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**SANCTIONS IN ANTITRUST CASES**

**Contribution by Canada**

-- Session IV --

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## SANCTIONS IN ANTITRUST CASES

-- Canada --

### Executive Summary

1. Canada's *Competition Act* (Act) sets out the potential sanctions for certain anti-competitive conduct. Canada's Competition Bureau (Bureau) is responsible for the enforcement and administration of the Act. In Canada, only the Competition Tribunal or the courts have the authority to make the final determination as to whether there has been an infringement of the Act and, if so, which sanctions should be imposed.
2. Amendments to the Act in 2009 strengthened the potential sanctions for certain anti-competitive conduct. Potential sanctions now include administrative monetary penalties for abuse of dominance as well as increased fines (for both companies and individuals) and terms of imprisonment for cartel conduct including price-fixing, market allocation, output restriction, and increased terms of imprisonment for bid-rigging. The Act also provides for a right of private action with respect to conduct that violates the criminal provisions of the Act or that fails to comply with a Tribunal or court order.
3. The Bureau also encourages voluntary compliance with the Act through the use of alternative case resolution mechanisms and by promoting the use of corporate compliance programs to the business and legal communities.

## 1. Introduction

### 1.1 General Bureau Overview

4. Canada's Competition Bureau (Bureau) is pleased to provide this submission for the roundtable on "Sanctions in Antitrust Cases" at the OECD's 15<sup>th</sup> Global Forum on Competition.

5. The Bureau, headed by the Commissioner of Competition (Commissioner), is an independent law enforcement agency of the Federal Government of Canada responsible for the administration and enforcement of the *Competition Act* (Act)<sup>1</sup> and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers have the opportunity to prosper in a competitive and innovative marketplace.

6. The Act is a federal law governing most business conduct in Canada. It contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace. This paper will focus on the potential sanctions for unilateral anti-competitive conduct, cartel agreements and bid-rigging in Canada.

7. Unilateral anti-competitive conduct is subject to enforcement action under civil provisions of the Act. Cartel agreements (price-fixing, market allocation or supply restriction) and bid-rigging are *per se* illegal and subject to criminal prosecution. Other forms of collaboration between competitors, such as joint ventures and strategic alliances, may be subject to review under a civil agreements provision that prohibits agreements between competitors only where they are likely to substantially lessen or prevent competition.<sup>2</sup>

8. The Bureau's mandate is strictly investigative. Only the Competition Tribunal (Tribunal)<sup>3</sup> or the courts have the authority to make the final determination as to whether there has been an infringement of the Act and to impose sanctions or issue orders.<sup>4</sup> There are separate paths to adjudication for civil and criminal matters.

9. In civil matters, the Bureau is supported by Competition Bureau Legal Services (CBLS), a group of in-house lawyers from the Department of Justice. CBLS provides legal services and advice and represents the Commissioner on civil matters before the Competition Tribunal or the courts.

10. The Public Prosecution Service of Canada (PPSC) is responsible for the prosecution of criminal offences under federal jurisdiction. In instances where the Bureau believes a case can be brought forward, the Bureau refers evidence of alleged criminal offences to the PPSC along with prosecution recommendations, including the Bureau's view as to an appropriate sentence. The PPSC decides whether

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<sup>1</sup> The full text of the *Competition Act* is available online at: <http://laws-lois.justice.gc.ca/eng/acts/C-34/index.html>.

<sup>2</sup> Although outside the scope of this paper, the Act also contains criminal and civil provisions to address false or misleading representations and deceptive marketing practices in promoting the supply or use of a product or any business interest.

<sup>3</sup> The Competition Tribunal is a separate adjudicative body that has jurisdiction to hear and dispose of all applications made by the Commissioner under certain sections of the Act.

<sup>4</sup> In respect of mergers and reviewable matters, section 105 of the Act provides that the Commissioner and a person in respect of whom the Commissioner may apply to the Tribunal for an order may instead sign a consent agreement, which may be filed with the Tribunal for registration and, upon doing so, has the same force and effect as a Tribunal order. A consent agreement must be based on terms that could be the subject of a Tribunal order against that person.

and how to proceed with these prosecutions and has the sole authority to engage in plea and sentencing discussions with counsel for an accused. The Bureau remains an active partner in supporting the prosecution, including providing facts and analysis for PPSC counsel in plea and sentencing discussions, and the PPSC gives due consideration to the Bureau’s recommendation.

