Conspiracy and Competitor Collaboration

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This practice note reviews the elements of conspiracy under the Canadian *Competition Act*, R.S.C. 1985, c. C-34, including the concepts of cartels, horizontal agreements and conscious parallelism. Some comparisons to competition law in the United States are noted. The practice note also discusses collaboration activity between competitors subject to criminal prosecution and/or civil review under various provisions of the *Competition Act*. It explores criminal offences under the cartel provisions of the *Competition Act* where competitors agree with each other to ***fix prices***, restrict output or allocate markets. Finally, the practice note also looks at bid-rigging offenses where there is a coordination of submitted bids or the withholding of one or more bids.

For a discussion of the elements that comprise abuse of dominance under the *Competition Act* provisions, including the concepts of substantial or complete control, anti-competitive acts, market competition, remedies and private party access, see Abuse of Dominance and Distribution and Pricing Strategies and Abuse of Dominance. For a full discussion of Canadian Competition Law including a discussion of anti-competitive reviewable practices, see Canadian Competition Law. For a discussion of *Competition Act* enforcement, including Immunity and Leniency Programs and Compliance Programs, see Competition Act Enforcement.

Conspiracy

The law of conspiracy lies firmly at the heart of antitrust. As the Supreme Court of Canada has noted, the conspiracy provision is the oldest in Canada's federal *Competition Act*, and remains at the core of the Act's criminal provisions (see *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67 at para. 83 (S.C.C.) ("*Nova Scotia Pharmaceutical*")). Condemning conspiracy between competitors is one of the pillars of the antitrust ideal. This is equally true of conspiracy law under the *Sherman Act* (15 U.S.C. §§ 1–7) in the United States. It should come as no surprise that certain forms of collusion between competitors would be antithetical to the principles of free and open competition: "[c]oncerted activity inherently is fraught with anti-competitive risk. It deprives the marketplace of the independent centers of decision-making that competition assumes and demands" (see *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 at 768-769 (1984)). Conspiracies are increasingly international in scope, resulting in enhanced cooperation amongst domestic enforcement agencies in the investigation of global cartels.

The term "conspiracy" typically refers to an agreement between competitors to undertake some activity prohibited by competition law. In the United States, the idea of this agreement between competitors is sometimes expressed as "concerted action". The illicit confederation formed through this agreement is referred to as a "cartel", or in the earlier parlance of competition law, "combine" or "trust". It is important to note that the crime is in the conspiracy itself. In fact, the agreement need not be carried out, and there is no necessity to prove the carrying out of the agreement to prove the crime (see *R. v. O'Brien*, [1954] S.C.J. No. 44 (S.C.C.)).

An agreement to undertake the prohibited act is the essential element of the offence of conspiracy: "[t]o conspire is to agree. The essence of criminal conspiracy is proof of the agreement. On a charge of conspiracy the agreement itself is the gist of the offence…" (see *R. v. Papalia*, [1979] S.C.J. No. 47 (S.C.C.)).

The classic example of conspiracy is ***price fixing***, a horizontal (*i.e.*, between competitors) agreement to set the price at which they offer goods or services. Other examples of conspiracies are agreements regarding output

restrictions, bid-rigging, group boycotts and market allocation (although ‘group boycotts' now seen as conduct under the amended *per se* offence under s. 45 may not be an enforcement priority). These are known as the "hardcore" activities, and conspiracies sometimes involve more than one of these activities. Note, however, that a conspiracy can take many forms and is limited only by ingenuity, a fact reflected in the open wording of conspiracy offences. Moreover, because of the obvious desire to evade detection, agreements are rarely made in writing. Agreements are more likely to be tacit, raising difficult issues regarding when such agreements can be proven.

Conspiracy is prohibited in s. 45 of the *Competition Act*. Conspiracy legislation has, from its origins, occupied a prominent role in competition law. It has remained a criminal offence drawing sanctions normally reserved for morally reprehensible conduct. From June 23, 2023 onwards, the penalty for persons convicted under s. 45 will be imprisonment for a term not exceeding 14 years or a fine in the discretion of the court, or both. Until then, the fine for criminal conspiracy remains capped at $25 million.

