

Unclassified

DAF/COMP/GF/WD(2015)15

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

21-Oct-2015

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

SERIAL OFFENDERS: WHY SOME INDUSTRIES SEEM PRONE TO ENDEMIC COLLUSION

Contribution from Canada

-- Session IV --

This contribution is submitted by Canada under Session IV of the Global Forum on Competition to be held on 29-30 October 2015.

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JT03384615

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**SERIAL OFFENDERS: WHY SOME INDUSTRIES SEEM PRONE TO
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-- Canada --

1. Introduction

1. Canada's Competition Bureau (the "Bureau") is pleased to provide this submission to the OECD Competition Committee's October 2015 roundtable on "Serial offenders: a discussion on why some industries seem prone to endemic collusion". The Bureau, headed by the Commissioner of Competition, is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* (the "Act")¹ and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers prosper in a competitive and innovative marketplace.

2. Over the last 20 years, the Bureau has investigated more instances of alleged collusion in the Canadian construction industry than in any other industry in Canada. For example, between 2010 and 2014, 25% of the Bureau's cartel investigations related to the construction industry. Similarly, between 2010 and 2014, 16% of all criminal cartel fines imposed in Canada involved offences related to the construction industry. In most instances, these investigations and offences involved bid-rigging arrangements.

3. This is significant because the construction industry is a critical sector in the Canadian economy, accounting for 6.0% of Canada's gross domestic product ("GDP") and contributing \$76.5 billion² to the Canadian economy in 2011 alone. The construction industry grew by 4.2% between 2010 and 2011, greater than Canada's overall GDP growth of 2.6%.³

4. This submission discusses the market characteristics that are conducive to repeated collusion. Several examples of cases in the construction industry in which these characteristics were present and facilitated collusive behaviour are summarized. This submission then provides an overview of the ways in

¹ R.S.C. 1985, c. C-34.

² All dollar values are expressed in Canadian dollars.

³ See <http://www.statcan.gc.ca/pub/11-402-x/2012000/chap/construction/construction-eng.htm>.

which different levels of government in Canada have reacted to this type of criminal behaviour, including a sector-wide public inquiry in the Province of Quebec; legislative amendments to the Act; and new policy regimes aimed at tightening procurement rules. Lastly, this submission provides an overview of the Bureau's education and prevention initiatives, many of which are aimed specifically at participants in the construction industry.

2. Factors likely to lead to repeated collusion

5. The Bureau has identified a number of market characteristics which increase the likelihood of bid-rigging or other anti-competitive agreements between competitors and are present in industries prone to cartel activity, such as the construction industry. These include the following:

- a) **Homogeneity:** When products or services are simple or straightforward, and not subject to rapid technological advances or change, there is a greater risk of collusion. It is more difficult to maintain an agreement if the product is rapidly evolving and where there are features other than price upon which to compete.
- b) **Repetitive bidding:** When bidding is frequent and involves very similar products or commodities, it can facilitate the formation of an agreement between competitors.
- c) **Few or no close substitutes:** When there are few, if any, good alternative products or services that can be substituted for the product or service that is being purchased, individuals or firms wishing to rig bids or engage in other collusive conduct are more secure knowing that the purchaser has few, if any, good alternatives and thus their efforts to raise prices are more likely to be successful.
- d) **Few players:** A small number of suppliers in a localised area can also facilitate collusion. It also makes it easier to detect if someone is cheating on the agreement. A limited number of customers can also make it desirable to collude in order to carve up the market.
- e) **Inelastic demand:** Markets where the supply and demand for a good or service is unaffected if its price changes tend to also present optimal conditions for collusive behaviour.
- f) **Subcontracting:** Complex subcontracting relationships also make it difficult to detect collusive behaviour.
- g) **Trade or industry associations:** Association meetings provide a legitimate reason for competitors to get together. These meetings may be formal or informal and can lead to closer ties between industry participants and facilitate anti-competitive agreements. Well organized industry associations can work to facilitate legitimate discussions within an industry; however, such communications can ultimately lead to the establishment of collusive behaviour.⁴
- h) **Procurement policies:** Certain types of public procurement policies may have the effect of facilitating collusive behaviour. For example, rules or information relating to the frequency of contracts may enable market participants to allocate such contracts on a rotating basis.

⁴ See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03691.html>.

- i) **Input products or services:** Collusion may be more likely when the product or service is sold as an input into another product that is then re-sold to consumers. In this case, the buyer of the product or service at the inflated price may have less concern because most or all of the added cost may be passed on to consumers. Cost pass through is more likely if all firms who are buyers are impacted by the conspiracy. If one firm is not, it may present a sufficient competitive restraint on the others so that they may not be able to pass on the higher costs.
- j) **Information asymmetry:** Information asymmetry between the buyer and the seller in terms of what the “normal” costs for the supply of a product or service are is another factor that may foster collusion.