**Table 1: Litigation and Adjudication of Competition Matters in Canada**

	Civil Matters (Mergers & Reviewable Matters)	Criminal Matters (Cartels & Bid Rigging)
Litigation	Competition Bureau Legal Services (litigation support to Bureau)	Public Prosecution Service of Canada (sole carriage of matters referred by Bureau)
Brought before	Competition Tribunal and courts	Courts

11. The sanctions available under the Act differ depending on the nature of the conduct in question. In the civil context, Administrative Monetary Penalties (AMPs) are remedies designed to promote and encourage compliance with the Act. By contrast, a fine or term of imprisonment imposed by a court upon conviction under a criminal provision is intended to punish. Such differences will be discussed in further detail in the “Civilly Reviewable Conduct” and “Cartel Conduct” sections of this submission.

12. In 2009, amendments to the Act strengthened the available sanctions and remedies for certain civil and criminal offences. AMPs for abuse of dominance in all industry sectors were introduced.<sup>5</sup> Prior to the amendments, businesses that were found by the Tribunal to have abused their dominant market position were subject only to behavioural orders, such as requiring the offending company to discontinue the activity. The Tribunal can now order those businesses to pay an AMP of up to \$10 million<sup>6</sup> in the first instance and up to \$15 million for any subsequent order. In criminal cartel cases, the maximum fine was increased to \$25 million from \$10 million, and the maximum term of imprisonment to 14 years from 5 years. For bid-rigging, the term of imprisonment was also increased to 14 years from 5 years.<sup>7</sup> These increases reflect the Canadian Government’s recognition of the seriousness of anti-competitive conduct.

13. The Bureau actively enforces the Act. Table 2 provides statistics for the outcomes of selected Bureau investigations over the past five fiscal years.<sup>8</sup>

<sup>5</sup> Between 2000 and 2009, the Act’s abuse of dominance provisions made allowance for an AMP of up to \$15 million in respect of certain anti-competitive acts by domestic airlines. No AMPs were ever ordered under these airline-specific provisions, which were repealed in 2009.

<sup>6</sup> All amounts in this submission are in Canadian dollars.

<sup>7</sup> The fine for bid-rigging was not changed by the amendments, and remains an amount at the discretion of the court.

<sup>8</sup> Additional statistics available in the Competition Bureau Quarterly Statistics Report for the period ending March 31, 2016, available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03973.html>.

**Table 2: Selected Outcomes**

Measure	2011-12 Total	2012-13 Total	2013-14 Total	2014-15 Total	2015-16 Total
Dollar value (millions) of fines imposed upon companies and individuals by the courts for cartel conduct	\$15.23M	\$7.86M	\$55.72M	\$8.63M	\$3.14M
Number of individuals sentenced for cartel conduct under the <i>Competition Act</i>	12	10	3	2	2
Number of companies sentenced for cartel conduct under the <i>Competition Act</i>	9	7	8	4	7
Combined custodial sentences imposed (months) by the courts for cartel conduct	0	0	0	14	18
Dollar value (millions) of administrative monetary penalties for abuse of dominance imposed by the Competition Tribunal or contained within consent agreements registered with the Competition Tribunal	\$0M	\$0M	\$0M	\$5M	\$1M

## 2. Civilly Reviewable Conduct

### 2.1 Legislative Framework

14. Part VIII of the Act contains a number of provisions that enable the Tribunal to sanction, civilly, certain business practices where the conduct has resulted, or is likely to result, in anti-competitive effects in a market. These provisions include refusal to deal, exclusive dealing, tied selling, price maintenance, mergers and abuse of dominance.

15. Monetary sanctions are available under the civil provisions of the Act only in respect of abuse of dominance.<sup>9</sup> Abuse of a dominant position occurs when a dominant firm or group of firms in a market engages in anti-competitive acts, where competition has been, or is likely to be, prevented or lessened substantially.

16. Subsection 79(1) of the Act defines the elements of abuse of dominance. All three elements must be established before a remedy may be issued:

- one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business (i.e. is “dominant” in a product and geographic market);
- that person or those persons have engaged in or are engaging in a practice of anti-competitive acts;<sup>10</sup> and
- the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.<sup>11</sup>

<sup>9</sup> Excluding the deceptive marketing practices provisions in Part VII.1 of the Act, which deal with various types of misleading advertising.