Likewise, though the Constitution played an important role in the development of Canadian competition law, it would not be entirely correct to assume that conspiracy retains its criminal nature solely as an artifact of Parliament's jurisdictional insecurity regarding the extent of its ability to legislate outside the criminal sphere. Rather, the serious treatment of conspiracy law and its present-day status as a serious criminal offence reflect strong underlying public and economic policies.

It is widely acknowledged that competition legislation is, in general, economic legislation. For instance, the Act, of which conspiracy is one of the core principles, has been described as a "central and established feature of Canadian economic policy" (*Nova Scotia Pharmaceutical*). The conspiracy provision, and the *Competition Act* as a whole, concerns the proper functioning of the economy. The *Competition Act* presumes competition to be in the public interest and "proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public" (see *R. v. Howard Smith Paper Mills Ltd.*, [1957] S.C.J. No. 24 (S.C.C.)). Not surprisingly then, the primary rationale for condemning conspiracy is economic. The underlying principle is that consumers are entitled to the benefits of free competition.

Horizontal Agreements and Conscious Parallelism

There are several economic theories explaining how horizontal agreements can undermine the benefits of competition. Traditional collusion theory explains that, by colluding, firms enhance their collective market power, thereby permitting prices to be raised above marginal costs in the same manner that a single firm monopolist would. Effectively, the firms act as a joint monopolist.

Economic analysis also reveals one of the important tensions in conspiracy law: drawing the line between punishable conspiracy and "conscious parallelism". Conscious parallelism is a phenomenon whereby competitors arrive at similar decisions regarding the optimal competitive strategy to pursue, without reaching an illegal "agreement" as defined in antitrust law. Consciously parallel behaviour can occur under certain oligopoly market conditions — particularly where the product is homogenous or standardized — as a result of economically rational and arguably legitimate firm behaviour. Firms select strategies independently, and yet interdependently, in anticipation of their rivals' response.

Mere conscious parallelism is not an antitrust offence (*R. v. Canada Cement Lafarge Ltd.*, [1973] O.J. No. 800 (Prov. Ct.)).

The difficulty posed by consciously parallel behaviour is that it can have the same effect as conspiracy without the parties actually conspiring. In some cases, conscious parallelism can yield supra-competitive pricing, which is undesirable but lies beyond the reach of antitrust law because it lacks an "agreement". In its Competitor Collaboration Guidelines (May 6, 2021), the Bureau takes the position that where parallel conduct is coupled with facilitating practices, such as sharing competitively sensitive information or activities that assist competitors in monitoring one another's practices, it may be sufficient to infer that an agreement was concluded between the parties. Most recently, the Federal Court of Canada in *Jensen v. Samsung Electronics Co. Ltd.*, [2021] F.C.J. No.

1847, held that evidence of conscious parallelism does not amount to illegal conduct in the absence of an agreement.

Although the economic justifications for conspiracy law are strong, there has always been motivation to condemn conspiracy, especially those of the "hardcore" covert variety, on the sentiment that conspiracies are also morally reprehensible. This sentiment is rooted in the idea that conspiracy is a fraud on the public, and it stirs an especially strong sense of indignation (see *Canada v. Maxzone Auto Parts (Canada) Corp.*, [2012] F.C.J. No. 1206 (F.C.)). As well, the need to find moral culpability in order to criminally condemn conspiracies is also consistent with the general jurisprudence on criminal and regulatory offences, which makes it clear that a minimum element of fault must exist before punishment can be justified (see *R. v. Vaillancourt*, [1987] S.C.J. No. 83 (S.C.C.)).

Competitor Collaboration: Cartels and Bid-Rigging

Collaboration activity between competitors is subject to criminal prosecution and/or civil review under various provisions of the *Competition Act*. Competitors that agree with each other to ***fix prices***, restrict output or allocate markets commit a criminal offence under the cartel provision (*Competition Act*, s. 45). Showing market power is not required for a conviction.

