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Demonstration I: The Decision to Self-Report and Seek Leniency in Multiple Jurisdictions

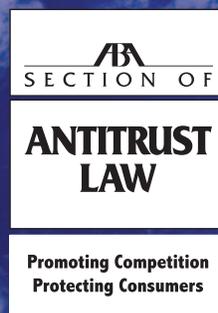
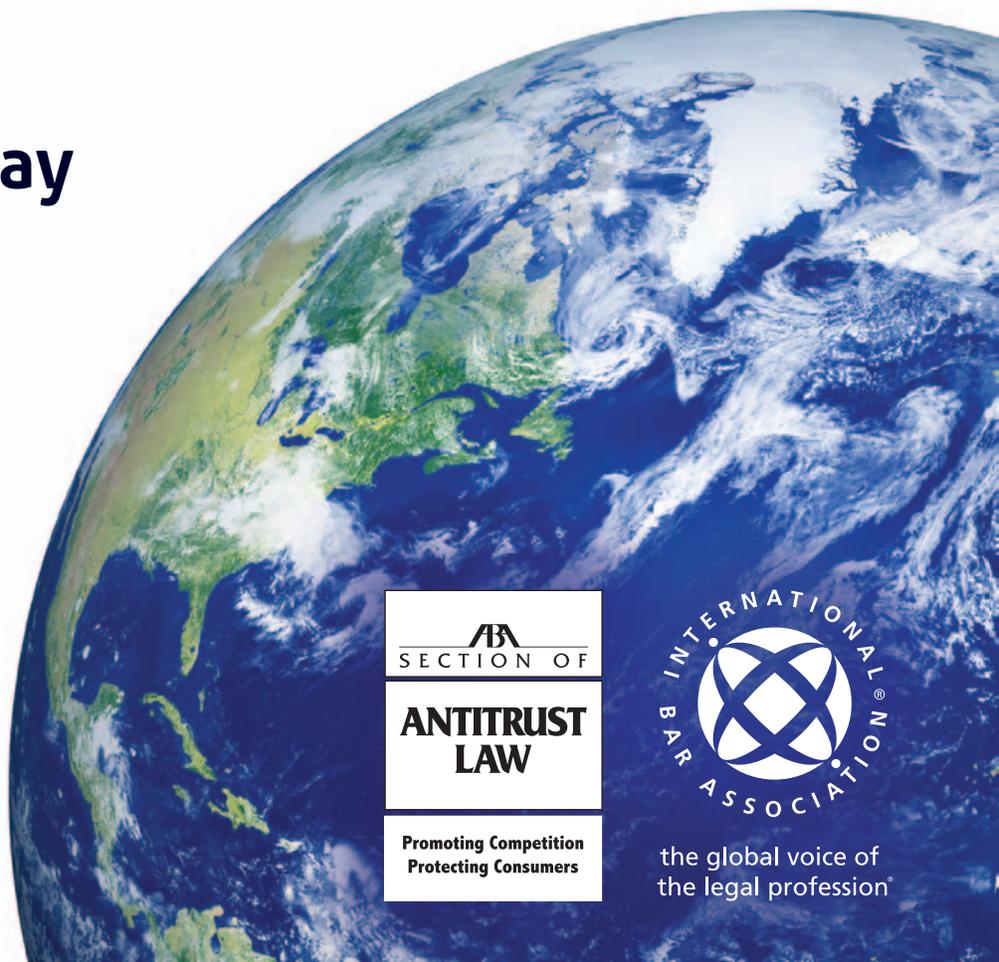
Key Issues for Canadian Cartel Enforcement in 2012

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American Bar Association International Cartel Workshop

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I. Introduction

An ancient Chinese (or perhaps modern American¹) proverb warns “may you live in interesting times”. The supposed corollary to that proverb continues “may you come to the attention of government authority”. Both adages appear to be true for companies subject to cartel investigation in 2012 and, in our view, no agency will be more active this year than Canada’s Competition Bureau (the “Bureau”). In this paper, we report on recent developments in Canada and highlight key issues of interest for international cartel law practitioners arising from the Canadian experience.

II. Record Enforcement Levels Expected in 2012

As most observers are by now aware, in March 2009 Canada enacted the most significant reform² of its cartel regime since the introduction of the original *Combinations in Restraint of Trade Act* of 1889.³ The new regime employs a two-track system featuring a *per se*

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¹ F.R. Shapiro, ed., *The Yale Book of Quotations* (New Haven: Yale University Press, 2006) at 669.

² 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.