<sup>10</sup> Subsection 78(1) of the Act sets out nine types of potentially “anti-competitive acts”, including margin squeezing, pre-emption of scarce facilities or resources, exclusive dealing and predatory pricing. This list, while broad, is not exhaustive, affording the flexibility to address other types of anti-competitive conduct that are not explicitly enumerated. The full text of subsection 78(1) is available online at: <http://laws-lois.justice.gc.ca/eng/acts/C-34/page-22.html#docCont>.

17. Where the Commissioner believes an abuse of dominance has occurred, he may bring an application to the Tribunal for a remedial order.<sup>12</sup> Upon making a finding that the abuse of dominance provision has been contravened, the Tribunal may issue up to three types of orders: an order prohibiting certain conduct, an order requiring certain corrective action be taken, and/or an order requiring the payment of an AMP.<sup>13</sup>

18. Orders of the Tribunal, including in respect of AMPs, may be appealed as of right to Canada's Federal Court of Appeal (except on a question of fact, which requires leave of the Court).<sup>14</sup> The Federal Court of Appeal may dismiss the appeal, substitute its decision for that of the Tribunal, or refer the matter back to the Tribunal for re-determination with such directions as it considers appropriate.<sup>15</sup> A decision of the Federal Court of Appeal may in turn be appealed to the Supreme Court of Canada, with leave of the Court.<sup>16</sup>

## 2.2 *Determination of AMP Amount*

19. Although AMPs in Canada are ultimately determined by the Tribunal and the courts, the Bureau will issue recommendations to inform this process. The goal of an AMP for civilly reviewable conduct is to promote compliance rather than to punish. In making its recommendation, the Bureau is guided by the factors in subsection 79(3.2) of the Act.

20. The Tribunal must take into account any evidence of the following:

- the effect on competition in the relevant market;
- the gross revenue from sales affected by the practice;
- any actual or anticipated profits affected by the practice;
- the financial position of the person against whom the order is made;
- the history of compliance with this Act by the person against whom the order is made; and
- any other relevant factor.

21. Other relevant factors may include, for example, whether the person or persons against whom a section 79 application is brought had in place a credible and effective corporate compliance program at the time that the impugned conduct took place. Such a program may be considered by the Bureau as

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<sup>11</sup> The Commissioner's general approach to the enforcement of section 79 (abuse of dominance) is set out in Competition Bureau Canada, *The Abuse of Dominance Provisions – Enforcement Guidelines*, available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html>.

<sup>12</sup> Alternatively, the Commissioner may pursue a form of alternative case resolution, including a registered consent agreement pursuant to section 105 of the Act.

<sup>13</sup> In making such an order, subsection 79(3) of the Act requires that the terms of the order interfere with the rights of the person to whom the order is directed or who is affected by the order, only to the extent necessary to achieve the purpose of the order.

<sup>14</sup> *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2<sup>nd</sup> Supp.), s. 13.

<sup>15</sup> *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 52.

<sup>16</sup> *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40.

mitigating the magnitude of an AMP. The Bureau is guided by these same factors when negotiating a consent agreement in respect of abuse of dominance.

22. AMPs are civil remedies and are distinct from criminal fines. Failure to pay an AMP may be enforced civilly as a debt due to the Crown.<sup>17</sup> Fines are a remedy imposed by a court upon conviction of a criminal offence and failure to pay may lead to additional sanctions including imprisonment.

### **2.3 Practical Experience with AMPs**

23. Since the 2009 amendments to the Act, which introduced AMPs for abuse of dominance, AMPs have been levied in two abuse of dominance cases. The AMPs were part of comprehensive negotiated remedies embodied in consent agreements registered with the Tribunal that are enforceable as a court order. Both instances involved the Canadian water heater industry.

