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Assessing the Auto Parts Inquiry in Canada

ABA / IBA International Cartel Workshop 2014

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I. Introduction

In an article contributed to the 2012 Cartel Workshop in Vancouver, I discussed (among other things) the status of the auto parts inquiry in Canada, based on a review of public record materials.[1] Affidavits filed in support of subpoena applications to the Ontario courts indicated that the Canadian Competition Bureau's ("CCB") auto parts inquiry had, by October 2011, reached such a significant scale that the CCB had: (i) 10 co-operating parties in the inquiry; (ii) issued at least 15 "target" letters and numerous subpoenas; and (iii) had granted 164 markers to co-operating parties across a broad range of products.[2]

In the intervening two years, the CCB's investigative efforts have begun to yield results, with three Canadian guilty pleas having been entered in the auto parts inquiry to date. This article reviews those pleas and the court filings associated with them in an attempt to provide readers with insight, from a senior cartel enforcement jurisdiction, into what Scott Hammond and others have called "the largest cartel investigation in history".[3] As with my 2012

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[1] *See* D.M. Low and C.W. Halladay, "Key Issues for Canadian Cartel Enforcement in 2012", paper submitted to the American Bar Association / International Bar Association International Cartel Workshop, 1-3 February 2012.

[2] *Ibid.*, at 5.

[3] *Crain's Detroit Business*, "Price-fixing probe may widen; suppliers uneasy" (February 24, 2013), available online at <http://www.crainsdetroit.com/article/20130224/NEWS/302249958/price-fixing-probe-may-widen-suppliers-uneasy>.

paper, this article is based solely on information obtained from Canadian court archives and other public record sources.

II. Common Features Of The Canadian Guilty Pleas To Date

Canadian guilty pleas have been entered by Furukawa Electric Co., Ltd. ("Furukawa"; electrical boxes), Yazaki Corporation ("Yazaki"; wire harnesses) and JTEKT Corporation ("JTEKT"; automotive bearings). All of these pleas were filed in 2013 — Furukawa was the first party to plead guilty in Canada, on April 4, 2013. Two weeks later, Yazaki entered its plea. Although the products named in these two pleas differ somewhat, it is apparent from documents filed with the Ontario Superior Court (East Region) that the electrical boxes for which Furukawa plead guilty are an input into or component of the broader wire harnesses which comprised Yazaki's plea, and that Furukawa and Yazaki were respectively first- and second-in under the CCB's *Leniency Program*.[4] (Based on the court filings in both cases, Sumitomo Corporation appears to have been the immunity applicant in this matter.) Three months later, JTEKT entered its plea in respect of a different cartel involving automotive bearings. As of mid-January 2014, no other party has yet plead guilty in Canada (in the bearings matter or otherwise).

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[4] *See* Competition Bureau, *Leniency Program* (September 29, 2010), available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/LeniencyProgram-sept-2010 e.pdf/$FILE/LeniencyProgram-sept-2010-e.pdf>. *See also* Competition Bureau, *Leniency Program: Frequently Asked Questions* (September 25, 2013), available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03594.html>.

These three guilty pleas share certain common features, which may offer insight into the CCB's broader auto parts inquiry. Notable shared characteristics include:

- **Focus On Bid-rigging.** In each instance, the offender plead guilty to multiple bid-rigging offences under section 47 of the *Competition Act*,[5] with each affected RFQ treated as a separate offence. Section 45, the general cartel conspiracy provision, has not been invoked. The CCB's preference for using section 47 over section 45 likely relates to the RFQ-driven nature of the auto parts procurement process, and the fact that section 47 is a *per se* offence[6] (whereas section 45 only incorporated *per se* liability after March 13, 2010).[7]

- **Direct Sales Only.** Each of the three pleas involves admissions of bid-rigging in respect of RFQs issued by Canadian auto assembly plants. As discussed at Part III below, indirect sales into Canada have not been included in the relevant volume of commerce ("VOC") from which the base fine is calculated, although

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[5] R.S.C. 1985, c. C-34, as amended (the "*Act*").

