Federal Court  Cour fédérale

Date: 20120924

Docket: T-798-12

Citation: 2012 FC 1117

BETWEEN:

HER MAJESTY THE QUEEN

and

MAXZONE AUTO PARTS (CANADA) CORP.

Accused

SENTENCING REASONS

CRAMPTON C.J.

[1] On May 3, 2012, Maxzone Auto Parts (Canada) Corp. ("Maxzone Canada") pleaded guilty to the single count with which it was charged under section 46 of the *Competition Act*, RSC, 1985, c C-34 (the "Act").

[2] Upon convicting Maxzone Canada and entering into the Court record a Statement of Admissions and Agreed Facts ("SAAF") that was executed on behalf of the parties, I proceeded to hear their Joint Submission on Sentencing. After then hearing supplementary submissions on behalf of Maxzone Canada, and having reviewed the written sentencing submissions filed on behalf of the

Crown, I imposed on Maxzone Canada a fine of $1.5 million, as jointly recommended by the parties.

[3] However, I expressed certain concerns and stated that I would elaborate upon those concerns in reasons to follow. As explained below, those concerns relate to whether the evidentiary record and submissions were sufficient to permit the Court to become satisfied that acceptance of the jointly recommended sentence would not be both contrary to the public interest and such as to bring the administration of justice into disrepute. Notwithstanding those concerns, I ultimately agreed to impose the jointly proposed fine of $1.5 million. I did so primarily because of the significant weight I gave to the understandable expectations of the Crown and Maxzone Canada that the manner in which the recommended sentence was determined in this case would be endorsed by the Court. As noted by the parties, that approach has typically been endorsed in the past.

[4] The purpose of these reasons is to alter future expectations by noting for the record that, going forward, the Court may very well require a more fulsome evidentiary record, or a modified approach to the determination of a jointly recommended sentence, as well as more detailed submissions, to become satisfied that such a sentence would not be contrary to the public interest and would not bring the administration of justice into disrepute.

I. Background

[5] The following background facts were agreed upon in the SAAF.

[6] Maxzone Canada is an affiliate of (i) Depo Auto Parts Industrial Co., Ltd. ("Depo"), a Taiwan-based manufacturer and supplier of aftermarket automotive replacement lighting parts, and (ii) Maxzone Vehicle Lighting Corp. ("Maxzone"), a corporation incorporated in the United States that is engaged in the distribution, supply, marketing and sale of aftermarket automotive replacement lighting parts.

[7] TYC Brother Industrial Company Ltd. ("TYC") is a Taiwan-based manufacturer of aftermarket automotive replacement lighting parts and the parent of its distributor and affiliate Genera Corporation ("Genera"), based in the United States.

[8] Eagle Eyes Traffic Ind. Co., Ltd. ("Eagle Eyes") is a Taiwan-based manufacturer of aftermarket automotive replacement lighting parts and the parent of its distributor and affiliate E-Lite Automotive, Inc., ("E-Lite"), based in the United States.

[9] The products ("Products") described above as "aftermarket automotive replacement lighting parts" include, predominantly but not exclusively, headlights and tail lights. They encompass the whole lighting unit, including the lens, casing, reflected back, and wiring, but exclude the bulb. The Products are made for the automotive aftermarket, and not for the original assembly of automobiles. They are sold across Canada for replacement on a variety of automobile models.

[10] Between January 1, 2004 and September 1, 2008 (the "Relevant Period"), Depo and Maxzone, through their employees and senior officers, communicated with representatives from TYC, Genera, Eagle Eyes, and E-Lite in a variety of ways, including attendances at meetings,

resulting in an agreement (the "Price Fixing Agreement") to which each of them was a party that, if it had been entered into in Canada, would have been in contravention of section 45 of the Act.

[11] The Price Fixing Agreement included, but was not limited to, a coordinated pricing formula, maintenance of price discipline to avoid a price war, coordination of responses to new market entrants, maintenance of a common discount program, and the sharing of price data. Over the course of the Relevant Period, Depo and Maxzone occasionally did not comply with that agreement.

[12] During the Relevant Period, Maxzone Canada carried out directives, instructions, and other communications from Depo and Maxzone, who had the authority to give directions to Maxzone Canada as to prices and sales of the Products in Canada. The directives, instructions and other communications were for the purpose of giving effect to the Price-Fixing Agreement in Canada.

[13] Total sales of the products by Maxzone Canada during the Relevant Period amounted to approximately $15,000,000.

[14] Subsequent to the Relevant Period, from late 2008 to date, Depo and its affiliates have suffered significant financial difficulty due to a major international market decline.

[15] Maxzone Canada has agreed that, for the purposes of section 655 of the *Criminal Code*, RSC 1985, c C-46**,** its admissions set forth at paragraphs 11 and 12 above establish all of the constituent elements of an offence under section 46 of the Act.

[16] During the sentencing hearing, counsel to Maxzone Canada noted that Maxzone, Mr. Polo Shu-Sheng Hsu ("Polo"), Maxzone's former President and Chief Executive Officer, and Mr. Shiu-Min Hsu ("Shiu") - the former Chairman of Depo, had each pleaded guilty to an offence under section 1 of the *Sherman Act*, 15 USC §§1 - 7. Maxzone was fined US$43 million in respect of that offence, Polo was sentenced to serve 180 days in prison and to pay a fine of US$25,000, and Shui, a citizen and resident of Taiwan, voluntarily submitted himself to the jurisdiction of the United States to plead guilty and to serve a sentence of nine months of incarceration in the United States.

II. Relevant Legislation

[17] Pursuant to section 46 of the Act, it is an offence for a corporation that is carrying on a business in Canada to implement a foreign directive intended to give effect to an agreement or arrangement that, if entered into in Canada, would have been in contravention of section 45 of the Act. The full text of section 46 is provided at Appendix "A" hereto.

[18] For the purposes of these proceedings, the relevant provision in section 45 is paragraph 45(1)(c), which, during the Relevant Period, provided as follows:

Conspiracy	**Complot**
45. (1) Everyone who conspires, combines, agrees or arranges with another person	45. (1) Quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :
…	…
(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation	(c) soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la

or supply of a product, or in the price of insurance on persons or property,	location, le transport ou la fourniture d'un produit, ou dans le prix d'assurances sur les personnes ou les biens;
…	…
is guilty of an indictable offense and liable to imprisonment for a term not exceeding five years or to a fine not exceeding $10 million or to both.	commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines.

[19] The sentencing provisions in the *Criminal Code* that are related to these proceedings are discussed in Part IV below, and are reproduced in full at Appendix "A" hereto.

III. Joint Sentencing Submission

[20] The written submissions on sentencing submitted on behalf of the Crown contained two short paragraphs under the heading "Joint Submission," in which it was submitted that a fine in the amount of $1.5 million would appropriately fit the crime and circumstances of this case and serve the public interest by reflecting the relevant sentencing factors.

[21] In addition, it was jointly submitted that a sentencing judge should only deviate from the recommendations of a joint submission where accepting the recommendation would either be contrary to the public interest or would bring the administration of justice into disrepute. This language has been endorsed by the New Brunswick Court of Appeal (*R v Steeves*, 2010 NBCA 57, at para 31) and, in a slightly different form, by the Ontario Court of Appeal, which has "repeatedly held that trial judges should not reject joint submissions unless the joint submission is contrary to the public interest and the sentence would bring the administration of justice into disrepute" (*R v Cerasuolo* (2001), 151 CCC (3d) 445, at para 8 (Ont CA); *R v Downey* (2006), OJ No 1289, at para 3 (Ont CA); *R v Haufe*, 2007 ONCA 515, at para 4 (emphasis added)). Although other appellate

courts have couched the test for rejecting joint sentencing submissions in somewhat different terms, there appears to be an increasing consensus that the alternative formulations of the test do not differ materially in substance (*R v Douglas* (2002), 162 CCC (3d) 37, at para 51 (Qc CA); *R v Sinclair*, 2004 MBCA 48, at para 11).

[22] Accordingly, before accepting a jointly recommended sentence, the Court must be satisfied that the sentence would not be both contrary to the public interest and such as to bring the administration of justice into disrepute.