24. In November 2014, Reliance Comfort Limited Partnership (Reliance) agreed to pay an AMP of \$5 million under the terms of a registered consent agreement.<sup>18</sup> The consent agreement addressed the Bureau's concerns that Reliance had implemented anti-competitive water heater return policies and procedures that were aimed at preventing consumers from switching to competitors. In a section 79 (abuse of dominance) application filed against Reliance in 2012, the Bureau alleged that Reliance's return policies and procedures left many customers with little choice but to continue their water heater rental agreements with Reliance, even if they wanted to purchase a new water heater or switch to another rental provider to realize cost savings. Under the terms of the consent agreement, Reliance was also required to make it easier for customers to terminate their rental agreements and return their water heaters to Reliance.

25. In October 2015, Direct Energy Marketing Limited (Direct Energy) also agreed to pay an AMP of \$1 million under the terms of a registered consent agreement.<sup>19</sup> The agreement with Direct Energy resolved the Bureau's concerns that it too had abused its dominance by restricting competition and limiting consumer choice in Ontario's residential water heater industry. While Direct Energy exited the market for water heater rentals in Ontario in 2014, this resolution addresses its past conduct and encourages future compliance, including by requiring Direct Energy to establish and maintain a corporate compliance program in the event that it re-enters the residential water heater market in Ontario in the next ten years.

## **3. Cartel Conduct**

### **3.1 Legislative Framework**

26. Laws prohibiting cartel conduct in Canada are set out primarily in sections 45 (conspiracy), 46 (foreign directive) and 47 (bid-rigging) of the Act. Criminal fines can be levied against parties found guilty of any of these offences.

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<sup>17</sup> Note, however, that failure to comply with other types of Tribunal remedial orders in respect of the civil provisions of the Act may lead to criminal sanction under section 66 of the Act.

<sup>18</sup> Competition Bureau Canada, News Release, *Competition Bureau Strengthens Competition in Ontario's Water Heater Industry*, 6 November 2014, available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03836.html>.

<sup>19</sup> Competition Bureau Canada, News Release, *Agreement with Direct Energy to resolve concerns in Ontario water heater industry*, 30 October 2015, available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03997.html>.

27. Section 45 prohibits conspiracies, agreements or arrangements between competitors or potential competitors:

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

28. Section 46 prohibits a corporation that carries on business in Canada from implementing a foreign directive for the purpose of giving effect to an agreement or arrangement made outside of Canada that, were it made in Canada, would violate section 45. Section 47 prohibits two or more persons, in response to a call or request for bids or tenders, from submitting bids arrived at by agreement, or agreeing that one or more of them will not submit a bid or will withdraw a bid.

29. The maximum fine available for a conspiracy offence under the Act is \$25 million. Parties convicted under the foreign directive and bid-rigging provisions are liable for a fine at the discretion of the court, with no statutory maximum. In the case of conspiracy and bid-rigging, the sanctions outlined above can be imposed on individuals or organizations, including corporations. In the case of a foreign directive, only a legal corporation can be found guilty of, and therefore sanctioned for, that offence. With respect to sentencing of cartel offences in particular, recent precedent uses the affected volume of commerce (VOC) as the relevant starting point for the calculation of the fine.

30. Historically, fines have been the most common sanction imposed against both organizations and individuals found guilty of cartel offences in Canada. However, for cartel offences under sections 45 and 47, in addition to the fines described above, the Act states that a person can be liable on conviction to imprisonment for a term not exceeding 14 years. Sentences of imprisonment for these offences are becoming increasingly common: Canadian courts have handed down terms of imprisonment totalling over seven years in the last decade. All of these sentences were “conditional sentences”, meaning a term of imprisonment served in the community on conditions such as house arrest.

31. In 2012, Canadian Parliament passed the *Safe Streets and Communities Act*.<sup>20</sup> Under the new legislation, judges can no longer sentence individuals convicted of crimes carrying a maximum penalty of 14 years of imprisonment (including cartel conduct under section 45 or 47 of the Act) to a conditional sentence. This change means that an individual sentenced under sections 45 or 47 of the Act must serve any jail time in prison. The Bureau and the Chief Justice of the Federal Court agree that a sentence of actual jail time is an important and effective tool in addressing cartels.<sup>21</sup> It is only a matter of time until conduct that postdates both the 2009 amendments to the *Act* and the coming into force of the *Safe Streets and Communities Act* is before the courts and custodial sanctions become the norm.