³ *An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade*, 52 Vict. c. 41 (1889) [hereinafter the *Combinations in Restraint of Trade Act*].

illegal criminal offence for so-called “naked restraints” agreements⁴ (along with an independent *per se* illegal bid-rigging offence) and a civil “reviewable practice” for other horizontal agreements between actual or potential competitors. Backing up the new cartel offence are significantly increased penalties, with possible prison terms of up to 14 years for convicted individuals and fines of up to C\$25 million for individuals and corporations. On paper, Canada now has the most stringent anti-cartel regime in the world, combining a broad *per se* offence with severe criminal penalties.⁵

The Commissioner of Competition (“Commissioner”) has publicly stated her intention to bring more cartel cases⁶ to test the boundaries of the new law, recognizing that the Bureau “must not be intimidated by the fear of losing”.⁷ The Bureau has worked assiduously to “put its house in order” following the legislative amendments, issuing new *Competitor*

⁴ The new offence provides as follows: “every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges (a) to fix, maintain, increase or control the price for the supply of the product; (b) to allocate sales, territories, customers or markets for the production or supply of the product; or (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.” Notably, new section 45(4) of the *Competition Act* also provides an ancillary restraints-type defence, similar to that available under US (e.g., *United States v. Addyston Pipe & Steel Co.*, 85 F.271 (6th Cir. 1898), aff’d 175 U.S. 211 (1899) and its progeny) and EC (Commission Notice on restrictions directly related and necessary to concentrations, OJ C 56, 5.3.2005 at 24-31) law.

⁵ The substantially-increased penalties are a particularly notable feature of the 2009 amendments, as this issue had not been canvassed in any of the recent public consultation processes that preceded the reforms. The issue, in fact, had not been raised since a 2003 Discussion Paper, and on that occasion the question related only to increasing the maximum fines, not the maximum prison sentences. See Public Policy Forum, *National Consultation on the Competition Act: Final Report* (8 April 2004) at 15, question 33, available online at <http://www.pforum.ca/sites/default/files/competition_act_consultation.pdf>.

⁶ See, e.g., Speech of Commissioner of Competition Melanie L. Aitken to the Canadian Bar Association Spring Competition Law Conference (17 May 2010), available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03247.html>>; Speech of Acting Commissioner Melanie L. Aitken to the Canadian Bar Association Competition Law Section 2009 Spring Forum (12 May 2009), available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03066.html>>.

⁷ See Speech of Commissioner Melanie L. Aitken to the Canadian Bar Association Competition Law Section Annual Conference (25 September 2009), available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03138.html>>.

*Collaboration Guidelines*⁸ and updated and revised immunity⁹ and leniency¹⁰ bulletins, entering into an MOU with the Public Prosecutions Service of Canada (“PPSC”),¹¹ and hiring a former Crown prosecutor as Associate Deputy Commissioner of its Criminal Matters Branch.¹² In our view, these developments portend rigorous enforcement. We expect that it will achieve greater prosecutorial success under the new regime (although, as recent American prosecutions in the DRAM and marine hose cases demonstrate,¹³ a *per se* offence does not guarantee convictions). Given the increased potential liability exposure, we expect the use of Canada’s immunity and leniency regimes will increase under the new regime.

A good example is the polyetherane foam case, in which the Bureau recently announced a guilty plea imposing fines of C\$12.5 million,¹⁴ including the first fines issued under the new cartel offence. While the portion of the fines imposed under the new offence (C\$2.5

⁸ See Competition Bureau, *Competitor Collaboration Guidelines* (23 December 2009), available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html>>.

⁹ Competition Bureau, Information Bulletin, *Immunity Program Under the Competition Act* (June 2010), available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html>> [hereinafter *Immunity Program*].

¹⁰ Competition Bureau, *Leniency Bulletin* (29 September 2010), available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html>>.

¹¹ *Memorandum of Understanding Between the Commissioner of Competition and the Director of Public Prosecutions* (May 2010), available online at <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Protocole-entente-Memorandum-of-Understanding.pdf/\\$file/Protocole-entente-Memorandum-of-Understanding.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Protocole-entente-Memorandum-of-Understanding.pdf/$file/Protocole-entente-Memorandum-of-Understanding.pdf)>.

¹² Competition Bureau, News Release, “Matthew Boswell Appointed Associate Deputy Commissioner of Criminal Matters” (12 January 2011), available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03339.html>>.

¹³ 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 cartel marine hose who pled guilty and testified against the two accused at trial, but the jury nevertheless returned an acquittal.