IV. The Principles of Sentencing

[23] The objectives and principles of sentencing are codified in ss. 718 to 718.21 of the *Criminal Code*, which have been reproduced in full in Appendix "A" hereto. According to s. 718, the "fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society." This is to be achieved by imposing "just sanctions" that reflect one or more of what the Supreme Court of Canada has recently characterized as being the traditional sentencing objectives, namely, "denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation to victims, and promoting a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community" (*R v Ipeelee*, 2012 SCC 13, at para 35).

[24] Pursuant to s. 718.1, a central principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Accordingly, regardless of the "weight a judge may wish to accord to the objectives listed above, the resulting sentence must respect the fundamental principle of proportionality" (*R v Nasogaluak*, 2010 SCC 6, at para 40; *Ipeelee*, above, at para 37).

[25] The requirement that a sentence be proportionate to the gravity of the offence "is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system" (*Ipeelee*, above, at para 37). However, proportionality also ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In *Nasogaluak*, above, at para 42, the Supreme Court described these dimensions of proportionality as follows:

> [T]he rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused … [reference omitted]. Understood in this latter sense, sentencing is a form of judicial and social censure … [reference omitted]. Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.

[26] Subject to constraints imposed by the principle of proportionality, ss. 718, 718.2 and 718.21, together with certain other statutory provisions and the jurisprudence, preserve a broad range of discretion for trial judges in the sentencing process (*Nasogaluak*, above, at paras 43 - 45). For example, paragraph 718.2(a) requires sentencing courts to take account of any relevant aggravating or mitigating circumstances relating to the offence or the offender. In short:

> No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the *Code* and in the case law. (*Nasogaluak*, above, at para 43.)

[27] That said, paragraphs 718.2(b), (d) and (e) enunciate additional principles that place certain parameters on the discretion of sentencing courts. Specifically, paragraph 718.2(b) requires that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Paragraph 718.2(d) requires that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances. Paragraph 718.2(e) requires courts to consider all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention required to be paid to the circumstances of aboriginal offenders.

[28] Finally, section 718.21 contains a list of factors to be taken into consideration by a court in imposing a sentence on an organization. Among other things, those factors include:

> (a) any advantage realized by the organization as a result of the offence;
>
> (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence; and
>
> …
>
> (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence.

V. The Basis for the Proposed Sentence

[29] In its written submissions on sentencing, the Crown began by (i) reproducing the text of section 718, (ii) briefly noting that specific and general deterrence are key factors in determining an appropriate sentence, and (iii) briefly addressing each of the specific sentencing factors set forth in section 718.21. It then briefly addressed various additional aggravating and mitigating sentencing factors that have been identified in previous price fixing cases under the Act.

[30] Apart from the objectives of specific and general deterrence, it is not immediately apparent that any of the principles and objectives of sentencing set forth in section 718, the factors set forth in section 718.21, or the aggravating and mitigating factors that were briefly addressed in the Crown's sentencing submissions, were taken into account in determining the proposed sentence. The same is true with respect to the proportionality principle in section 718.1.

[31] Indeed, it is fairly clear from the concluding paragraphs of those submissions that the jointly recommended sentence was arithmetically determined by reference to the volume of Maxzone Canada's total sales, or volume of commerce, in Canada during the Relevant Period, i.e., the $15,000,000 mentioned at paragraph 13 above. Specifically, it was observed that, under the Competition Bureau's 2010 bulletin ("Leniency Bulletin") entitled *Leniency Program*, "absent compelling evidence to the contrary, the starting point for a recommended fine is 20 percent of the cartel participant's affected volume of commerce in Canada throughout the duration of the offence." It was then noted that, "[a] reduction of 50 percent of the otherwise applicable fine may be

recommended by the Bureau for the first party to seek leniency under the Leniency Program (such as Maxzone in this case)." It was subsequently reiterated that the jointly proposed fine of $1,500,000 "reflects approximately 10 percent of Maxzone Canada's relevant volume of commerce in Canada during the period of the offence", and "is based on a 50 percent discount of the 20 percent volume of commerce" that typically represents the starting point in the determination of fines that the Bureau will seek under its Leniency Program. In its oral submissions, the Crown confirmed that this is how the jointly proposed fine was calculated.

[32] The link between the 20 percent "starting point" for the determination of a recommended sentence under the Leniency Program and the objectives of ensuring that a sentence will serve as a general and specific deterrent is briefly addressed at paragraph 72 of these reasons below.

VI. The Bureau's Leniency Program

[33] The Bureau's Leniency Bulletin sets out the factors and principles that the Bureau considers in making a recommendation to the Public Prosecution Service of Canada ("PPSC") for lenient treatment in the sentencing of individuals and business organizations accused of criminal cartel offences under the Act. Collectively, these factors and principles constitute the Bureau's Leniency Program. That Program was designed to complement the Bureau's Immunity Program, as set forth in its 2010 bulletin entitled *Immunity Program under the Competition Act*. Under the Immunity Program, the Bureau recommends complete immunity from prosecution only for the first business organization or individual to apply under the Immunity Program. Parties who begin to cooperate

subsequent to the point in time at which another party begins to cooperate under the Immunity Program are treated under the Leniency Program.

[34] The Preface to the Leniency Bulletin suggests that the Leniency Program is premised on the view that "[i]ndividuals and business organizations are more likely to come forward, cooperate, and plead guilty (rather than litigate) when they are aware of the relevant leniency considerations and when they are confident that the Bureau will follow them in its leniency recommendations to the PPSC."

[35] After clarifying that the PPSC has independent discretion to accept or to reject the Bureau's recommendations with respect to sentencing, the Leniency Bulletin states, at paragraph 5, that the Federal Prosecution Service Deskbook provides that the PPSC should consult with the Bureau and give due consideration to its recommendations. At paragraph 6, it is then noted that it "is in the public interest to avoid unnecessary litigation with its attendant costs and uncertainties while, at the same time, ensuring that parties are held responsible for their criminal activities." That said, the Leniency Bulletin recognizes that the "determination of the sentence to be imposed is at the sole discretion of the court, and a judge is not bound by a joint sentencing submission" (paragraph 7).

[36] After describing the conditions for eligibility under the Leniency Program, the Leniency Bulletin states, at paragraph 12, that the Bureau "generally uses a proxy of 20 percent of the cartel participant's affected volume of commerce in Canada" as the base level of a fine recommendation. That document proceeds to state that the "first leniency applicant is eligible for a reduction of 50 percent of the fine that would otherwise have been recommended, provided that the applicant meets

the requirements of the Leniency Program, including providing full, frank, timely and truthful cooperation." The Leniency Bulletin then notes that the second leniency applicant is eligible for a reduction of 30% of the fine that would otherwise have been recommended by the Bureau to the PPSC, and that the amount of reduction that a subsequent applicant is eligible to receive will depend on when the applicant sought leniency compared to the "second in" applicant, and on the timeliness of its cooperation.

[37] At paragraph 17, the Leniency Bulletin states that the "20 percent proxy associated with the applicant's cartel conduct will be increased or reduced based on the presence of aggravating or mitigating factors," and that the appropriate sentencing reduction will be applied only after the 20 percent proxy has been increased or decreased to reflect those factors.

[38] At paragraph 21, it is stipulated that "[a]t the request of the first-in leniency applicant that is a business organization, the Bureau will recommend that no separate charges be laid against the applicant's current directors, officers or employees, provided that such individuals cooperate with the Bureau's investigation in a full, frank, timely and truthful fashion." At paragraph 22, it is noted that the same policy applies with respect to the first applicant who is a natural person applying independently for leniency. However, it is then made clear that current and former directors, officers, employees and agents of subsequent leniency applicants may be charged depending on their role in the offence. In a document entitled "Leniency Program – FAQs" that appears on the Bureau's website and was reproduced in the Crown's Book of Authorities, it is stated (at Question #22) that "[t]he Bureau is increasingly recommending imprisonment for cartel violations so as to secure sufficient specific and general deterrence and denunciation of the cartel conduct."

VII. Analysis

A. Introduction

[39] At the sentencing hearing, counsel to Maxzone Canada observed that it would be "important to the bar and to the business community for the Court to provide an acknowledgment or recognition of the manner in which the Leniency Bulletin suggests that fine calculations should be carried out in these cases" arising under sections 45 and 46 of the Act. More specifically, it was observed that it would be very helpful if the Court were to conclude that the approach to sentencing described Leniency Bulletin is effective, fair and legally sound.