3. Overview of cartel cases in the Canadian construction industry

6. The Bureau has pursued a number of cases in specific sectors of the construction industry which include, but are not limited to:

- a) **Water services (2015):** This matter relates to an investigation into an alleged bid-rigging conspiracy to obtain contracts for the supply of water services to municipalities in the Province of Quebec (contracts between 2005 and 2011). Criminal charges were laid in 2015 against three companies and four individuals relating to municipal contracts. To date, one company has pled guilty to nine counts of bid-rigging and was fined \$117,000 for its role in the alleged bid-rigging.⁵
- b) **Infrastructure (2012-2014):** A partnership between the Bureau and Quebec’s *Unité permanente anticorruption* (“UPAC”) led to an investigation into an alleged bid-rigging conspiracy related to municipal infrastructure projects in the Province of Quebec (near Montreal). The projects were valued at over \$21 million. Between 2012 and 2014, 79 criminal charges were laid against 10 companies and 12 individuals for their participation in the alleged conspiracy.⁶
- c) **Sewers (2009-2011):** An investigation into an alleged bid-rigging conspiracy to obtain contracts for municipal sewage services in the Greater Montreal region commenced in 2009. Criminal charges were laid in 2011 against six companies and five individuals for alleged bid-rigging offences relating to 37 calls for tenders for municipal and provincial sewage services totalling over \$3 million. To date, three companies and one individual have pled guilty, resulting in fines totalling \$140,000 and two years of probation.⁷
- d) **Hospital renovations (2007-2012):** The Bureau investigated an alleged bid-rigging scheme relating to the renovation and expansion of the emergency room in a hospital in Chicoutimi,

⁵ See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01863.html>.

⁶ See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03473.html>;
<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03645.html>; and
<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03857.html>.

⁷ See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03429.html>.

Quebec, which began in 2007. Three parties pleaded guilty to bid-rigging for reaching an agreement to determine beforehand who would win the contract. In 2012, the parties were fined a total of \$100,000.⁸

- e) **Ventilation (2004-ongoing):** In 2004, the Bureau commenced an investigation into an alleged bid-rigging conspiracy related to residential construction projects for ventilation services in the Montreal area, in the Province of Quebec. Criminal charges were laid against eight companies and five individuals. To date, one company has pled guilty to three charges of bid-rigging and was fined \$425,000 for its participation in the cartel.⁹
- f) **Oil rig contract (1999-2001):** In 1999, a Bureau investigation led to the determination that bid-rigging had occurred when a tender was issued for the supply and installation of a system to reinforce the concrete base of an oil rig off the Atlantic coast. The scheme was conceived in Europe and implemented in Canada. In 2001, a guilty plea was entered and a fine of \$800,000 was paid.
- g) **Electrical (1993):** Four Toronto-based electrical contractors were fined a total of \$2.55 million after admitting to a bid-rigging scheme that led to 19 breaches of the Act from 1988 to 1993.

4. Commission of Inquiry in the Province of Quebec

7. Collusive behaviour in the construction industry in the Province of Quebec has been particularly prevalent. In this regard, out of the 654 immunity and leniency applications received by the Bureau across all industries between 1996 and 2014, 123 were related to alleged offences in the construction industry in Quebec alone, with the majority of the applications being made within the last 5 years. Similarly, over this same time period, bid-rigging investigations into the construction industry in Quebec have resulted in fines of over \$12 million as well as 12 months confinement and 200 hours of community service for individuals. The significant media attention generated by allegations of corruption and collusion in Quebec has increased public awareness about the Bureau's mandate and the offence of bid-rigging.

8. It is in this context that a Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry, also known as the Charbonneau Commission (the "Commission"), was established by the Government of Quebec on November 9, 2011.¹⁰

- 9. The Commission is chaired by the Honourable Justice France Charbonneau and its mandate is to:
 - a) Examine the existence of schemes and, where appropriate, to paint a portrait of activities involving collusion and corruption in the provision and management of public contracts in the

⁸ See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03436.html>.

⁹ See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03328.html>.

¹⁰ By way of background, under the Loi sur les commissions d'enquete (Act respecting public inquiry commissions) in the Province of Quebec, the government may appoint commissioners to investigate any matter connected with the Government of Quebec, the administration of justice or any matter of importance relating to public health or the welfare of the population. Public Commissions of Inquiry are established to determine facts and discover the truth in relation to issues of concern. They are independent of government and they offer recommendations for dealing with situations deemed problematic. For more information on the Commission, see <https://www.ceic.gouv.qc.ca>.

construction industry (including private organizations, government enterprises and municipalities) and to include any links with the financing of political parties;

- b) Examine possible organized crime infiltration in the construction industry; and
- c) Examine possible solutions and make recommendations establishing measures to identify, reduce and prevent collusion and corruption in awarding and managing public contracts in the construction industry.¹¹

10. The Commission launched its public inquiry on May 22, 2012, and a final report is scheduled to be released in November 2015.

