Six Years On: Analyzing The Auto Parts Cartel Inquiry In Canada

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I. Introduction

Continuing a theme from the 2012 Cartel Workshop in Vancouver[1] and the 2014 Cartel Workshop in Rome,[2] the focus of this article is on the Canadian dimensions of the global auto parts cartel inquiry, which has been called "*the largest cartel investigation in history*".[3] That inquiry is now entering its sixth year in Canada, with 8 guilty pleas, imposing more than C$58 million in fines, recorded to date. While the Competition Bureau's ("CCB") record is impressive record by most standards, the pace of convictions in the Canadian inquiry has slowed since the 2014 Workshop — for reference, in the United States (still undeniably the world leader in cartel enforcement), 38 companies (and 58 executives) have been convicted in the parallel U.S. investigations, resulting in more than US$2.6 billion fines.[4]

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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, February 1-3, 2012.

[2] *See* C.W. Halladay, "Assessing the Auto Parts Inquiry in Canada", paper submitted to the American Bar Association / International Bar Association International Cartel Workshop, February 19-21, 2014.

[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> (quoting Scott D. Hammond, then the Deputy Assistant Attorney General for Criminal Enforcement at the United States Department of Justice, Antitrust Division).

[4] *See* United States Department of Justice, Antitrust Division, News Release, "INOAC Corp. to Pay $2.35 Million for Fixing Prices on Auto Parts" (November 19, 2015), available online at <http://www.justice.gov/opa/pr/inoac-corp-pay-235-million-fixing-prices-auto-parts>.

This article reviews the 8 Canadian guilty pleas and the underlying court filings associated with them in an attempt to provide readers with a comparative analysis of the functioning of various auto parts cartels and Canada's approach to penalizing them. (For sake of completeness and consistency of analysis, I have included a discussion of the first three Canadian pleas, which is drawn largely from my paper for the 2014 Workshop.) As with my prior 2012 and 2014 papers, this article is based solely on information obtained from Canadian court archives and other public record sources.

II. Common Themes Of The Canadian Investigation

To date, Canadian guilty pleas have been entered by Furukawa Electric Co., Ltd. ("Furukawa"; electrical boxes; April 2013), Yazaki Corporation ("Yazaki"; wire harnesses;[5] April 2013), JTEKT Corporation ("JTEKT"; automotive bearings; July 2013), NSK Ltd. ("NSK"; automotive bearings; January 2014), Panasonic Corporation ("Panasonic"; switches, steering angle sensors; February 2014), Denso Corporation ("Denso"; body electronic control units; August 2014), Yamashita Rubber Co. Ltd. ("Yamashita"; rubber anti-vibration components or systems; December 2014), and Toyo Tire & Rubber Co., Ltd. ("Toyo"; anti-vibration rubber parts; December 2015).

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[5] Although the products named in the Furukawa and Yazaki 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 were an input into or component of the broader wire harnesses which formed the basis of Yazaki's plea, and that Furukawa and Yazaki were respectively first- and second-in under the CCB's *Leniency Program*: *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>. (Based on the court filings in both cases, Sumitomo Corporation appears to have been the immunity applicant in that matter.)

These 8 guilty pleas share certain common features, which may offer insight into the CCB's broader auto parts inquiry. Notable shared characteristics include:

- **Limited to Bid-rigging.** In each instance, the offender pleaded guilty to multiple bid-rigging offences under section 47 of the *Competition Act*.[6] In each case, save for Panasonic, separate counts were charged for each vehicle model/generation affected; generally speaking, RFQs were not issued by the automotive OEMs across multiple vehicle models. (The Panasonic plea comprised two counts of section 47 offences, distinguishable according to the affected products (*i.e.*, various switches, steering angle sensors), with the count related to the latter covering three vehicle models: the Toyota Corolla/Matrix, the Toyota RAV4 and the Lexus RX 350.) Section 45, the general cartel price-fixing provision, was not 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 has always been a *per se* offence (whereas section 45 only incorporated *per se* liability after March 13, 2010).[7]

- **Direct Sales Only.** Each of the 8 pleas involves admissions of bid-rigging in respect of RFQs issued for the supply of automotive parts to Canadian auto

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

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

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 in at least one case (*i.e.*, the Furukawa plea) they appear to have been considered as an aggravating factor in determining the ultimate fine to be imposed.

- **VOC Percentages.** As explained in greater detail below, the fines in the 8 guilty pleas represented approximately 12.2%, 11.5%, 12.9%, 8.4%, 11.7%, 13.8%, 16.1% and 10.4% of the party's affected Canadian VOC, respectively.