[40] Generally speaking, the framework described in the Leniency Bulletin is consistent with the sentencing principles set out in the *Criminal Code* and developed in the jurisprudence. If followed in letter and spirit, that framework is sufficiently comprehensive and flexible to permit the Court to satisfy itself that a jointly recommended sentence would not be contrary to the public interest and would not bring the administration of justice into disrepute, having regard to:

i. the fundamental purpose of sentencing and the objectives set forth in section 718 of the *Criminal Code*;
ii. the principle of proportionality set forth in section 718.1;
iii. the aggravating and mitigating factors set forth in sections 718.2 and 718.21 and in the jurisprudence; and
iv. the other principles set forth in section 718.2 and in the jurisprudence.

[41] However, a jointly proposed fine that is determined exclusively by multiplying an accused corporation's volume of commerce by a particular percentage is not consistent with the letter or spirit of the Leniency Bulletin, the aforementioned provisions in the *Criminal Code* or the jurisprudence. The same is true with respect to a jointly proposed fine that was initially calculated in this manner, and then adjusted by further multiplying the amount so reached by a second percentage, to reflect the fact that the offender sought leniency in a particular sequence, relative to the other participants in the prohibited agreement.

[42] I accept that there are very good reasons why the sequence in which co-conspirators have sought leniency and have offered to cooperate with the Competition Bureau's investigation should be given significant weight in the determination of the appropriate sentence to be imposed. Among other things, and as noted in the Crown's sentencing submissions, a transparent and predictable approach to the sentencing of those who may wish to cooperate with the Bureau and the Crown supports the effective and efficient enforcement of the Act. This is because, generally speaking, individuals and business organizations are more likely to come forward, cooperate and plead guilty, rather than litigate, when they have a high degree of certainty regarding the *quid pro quo* for such cooperation.

[43] However, cooperation cannot so dominate the approach to sentencing as to leave virtually no meaningful role for relevant aggravating factors, other mitigating factors, and the principles of sentencing discussed at part IV of these reasons above.

[44] I have serious concerns as to the Court's ability to become satisfied, on the basis of an evidentiary record such as that which was submitted in these proceedings, and the cursory

submissions that were made, that a sentence calculated in the arithmetical manner that was followed in this case would not be contrary to the public interest and would not bring the administration of justice into disrepute.

[45] In brief, such a record does not provide the Court with sufficient information to be satisfied that a fine equivalent to approximately 10 percent of the accused corporation's volume of affected commerce during the Relevant Period will promote respect for the law, assist in achieving a just society, or constitute a "just sanction," having regard to the sentencing objectives listed in section 718 of the *Criminal Code*, the provisions in sections 718.1, 718.2 and 718.21, and the jurisprudence on sentencing. The same would be true even if the offender did not benefit from a 50 percent reduction in the fine that would otherwise be recommended, to reflect the fact that it was the first to seek leniency under the Competition Bureau's Leniency Program in respect of the illegal conduct in question.

[46] This is primarily because such an evidentiary record and submissions such as those that were made in this case do not provide the Court with any sense, let alone comfort, that a recommended fine determined in this manner would appropriately denounce the conduct in question, achieve general or specific deterrence, be proportionate to the gravity of the offence, or even ensure that crime does not pay. Such a record and such submissions also do not materially assist the Court to understand why the relevant aggravating and mitigating factors have been weighted in a manner such as to effectively cancel each other out.

[47] Without having a general "ballpark" sense of the illegal gains contemplated by, and ultimately derived from, an agreement prohibited by section 45 or 46 of the Act, it is difficult to

understand how the Court could become satisfied that a fine determined in this manner would likely lead a would-be cartel participant to refrain from becoming a party to such an agreement, having regard to the low combined risk of detection, investigation and successful prosecution. Indeed, it is difficult to see how the Court could even be satisfied that a fine so determined would likely disgorge, in an approximate way, the ill-gotten gains from the conduct prohibited by sections 45 and 46 of the Act, and contemplated by section 718.21 of the *Criminal Code*. In turn, this raises serious questions as to whether such a fine would appropriately denounce the prohibited conduct, promote a sense of responsibility in offenders, or represent an acknowledgement of the harm done to victims and the community, as contemplated by paragraphs 718(a) and (f) of the *Criminal Code*.

[48] In my view, to enable the Court to make the determination that it needs to make in these types of cases involving jointly recommended sentences for contraventions of sections 45 or 46 of the Act, the evidentiary record and the submissions of counsel ought to be more fulsome than they were in these proceedings. In short, at a minimum, the Court requires either (i) some sense, even if only in general "ballpark" terms, of the illegal profits contemplated by, and ultimately attributable to, the prohibited agreement; or (ii) evidence that the accused has paid restitution to the ultimate victims of that agreement. The Court also requires a good sense of any relevant aggravating and mitigating factors and how they influenced the jointly recommended fine. Where no adjustment to the recommended fine has been made to reflect such factors, it will be necessary for the Court to understand the basis for such an approach.

[49] In addition, the Court will require sufficient information to determine whether the recommended sentence appropriately reflects:

i. the fundamental purpose of sentencing and the objectives set forth in section 718 of the *Criminal Code*;

ii. the principle of proportionality set forth in section 718.1; and

iii. the principles set forth in section 718.2 and in the jurisprudence.

[50] These things can easily be accommodated within the existing framework of the letter and spirit of the Leniency Bulletin.

B. Denunciation

[51] There are certain offences in respect of which an appropriate degree of denunciation can only be achieved through a sentence that communicates society's "abhorrence" of the crime in question (*R v Sargeant* (1974), 60 Cr App R 74, at 77, quoted in *R* v *CAM*, [1996] 1 SCR 500, at para 81). The offences set forth in sections 45 and 46 of the Act are clearly among such crimes.

[52] In *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, at 648-649, it was noted that what is now section 45 "is one of the central pillars of the Act" and "remains at the core of the criminal part of the Act." The Court added that section 45 "definitely rests on a substratum of values." Lower courts have also recognized the seriousness of the offence created set forth in section 45 (and referred to in section 46). (See, for example, *R v Kason Industries Inc*, 2011 FC 281, at para 6; *Canada v Canada Pipe Co* (1995), 101 FTR 211, at para 6; *Canada v Kanzaki Specialty Papers Inc* (1994), 82 FTR 63, at para 6; *R v Albany Felt Co of Canada Ltd et al (No 2)* (1980), 52 CPR (2d) 204, at 205-6 (Qc SC); *R v Browning Arms of Canada Limited* (1974), 18 CCC (2d) 298,

at 299 (Ont HC); *R v Dominion Steel* (1957), 27 CPR 57 at 76 (Ont HC); and *R v Firestone Tire & Rubber Co of Canada Ltd* (1953), 107 CCC 286 at 293 (Ont CA).)

[53] In 1986, the maximum fine set forth in what is now section 45 of the Act was increased from $1 million to $10 million, to "send a clear signal to the courts that Parliament considers conspiracy to be a very serious criminal offence and that offenders should be dealt with by a firm hand." (Consumer and Corporate Affairs Canada, *Competition Law Amendments, A Guide* (Ottawa: December 1985) at 27). In 2009, subsequent to the Relevant Period in these proceedings, Parliament sent a further unambiguous signal in this regard by further increasing the maximum fine set forth in section 45 from $10 million to $25 million, and by increasing the maximum term of imprisonment from five years to fourteen years. As for section 46, during the Relevant Period there was no limit on the maximum fine that could be imposed in respect of that offence. The same remains true today.

[54] Price fixing agreements, like other forms of hard core cartel agreements, are analogous to fraud and theft. They represent nothing less than an assault on our open market economy. Buyers in free market societies are entitled to assume that the prices of the goods and services they purchase have been determined by the forces of competition. When they purchase products that have been the subject of such an agreement, they are effectively defrauded.

[55] Indeed, such agreements have a greater adverse economic impact on society than do theft and fraud. This is because, in addition to leading to a transfer of wealth from victims of the agreement to the participants in the agreement, they also generally result in further detrimental effects on the economy. Such further effects include what is often referred to as the "deadweight loss" to the economy that results when higher prices lead buyers at the margin to switch to less

valued substitutes, thereby bringing about a misallocation of resources. This misallocation of resources typically reduces aggregate wealth in the economy by an amount that is equivalent to a significant percentage of the wealth transfer mentioned above.

[56] Price fixing and other hard core cartel agreements therefore ought to be treated at least as severely as fraud and theft, if not even more severely than those offences.