[6] However, as American cartel practitioners know well, a *per se* offence does not guarantee success, with the marine hose and DRAM cases providing exceptions to the rule. *See U.S.* v. *Gary Swanson*, Case Number 06-692, U.S. District Court for the Northern District of California, 7 March 2008. Despite securing guilty pleas (and fines in excess of US$730 million) from the four companies that participated in the DRAM cartel, the U.S. Department of Justice prosecution against Gary Swanson, a former Senior Vice-President of Sales for Hynix Semiconductor America Inc., resulted in a mistrial. *See also U.S.* v. *Northcutt*, Case Number 07-60220CR, U.S. District Court for the Southern District of Florida, 10 November 2008. In that case, the US DOJ had several co-operating witnesses from the alleged marine hose cartel who pled guilty and testified against the two accused at trial, but the jury nevertheless returned an acquittal.

Similarly, the CCB has lost prior bid-rigging cases, despite the *per se* nature of the offence. *See, e.g., R.* v. *Rowe et al.*, 29 C.P.R. (4th) 525 (2004) (Ont. S.C.), in which the author represented one of the corporate and one of the individual accused.

[7] *See* Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on 27 January, 2009 and related to fiscal measures*, 2nd Sess., 40th Parl., 2009 [hereinafter *Bill C-10*]. Upon passage through Parliament, Bill C-10 subsequently became S.C. 2009, c. 2. *See also* D.M. Low & C. W. Halladay, "Redesigning a Criminal Cartel Regime:

they have been considered as an aggravating factor in determining the ultimate fine to be imposed.

- **VOC Percentages.** As explained in greater detail below, the Furukawa, Yazaki and JTEKT fines represent approximately 12.2%, 11.5%, and 12.9% of the party's affected VOC, respectively. Interestingly, Yazaki appears to have paid the lowest percentage, despite being the second leniency applicant in that particular cartel.

- **"Made In Japan" Cartels.** All of the companies entering pleas to date have been Japan-based automotive parts manufacturers. Similarly, Toyota and Honda's Canadian subsidiaries are the only affected customers named in the plea documents. So far, there is no indication of any involvement of North American or European parts suppliers or automotive OEMs.

- **No Anti-Competitive Conduct In Canada.** Perhaps not surprising, given the observation above, the plea documents in all three matters explicitly state that all meetings and communications between members of the cartels took place outside of Canada.

- **Global Enforcement Efforts.** The CCB's press releases have confirmed what cartel practitioners have come to expect — that numerous antitrust regulators are co-ordinating their efforts in the broader auto parts inquiry. Specifically, the CCB

The Canadian Conversion", in *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, C. Beaton-Wells and A. Ezrachi, eds. (Oxford: Hart Publishing, 2010).

has mentioned co-operation with the United States Department of Justice Antitrust Division, the Japan Fair Trade Commission, the European Commission, and the Australian Competition and Consumer Commission. This may explain, at least in part, why the guilty pleas to date have focused on direct sales to Canada; given the investigations in numerous other jurisdictions, fining on indirect sales raises double-counting concerns.

III. Notable Aspects Of Each Guilty Plea

Each of the Furukawa, Yazaki and JTEKT guilty pleas raises interesting issues for cartel practitioners. Highlights of the most notable aspects of each plea are provided below.

(1) Furukawa

Furukawa plead guilty in Canada to two counts of bid-rigging involving RFQs for the supply of electrical boxes (including fuse boxes, relay boxes and junction blocks) to the 2001 model Honda Civic and the 2006 model Honda Civic.[8] Both generations of this vehicle were produced at Honda's assembly plants in Alliston, Ontario. The Statement of Admissions filed with the Ontario court indicates that "Furukawa was aware that these vehicles were assembled by Honda Canada in Ontario and that the agreements […] would have a direct effect on commerce in Canada."[9]

Bid-rigging is defined under the *Act* as follows:

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[8] *R.* v. *Furukawa Electric Co., Ltd.*, Statement of Admissions, at para. 5. *See also* Competition Bureau, News Release, "$5M Fine for a Japanese Supplier of Motor Vehicle Components" (April 4, 2013), available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03555.html>.