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<sup>20</sup> The full text of the *Safe Streets and Communities Act* available online at: [http://laws-lois.justice.gc.ca/eng/annualstatutes/2012\\_1/](http://laws-lois.justice.gc.ca/eng/annualstatutes/2012_1/).

<sup>21</sup> *Canada v. Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117

### 3.2 *Determination of fines*

32. Criminal offences under the Act are tried and sentenced by the courts. The purposes and principles for sentencing are set out in Part XXIII of the *Criminal Code of Canada* R.S.C. 1985 c. C-46 (*Criminal Code*).<sup>22</sup> The fundamental principle of sentencing in Canada is proportionality: “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” The *Criminal Code* further advises that “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.”<sup>23</sup>

33. The fundamental purpose of criminal sentencing differs from the purpose of civil sanctions. While sanctions in civil matters focus on promoting and encouraging compliance with the Act, criminal sentences have the following objectives:

- to denounce unlawful conduct, to deter the offender and other persons from committing offences;
- to separate offenders from society, where necessary;
- to assist in rehabilitating offenders; to provide reparations for harm done to victims or to the community; and
- to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.<sup>24</sup>

#### 3.2.1 *Immunity and Leniency Programs*

34. The Immunity Program is one the Bureau’s most effective tools for detecting and investigating criminal anti-competitive activities prohibited by the Act. Under the Immunity Program, the first party to disclose an offence not yet detected by the Bureau, or to provide evidence leading to the filing of charges, may receive immunity from prosecution as long as the party cooperates with the Bureau.

35. The Bureau recommends immunity from prosecution only for the first business organization or individual to apply under the Immunity Program. However, other parties to the cartel conduct (business organizations or individuals) that come forward to resolve their liability and cooperate with the Bureau's investigation and any subsequent prosecution may qualify for leniency in sentencing.

36. The Bureau will make a recommendation for leniency in sentencing to the Public Prosecution Service of Canada (PPSC) when the individual or business organization:

- has terminated its participation in the cartel;
- 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

<sup>22</sup> The full text of the *Criminal Code* is available online at: <http://laws-lois.justice.gc.ca/eng/acts/C-46/index.html>.

<sup>23</sup> The full text of sections 718.1 and 718.2 of the *Criminal Code* are available online at: <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-180.html#h-264>.

<sup>24</sup> The full text of section 718 of the *Criminal Code* is available online at: <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-180.html#h-264>.

- agrees to plead guilty.

37. The Bureau sets out the methodology it will use when recommending a fine in its *Leniency Program Bulletin* and *Leniency Program: Frequently Asked Questions*<sup>25</sup>.

38. The determination of a fine, or any sentence, in the context of the Leniency Program is a multistep process, and the Bureau is responsible for only a part of the process: the Bureau will make a recommendation for sentencing to the PPSC. The PPSC will give that recommendation due consideration, but is not bound by it; and the court will ultimately impose the fine, guided by relevant sentencing legislation described below.

39. Unless there is relevant, compelling and readily available evidence to the contrary, 20 percent of a Leniency Applicant's affected volume of commerce (VOC) in Canada is the starting point for the Bureau's recommended fine. The 20 percent figure includes two components: 10 percent of the affected VOC as a proxy for the overcharge resulting from the cartel activity and other types of economic harm; and 10 percent of the affected VOC for deterrence and to ensure that the fine does not represent a mere licensing fee or cost of doing business. The fine level can then be adjusted up or down depending on the weight assigned by the Bureau to relevant aggravating or mitigating factors. In cases where 20 percent of an Applicant's affected VOC is greater than the statutory maximum fine, the starting point of the Bureau's assessment of the fine level for the Applicant will be the statutory maximum.

### 3.2.2 *Aggravating and mitigating factors*

40. After establishing the appropriate starting point for a fine, based on the affected VOC, both the Bureau and the courts will then consider relevant aggravating and mitigating factors. The factors used by both the Bureau in the context of a Leniency recommendation and the courts in the case of a contested sentencing, are set out in the *Criminal Code*. Well established factors in cartel cases include:

- the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- the cost to public authorities of the investigation and prosecution of the offence;
- any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
- any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.<sup>26</sup>

41. The ability of a convicted party to pay a fine can be considered in at least two different stages in the sentencing process: first, when the Bureau is recommending a sentence to the PPSC with respect to a party cooperating through its Leniency Program; and secondly, by the court when sentencing a party at the conclusion of a contested proceeding.