¹⁴ Competition Bureau, News Release, “Competition Bureau Sends Signal to Price-Fixers with \$12.5 Million Fine” (6 January 2012), available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01353.html>>.

million) was a relatively modest percentage of the total, it only related to a very brief period (five months) of anti-competitive conduct. The Bureau appears to have used all of the investigative tools in its arsenal; it “obtained wiretap authorizations and executed search warrants in coordination with its international partners [...] searched five sites, seized thousands of documents and interviewed numerous witnesses.”¹⁵

Massive enforcement resources appear to be at play in the ongoing auto parts inquiry which, from early estimations, appears poised to become the biggest cartel case in history. From documents filed with the Ontario courts, we know that the Bureau’s investigation began with the wire harness raids in February 2010 and has grown exponentially since then. The size of the Canadian inquiry is remarkable — as of October 2011, the Bureau claims to have:

- 10 co-operating parties in the inquiry;
- issued at least 15 “target” letters and numerous subpoenas (“Section 11 orders”); and
- granted 164 markers to its co-operating parties across a broad range of products.

The latter figure is particularly impressive and would, under normal circumstances, reflect *years* of enforcement efforts. Clearly it is the result of the enormous scope of the automobile manufacturing supply chain, and the effects of “amnesty plus” applications. As the lysine investigation begat citric acid, vitamins, sodium gluconate, sodium erythorbate and

¹⁵ Competition Bureau, Backgrounder, “Backgrounder — Polyetherane Foam” (6 January 2012), available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02585.html>>.

maltol, so too wire harness appears to have begotten investigations into numerous other auto parts.

The Bureau has also been very active on the bid-rigging front, with pending prosecutions in local cases involving real estate consulting services in Ottawa, sewer services in Montréal, and ventilation contracts for residential apartment buildings in the Montréal area.

III. The Bureau’s Approach to Offshore Parties

The Bureau takes an aggressive view of its ability to penalize offshore cartel conduct. For example, it has long claimed jurisdiction over indirect sales into Canada — which it describes as sales of “a cartelized product [...] used as an input into an intermediate or final product manufactured abroad that is subsequently sold to a purchaser in Canada”.¹⁶ Another example is section 46 of the *Competition Act*, the foreign-directed conspiracy offence, which criminalizes any implementation by a Canadian corporation of “a directive, instruction, intimation of policy or other communication”, given by a person outside Canada “who is in a position to direct or influence the policies” of the Canadian corporation, where the communication is “for the purpose of giving effect to a conspiracy”.¹⁷ The provision purports to apply even if the directors and officers of the Canadian corporation act without knowledge of the foreign conspiracy.¹⁸

¹⁶ See, e.g., Competition Bureau, *Leniency Program — FAQs*, at question 20, available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03289.html>>.

¹⁷ *Competition Act*, s. 46(1).

¹⁸ While significant doubt exists as to whether this provision would survive a constitutional challenge in a contested case, to date it has formed the basis for guilty pleas in several international cartel cases, including graphite electrodes, carbon

Another tool in the Bureau’s offshore arsenal, and one that we expect to figure prominently in legal developments in 2012, is section 11(2) of the *Competition Act*. This provision, which augments the Bureau’s subpoena powers, allows the Bureau to obtain a court order to compel a Canadian company to produce records from affiliates — whom it may not be in a position to influence or control — located offshore. Long considered by many in the Canadian competition Bar to be vulnerable to judicial scrutiny, section 11(2) is presently under challenge in a series of proceedings brought by Toshiba of Canada Limited (“Toshiba Canada”) in connection with the cathode ray tube inquiry. Among the various arguments raised by Toshiba,¹⁹ the provision is deficient in that it:

- violates section 8 (the right to be free from unreasonable search and seizure) of the *Canadian Charter of Rights and Freedoms* by compelling the production of documents that may be used to establish criminal liability without meeting the standard for the issuance of a search warrant;
- violates section 7 (the right to life, liberty and security of the person) of the *Canadian Charter of Rights and Freedoms* by threatening to impose criminal penalties on Toshiba Canada’s officers and directors for failure to produce documents over which they have no possession, power or control;
- is an administrative investigative power that the Commissioner is attempting to use improperly to gather evidence for criminal prosecutions; and
- is being used improperly to gather foreign documents that cannot be obtained under treaties sanctioned by the Canadian Parliament.

brushes, vitamins, fax paper and chemical insecticides. The section applies only to corporations, although the Bureau on one occasion publicly stated that “an individual could be convicted of aiding and abetting the commission of such an offence”: *see* Competition Bureau, Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases (25 March 2009). (The basis of this statement was that, under s. 21(1) of the *Criminal Code of Canada*, such an individual could be found to be a party to the section 46 offence and thus liable on conviction to the same penalty as the offending corporation, *i.e.*, a fine in the discretion of the court.) However, that statement was subsequently removed from the finalized guidelines.