- **"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 8 guilty pleas explicitly state that all anti-competitive meetings and communications between the members of the cartels took place outside of Canada, and that no Canadian personnel were involved in the misconduct.

- **Global Enforcement Efforts.** Several of 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 has mentioned co-operation with the United States Department of Justice, Antitrust Division ("DOJ"), the Japan Fair Trade Commission ("JFTC"), the European Commission ("Commission"), and the Australian Competition and Consumer Commission ("ACCC"). 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. However, the CCB's focus on direct sales may also be attributable to it pursuing matters with a clearer jurisdictional link to Canada.

III. Analysis Of Individual Guilty Pleas

Each of the 8 Canadian guilty pleas raises interesting issues for cartel practitioners, particularly as the (publicly-accessible) court records in Canadian criminal proceedings often contain detailed information about individual cartel cases that may not be available in other jurisdictions. Highlights of the notable aspects of each plea are provided below.

(1) Furukawa

Furukawa pleaded 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) for 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:

> "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 pleaded 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

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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>.

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

[10] *Supra* note 6, section 47(1).

supplier list for these parts — 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. Despite this outcome, interestingly 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, perhaps reflecting the *per se* illegal nature of the section 47 bid-rigging offence.

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. Under the CCB's *Leniency Program*,[12] Furukawa's base 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 significantly increase the base fine by approximately 22% (or C$910,000) from C$4.09 million to C$5 million.

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

[12] *Supra* note 5 at 9.

Indeed, the Sentencing Submissions filed with the court 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 from the court records 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.*

(2) Yazaki

That dubious honour did not last long — two weeks later,[14] Yazaki pleaded 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]

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

[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] In the highest fine ever imposed under the *Act*, 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>.

Each of these vehicles was 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 pleaded guilty under section 47(1)(b) of the *Act*. For the Ridgeline and Civic RFQs, it acknowledged entering into an agreement with Sumitomo and 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 good 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

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

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

[20] *Supra* note 5.

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 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.

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

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

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 percentage — 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 ("bearings"). On July 12, 2013 JTEKT pleaded 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]

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[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.

As with Furukawa and Yazaki, JTEKT pleaded 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 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 pleaded 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

[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>.

before the first leniency applicant pleaded guilty in Canada — NSK's plea was not entered for another six months.

(4) NSK

On January 30, 2014, NSK, the first leniency applicant under the CCB's *Leniency Program* in the bearings matter, also pleaded guilty under section 47(1)(b) of the *Act* to two counts of bid-rigging with JTEKT for the supply of bearings for the Toyota RAV4 and Corolla / Matrix.[26] Consistent with JTEKT's plea, and the prior Furukawa and Yazaki pleas, the Statement of Admissions recognized that none of the anti-competitive conduct took place within Canada, but that NSK knew that these vehicles were assembled in Canada and that its conduct would have "*a direct effect on commerce in Canada*."[27]

According to the court documents, NSK's VOC on the sale of bearings under the affected RFQs amounted to C$17.6 million in respect of the RAV4 and C$35.8 million in respect of the Corolla / Matrix, or C$53.4 million in total. Thus, its agreed fine of C$4.5 million appears to have represented an excellent outcome — at only approximately 8.4% of the affected VOC, this represented the lowest fine (in percentage terms) among the auto parts plea cases in Canada as of the date of its plea, and it remains the lowest percentage fine among the subsequent guilty pleas. In addition to its position as the first leniency applicant, and thereby eligible for a 50% reduction of the applicable base fine, the sentencing submissions of the PPSC identify several

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[26] *See* Competition Bureau, News Release, "Japanese Bearings Manufacturer Fined $4.5 Million; Second to Plead Guilty in Bearings Bid-rigging Investigation" (January 30, 2014), available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03652.html>.

[27] *R.* v. *NSK Ltd.*, Statement of Admissions, at para. 12.

mitigating factors considered by the prosecution, including: (a) the existence of post-bidding price reductions negotiated by Toyota; (b) NSK's attornment to the jurisdiction of the Canadian courts; (c) NSK's lack of prior convictions in Canada; and (4) its adoption of an updated competition law compliance program.[28]