Being a party to a bid-rigging agreement for the coordination of submitted bids or the withholding of one or more bids is a criminal offence under the bid-rigging provision (s. 47) of the *Competition Act*. Conspiracies relating to professional sport and between federal financial institutions are also criminalized under ss. 48 and 49 of the *Competition Act*.

Proof of market power is not required under the bid-rigging and financial institution provisions, and the professional sport provision has its own test based on reasonableness in light of several factors including the desirability of maintaining a reasonable balance among participating clubs.

The purpose of the cartel provision is to prohibit cartel activity that ***fixes prices***, limits output or allocates markets. Competitive injury is presumed as a matter of law insofar as there is no requirement to prove that the parties have market power. At their core, cartel and bid-rigging activities are considered to be the most egregious forms of anti-competitive conduct which harm society by restricting output below optimal levels and increasing prices to supra-competitive levels, generally without off-setting pro-competitive benefits.

In some cases, however, it is recognized that agreements between competitors can have significant pro-competitive benefits that greatly outweigh any anti-competitive effects. For example, research and development and joint production agreements can often lead to pro-competitive benefits such as increased innovation that would not otherwise occur and scale economies that could not otherwise be obtained. Although the cartel provision does not include an efficiencies defence, in practice this deficiency has not had a chilling effect on clearly pro-competitive activities that may also involve restrictions on competition. Although the civil provision in s. 90.1 has an efficiencies defence, it is not available in a prosecution under the criminal provision in s. 45.

The current cartel provision, which came into force on March 12, 2010, significantly altered the former cartel provision. Along with the amendments to the cartel provisions, numerous other amendments were made to the *Competition Act*. These amendments include an amendment to s. 47, criminalizing agreements to withdraw a submitted bid.

The Competition Bureau Canada ("Bureau") notes that there are four common types of agreements that result in a pre-selected supplier winning the contract:

1. Cover bidding gives the impression of competitive bidding, but, in reality, suppliers agree to submit token bids that are usually too high.
2. Bid suppression is an agreement among suppliers to either abstain from or to withdraw bids.
3. Bid rotation is a process whereby the preselected supplier submits the lower bid on a systematic or rotating basis.

4 Market division is an agreement among supplier not to compete in designated geographic regions or for specific customers.

Parties drafting tender specifications should consider the best practices listed on the Bureau website, including asking bidders to submit a Certificate of Independent Bid Determination which requires disclosure of all material facts about any communications and arrangement with other bidders.

The Bureau has established an immunity program that, provided certain requirements are met, is available to persons who have participated in cartel or bid-rigging activity (see Immunity and Leniency Programs under the Competition Act (March 15, 2019)).

The Immunity and Leniency Programs (the "Programs") had been very successful, resulting in the criminal prosecution of a number of persons. Significant changes were introduced to the structure of the Programs in 2018 that have seen decreased participation in the Programs. For example, in 2019-2020, four immunity markers were granted by the Cartels and Deceptive Marketing Practices Branch. In the same period, no leniency markers were granted by the Cartels Directorate.

Bid-Rigging Provision

Bid-rigging is defined as an agreement or arrangement between at least two unaffiliated persons whereby, as a result of such agreement or arrangement, one or more of the parties agrees

- not to submit a bid or tender in response to a call or request for bids or tenders;
- to submit coordinated bids or tenders in response to a call for bids or tenders; or
- to withdraw a bid or tender submitted in response to a call or request for bids or tenders.

Bid coordination, as described above, is not bid-rigging under s. 47 (but may still be criminal conduct under the cartel provision) if the agreement or arrangement is made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted by any person who is a party to the agreement or arrangement.

Bid-rigging is *per se* illegal; an anti-competitive effect is presumed from the nature of the behaviour in which there has been a process designed to solicit competitive bids.