> "bid-rigging" means
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> (a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or
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> (b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,
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> where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.[10]

Furukawa plead guilty under section 47(1)(b) that it agreed with others to submit bids arrived at "by agreement or arrangement". Specifically, the court documents indicate that Furukawa, Yazaki and Sumitomo — the three parties on Honda Canada's approved supplier list — agreed that Furukawa would win the electrical boxes RFQs for both the 2001 and 2006 Civic, and each submitted bids consistent with that agreement.[11] Furukawa won the 2001 tender but, despite the parties' intentions, it did not win the 2006 tender. Nevertheless, the commerce associated with the latter RFQ — which the court documents indicate to have been approximately C$24.4 million — was included in the VOC for Furukawa's base fine.

In addition, C$16.5 million in commerce attributable to the 2001 RFQ was included in Furukawa's base VOC, comprising C$40.9 million in total affected commerce.

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[9] *Ibid.*, at para. 9.

[10] *Supra* note 5, s. 47(1).

Under the CCB's *Leniency Program*,[12] Furukawa's fine should have been determined by applying a 20% multiplier to the relevant VOC (comprising a 10% proxy for the expected overcharge, and 10% for general deterrence), and then applying a 50% discount for being the first leniency applicant (*i.e.*, the second co-operating party). As a result, absent any aggravating or mitigating factors, one would have expected Furukawa to have paid a fine of approximately C$4.09 million (C$40.9 million x 20% x 50%). Given that it paid a fine of C$5 million, it would appear that the CCB and/or the prosecution service (the Public Prosecution Service of Canada ("PPSC")) applied aggravating factors to increase the base fine from C$4.09 million by an additional C$910,000.

Indeed, the Sentencing Submissions indicate that the PPSC considered various aggravating and mitigating factors "including indirect commerce into Canada of vehicles containing parts that had been the subject of bid-rigging in other jurisdictions", leading to an increase in the recommended fine.[13] It is unclear what other aggravating factors may have played a role in the PPSC's analysis. Furukawa's fine of C$5 million represented approximately 12.2% of its affected VOC, and (briefly) became the highest fine ever imposed under section 47 of the *Competition Act*.

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[11] *Ibid.*, at paras. 10-13.

[12] *Supra* note 3 at 9.

[13] *R.* v. *Furukawa Electric Co., Ltd.*, Sentencing Submissions of Her Majesty The Queen, at para. 24.

(2) Yazaki

That dubious honour did not last long — two weeks later,[14] Yazaki plead guilty in Canada to three counts of bid-rigging involving RFQs for the supply of wire harnesses (including electrical boxes[15]) to the 2005.5 model Honda Ridgeline, the 2006 model Honda Civic and the 2006 model Toyota Corolla/Matrix.[16] It agreed to pay a fine of C$30 million, by far the highest Canadian fine ever imposed for bid-rigging and the second highest antitrust fine ever paid in Canada.[17]

All of these vehicles were produced at Honda's assembly plants in Alliston, Ontario and Toyota's assembly plants in Cambridge and Woodstock, Ontario. Similar to the Furukawa plea, the Statement of Admissions filed with the Ontario court indicates that "Yazaki was aware that these motor vehicles were assembled by Honda Canada or Toyota Canada in Ontario and that the agreements […] would have a direct effect on commerce in Canada."[18]

Like Furukawa, Yazaki also plead guilty under section 47(1)(b) of the *Act*. For the Ridgeline and Civic RFQs, it acknowledged entering into an agreement with Sumitomo and

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[14] *See* Competition Bureau, News Release, "Record $30M Fine Obtained by Competition Bureau Against Japanese Auto Parts Supplier" (April 18, 2013), available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03560.html>.