(5) Panasonic

Only three weeks later, Panasonic entered a guilty plea in the Ontario Superior Court to two counts of bid-rigging, contrary to section 47(1)(b) of the *Act*, relating to agreements with Tokai Rika Co., Ltd. ("Tokai Rika") to rig bids for the supply of turn switches, wiper switches, steering wheel switches (collectively, "switches"), and steering angle sensors.[29] The various switches products were intended for installation on the 2008.5 model year Toyota Corolla and the 2008.5 model year Toyota Matrix, and the steering angle sensors for installation on the 2008.5 model year Toyota Corolla, the 2008.5 model year Matrix, the 2008 model year RAV4 and the 2009 model year Lexus RX 350; each of these vehicles is manufactured by Toyota in Canada. As with the prior auto parts convictions, the Statement of Admissions in this case acknowledged Panasonic's awareness that its conduct would have a direct effect on Canadian commerce.[30]

The arrangement of the counts charged is of mild interest, as it represents the only auto parts conviction in Canada in which multiple vehicle models (*i.e.*, the Corolla, Matrix,

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[28] *R.* v. *NSK Ltd.*, Sentencing Submissions of Her Majesty The Queen, at paras. 10 and 22.

[29] *See* Competition Bureau, News Release, "Panasonic Fined $4.7 Million for Rigging Bids" (February 20, 2014), available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03669.html>.

[30] *R.* v. *Panasonic Corporation*, Statement of Admissions, at para. 7.

RAV4 and Lexus RX 350) were included in the same count; in the other cases, separate counts were charged for the RFQs associated with each affected vehicle model.[31] As a practical matter, the difference may not be significant as the number of counts charged typically does not have a material impact in fine negotiations, where the affected VOC and the aggravating and mitigating sentencing factors applicable to corporations[32] are usually the key variables.

According to the court documents, Panasonic's VOC on the sale of products under the affected RFQs amounted to approximately C$40 million. As the first co-operating party under the *Leniency Program*, it received a 50% discount on the otherwise-applicable base fine (*i.e.*, C$8 million), resulting in reduced base fine of C$4 million. It ultimately agreed to pay a fine of C$4.7 million, and the court documents identify two important aggravating factors that the PPSC considered in recommending this fine. First, the PPSC indicated that it "*regards Tokai Rika's sales of the Products to [Toyota] as an aggravating factor*," an issue on which Panasonic "*[took] no position with respect to the relevance of these sales for the purpose of [sentencing].*"[33] The PPSC indicated that, based on information available to the CCB, Tokai Rika's sales of the affected products amounted to approximately C$34 million and, in its sentencing submissions, argued that "*the conduct of Panasonic as indicated above (**and including the cover bids they participated in**)*" was considered as an aggravating sentencing factor.[34]

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[31] *R.* v. *Panasonic Corporation*, Indictment.

[32] *See Criminal Code of Canada*, R.S.C. 1985, c. C-46, section 718.21.

[33] *Supra* note 30 at para. 17.

[34] *R.* v. *Panasonic Corporation*, Sentencing Submissions of Her Majesty The Queen, at para. 25 (emphasis added).

It is not immediately clear on what legal authority another, unaffiliated, cartel participant's VOC is relevant to the sentencing of Panasonic. The relevant sentencing principles and factors in sections 718, 718.1, 718.2 and 718.21 of the *Criminal Code of Canada* do not refer to such a factor. I am not aware of any jurisprudence identifying such a factor, nor was any such caselaw cited in the PPSC's sentencing submissions. In revisions to its *Leniency Program FAQs* (an agency policy document) in September 2013, the CCB described the calculation of recommended fines in bid-rigging cases as follows:

> [i]n a bid-rigging case, the fine recommendation will be fact-specific and determined on a case-by-case basis. In making its recommendation, the Bureau will consider the **total volume of commerce covered by the relevant agreements or arrangements** and the need to deter and denounce bid-rigging. All participants in a bid-rigging offence are subject to a penalty whether or not they submitted a bid or agreed to withdraw a previously submitted bid, and whether or not they were ultimately chosen to supply the product for which they submitted a bid.[35]

In subsequent public forums, CCB staff indicated an interest in obtaining higher fines from bid-rigging participants by incorporating both the guilty party's own VOC and the VOC of other parties to the agreement in situations of so-called "cover bidding" (*i.e.*, where Party A agrees to submit artificially high prices on certain agreed products to facilitate Party B winning the business for those particular products, and vice-versa). As indicated above, in my view there is no established legal authority for doing so, and Panasonic's decision to "take no position" on such an issue, in the context of a negotiated fine settlement, does not create any such authority.