Bill C-10 amended the bid-rigging provision to criminalize the coordinated withdrawal of a bid or tender that was previously submitted in response to a call or request for bids or tenders. As with bid coordination, a withdrawal of a bid is not illegal under the amended bid-rigging section (but may still be criminal conduct under the cartel provision) if the agreement or arrangement to withdraw a bid is made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is withdrawn by any person who is a party to the agreement or arrangement.

The penalty for persons convicted of bid-rigging is a fine in an amount to be determined by the court (there is no limit on the size of the fine) and/or imprisonment for up to 14 years.

The amended bid-rigging provisions provide an exception for airline joint ventures that are authorized by the Minister of Transport under s. 53.73(8) of the *Canada Transportation Act*, S.C. 1996, c. 10.

A "Call or Request for Bids or Tenders"

There have been some developments of what is required to show that there has been a call or request for bids or tenders within the meaning of the bid-rigging law. In *R. v. Dowdall*, [2013] O.J. No. 1456, leave to appeal refused [2013] S.C.C.A. No. 244 (*"Dowdall"*), the Ontario Court of Appeal upheld the dismissal of an application for an order of *certiorari* of a decision at a preliminary inquiry committing the appellants to trial for alleged bid-rigging (and

conspiracy to commit bid-rigging). The preliminary inquiry judge determined that there was sufficient evidence to found a conclusion at trial that requests for proposal issued by the Federal Government amounted to calls or requests for bids or tenders. The Court of Appeal found that the resolution of this question turned on whether the parties intended to create a binding contract with respect to the procurement process (as distinct from a binding contract for the procurement of goods or services that were the subject of the call or request for bids or tenders). If this did not occur, then the procurement process would fall within the prohibition on bid-rigging (but could still be contrary to the cartel law).

In *R. v. Nasher*, February 1, 2013, the Court of Quebec discharged the accused at a preliminary inquiry, finding that the procurement process in question did not amount to a call or request for bids or tenders. It appears that the basis for this decision was that the entity running the procurement process reserved the right to not accept any bid. The Court appears to have focused on the point of whether a procurement contract would have formed at the end of the process, rather than the point of whether a contract regarding the procurement process would have formed as was discussed by the Ontario Court of Appeal in *Dowdall*.

In *R v. Rousseau*, [2018] J.Q. no 1413 (S.C.), the court held that the offence of bid-rigging does not apply to all invitations to submit bids, but to a bid rigging process that has the essential attributes of a more formal call or request for bids or tenders. A formal process includes:

- the existence of a direct link between the tender and bidders;
- a sufficiently defined project;
- the commitment of the "tenderer" to treat bidders fairly; and
- the expectation that tender call triggers a contractual relationship between compliant bidders and the tenderer.

In the jury instructions in *R v. Duward*, [2014] O.J. No. 3844 (S.C.J.), in jury instructions, the presiding judge held that the "made known" defence could be satisfied by either express or implied notification. Older case law required explicit notice to the caller of bids.

Bid-Rigging Enforcement Activity

The Commissioner aggressively enforces the bid-rigging provision. Recent enforcement actions include the following:

- An Investigation into a bid-ridding scheme in the Greater Toronto Area condominium refurbishment market

    o In March 2021, multiple criminal charges were laid against three companies and their respective owners (TRI-CAN Contract Inc., JCO & Associates, LAR Condominium Refurbishment Specialists) in connection with an alleged conspiracy to commit fraud and rig bids for condominium refurbishment services in the Greater Toronto Area. All three of the business were charged with conspiracy to rig bids, conspiracy to commit fraud, and fraud over $5000 under the *Criminal Code*. A fourth company, CPL Interiors Ltd., was charged under the conspiracy provision in the *Competition Act* for its role in the scheme. See Competition Bureau: Multiple Companies and their owners charged with conspiracy to commit fraud and rig bids for condo refurbishment contracts in the GTA.

    o In January 2022, the Bureau announced that CPL Interiors Ltd. was fined $761,967 after pleading guilty for its role in the bid-rigging scheme. The company admitted to conspiring with several competing businesses to allocate customers and fix bid prices on 31 refurbishment contracts issued by private condominium corporations between 2009 and 2014 with a total value of over $19 million. The company was shown leniency in sentencing for its full cooperation in the investigation and agreement to testify in any resulting prosecutions. See Competition Bureau: CPL Interiors fined $761,967 after pleading guilty in GTA condo refurbishment bid-rigging scheme.