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<sup>25</sup> The Leniency Program Bulletin and FAQs are available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03594.html>; and <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03593.html>.

<sup>26</sup> The full text of section 718.21 of the *Criminal Code* is available online at: <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-180.html#h-264>.

42. In the case of a party cooperating through the Leniency Program, an organization will be required to provide financial information about its assets, liabilities, revenues and equity before any reduction in fine or adjustment to payment schedule will be recommended by the Bureau to the PPSC. The Bureau may also request an independent third-party expert accountant review of the organization's financial information at the expense of the Applicant.

43. In the case of sentencing by the court, the *Criminal Code* sets out that the court shall consider: "the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees"<sup>27</sup>.

### 3.2.3 Case – Motor Vehicle Components (Wire Harnesses)<sup>28</sup>

44. The Bureau's motor vehicle components investigation is its largest ever public bid-rigging investigation. It relates to the conduct of manufacturers of motor vehicle components, and is being, or has been, investigated by a number of other jurisdictions including the United States, Japan, the European Union and Australia. A Statement of Admissions (SOA)<sup>29</sup> in the motor vehicle components case illustrates how the factors set out above come into play even in the context of a guilty plea. This matter was resolved via the Leniency Program with a guilty plea and a fine of \$30 million – the largest bid-rigging fine ever ordered in Canada. The facts in the SOA are agreed to by the two parties, and viewed as those that the court must have in order to be able to endorse the plea agreement they have reached. The SOA becomes a part of the court record, allowing the judge to rely on the facts set out therein in his or her reasons.<sup>30</sup>

### 3.3 Practical Issues

45. As outlined above, there is judicial involvement in the setting of all fines levied for criminal cartel offences in Canada. In the case of a sentence handed down upon a finding of guilt in a contested process, the court will consider the purposes, principles and factors related to sentence in the *Criminal Code*, relevant case law, and submissions from the Crown and the Defence. Even in the case of a settlement negotiated through the Bureau's Leniency Program, the court will only accept a fine jointly recommended by the Crown and the pleading party if it would not be contrary to the public interest, such as to bring the administration of justice into disrepute.

46. Section 674 of the *Criminal Code* provides for a right of appeal from a conviction for an indictable offence, including cartel conduct under sections 45 through 47 of the Act. Such an appeal may be based on questions of law or fact, and be made to the court of appeal for the province in which the matter was originally heard, or the Federal Court of Appeal, if that matter was heard in Federal Court. A decision of a court of appeal may be appealed to the Supreme Court of Canada, with leave.

47. There is no automatic suspension of a sentence when an application for leave to appeal is made to a court of appeal. Subsection 683(5) of the *Criminal Code* states that a court may, where it considers it to be in the interests of justice, order that an obligation to pay a fine be suspended until the appeal has been

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<sup>27</sup> Ibid.

<sup>28</sup> Competition Bureau Canada, News Release, *Record \$30M Fine Obtained by Competition Bureau Against Japanese Auto Parts Supplier*, 18 April 2013, available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03560.html>.

<sup>29</sup> The full SOA is available (in English only) online at: <https://www.osler.com/uploadedFiles/Yazaki.Admissions.pdf>.

<sup>30</sup> Paragraphs 17 to 28 of the SOA speak to the facts relevant to the determination of the fine.

determined. The “interests of justice” include the merits of the appeal, the interests of the state, and the public’s confidence in and respect for the court in its administration of the criminal law.

48. An individual sentenced to a term of imprisonment can seek release pending an appeal pursuant to section 679 of the *Criminal Code*. The individual must establish that his or her appeal has sufficient merit and that his or her detention in custody would cause unnecessary hardship.

### **3.4 Private Enforcement**

49. In addition to fines and imprisonment, section 36 of the Act provides for a right of private action with respect to conduct contrary to the criminal provisions of the Act, including the cartel provisions. Individuals or organizations may sue and recover any loss or damage proved to have been suffered as a result of the conduct. The Bureau monitors private actions that are related to ongoing investigations or are seeking to make use of Bureau records or call Bureau staff as witnesses.