A second important aggravating factor considered in the determination of Panasonic's fine was its recidivist status in Canada. In November 2010, it pleaded guilty to price-fixing under section 45 of the *Act* for its role in a cartel relating to the sales of hermetic refrigeration compressors in Canada, and paid a fine of C$1.5 million.[36]

Notwithstanding the significance of this aggravating factor,[37] and any other aggravating factors, it appears to have only added about C$700,000 (*i.e.*, 18%) to the otherwise-applicable base fine of C$4 million, and the total fine of C$4.7 million imposed on Panasonic represented approximately 11.7% of its affected VOC, placing it slightly below the average (12.1%) of the fines imposed across the 8 Canadian guilty pleas.

(6) Denso

On August 20, 2014, Denso pleaded guilty to three counts of bid-rigging under section 47(1)(b) of the *Act* in the supply of body electronic control units ("ECUs") to Toyota, and was sentenced to pay a fine of C$2.45 million.[38] Unlike the other auto parts guilty pleas, the RFQs covered by the Denso indictment were neither vehicle model-specific nor country-specific,

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[35] Competition Bureau, *Leniency Program: Frequently Asked Questions* (September 2013), at Question 26, available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03593.html> (emphasis added).

[36] *See* Competition Bureau, News Release, "Panasonic Corporation Pleads Guilty to Price-Fixing Conspiracy" (November 3, 2010), available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03310.html>.

[37] In an unrelated auto parts matter, resolved in the United States only one week before the Panasonic guilty plea in Canada, Bridgestone Corporation pleaded guilty and paid a fine of US$425 million in relation to a cartel agreement concerning anti-vibration rubber components: *see* United States Department of Justice, Antitrust Division, News Release; "Bridgestone Corp. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars" (February 13, 2014), available online at <http://www.justice.gov/opa/pr/bridgestone-corp-agrees-plead-guilty-price-fixing-automobile-parts-installed-us-cars>. Bridgestone's failure to disclose this matter at the time of its 2011 guilty plea for price-fixing in respect of marine hoses was cited by the DOJ as a factor in imposing the very significant US$425 million fine in the auto parts matter; I understand that it resulted in an increase of approximately US$100 million in the otherwise-applicable fine.

but were apparently used to select body ECU suppliers with which Toyota would later enter into supply agreements for specific models.[39] The plea documents indicate that Denso entered into illegal bid-rigging agreements with Yazaki Corporation and Sumitomo Electric Industries, Ltd. ("Sumitomo") in respect of a 2000 RFQ for the supply of body ECUs to 2003 model year vehicles, and with Sumitomo in respect of a 2003 RFQ and a 2005 RFQ for the supply of body ECUs to 2005 and 2008 model year vehicles, respectively. Perhaps with an eye to containing its liability in the inevitable follow-on civil class actions, Denso's Statement of Admissions noted that:

> DENSO's agreements with respect to the relevant RFQs are separate from and entirely unrelated to other agreements between certain manufacturers of wire harnesses concerning the supply of wire harnesses, automotive electric wiring, lead wire assemblies, cable bond, automotive wiring connectors, automotive wiring terminals, high voltage wiring, fuse boxes, relay boxes, junction blocks, power distributors, and/or speed sensor wire assemblies.[40]

According to the court documents, Denso's VOC on the sale of body ECUs under the affected RFQs amounted to C$17.69 million. Its agreed fine of C$2.45 million represented approximately 13.8% of the affected VOC — seemingly higher than some of the prior auto parts pleas, but this appears to have been largely due to Denso's status as the second co-operating party under the CCB's *Leniency Program*, meaning that it was eligible for a maximum 30% (rather than 50% for the first co-operating party) discount on its base fine.

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[38] *See* Competition Bureau, News Release, "Sixth Guilty Plea in Competition Bureau's Investigation Involving Motor Vehicle Components" (August 20, 2014), available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03792.html>.

[39] *R.* v. *Denso Corporation*, Statement of Admissions, at paras. 8-9.

Indeed, Denso's fine of C$2.45 million appears to have been a good outcome for the company. A straight application of the CCB's *Leniency Program* fining formula would have produced a fine of C$2.4766 million (*i.e.*, C$17.69 million x 20% x 70%), absent any consideration of aggravating and mitigating factors; some C$26,600 more than the fine actually imposed. Moreover, the PPSC's sentencing submissions indicated that two Denso managers instructed their subordinates to destroy documents and emails on the same day that U.S. authorities executed search warrants on the premises of Denso's American affiliate, and that this conduct constituted a "*significant aggravating factor*" in determining Denso's fine.[41] The counter-balancing mitigating factors set out in the Statement of Admissions and the PPSC's sentencing submissions — the use of target prices and requests for post-bid price reductions by Toyota, transparency of Denso's costs to Toyota, Denso's lack of prior Canadian convictions, its adoption of improved compliance measures and its voluntary attornment to the jurisdiction of the Canadian courts — are not particularly notable in the context of the prior guilty pleas discussed above, leaving one to speculate whether "immunity plus" or other considerations not mentioned in the court documents played a role in reducing the fine.