¹⁹ *See, inter alia, Commissioner of Competition v. Toshiba of Canada Ltd.* (2010), 100 O.R. (3d) 535 (S.C.J.) [hereinafter *Toshiba*].

We understand that a similar challenge has recently been initiated by the Royal Bank of Scotland in the LIBOR inquiry, with a hearing on the matter expected in June 2012.²⁰ Despite these challenges, from court documents filed in connection with the auto parts inquiry, we understand that the Bureau has made extensive use of the section 11(2) powers in that matter in an attempt to compel the production of offshore documents from various suppliers. Thus, the progress of the *Toshiba* and *RBS* cases in 2012, and the continuing validity of the Bureau’s offshore evidence-gathering powers, will bear close watching as the year unfolds.

IV. Penalties Analysis: A Moving Target

Since March 13, 2010, the cartel and bid-rigging offences have carried vastly-higher penalties, with maximum prison terms increased from 5 to 14 years for individuals, and maximum fines increased from C\$10 million to C\$25 million. While the Bureau had, on occasion, exceeded the statutory maximum under the old regime by charging multiple offences,²¹ in most cases the penalties imposed were well below the statutory maximum, and it remains to be seen whether the Bureau can take advantage of the new penalty ceilings. At the last International Cartel Workshop, the Commissioner noted that the Bureau is “looking for the right case to galvanise public opinion and bring the judges along” in order to secure more convictions

²⁰ *Royal Bank of Scotland v. Commissioner of Competition*, Ontario Superior Court of Justice (East Region), Court File 13010-11, decision of Quigley J., 30 November 2011 [hereinafter *RBS*].

²¹ For example, under the former C\$10 million per count maximum, F. Hoffman-LaRoche Ltd. was convicted of eight counts of conspiracy and fined a total of C\$50.9 million for its role in the bulk vitamins and citric acid cartels: 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>>.

and higher penalties.²² The recent polyutherane foam case provides the Bureau with a strong starting point — in the charges brought under the new offence, the defendant agreed to a C\$2.5 million fine for **only five months** of illegal conduct (March-July, 2010).²³ On an annualized basis, an application of that average of C\$500,000/month in fines would quickly lead to record-setting cartel penalties in Canada.

Two other areas in which we expect to see continued developments in penalties analysis relate to “inability to pay” considerations and the potential elimination of conditional sentencing in cartel cases. Each of these issues is discussed in greater detail below.

(1) “Inability to Pay” Considerations

Consistent with prevailing practice in the US and EC, the Bureau and PPSC have recently been giving more attention to “ability to pay” submissions in assessing the appropriate fine to be imposed on co-operating parties. The new *Leniency Program* references the sentencing provisions of the *Criminal Code of Canada*, which state that courts must consider “the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees” when sentencing corporations.²⁴ The *Leniency Program FAQs* clarify the Bureau’s position, explaining that:

[i]n cases where the PPSC determines that an applicant’s ability to pay should be further considered, the PPSC may ask the Bureau to verify

²² The comments were made by Commissioner Aitken during the “Enforcers Roundtable” at the ABA/IBA 2010 International Cartel Workshop (Paris, 12 February 2010).

²³ *Supra* note 16.

²⁴ *Criminal Code of Canada*, R.S.C. 1985, c. C-46, section 718.21(d).

the financial situation of the business organization or individual. A business organization will be required to provide financial information about its assets, liabilities, revenues and equity. The Bureau may request that a third-party expert accountant review the business organization’s financial information. In the case of an individual, he or she will be required to provide information about his or her financial situation, including all sources of income, property, bank and investment records, tax filings and other relevant records necessary to make a determination.²⁵

The effect of a proposed fine on the ongoing “economic viability” of a leniency applicant played an important role at sentencing in a recent case. The Federal Court accepted a plea agreement²⁶ in which Kason Industries Inc. (“Kason”) pled guilty to a customer allocation scheme, contrary to section 45 of the *Competition Act*. Owing to the company’s financial distress, the court accepted the parties’ recommended sentence of a C\$250,000 fine, paid in annual instalments over five years. Based on the criteria set out in the *Leniency Program*, and the affected volume of commerce (which was stipulated to have been \$3.16 million), Kason should have received a fine of C\$316,000 if it qualified for the maximum 50% discount available. Its fine of C\$250,000 thus represented a further 21% discount from the guidelines level, which was granted (at least in part) based on Kason’s successful inability to pay argument.