- In June 2020, the Bureau announced its fifth settlement resulting from its investigations into bid-rigging on municipal infrastructure contracts in Montreal and North Shore municipalities between 2002 and 2012 (see Competition Bureau: "Génius Conseil Inc. to Pay $300,000 in Fifth Québec Bid-Rigging Settlement" (June 19, 2020)). Five engineering firms (Génius Conseil Inc., Genivar, Dessau, Roche ltée, SNC-Lavalin) have been ordered so far to pay a total of $8,850,000 in fines, and criminal charges were laid against former executives of the firms as well (see Competition Bureau: Criminal charges laid against four individuals for bid-rigging in the engineering industry). The Bureau's investigations resulted in guilty pleas by the four former executives of engineering firms Cima+, Genivar and Dessau for bid-rigging. They received conditional prison sentences totaling 5 years and 11 months, and court-ordered community service totaling 260 hours.
- In January 2014, criminal charges were laid against one company and one individual for their role in an agreement to rig bids for contracts involving road construction, water treatment and other infrastructure projects in the Saint-Jean-sur-Richelieu region of Quebec between January 2008 and December 2009 (see Competition Bureau: "Competition Bureau Lays Criminal Charges Related to Infrastructure Projects in Quebec" (January 27, 2014)).
- An extensive investigation into the Japanese auto parts industry:
    - From April 2013 to October 2018, the Bureau's auto parts bid-rigging investigation resulted in 13 guilty pleas and more than $86 million in fines, including several of the largest bid-rigging fines ever imposed by the Courts in Canada: $30 million against Yazaki Corporation and $13.4 million against Mitsubishi Electric Corporation (see Competition Bureau: "Overview of the Auto Parts Bid Rigging Investigation"). The investigation related to a series of international conspiracies and bid-rigging agreements among various auto parts suppliers.
    - In total, the Bureau's motor vehicle component investigation has resulted in seven guilty pleas and over $86 million in fines (see Competition Bureau: "Thirteenth Guilty Plea Concludes Auto Parts Bid-Rigging Investigations With Fines Totalling Over $86 Million" (October 19, 2018)). The Commissioner has noted that the Bureau's investigation "benefitted from coordination with a number of other jurisdictions, including the United States, Japan, the European Union and Australia" (see Competition Bureau: "Remarks by John Pecman, Commissioner of Competition" (November 14, 2013)).
- Criminal charges were laid between 2010 and 2012 against six companies and five individuals accused of rigging bids for 37 municipal and provincial sewer services contracts worth over $3 million in the Greater Montreal area (see Competition Bureau: "Competition Bureau Exposes Sewer Services Cartel in Quebec" (November 22, 2011)). As of November 2017, all six companies had pleaded guilty and were collectively fined $353,000. In connection with one of the guilty pleas, the firm's director was ordered to perform 100 hours of community service subject to a 2-year probation period (see Competition Bureau: "Seventh Guilty Plea Concludes the Competition Bureau's Quebec Sewer Services Cartel Case" (November 29, 2017)).
- Criminal charges were laid in December 2010 against eight companies and five individuals accused of coordinating bids for ventilation contracts in residential high-rise buildings in the Montreal area (see Competition Bureau: "Charges Laid in Residential Construction Bid-Rigging Scheme in Montreal" (December 21, 2010)). In July 2011, one company pleaded guilty and was fined $425,000. Bid-rigging charges against the company's estimator were stayed in exchange for the estimator's full cooperation with the prosecution of the remaining accused (see Competition Bureau: "Guilty Plea and $425,000 Fine for Bid-Rigging in Montreal" (July 19, 2011)).
- Three Quebec construction companies and their presidents were charged in November 2008 with rigging bids that were submitted for the expansion and refitting of the emergency room of a hospital and finishing work at a smelter (see Competition Bureau: "Quebec Construction Companies Charged with Bid-Rigging Following Competition Bureau Investigation" (November 10, 2008)). All three companies pleaded guilty; one was fined $50,000, and the other two were fined $25,000 each (see Competition Bureau "Quebec Construction Companies Plead Guilty to Rigging Bids for the Chicoutimi Hospital" (February 17, 2012)).