[57] When, as in the case at bar, a price fixing agreement affects a market that comprises sales in the tens of millions, it should be treated as a major fraud, and denounced accordingly. At a minimum, this requires the imposition of a fine that (i) ensures that the accused corporation does not profit from its illegal conduct, and (ii) includes an additional significant amount to communicate the Court's recognition of the very serious nature of such illegal conduct, its substantial adverse impact on the economy, and society's abhorrence of the crime.

[58] Unfortunately, an evidentiary record such as that which was before me in these proceedings is not sufficient to enable the Court to be satisfied that a sentence determined in the manner that was embraced in this case would reflect either of these principles. The Court will expect more in the future.

C. Deterrence

[59] Courts in Canada have consistently identified general and specific deterrence as an important objective in sentencing for offences under the Act. (See, for example, *Kason*, above, at para 8; *R v Mitsubishi Corp* [2005], OJ No 2394, at para 22 (Ont SC); *R v UCAR Inc* (1999), 164

FTR 85, at para 21; *Kanzaki*, above, at para 5; *R v McNamara et al (No 2)*, [1981] OJ No 3260, at para 21 (Ont CA); *Albany Felt*, above, at 206-7(Qc SC); *R v Hoffman-LaRoche Limited (No. 2)* (1980), 53 CPR (2d) 189, at 190-91 (Ont HC); *R v Canadian General Electric Co Ltd*, [1977] OJ No 509, at para 4 (Ont HC) ("*Large Lamps*"); *R v Armco Canada Ltd et al* (No. 2) (1975), 19 CPR (2d) 273, at 274 (Ont HC), varied on different grounds (1977) 13 OR (2d) 32 (CA), leave to appeal refused 30 CCC (2d) 183 (SCC); *R v Aetna Insurance Company et al (No 2)* (1975), 24 CPR (2d) 160, at 162 (NSCA), rev'd on other grounds [1978] 1SCR 731**;** *Browning Arms*, above, at 303; and *R. v. St. Lawrence Corporation Limited et al.* (1967), 51 CPR 170 at 190-91 (Ont HC); aff'd [1969] OJ No 1326 (CA).

[60] As noted in *Mitsubishi*, above, at para 20, and in the Crown's sentencing submissions, the courts have also repeatedly emphasized that fines in criminal price-fixing cases must be set sufficiently high to ensure that they are more than a mere license fee or a cost of doing business. (See, for example, *Kanzaki*, above, at para 5; *R v Davis Wire* (1992), 47 CPR (3d) 394, at 397; *Albany Felt, above*, at 206; *Armco, above*, at 275; *Browning Arms, above*, at 300-01,303; and *R v Ocean Construction Supplies Ltd* (1974), 15 CPR (2d) 224, at 229 (BCSC). See also *R v Shell Canada Products Limited* (1990), 75 CR (3d) 365, at 375 (Man CA); *R v Rolex Watch Co of Canada Ltd* (1980), 50 CPR (2d) 222, at 228 (Ont CA); *R v A & M Records of Canada Ltd* (1980), 51 CPR (2d) 225, at 230 (Ont Co Ct); *R v Kito Canada Ltd* (1976), 25 CPR (2d) 145, at 146 (Man CA); *R v Superior Electronics Inc* (1979), 45 CPR (2d) 234, at 236 (BCCA); *R v Northern Electric Company Limited et al* (1957), 26 CPR 73, at 74-5 (Ont HC); *R v Goodyear Tire & Rubber*, [1956] SCR 303, at 311; and *R v Dominion Steel* (1957), 27 CPR 57, at 76 (Ont HC)). To be sufficient to achieve effective general deterrence, fines imposed in respect of criminal anti-competitive

agreements must be substantial and exemplary, but not crippling or vindictive (*McNamara*, above, at para 26).

[61] As is increasingly recognized in international competition law circles, fines are unlikely to deter persons contemplating becoming a party to a price fixing or other hard core cartel agreement unless they are set at a level that is likely to render the expected value of such action negative. This means that fines must take account of the low probability of detection, prosecution and conviction. To give a simple example, if the expected additional profits from a cartel overcharge ("Overcharge") were estimated to be $1 million, and the combined probability of detection, prosecution and conviction was 50%, the fine would need to exceed $2 million to render the expected value of joining the prospective cartel negative. In other words, to be an effective deterrent in this example, the fine would need to be more than double the expected gain from the Overcharge.

[62] As counsel to the Crown observed during the sentencing hearing in this case, and has been recognized in the jurisprudence (see, for example, *Mitsubishi*, above, at para 9; *R c Ciment Québec Inc*, [1996] JQ no 2580, at para 22, and *McNamara*, above, at para 26), "cartels are very hard to detect." Common sense suggests that the combined probability of detection, prosecution and conviction for participating in a price fixing or other hard core cartel agreement is much less than 50%. If this uncontroversial proposition is accepted, it follows that fines for engaging in such conduct should be a multiple of more than double the expected gain from the Overcharge to be an effective deterrent.

[63] I am not aware of any studies that have estimated the combined probability of detection, prosecution and conviction for price fixing in Canada. Accordingly, it is not possible for me to

comment upon the level of the multiple that would achieve the optimal deterrent. The Competition Committee of the Organisation for Economic Co-operation and Development ("OECD"), which is comprised of the heads of the competition enforcement agencies in the OECD's 34 member countries, has noted that "[s]ome believe that as few as one in six or seven cartels are detected and prosecuted, implying a multiple of at least six" and that a "multiple of three is more commonly cited" (OECD, *Hard Core Cartels – Recent Progress and Challenges Ahead* (Paris: 2003), at 27). In another report, the Competition Committee noted that studies supporting multiples of larger than three exist (OECD, *Fighting Hard-Core Cartels – Harm, Effective Sanctions and Leniency Programmes* (Paris: 2002), at 91).

[64] A multiple of three implies that the combined probability of detection, prosecution and conviction is 33.3%. Once again, common sense suggests that the true figure is likely less than this, and that therefore a multiple of three would be a very conservative rule of thumb to adopt in attempting to calculate the level at which a fine would have to be set to be an effective deterrent for those who may be tempted to consider participating in a price fixing or other hard core cartel agreement.

[65] Unfortunately, accurately calculating the true Overcharge, in order to then apply a conservative multiple in an attempt to establish a fine that will serve as an effective deterrent, is notoriously difficult. Among other things, it is generally very difficult to establish what the price of the cartelized product(s) would have been in the absence of an impugned price fixing agreement (OECD 2002, above, at 77; International Competition Network, Cartels Working Group, *Setting of Fines for Cartels in ICN Jurisdictions* (Kyoto: April 2008), at 7). In addition, cartel agreements often do not work out as well as expected.

[66] That said, in establishing a fine that is likely to serve as an effective deterrent, the fact that a proposed price fixing agreement "did not work out as well as the conspirators expected is … of little consequence" (*McNamara*, above, at para 17). As with other forms of conspiracy, the "gist of the offence" of price fixing is the entering into the prohibited agreement itself (*R v Papalia*, [1979] 2 SCR 256, at 276; *R v Cominco Ltd*, [1980] AJ No 524, at para 20 (Alta QB)).

[67] For the purposes of achieving effective deterrence, it is the expected gain from the agreed upon Overcharge that is most relevant, together with the level of the multiple required to render negative, in approximate terms and on average, that gain.

[68] Among other things, the Leniency Bulletin states that the Competition Bureau "will make its leniency recommendation to the PPSC only after an applicant has completed its proffer and provided all relevant information pertinent to leniency and sentencing" (paragraph 26). It also states that plea agreements entered into with the PPSC "will require the leniency applicant to provide full, frank, timely and truthful disclosure of all non-privileged information, records or other materials in its possession, under its control or available to it, wherever located, that in any manner relate to the anti-competitive conduct for which leniency is sought" (paragraph 28). The Interpretation section of that document adds that it "should be read in conjunction with the Leniency Program's Frequently Asked Questions" (FAQs). In turn, at Question #17, the FAQs state that, at the proffer stage, the Bureau "will not accept a bare outline of the conduct", but rather will require applicants for leniency to "report [the details of the offence and their role] as completely and accurately as possible with candour and in a spirit of cooperation." The FAQs then proceed to identify the general topics that may be covered in a proffer, "depending on the facts surrounding the specific offence." Among

other things, the list of topics identified in the FAQs includes the "impact of the conduct", including "the volume of commerce in Canada involved," and "pricing and other effects."