Ability to pay considerations also appear to have played a role in a recent bid-rigging plea involving Québec company Les Entreprises Promécanic Ltée (“Promécanic”).²⁷ In July of 2011 it pled guilty to three charges of bid-rigging in relation to its role in a conspiracy to

²⁵ *Leniency Program FAQs*, *supra* note 16 at para. 43.

²⁶ *R. v. Kason Industries Inc.*, Case No. T-279-11, 2011 FC 281 (decision of 9 March 2011).

²⁷ See Competition Bureau, News Release, “Guilty Plea and \$425,000 fine for Bid-rigging in Montreal” (19 July 2011), available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03391.html>>.

rig bids for private sector ventilation contracts for residential apartment buildings in the Montréal area. In exchange for its plea, the company paid a fine of C\$425,000, which appeared to be a very good result — the Bureau’s *Leniency Program* guidelines suggest that the lowest fine available should have been C\$660,000 (based on the volume of affected commerce, which from public documents appears to have been \$6.6 million²⁸). As the first pleading party, Promécanic’s ability to help make the case against the other accused may have played a role, but we suspect that inability to pay arguments may also have been made to bring the fine level below the expected guidelines level. We are aware of at least one other case currently in negotiation where inability to pay analysis has been accepted by the Bureau and PPSC.

Another application of the inability to pay analysis relates to the time period over which a fine is payable. For example, we understand that in the polyether foam case, the company and the Bureau negotiated a 6-year payment period, recognizing the defendant’s difficult financial circumstances and limited capacity to pay. A similar arrangement was reached in the *Crompton* case,²⁹ and we are aware of other cases in which the Bureau has been willing to consider deferred payment schedules. As these arrangements are typically not made public, it is unclear to what extent the Bureau will require, as has been common in some US cases, that the defendant provide security for future payments.

²⁸ See Competition Bureau, Backgrounder, “Charges Laid in Residential Construction Bid-Rigging Scheme in Montreal” (21 December 2010), available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03328.html>>.

²⁹ *R. v. Crompton Corporation*, Case No. T-980-04 (decision of 28 May 2004) [hereinafter *Crompton*]. Based on its inability to pay submissions, Crompton Corporation was sentenced to a fine of C\$9 million, payable in six annual instalments without interest. Further reductions of the outstanding amount payable were negotiated in 2010 as a result of the restructuring of the company under US insolvency laws. See Chemtura Corporation, Form 10-K, Annual Report for

(2) The Potential Elimination of Conditional Sentences

A less positive trend is a potential threat to the use of conditional sentencing (*i.e.*, prison sentences served in the community). The governing Conservative Party, in each of its last two mandates, has introduced legislative amendments as part of its “tough on crime” agenda that would eliminate the ability of judges to impose a conditional sentence on any person convicted of a crime which carries a maximum penalty of 14 years’ imprisonment or more.³⁰ The revised conspiracy and bid-rigging offences carry such a maximum. As a result, if these proposals are re-introduced, as expected, individuals convicted of a cartel offence will be required to either spend time in a jail cell or receive only a fine as punishment — the halfway house of conditional sentencing would not be available.

The potential chilling effects on the Bureau’s *Leniency Program* are significant, as individuals involved in price fixing will no doubt balk at serving jail time despite co-operating and pleading guilty. It is notable that in the ongoing investigation and prosecutions related to the Québec retail gasoline market — the Bureau’s top domestic cartel case — four individuals have received custodial sentences, and *all* of these sentences are to be served conditionally, in the

the period December 31, 2010 at 111. *See also* Chemtura Corporation, Form 10-K, Annual Report for the period December 31, 2004 at 15.

³⁰ *See* Bill C-16, *Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act*, First Reading 22 April 2010, 3rd Sess., 40th Parl., Elizabeth II, 2010, available online at <http://www2.parl.gc.ca/content/hoc/Bills/403/Government/C-16/C-16_1/C-16_1.PDF>. While this Bill did not pass before the May 2011 federal election, we expect it to return and proceed now that the sponsoring Conservative Party has obtained a majority in Parliament.

community.³¹ It is doubtful whether these individuals would have agreed to plead guilty had the possibility of conditional sentencing not existed.

³¹ See Competition Bureau, *Québec Gas Cartel Update*, available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03162.html>>.