50. These kinds of actions for private damages interact with criminal sanctions in the following manner: once a person is convicted of a criminal offence under the Act, the record of the criminal proceedings may be used by the plaintiff in the private action to establish *prima facie* proof of the wrongdoing and its effects on the plaintiff. However, an action for damages under section 36 of the Act exists independently of any criminal prosecution that has been or may be brought. In fact, an action can be brought under section 36 of the Act even if a criminal prosecution has not been initiated pursuant to one or more of the provisions of the Act.

### **3.5 Other Sanctions**

51. In addition to fines/imprisonment and private actions for damages, parties found guilty of cartel conduct under the Act can also be prohibited from contracting with various levels of government in Canada. Specifically, some municipal, provincial and federal government agencies in Canada will prohibit guilty parties’ participation in calls for tender based on their conduct contrary to the Act.

## **4. Achieving Compliance**

52. In addition to the deterrent effect of sanctions that can be imposed by the Tribunal or courts, to achieve the most effective compliance outcomes, the Bureau relies on a variety of outreach, enforcement and advocacy instruments.<sup>31</sup> The Bureau employs techniques known as alternative case resolutions aimed at facilitating voluntary compliance with the Act. The techniques most likely to be employed are information letters, information meetings and warning letters.

### **4.1 Information letters**

53. The Bureau may send information letters to businesses and/or individuals to advise them that the Bureau is concerned about possible contraventions, and to emphasize their obligation to comply with the Act. These letters note specific requirements of the legislation, and may be used when the Bureau believes a business or individual is unaware that a particular type of conduct raises issues.

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<sup>31</sup> More information on the Bureau’s approach can be found in the *Competition and Compliance Framework*, available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03982.html>.

## 4.2 Information meetings

54. At a stage in an investigation where the Bureau believes that a business or individual is unaware that particular conduct raises compliance concerns under the Act, the Bureau may seek to facilitate compliance by meeting with the business or individual to explain the legislation.

### 4.2.1 Warning letters

55. Warning letters are formal written notices to a business or individual that identify a specific alleged contravention of the Act. The Bureau will typically advise the business or individual that more stringent action may be considered if the conduct is not corrected, or if it is repeated. These letters may also request that the recipient provide information on how it intends to comply with the Act.

### 4.2.2 Corporate Compliance Programs

56. The Bureau also proactively encourages businesses to put in place compliance programs to prevent or minimize their risk of contravening the Act, and to detect contraventions, should they occur. In June 2015, the Bureau updated its *Corporate Compliance Programs Bulletin*<sup>32</sup> to provide guidance to businesses on what constitutes a credible and effective corporate compliance program. The Bureau also established a Compliance Unit to conduct outreach and promote compliance across the country.

57. The existence of a compliance program does not immunize businesses or individuals from enforcement action. However, in determining the most appropriate means to resolve cases, including with respect to offences and contraventions where the exercise of due diligence is a defence, a credible and effective compliance program may be considered by the Bureau. Consideration, and therefore the potential benefits, will be greater in most circumstances for a company with a pre-existing credible and effective compliance program, than for a company that waits until it is investigated before implementing or enhancing a program.

58. Although the decision to implement a compliance program is generally voluntary, the Bureau can recommend or request that a program be established in certain circumstances, including in the context of a prohibition order, a probation order, a consent agreement, as well as in the context of alternative case resolutions. The Bureau can also recommend or request that an independent compliance monitor be appointed to monitor the implementation and operation of any such compliance program.

## 5. Conclusion

59. Appropriate sanctions for anti-competitive conduct are an important tool to encourage compliance. Strengthening the potential sanctions under certain sections of the Act in 2009 was a clear recognition by the Canadian Government of the seriousness of anti-competitive conduct, as well as of the deterrent effect of sanctions. The passage of the *Safe Streets and Communities Act* in 2012 also made it clear that, in Canada, individuals will be held to account for their roles in cartel conduct. Sanctions are one part of the Bureau's efforts to deter anti-competitive conduct and encourage compliance. To complement its enforcement activities, the Bureau has increased its outreach and advocacy efforts to inform stakeholders of their obligations with the goal of preventing anti-competitive conduct before it occurs. The Bureau takes a shared approach to compliance, recognizing that the Bureau, consumers, and the business and legal communities all have a role to play.

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<sup>32</sup> The *Corporate Compliance Programs Bulletin* is available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html>.