[69] Where evidence regarding the impact of the conduct is disclosed to the Competition Bureau, the Court will expect to be provided with some sense of that evidence, so that it can determine whether the fine jointly proposed by the Crown and the accused is sufficiently high to be an effective specific and general deterrent. Unfortunately, an evidentiary record such as that which was adduced in these proceedings does not permit the Court to make these determinations.

[70] I recognize that the disclosure of such evidence at the time of a guilty plea or in a sentencing hearing may well increase the exposure that a convicted party may face in any subsequent civil action that may be brought by victims of the impugned agreement. This is a good reason why applicants for leniency should make every effort to provide restitution to, or otherwise settle with, such victims prior to making their guilty plea.

[71] In any event, it bears emphasizing that a failure to adduce evidence that will provide the Court with at least some sense of the magnitude of any agreed upon or contemplated Overcharge and the overall economic impact of the illegal agreement may make it very difficult for the Court to be satisfied that the proposed fine (i) will achieve the objectives of general and specific deterrence, and (ii) will not be contrary to the public interest and such as to bring the administration of justice into disrepute. Indeed, it is not immediately apparent how a failure to disclose such evidence to the Court is consistent with the public interest.

[72] I also recognize that there are good reasons why, in determining a fine to be jointly proposed by the Crown and an applicant for leniency, it may make sense to start with a base level of 20 percent of the cartel participant's affected volume of commerce in Canada. As explained at Question #19 of the FAQs, that 20 percent figure includes two components, namely, (i) a proxy of 10 percent of the affected volume of commerce in Canada, to account for the overcharge resulting from the typical cartel agreement and for other types of harm, presumably including the deadweight loss mentioned earlier in these reasons, and (ii) an additional 10 percent, to ensure that the fine is sufficiently large that it does not represent a mere licensing fee or cost of doing business. Of course, as recognized at Question #21 of the FAQs, where there is relevant and compelling evidence that demonstrates that a lower Overcharge was contemplated by the illegal agreement and imposed pursuant to the agreement, it may be appropriate to set the base level of the fine at a level that is lower than 20 percent.

[73] However, where there is reliable evidence that the agreed upon Overcharge or other economic harm contemplated by the impugned agreement likely exceeded the 10 percent proxy for the typical cartel agreement, this will be an important aggravating factor that should be brought to the Court's attention. A failure to disclose this evidence to the Court may well place the Court in the position of being asked to accept a jointly proposed fine that not only is unlikely to specifically deter similar conduct in the future, but also allows the convicted party to profit from its illegal activity.

[74] A practice of consistently failing to disclose such information to the Court also would undermine the important objective of achieving general deterrence. This is because, once it became

known that the 20 percent base level would rarely be altered, would-be cartel participants would have little disincentive to entering into agreements to raise prices by more than 10 percent.

[75] In this regard, the Court notes the existence of studies that have estimated the average cartel Overcharge to be "somewhere in the 20 percent – 30 percent range, with higher overcharges for international cartels than for domestic cartels" (OECD, *Hard Core Cartels – Third Report on the Implementation of the 1998 Recommendation* (Paris: 2005), at 25).

[76] Particularly given the foregoing, it is incumbent upon parties to joint sentencing submissions to provide the Court with sufficient evidence to enable it to determine whether the jointly recommended fine (i) will serve as an effective general and specific deterrent, and (ii) will not be contrary to the public interest and such as to bring the administration of justice into disrepute.

[77] To the extent that substantial fines also serve to increase the incentive for participants to seek immunity or a reduced sentence by disclosing the existence of a price fixing agreement and by cooperating with the investigation and prosecution of that agreement, they serve to further increase the deterrent effect of the fine, by increasing the probability of successful detection, prosecution and detection.

[78] Achieving effective general and specific deterrence may be difficult through substantial fines alone. Justice La Forest explained why this may be the case in the following passage of his judgment in *Thompson Newspapers Ltd v Canada (Director of Investigation and Research)*, [1990] 1 SCR 425, at 514:

> … In the vast majority of cases, fines will not be sufficient to the task. Regardless of whether they are imposed on the corporation or

> its officers, they will usually be paid by the former. Unless they were to be set at so high a level as to be capable of putting violators out of business (a result that would in most cases be politically and economically indefensible), such fines would simply be treated as part of the cost of doing business. When measured against the relatively low probability of detection, the possibility of suffering a loss by way of a fine may seem inconsequential as compared to the likelihood of making or increasing profits through anti-competitive practices.
>
> For these reasons, fines are unlikely to encourage the kind of compliance that is necessary if the objectives of combines legislation are to be realized. This is the ultimate rationale for the imprisonment of those responsible for the operation of the company or unincorporated business which engages in anti-competitive conduct. Obviously, there is no way in which the cost of such a penalty can be passed on to the employing company or business. It can only be paid by the officers of the company or business. This introduces an element of personal vulnerability into business decision-making, in so far at least as it relates to the type of conduct and practices proscribed by the [*Competition Act*]. The result is that the provisions of the Act are much more likely to be a part of the process by which the company or business decides between alternative courses of conduct. It goes without saying that it also increases the probability that conduct that violates the Act will not be engaged in.

[79] The powerful deterring effect of a potential prison sentence for cartel offences is increasingly being recognized internationally (see, e.g., OECD 2003, above, at 29; International Competition Network, above, at 11). Among other things, this increased recognition is reflected in the enactment of laws providing for the possibility of prison sentences for cartel offences in an increasing number of countries, including the United States, the United Kingdom, Ireland, Australia, Israel, Hungary, Brazil, Japan and Korea.

[80] In the absence of a serious and very realistic threat of at least some imprisonment in a penal institution, directors, officers and employees who may otherwise contemplate participating in an agreement proscribed by section 45 of the Act, or who may have been directed to implement such

an agreement in Canada in contravention of section 46 of the Act, are unlikely to be sufficiently deterred from entering into or implementing such agreements by mere fines. In brief, achieving effective general and specific deterrence requires that individuals face a very real prospect of serving time in prison if they are convicted for having engaged in such conduct. As the Ontario Court of Appeal has observed: "The reality of the threat of jail sentences for general deterrence of individuals and corporate executives who commit "white-collar" crimes has become an effective and apparently necessary tool in the arsenal of law enforcement agencies." (*R v Serfaty*, [2006] OJ No 2281, at para 32.) Accordingly, "in appropriate cases, significant jail sentences will not only be warranted, but required in order to meet the objectives of general deterrence and denunciation for this type of crime that some may still mistakenly view as relatively harmless." (*Serfaty*, above, at para 35,)

[81] When imprisonment is a serious and very realistic possibility it also provides a powerful incentive for those who have contravened the Act to disclose the existence of illegal conduct and cooperate in the prosecution of co-offenders. This further increases the risk associated with engaging in such conduct, and exercises an additional deterrent effect on would-be price fixers.

[82] The Court recognizes that it may be in the public interest for the Crown to agree to refrain from seeking a term of imprisonment for a leniency applicant's directors, officers or employees, in the limited circumstances described at paragraphs 21 and 22 of the Leniency Bulletin. In all other circumstances where a jointly recommended sentence for a contravention of section 45 or 46 of the Act does not include a term of imprisonment for one or more directors, officers or employees of an accused corporation, the Court will expect the parties' sentencing submissions to explain why a fine alone would suffice to achieve general and specific deterrence, to appropriately denunciate the

crime, and to reflect the other objectives and principles set forth in section 718, 718.1, 718.2 and 718.21 of the *Criminal Code*. For the reasons explained at paragraphs 107 and 108 below, this includes situations in which one or more individuals associated with an affiliated entity have been sentenced to prison in the U.S. or another jurisdiction in respect of separate offences committed in that jurisdiction.

[83] In addition to the foregoing, and as contemplated by paragraph 718.2(b) of the *Criminal Code*, the Court will want to understand how a sentence that is jointly recommended compares to sentences that have been imposed on similar offenders for similar offences committed under similar circumstances, including sentences imposed for theft and fraud of a magnitude similar to that which was contemplated by the illegal agreement. In addition, the Court will want to have at least some sense that the recommended fine disgorges any financial gain that the director, officer or employee may have received as a result of the illegal agreement, for example by way of compensation linked to the financial performance of the company.

