PPSC)<sup>6</sup> are prepared to seek only fines for such offences.

The vast majority of penalties that have been imposed on individuals in Canada for cartel offences under the Act (and all of the penal sanctions) have resulted from plea negotiations between the accused and the Bureau/PPSC. Although the courts retain the ultimate jurisdiction to reject any penalty that the parties propose, joint submissions on penalty are almost always accepted.

It also remains to be seen how Bill C-10 will affect the application and effectiveness of the Bureau's leniency policy. The Bureau's success in obtaining cartel convictions in recent years is due in large part to the availability of its immunity programme and leniency policy. The Bureau's immunity programme encourages cartel participants to disclose their illegal conduct in exchange for potential immunity from prosecution. Under the leniency policy, where immunity is no longer available, a corporation or individual employees may agree to plead guilty and co-operate in an existing investigation in return for more lenient recommended penalties than the Bureau and the PPSC would otherwise seek. Which employees may be pursued by the government and what types of plea arrangements might be available to them are often an important part of a corporate leniency negotiation. Once again, unless the government is prepared to accept only a fine from such employees, leniency may be less attractive to not only individual employees, but also to a corporation, if only because the alleged cartel would be more likely to be the subject of a full public trial against some individuals even if the corporation avoids a trial by entering a guilty plea.

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Davies represents both individuals and corporations in criminal antitrust investigations and prosecutions, as well as follow-on class action proceedings. We have been involved in the majority of the most significant and complex cartel cases in Canada. The depth of our experience enables us to either successfully negotiate immunity or leniency for our clients and their employees, including those initially targeted for prosecution in Competition Bureau investigations, or contest proceedings, as appropriate.

*If you would like to discuss any of the foregoing, please contact [Elisa Kearney](#) (416.367.7450), [John Bodrug](#) (416.863.5576) or [Mark Katz](#) (416.863.5578) in our Toronto office, or [Louis-Martin O'Neill](#) (514.841.6547) or [Stéphane Eljarrat](#) (514.841.6439) in our Montréal office.*

*Davies Ward Phillips & Vineberg LLP is an integrated firm of more than 240 lawyers with offices in Toronto, Montréal and New York. The firm is focused on business law and is consistently at the heart of the largest and most complex commercial and financial matters on behalf of its clients, regardless of borders.*

*The information and comments contained herein are for the general information of the reader and are not intended as advice or opinions to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations, the reader should seek professional advice.*

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- <sup>1</sup> Bill C-10, An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009, and related fiscal measures received Royal Assent on March 12, 2009. See, <http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=5697&List=toc&Session=22>.
- <sup>2</sup> See, Competition Bureau, News Release, Competition Bureau Sends Signal to Price-Fixers with \$12.5 Million Fine, January 6, 2012 available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01353.html>
- <sup>3</sup> See, for example, Remarks by Melanie Aitken, Commissioner of Competition to CBA Fall Competition Law Conference, September 30, 2010 available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03306.html>
- <sup>4</sup> See, Competition Bureau, News Release, and Competition Bureau, News Release, Seven Sentenced for Fixing Gas Prices in Thetford Mines, January 27, 2012 available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03041.html>
- <sup>5</sup> See, Sheridan Scott, former Commissioner of Competition, Competition Bureau Canada, "Criminal Enforcement of Anti-Trust Laws – The U.S. Model – A Canadian Perspective", presented at Fordham Corporate Law Institute Annual Conference, New York (September 14, 2006).
- <sup>6</sup> Prosecution is the responsibility of the PPSC, which is headed by the Director of Public Prosecutions (DPP). The Bureau may refer criminal matters to the DPP, who then must decide whether it is in the public interest to commence proceedings. Although the DPP has official carriage of these cases, Bureau officers work closely with counsel for the DPP throughout the prosecution process.