[15] The Statement of Admissions defines wire harnesses as including motor vehicle electrical wiring, lead wire assemblies, cable bond, motor vehicle wiring connectors, motor vehicle wiring terminals, electronic control units, and electrical boxes (including fuse boxes, relay boxes and junction blocks).

[16] *R.* v. *Yazaki Corporation*, Statement of Admissions and Agreed Statement of Facts, at para. 5.

[17] F. Hoffman-LaRoche Ltd. was fined a total of C$48 million under the section 45 conspiracy offence for its role in the bulk vitamins cartel: *see* Competition Bureau, News Release, "Federal Court Imposes Fines Totalling $88.4 Million For International Vitamin Conspiracies" (22 September 1999), available online at <http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/00607.html>.

[18] *Supra* note 16 at para. 9.

Furukawa by which Yazaki was intended to win the tenders. For the Corolla/Matrix, Yazaki entered into a similar agreement with Sumitomo; based on the court documents, Delphi Corporation was also an approved supplier for this model but does not appear to have been a party to the bid-rigging agreement.[19]

These three RFQs generated VOC of approximately US$260.2 million. Yazaki's C$30 million fine, despite its record-setting status, actually appears to have been a decent outcome for the company under the circumstances. As the second leniency applicant, Yazaki was eligible for a maximum 30% discount off the otherwise-applicable fine under the CCB's *Leniency Program*.[20] Applying the CCB's standard 20% multiplier to VOC of US$260.2 million yields a base fine of US$52.04 million which, when reduced by Yazaki's 30% discount under the CCB's program, becomes an expected fine of US$36.428 million. Yet Yazaki paid a fine of C$30 million.

The difference appears to be due, at least in part, to creative arguments from Yazaki that the CCB's standard 10% overcharge proxy should be reduced based on the particular facts of the case. The Statement of Admissions indicates that "certain aspects of the bidding process in this matter are relevant to an assessment of the advantage realized by the successful bidder."[21] In particular, it notes that: (a) target prices were set by Toyota and Honda to be met by suppliers; (b) post-bidding price negotiations and pre-mass production design changes were

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[19] *Ibid.*, contrasting paras. 7(i) and 14.

[20] *Supra* note 9.

[21] *Supra* note 16 at para. 23.

common features; and (c) there was transparency of supplier costs to Toyota and Honda due to exchange of engineering employees and information during bidding, design and production phases.

These factors resulted in a 15%, rather than 20%, total fining proxy (5% for the overcharge, 10% for general deterrence) being applied to the VOC associated with the rigged RFQs. This downward reduction of the usual formulae used in the *Leniency Program* reflected "evidence provided by Yazaki that any overcharge or profit as a result of [its] conduct was likely to have been less than 10%."[22] A consideration of additional aggravating and mitigating circumstances, which were not specified, led to the imposition of an additional 15% increase on the 15% fine proxy (taking it, one assumes, to 17.25%). Yazaki's 30% fine reduction, as the second leniency applicant, was then applied to further reduce the fine amount.

These figures, at least by my calculation, lead to a fine of approximately US$31.419 million, not the C$30 million paid by Yazaki. It is possible that the company and the PPSC simply rounded down and agreed to a figure of C$30 million, or that "immunity plus" or other considerations not mentioned in the court documents played a role in reducing the total fine. Interestingly, the C$30 million figure represented about 11.5% of Yazaki's total VOC — without taking into account currency differential, which would further lower this figure — meaning that, despite being the second leniency applicant, it appears to have paid a lower percentage fine than Furukawa.