[84] The Court will also want to be satisfied that a fine alone would be consistent with Parliament's intent in recently amending section 45 to increase the maximum term of imprisonment from five years to fourteen years. More broadly, the Court will want to be satisfied that a fine alone would not be both contrary to the public interest and such as to bring the administration of justice into disrepute.

D. Reparations for Harm Done to Victims or to the Community

[85] Paragraph 718(e) of the *Criminal Code* lists providing reparations for harm done to victims or to the community as one of the objectives of sentencing.

[86] For the reasons explained at paragraph 55 of these reasons, the harm resulting from price fixing and other agreements proscribed by section 45 and referred to in section 46 of the Act includes the wealth transfer from victims to the perpetrators of the offence, as well as the deadweight loss that such agreements bring about for the Canadian economy. As noted at paragraph 65 above, it is often very difficult to accurately estimate both of these effects of such agreements. Nevertheless, it remains incumbent upon the Court to ensure that a sentence imposed is sufficient, even if only approximately so, to appropriately reflect this sentencing objective.

[87] In the Crown's sentencing submissions, it was observed that there was no evidence that Maxzone Canada had paid any restitution in relation to the offence for which it was charged.

[88] I recognize that there may be legitimate reasons why a party to a joint sentencing recommendation may wish to plead guilty and receive its sentence before having dealt with the matter of restitution. However, the Court cannot assume that full restitution, or indeed any restitution, ultimately will be paid by a party who has pleaded guilty and has been convicted for contravening section 45 or section 46 of the Act. Indeed, the Court must be alive to the possibility that a failure to have provided restitution to victims reflects an absence of remorse and implies an

intention to profit from wrongdoing (Clayton C Ruby et al, *Sentencing*, 7th ed. (Markham: LexisNexis Canada, 2008), at § 19.53).

[89] Where restitution has not been paid prior to the sentencing hearing, the Court will be in a much more difficult position than would otherwise be the case. Among other things, this may make it more difficult for the Court to ensure that a recommended sentence will, on balance, achieve the purposes set forth in section 718 of the *Criminal Code*. In addition, the Court will have little alternative but to recognize that the Overcharge remains an advantage realized as a result of the offence, as contemplated by paragraph 718.21, even if the precise extent of the Overcharge cannot be accurately determined.

E. Promoting a Sense of Responsibility in Offenders, and Acknowledgement of the Harm Done to Victims and to the Community

[90] Another objective of sentencing, as set forth in paragraph 718(f) of the *Criminal Code*, is promoting a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[91] This objective was not specifically addressed in the Crown's sentencing submissions in the case at bar.

[92] In my view, this objective reinforces the objectives of denunciation, deterring the offender and other persons from committing similar offences, and providing reparations for harm done to victims and to the community. At a minimum, in the context of sections 45 and 46 of the Act, this

objective contemplates that a sentence should (i) ensure that a convicted party does not profit from the anti-competitive agreement in question, and (ii) include an additional substantial component to promote a sense of responsibility in the offender, and an acknowledgement of the harm done to the victims and to the community. As with the objectives of denunciation and deterrence, this objective may well require at least some term of imprisonment, particularly for parties who were not the first to begin cooperating under the Competition Bureau's Leniency Program.

F. Factors Set forth in section 718.21 of the *Criminal Code*

[93] As noted at paragraph 28 of these reasons, section 718.21 contains a list of ten factors to be taken into consideration by a court in imposing a sentence on an organization.

[94] The first of those factors is "any advantage realized by the organization as a result of the offence," which has already been discussed above. Another of those factors is restitution, which has also been discussed above.

[95] A third factor in the list is "the degree of planning involved in carrying out the offence and the duration and complexity of the offence." In its sentencing submissions, the Crown submitted that the offence involved a great degree of planning and covertness. In addition, it was noted that the parties to the Price Fixing Agreement carried out a complex series of coordinated price changes involving thousands of products. Moreover, the Crown stated that the co-conspirators' pricing was based on an agreed upon tiered pricing formula designed to avoid detection by purchasers and thwart competition throughout the Relevant Period.

[96] In my view, facts such as these should be treated as an aggravating factor in sentencing, warranting a significant upward adjustment to the sentence that would otherwise be imposed. In cases where the evidence demonstrates that an offender was a "ring leader," coerced others to participate in the offence or engaged in other conduct that reflects serious moral turpitude, the upward adjustment should be substantial. The same is true where the victim of the offence was particularly vulnerable.

[97] Two other potentially aggravating factors in the list were not relevant in this particular case. These are (i) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution; and (ii) whether the organization, or any of its representatives who were involved in the commission of the offence, has previously been convicted of a similar offence or sanctioned by a regulatory body for similar conduct. In my view, in cases where these factors are present, they should warrant a significant upward adjustment to the sentence that would otherwise be imposed.

[98] The remaining five factors in the list set forth in section 718.21 are potential mitigating factors. In case at bar, the only one of those factors that was relevant was "the cost to public authorities of the investigation and prosecution of the offence." In its submissions, the Crown submitted that Maxzone Canada's guilty plea had reduced the Competition Bureau's investigation costs and the Crown's prosecution costs, particularly given Maxzone Canada's agreement to cooperate with any Bureau investigation of other parties to the offence. In my view, this factor merits significant weight. However, given that the Bureau's Leniency Program is entirely premised on cooperation, it can be assumed that the cooperation described in the Leniency Bulletin has

already been built into the "starting point" for determining the appropriate fine. Accordingly, absent an extraordinarily high degree of cooperation, no additional downward adjustment to that starting point should be made in recognition of a degree of cooperation that would typically be required under the Leniency Program. The same is true with respect to the other conditions for eligibility under the Leniency Program, such as termination of participation in the cartel agreement and agreeing to plead guilty. These last two observations are based on the assumption that a jointly recommended sentence has been based on the approach set forth in the Leniency Bulletin, and therefore implicitly incorporated into the "starting point" for the calculation of any jointly recommended fine. Where that is not the case, it will be incumbent upon the parties to draw that fact to the Court's attention.

[99] The remaining four factors set forth in section 718.21 appear in paragraphs (d), (f), (h) and (j) of that provision. They are reproduced together with the rest of that section in Appendix "A" hereto.

[100] It bears emphasizing that, where present, aggravating and mitigating factors should be explicitly addressed in any sentencing submissions that may be made on behalf of the Crown or the offender, in a manner that enables the Court to understand how those factors influenced the recommended sentence.

G. Additional Aggravating and Mitigating Factors

[101] In its written submissions on sentencing, the Crown listed a number of aggravating and mitigating factors that have been considered in the jurisprudence. For the most part, those factors

are reflected in the list set forth in section 718.21 of the *Criminal Code*, discussed immediately above. (See, for example, *Mitsubishi*, above, at paragraphs 9-18; *UCAR*, above; *Canada Pipe*, above; *Davis Wire*, above; *Armco*, above, at 276; *Large Lamps*, above, at para 7; *Ocean Construction*, above; *McNamara*, above, at paras 21 – 26; and *St. Lawrence Corp* (Ont CA), above, at para 37).

[102] One factor addressed in the Crown's submissions that is not addressed in section 718.21 is the economic harm caused by the offence. The Crown submitted that this factor was "deemed to be significant." However, it is not clear how, if at all, this factor influenced the determination of the jointly recommended sentence, other than by virtue of the fact that the fine seems to have been reached by multiplying Maxzone Canada's volume of affected commerce by 10 percent. No mention was made of other economic impacts of the offence, including those discussed at paragraph 55 above. It bears emphasizing that, in the future, it would be wise for parties to jointly recommended sentences to put the Court in a position to better appreciate (i) the magnitude of the economic harm caused by any conduct that has contravened sections 45 or 46, even if only in "ballpark" terms; and (ii) how the economic harm caused by the prohibited conduct influenced the determination of a jointly recommended sentence. The Court may not be particularly receptive to the position, advanced in these proceedings by Maxzone Canada, that the "question of whether this conspiracy produced higher prices or caused any economic damage to any Canadian consumer is a matter that will be addressed in another [civil] proceeding that is ongoing in Ontario."

[103] Additional factors addressed in the Crown's submissions that are not addressed in section 718.21 are the size and market share of offender. The size of an offender is often discussed in connection with its ability to pay. The flip side of this is that a large, financial strong offender may

require a more severe sentence than would otherwise be imposed, to, among other things, achieve specific deterrence.