(7) Yamashita

Less than four months later, Yamashita Rubber Co. Ltd. ("Yamashita") pleaded guilty to two counts of bid-rigging under section 47(1)(b) of the *Act* in connection with the sale of rubber anti-vibration components or systems ("AVS Products") for installation on the Honda

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[40] *Ibid.*, at para. 15.

[41] *R.* v. *Denso Corporation*, Sentencing Submissions of Her Majesty The Queen, at para. 23.

Civic and the Honda CRV and agreed to pay a fine of C$4.5 million.[42] According to the court documents, Yamashita entered into the illegal bid-rigging agreements with Sumitomo Rika Company Limited (formerly Tokai Rubber Industries Ltd.) and, while none of the anti-competitive meetings or communication occurred in Canada, Yamashita was aware that the vehicles covered by the affected RFQs were assembled in Canada and that its conduct would "*have a direct effect on commerce in Canada*."[43]

Yamashita agreed to pay a fine of C$4.5 million, representing approximately 16.1% of its affected VOC of approximately C$28 million. As the second *Leniency Program* applicant, as Denso was in the body ECUs matter, Yamashita was eligible for a discount of up to 30% of the otherwise-applicable base fine. The slightly higher percentage of VOC that it agreed to pay appears to have been based, in large part, on the "cover bid" theory of liability (similar to the Panasonic plea). The PPSC sentencing submissions explicitly stated that, after applying the *Leniency Program* fining formula, "*the recommended fine was* ***augmented to reflect Yamashita's participation in cover bidding***."[44] Separately, the Statement of Admissions filed in this matter indicated that "*the [CCB] has information that Tokai's sales of AVS Products to Honda in Canada with respect to the Relevant RFQs were approximately C$125 million*."[45] The

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[42] *See* Competition Bureau, News Release, "Seventh guilty plea in Competition Bureau's investigation involving motor vehicle components" (December 11, 2014), available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03860.html>.

[43] *R.* v. *Yamashita Rubber Co. Ltd.*, Statement of Admissions, at para. 18.

[44] *R.* v. *Yamashita Rubber Co. Ltd.*, Sentencing Submissions of Her Majesty The Queen, at para. 33 (emphasis added).

[45] *Supra* note 43, at para. 32.

apparent involvement of "*officers*" and "*senior employees*" at Yamashita was also considered to be a relevant aggravating sentencing factor.[46]

(8) Toyo

After registering four guilty pleas, relating to four separate cartels, in 2014, almost one year passed before the CCB and PPSC obtained another conviction arising from the auto parts inquiry. On December 9, 2015, Toyo entered a guilty plea relating to the supply of anti-vibration rubber components. As counsel to Toyo in that matter, it would be inappropriate for me to comment on the case beyond the basic facts set out in the CCB's press release, which stated that Toyo:

> pleaded guilty to three counts of bid-rigging under the *Competition Act* and was fined $1.7 million for its participation in an international bid-rigging conspiracy related to the supply of anti-vibration components to Toyota Motor Corp., Ltd. (Toyota) […] for certain Corolla, RAV4 and Lexus RX 350 models.[47]

IV. Conclusions

At the conclusion of my paper for the 2014 Workshop, I stated that "*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.*" Given the much larger number of U.S. guilty pleas registered to date — 38 companies and 58 executives — it could be argued that, in Canada, we are still perched atop the tip of the iceberg, and that many additional guilty pleas are on the way. However, given the reduction in pace — 3 pleas entered in 2013, 4 pleas entered in

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[46] *Supra* note 44 at paras. 17 and 33.

2014, but only a single plea entered in 2015 — it is difficult to say what 2016 will bring for the Canadian auto parts inquiry. As a general observation, I expect additional guilty pleas ***will*** be secured, as the CCB and PPSC's approach to the auto parts inquiry in my view — with the exception of the "cover bid" theory of liability — remains reasonable, with a focus on direct sales to Canadian auto assembly plants and no foreign nationals yet required to serve jail time in Canada. Companies co-operating and resolving their liability in the United States would therefore do well to include Canada on their list of "must have" jurisdictions in which to pursue criminal settlements.

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[47] *See* Competition Bureau, News Release, "Toyo Tire fined $1.7 million for participating in bid−rigging conspiracy" (December 9, 2015), available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04013.html>.