(3) JTEKT

JTEKT's plea involved a different cartel affecting different products: automotive wheel hub unit bearings. On July 12, 2013 JTEKT plead guilty to two counts of bid-rigging for the supply of bearings for the "third generation" Toyota RAV4 (produced in Canada from 2008-2012) and the "tenth generation" Corolla / "second generation" Matrix (produced in Canada from 2007-2013).[23] These vehicles were produced at Toyota's assembly plants in Cambridge and Woodstock, Ontario, and the Statement of Admissions contained language similar to that of Furukawa and Yazaki indicating that JTEKT was aware that its actions would have a direct effect on commerce in Canada.[24]

As with Furukawa and Yazaki, JTEKT plead guilty under section 47(1)(b) of the *Act*, admitting to agreeing with fellow bearings supplier NSK Ltd. that JTEKT would win the orders for some of the bearings sought by Toyota. The total VOC associated with JTEKT`s sales on these RFQs was approximately C$38.6 million. On this VOC, JTEKT — the second leniency applicant — paid a fine of C$5 million. Applying the CCB`s fining formula, the base fine for JTEKT should have been C$5.404 million (C$38.6 million x 20% x 30%).

However, in an interesting divergence from the Yazaki plea, the existence of: (a) post-bid price reductions requested by Toyota; and (b) transparency of JTEKT`s costs to Toyota due to the exchange of information during the post-bidding price reduction negotiations with

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[22] *R.* v. *Yazaki Corporation*, Sentencing Submissions of Her Majesty The Queen, at para. 21.

[23] *See* Competition Bureau, News Release, "Japanese Bearings Manufacturer Fined $5 Million" (July 12, 2013), available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03583.html>.

[24] *R.* v. *JTEKT Corporation*, Statement of Admissions, at para. 11.

Toyota, was considered to be a mitigating factor that reduced the otherwise-applicable fine amount rather than reducing the overcharge proxy used as a multiplier against the relevant VOC. This may be due to the absence of an additional factor cited in the Yazaki plea documents — that Toyota (and Honda) set target prices to be achieved in its wire harness RFQs. In the result, JTEKT`s fine represented about 12.9% of its VOC, as compared to 11.5% for Yazaki. Both companies were second-in leniency applicants in Canada.

Another interesting aspect of the JTEKT plea is its timing. Contrary to common practice, JTEKT plead guilty in Canada more than two months before its plea was announced in the United States (which occurred on September 26, 2013).[25] Even more curious, it did so before the first leniency applicant plead guilty in Canada. To date, no other company has entered a plea in the bearings cartel in Canada; while the Canadian plea documents only refer to the involvement of NSK Ltd., the US Department of Justice press release — which, as is typical, does not name other cartel members — refers in the plural to JTEKT and its "co-conspirators".[26] The Statement of Admissions filed in the Canadian case refers to JTEKT and NSK having been "the principal pre-qualified suppliers" of bearings to Toyota, leaving open the possibility that another party — perhaps the immunity applicant — also participated in these RFQs.[27] It is therefore unclear whether NSK was the immunity applicant or the first leniency applicant, and who the remaining party to the cartel agreement may have been.

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[25] *See* United States Department of Justice (Antitrust Division), News Release, "Nine Automobile Parts Manufacturers and Two Executives Agree to Plead Guilty to Fixing Prices on Automobile Parts Sold to U.S. Car Manufacturers and Installed in U.S. Cars" (26 September 2013), available online at <http://www.justice.gov/opa/pr/2013/September/13-at-1074.html>.

[26] *Ibid.*

[27] *Supra* note 24 at para. 9(g) (emphasis added).

IV. Conclusions

It is clear that these three guilty pleas represent only the proverbial tip of the iceberg in the CCB's auto parts inquiry, and that additional pleas are on the way. However, given the paucity of information surrounding the global auto parts investigation generally, it is hoped that this review of the public record information in Canada will provide some valuable insight into the inquiry for cartel practitioners, wherever they may be located.