[104] In my view, the market share of an offender largely overlaps with the economic harm caused by the offence, and would not ordinarily merit additional weight as a distinct factor in sentencing. That said, evidence with respect to an offender's market share can certainly be quite helpful in assessing other matters, such as the economic harm caused by the offence.

[105] Two additional factors addressed in the parties' submissions were that Maxzone Canada is no longer doing business in Canada and agreed to submit to the jurisdiction of the Canadian Courts. In my view, these are mitigating factors that warrant a downward adjustment of the sentence that otherwise would be imposed on Maxzone Canada.

[106] In its oral submissions, Maxzone Canada addressed certain additional factors, beginning with Maxzone Canada's sincere regret and remorse. In my view, offenders who seek leniency under the Competition Bureau's Leniency Program and meet the conditions set forth in the Leniency Bulletin can be assumed to regret their participation in the offence in question, and to be remorseful. In such circumstances, sincere regret and remorse would ordinarily merit a neutral weighting, since they will have already been taken into account in the "starting point" for determining any sentence that ultimately might be jointly recommended by the Crown and the offender. Once again, where this is not the case, this fact should be drawn to the Court's attention.

[107] Maxzone Canada also noted that Maxzone, its former CEO, and the former Chairman of Depo had each pleaded guilty to an offence under section 1 of the *Sherman Act*. As discussed at

paragraph 16 of these reasons, Maxzone was fined US$43 million in respect of that offence, its CEO was sentenced to serve 180 days in prison and to pay a fine of US$25,000, and the Chairman of Depo voluntarily submitted himself to the jurisdiction of the United States to plead guilty and to serve a sentence of nine months of incarceration in the United States.

[108] In my view, these facts are not mitigating factors in the sentencing of an entirely different entity, Maxzone Canada. When Canadian subsidiaries of foreign companies, or their directors, executives or other employees, commit distinct offences under sections 45 or 46 of the *Competition Act*, they should not benefit from the sentences imposed on their parent or other related companies, or on individuals associated with those related companies, in respect of offences committed in other jurisdictions, whether as part of the same overall international conspiracy, or otherwise. Among other things, denunciation of a crime committed in Canada, and achieving specific and general deterrence, would be undermined by allowing Canadian subsidiaries or individuals associated with those subsidiaries to benefit from sentences that have been imposed abroad. In addition, giving credit to Canadian subsidiaries or individuals in Canada in such circumstances would often make it more difficult to ensure that a sentence is proportionate to the gravity of the offence and to the degree of responsibility of the offender, as contemplated by section 718.1. It may also be more difficult to ensure that a sentence is similar to the sentences imposed on co-offenders, as contemplated by paragraph 718.2(b). This is particularly where the co-offenders are (i) entities that do not have foreign parent companies which have received sentences similar to the entity that has one or more such affiliates, or (ii) individuals associated with such Canadian entities.

VIII. Conclusion

[109] There are several very fundamental problems with an evidentiary record such as the one in this proceeding. Among other things, it does not significantly assist the Court to be satisfied that a fine equivalent to approximately 10 percent of an offender's volume of affected commerce during the Relevant Period would promote respect for the law, assist in achieving a just society, or constitute a "just sanction," having regard to the sentencing objectives listed in section 718 of the *Criminal Code*, the provisions in sections 718.1, 718.2 and 718.21, and the jurisprudence on sentencing. The same observation would apply even if the offender did not benefit from a 50% reduction in the fine that otherwise would have been recommended, to reflect the fact that it was the first party to seek leniency in respect of the illegal conduct.

[110] This is primarily because such an evidentiary record does not provide the Court with any sense, let alone comfort, that a fine determined solely as a percentage of the offender's volume of affected commerce would appropriately denounce the conduct for which it was convicted, achieve general or specific deterrence, be proportionate to the gravity of the offence, or even ensure that crime does not pay. It also does not assist the Court to understand why the relevant aggravating and mitigating factors have been weighted in a manner such as to effectively cancel each other out.

[111] It may be very difficult for the Court to be satisfied that a recommended fine would not be contrary to the public interest and would not bring the administration of justice into disrepute, without at least having a general "ballpark" sense of the illegal gains contemplated by, and ultimately derived from, an agreement prohibited by section 45 or referred to in section 46 of the

Act. The Court cannot even be satisfied that the proposed fine would likely disgorge, in an approximate way, the ill-gotten gains from the conduct prohibited by sections 45 and 46 of the Act, and contemplated by section 718.21 of the *Criminal Code*. In turn, this raises serious questions as to whether the recommended fine would appropriately denounce the prohibited conduct, promote a sense of responsibility in offenders, or represent an acknowledgement of the harm done to victims and the community, as contemplated by paragraphs 718(a) and (f) of the *Criminal Code*.

[112] The parties' submissions in this proceeding also fell short of what is required by the Court to satisfy itself that the jointly recommended sentence met (i) the fundamental purposes of sentencing, as stated in section 718 of the *Criminal Code*, having regard to the various objectives set forth in that provision; (ii) the proportionality principle enshrined in section 718.1; and (iii) the other sentencing principles set forth in section 718.2. In addition, those submissions fell short of what is required by the Court to understand how relevant aggravating and mitigating factors, including those mentioned in section 718.21 and those that have been repeatedly recognized in the jurisprudence with respect to sections 45 and 46, influenced the determination of the jointly recommended sentence, as contemplated by paragraph 718.2(a) (see also *Nasogaluak*, above).

[113] As a consequence of the shortcomings in the evidentiary record and the parties' submissions in this proceeding, I had very serious doubts as to whether acceptance of the jointly recommended sentence would not be both contrary to the public interest and such as to bring the administration of justice into disrepute. However, given that past practice gave rise to understandable expectations that the Court would accept the jointly recommended sentence, I ultimately, and reluctantly, agreed to impose the recommended fine of $1.5 million. Now that these reasons have identified the principal shortcomings associated with such an evidentiary record and such submissions, parties to

jointly recommended sentences can no longer reasonably expect that the Court will conclude that sentences determined in the manner that was adopted in this case would not be contrary to the public interest and would not bring the administration of justice into disrepute.

[114] The shortcomings in the evidentiary record and the parties' submissions cannot be attributed to the Competition Bureau's Leniency Bulletin. In my view, the concerns that I have raised above can be addressed in a manner that is entirely consistent with the letter and the spirit of the Leniency Bulletin. The approach described in that document is sufficiently comprehensive and flexible to permit the Court to satisfy itself that a jointly recommended sentence would not be contrary to the public interest and would not bring the administration of justice into disrepute, having regard to the aforementioned provisions in the *Criminal Code* and the relevant jurisprudence.

[115] I recognize that there are good reasons why, in determining the fine to be recommended in respect of a corporate offender, it may make sense to begin with a base level of 20 percent of that entity's volume of affected commerce in Canada. I also recognize that there are good reasons why entities that voluntarily come forward and meet conditions such as those set forth in the Leniency Bulletin should benefit from a substantial reduction in the fine that otherwise would be recommended. Among other things, the evidence provided by such cooperating entities typically is very helpful in corroborating the evidence provided by the party who has been granted immunity, and in enabling the Crown to prosecute other participants in the impugned agreement. It also typically significantly reduces the time and cost that otherwise would have to be incurred in investigating and prosecuting the other parties to that agreement.

[116] So long as the fine that would otherwise be recommended is supported by sufficient evidence and submissions to enable the Court to be satisfied with respect to the matters described in paragraph 112 above, a practice of reducing such a fine by 50%, or by another specific percentage to reflect the sequence in which the offender sought leniency under the Competition Bureau's Leniency Program, is not inconsistent with the sentencing principles set forth in the Criminal Code and discussed in the jurisprudence. Of course, this implies that the fine that would otherwise be imposed may not always vary directly with the sequence in which a party meets the requirements of the Leniency Program. For example, the relevant aggravating and mitigating factors may well require that the fine that would otherwise be imposed (before adjustment for cooperation) on the first entity to begin cooperating under the Leniency Program be determined by reference to a percentage of that offender's affected volume of commerce which is higher than it is for the second entity to begin cooperating under that program.

[117] However, where the fine that would otherwise be jointly recommended (before adjustment for cooperation) has been determined solely or almost entirely in the arithmetical manner that was followed in these proceedings, it will not be consistent with the letter or spirit of the Leniency Bulletin, the aforementioned provisions in the *Criminal Code* or the manner in which those provisions or concepts have been discussed in the jurisprudence.