- A company pleaded guilty to bid-rigging for Government of Canada contracts for real estate advisory services and was fined $125,000 (see Competition Bureau: "Company Pleads Guilty to Bid-rigging of Federal Government Contracts" (July 30, 2012)).
- A company pleaded guilty in January 2010 after charges were laid in October 2006 with respect to the rigging of bids for a contract to provide traffic signals to Quebec City. The company was subject to a fine of $50,000 and was required to implement a corporate compliance program (see Competition Bureau: "Company Pleads Guilty to Bid-Rigging in Quebec City" (January 26, 2010)). The other company that was charged in relation to the same alleged bid-rigging conspiracy was subsequently acquitted by the Quebec Superior Court (see *R. c. Électromega ltée*, [2010] J.Q. no 5049 (S.C.)).
- A Court order was obtained by the Commissioner in June 2009 compelling the Saskatchewan Roofing Contractors Association to advise the Commissioner immediately if it becomes aware of any unauthorized pricing activity. There was no admission of liability or guilt (see Competition Bureau: "Competition Bureau Obtains Court Order Against the Saskatchewan Roofing Contractors Association" (June 22, 2009)).
- A prohibition order requiring compliance with bid-rigging and cartel law was obtained by the Commissioner in April 2008 against two bio-insecticide and insect control firms, primarily with respect to activities in Quebec. There was no admission of liability or guilt (see Competition Bureau: "Competition Bureau Obtains Prohibition Order Against Two Bio-insecticide and Insect Control Service Companies" (April 4, 2008)).

The Bureau has not always been successful in its enforcement of the bid-rigging provisions:

- In 2015, the Bureau lost a major case relating to alleged bid-rigging in relation to Government of Canada contracts for information technology services. Seven companies and 15 individuals were charged in February 2009, in relation to 10 Government of Canada contracts for information technology services with a total value of $67 million (see Competition Bureau: "Competition Bureau Announces Charges Against Companies Accused of Rigging Bids for Government of Canada Contracts" (February 17, 2009)).

  As of May 2010, two individuals had pleaded guilty: the first was given an absolute discharge under the Bureau's immunity program, while the second was fined $25,000 (see Competition Bureau, "Individual Pleads Guilty to Rigging Bids for a Government of Canada Contract" (June 9, 2009)).
- In May 2014, further criminal charges were laid against one company and six individuals for their alleged roles in a bid-rigging conspiracy providing IT services to the Library and Archives Canada worth $3.5 million (see Competition Bureau: "Criminal Charges Laid Against a Company and Six Individuals Involved in Bid-rigging Scheme" (May 2, 2014)). However, in April 2015, after a nearly 7-year investigation and 7-month trial, a jury in the Ontario Superior Court of Justice found nine defendants not guilty on 60 charges of bid-rigging and conspiracy to rig bids (see *R. v. TPG Technology et al.* (April 27, 2015), unreported).
- Another individual — David Watts, who waived his right to a preliminary inquiry, and sought an order directing a verdict of acquittal for himself only — was acquitted in February 2015 of similar charges in a directed verdict (see *R. v. Durward*, [2015] O.J. No. 2144 (S.C.J.)).

  The Crown has stayed conspiracy and bid-rigging charges against the remaining individual defendants. The case represents a significant loss for the Bureau and drew criticism of the DPP's assessment and use of evidence in criminal proceedings (see, for example, Ottawa Citizen: "Lost Decade: A Mega-Trial Over Alleged Bid-Rigging Should Never Have Happened" (May 1, 2015)).

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