[118] With respect to individuals, I recognize that there are good reasons that support a general practice of refraining from recommending charges against the first applicant under the Leniency Program who is a natural person, or against the current directors, officers or employees of the first applicant that is a business organization. Among other things, this may be necessary to obtain critical evidence that corroborates evidence provided by an applicant for immunity. The same

rationale will often apply to former directors, officers or employees of the first applicant that is a business organization, assuming, for example, that they have not subsequently become a director, officer or employee of another party to the illegal conduct.

[119] However, for subsequent individuals who seek leniency, and for current and former directors, officers and employees of subsequent applicants that are business organizations, it will be advisable for the Crown and the offender to explain to the Court why any jointly recommended sentence that does not include a period of imprisonment in a penal institution would not be contrary to the public interest and would not bring the administration of justice into disrepute, having regard to (i) the fundamental purposes of sentencing, as stated in section 718 of the *Criminal Code*, and the various objectives set forth in that provision; (ii) the proportionality principle enshrined in section 718.1; (iii) the other sentencing principles set forth in section 718.2, and (iv) the recent amendments to section 45 of the Act, which increased the maximum term of imprisonment from five years to fourteen years.

[120] It will also be incumbent upon the Crown and the offender to provide the Court with any available evidence that may help to satisfy the Court that the recommended fine will disgorge any financial gain that the individual may have received as a result of the illegal conduct, for example by way of compensation linked to the performance of the business in question.

"Paul S. Crampton"
Chief Justice

Ottawa, Ontario
September 24, 2012

Appendix "A" – Relevant Legislation

Competition Act, R.S.C., 1985, c. C-34

During the Relevant Period, the relevant provisions in section 45, as well as the text of section 46, stated as follows:

Conspiracy	**Complot**
45. (1) Everyone who conspires, combines, agrees or arranges with another person	45. (1) Quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :
…	…
(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property,	(c) soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture d'un produit, ou dans le prix d'assurances sur les personnes ou les biens;
…	…
is guilty of an indictable offense and liable to imprisonment for a term not exceeding five years or to a fine not exceeding $10 million or to both.	commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines.
…	…
Foreign directives	**Directives étrangères**
46. (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered	46. (1) Toute personne morale, où qu'elle ait été constituée, qui exploite une entreprise au Canada et qui applique, en totalité ou en partie au Canada, une directive ou instruction ou un énoncé de politique ou autre communication à la personne morale ou à quelque autre personne, provenant d'une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d'influencer les principes suivis par la personne morale, lorsque la communication a pour objet de donner effet à un

into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.

complot, une association d'intérêts, un accord ou un arrangement intervenu à l'étranger qui, s'il était intervenu au Canada, aurait constitué une infraction visée à l'article 45, commet, qu'un administrateur ou dirigeant de la personne morale au Canada soit ou non au courant du complot, de l'association d'intérêts, de l'accord ou de l'arrangement, un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal.

Limitation

(2) No proceedings may be commenced under this section against a particular company where an application has been made by the Commissioner under section 83 for an order against that company or any other person based on the same or substantially the same facts as would be alleged in proceedings under this section.

Restriction

(2) Aucune poursuite ne peut être intentée en vertu du présent article contre une personne morale déterminée lorsque le commissaire a demandé en vertu de l'article 83 de rendre une ordonnance contre cette personne morale ou toute autre personne et que cette demande est fondée sur les mêmes faits ou sensiblement les mêmes faits que ceux qui seraient exposés dans les poursuites intentées en vertu du présent article.

***Criminal Code, R.S.C. 1985, c.C-46*:**

Purpose

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

Objectif

718. Le prononcé des peines a pour objectif essentiel de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants :

(a) to denounce unlawful conduct;

(a) dénoncer le comportement illégal;

(b) to deter the offender and other persons from committing offences;

(b) dissuader les délinquants, et quiconque, de commettre des

infractions;

(c) to separate offenders from society, where necessary;

(c) isoler, au besoin, les délinquants du reste de la société;

(d) to assist in rehabilitating offenders;

(d) favoriser la réinsertion sociale des délinquants;

(e) to provide reparations for harm done to victims or to the community; and

(e) assurer la réparation des torts causés aux victimes ou à la collectivité;

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

(f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

Objectives — offences against children

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

Objectif — infraction perpétrée à l'égard des enfants

718.01 Le tribunal qui impose une peine pour une infraction qui constitue un mauvais traitement à l'égard d'une personne âgée de moins de dix-huit ans accorde une attention particulière aux objectifs de dénonciation et de dissuasion d'un tel comportement.

Objectives — offence against peace officer or other justice system participant

718.02 When a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(b), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

Objectifs — infraction à l'égard d'un agent de la paix ou autre personne associée au système judiciaire

718.02 Le tribunal qui impose une peine pour l'une des infractions prévues au paragraphe 270(1), aux articles 270.01 ou 270.02 ou à l'alinéa 423.1(1)b) accorde une attention particulière aux objectifs de dénonciation et de dissuasion de l'agissement à l'origine de l'infraction

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Principe fundamental

718.1 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence

Principes de détermination de la peine

718.2 Le tribunal détermine la peine à infliger compte tenu également des principes suivants :

(a) la peine devrait être adaptée aux circonstances aggravantes ou atténuantes liées à la perpétration de l'infraction ou à la situation du délinquant; sont notamment considérées comme des circonstances aggravantes des éléments de preuve établissant :

(i) que l'infraction est motivée par des préjugés ou de la haine fondés sur des facteurs tels que la race, l'origine nationale ou ethnique, la langue, la couleur, la religion, le sexe, l'âge, la déficience mentale ou physique ou l'orientation sexuelle,

(ii) que l'infraction perpétrée par le délinquant constitue un mauvais traitement de son époux ou conjoint de fait,

(ii.1) que l'infraction perpétrée par le délinquant constitue un mauvais traitement à l'égard d'une personne âgée de moins de dix-huit ans,

(iii) que l'infraction perpétrée par le délinquant constitue un abus de la confiance de la victime ou un abus d'autorité à son égard,

(iv) que l'infraction a été commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle;

(v) que l'infraction perpétrée

was a terrorism offence shall be deemed to be aggravating circumstances;

par le délinquant est une infraction de terrorisme;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(b) l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à des délinquants pour des infractions semblables commises dans des circonstances semblables;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(c) l'obligation d'éviter l'excès de nature ou de durée dans l'infliction de peines consécutives;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(d) l'obligation, avant d'envisager la privation de liberté, d'examiner la possibilité de sanctions moins contraignantes lorsque les circonstances le justifient;

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

(e) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.

Additional factors

718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

Facteurs à prendre en compte

718.21 Le tribunal détermine la peine à infliger à toute organisation en tenant compte également des facteurs suivants :

(a) any advantage realized by the organization as a result of the offence;

(a) les avantages tirés par l'organisation du fait de la perpétration de l'infraction;

(b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;

(b) le degré de complexité des préparatifs reliés à l'infraction et de l'infraction elle-même et la période au cours de laquelle elle a été commise;

(c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;

(c) le fait que l'organisation a tenté de dissimuler des éléments d'actif, ou d'en convertir, afin de se montrer incapable de payer une amende ou d'effectuer une

restitution;

(d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;

(d) l'effet qu'aurait la peine sur la viabilité économique de l'organisation et le maintien en poste de ses employés;

(e) the cost to public authorities of the investigation and prosecution of the offence;

(e) les frais supportés par les administrations publiques dans le cadre des enquêtes et des poursuites relatives à l'infraction;

(f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;

(f) l'imposition de pénalités à l'organisation ou à ses agents à l'égard des agissements à l'origine de l'infraction;

(g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;

(g) les déclarations de culpabilité ou pénalités dont l'organisation — ou tel de ses agents qui a participé à la perpétration de l'infraction — a fait l'objet pour des agissements similaires;

(h) any penalty imposed by the organization on a representative for their role in the commission of the offence;

(h) l'imposition par l'organisation de pénalités à ses agents pour leur rôle dans la perpétration de l'infraction;

(i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and

(i) toute restitution ou indemnisation imposée à l'organisation ou effectuée par elle au profit de la victime;

(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

(j) l'adoption par l'organisation de mesures en vue de réduire la probabilité qu'elle commette d'autres infractions.

Federal Court  Cour fédérale

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