11. The Bureau is following the inquiry with interest and has been involved insofar as having a senior official testify before the Commission.

5. Procurement Regime Rules in Canada

12. In an effort to deter collusive behaviour with respect to public contracts, including those pertaining to the construction industry, public procurement authorities in Canada have developed rules with strict consequences of debarment for parties found to have participated in collusive conduct.

13. The Department of Public Works and Government Services Canada (“PWGSC”) is responsible for the public procurement policy of the Canadian federal government. On July 3, 2015, PWGSC updated its Integrity Regime (formerly the Integrity Framework), which applies to construction contracts, goods and services contracts, and real property transactions for federal public procurement.¹²

14. A supplier is ineligible to do business with the Canadian federal government if it, or members of its board of directors, have been convicted or discharged in the last three years of certain offences, or similar foreign offences, which include corruption, collusion and bid-rigging. The ineligibility is for a period of 10 years, but can be reduced by five years if the party has cooperated with law enforcement authorities or undertaken remedial actions to address the wrongdoing.¹³

15. There are public interest exceptions within the Integrity Regime, which include the following circumstances: where no other supplier is capable of performing the contract; during an emergency and situations of national security; health and safety; and economic harm.¹⁴ Suppliers must enter into an administrative agreement before PWGSC can rely on any of the exceptions in order to safeguard the integrity of the procurement process.

¹¹ See <https://www.ceic.gouv.qc.ca/la-commission/mandat.html>.

¹² For more information on PWGSC’s Integrity Regime, see: <http://tps-gc-pwgsc.gc.ca/ci-if/ci-if-eng.html>.

¹³ Id.

¹⁴ Id.

16. Other levels of government have also put in place public procurement rules intended to deter collusive behaviour. For example, the agency responsible for regulating Quebec's financial markets, the *Autorités des Marchés Financiers*, has similar rules.¹⁵

6. Legislative Framework

17. As part of the Canadian federal government's efforts to combat criminal cartels, amendments were made to the Act in 2010.

18. Amendments to the main cartel offence¹⁶ lessened the evidentiary requirements to prove a criminal cartel and increased fines and potential jail time. The cartel offence no longer requires proof beyond a reasonable doubt that agreements between competitors prevent or lessen competition unduly or unreasonably enhance prices. Pursuant to the new cartel offence, agreements between competitors to fix prices, allocate markets or restrict supply are now *per se* illegal, meaning that there is no requirement to prove anti-competitive effects.¹⁷

19. Fines and potential imprisonment for the main cartel offence were increased from five years and/or \$10 million to 14 years and/or \$25 million. Potential imprisonment for the bid-rigging offence¹⁸ was also increased from five years to 14 years. Fines for bid-rigging remained in the discretion of the court.

20. While recidivism is not a factor precluding access to the Bureau's immunity or leniency programs, or to obtaining whistleblowing status, it is listed as an aggravating factor when concluding plea agreements and in determining the appropriate sentence, as outlined in Canada's *Criminal Code*.¹⁹

7. Education / prevention initiatives

21. Since the construction industry in Canada has been identified as an industry prone to collusive conduct, the Bureau proactively creates awareness in the marketplace to promote compliance.

a) **Outreach/education presentations:** Since 2001, the Bureau has provided more than 420 information sessions throughout Canada to more than 16,000 participants, including business representatives and various procurement entities. The purpose of these presentations is to discuss the Bureau's mandate and to provide members of these communities with the knowledge necessary to detect, prevent and, where necessary, report cartel activity.

¹⁵ For more information on the *Autorités des Marchés Financiers*, see <https://www.lautorite.qc.ca/en/about-amf-autre.html>.

¹⁶ The main cartel offence is contained in s. 45 of the Act and covers agreements to fix prices, allocate markets and restrict supply.

¹⁷ Alleged criminal offences are referred by the Bureau to the Public Prosecution Service of Canada ("PPSC"). The PPSC is the federal government organization responsible for prosecutions on behalf of the Attorney General of Canada. The Director of Public Prosecutions ("DPP") is the head of the Public Prosecution Service and the PPSC represents the DPP in proceedings before courts of criminal jurisdiction in Canada.

¹⁸ Section 47 of the Act contains a standalone prohibition against bid-rigging.

¹⁹ R.S.C., 1985, C. C-46, Part XXII.

- b) **Arrangement with procurement agency:** The Bureau has a Memorandum of Understanding (“MOU”) with PWGSC to strengthen the prevention, detection, reporting and investigation of possible cartel activity, including bid-rigging, for procurement processes and real property transactions that fall under the responsibility of the PWGSC. As part of the MOU, the Bureau and PWGSC have agreed to share information relating to procurement processes and real property transactions by collaborating in the areas of enforcement, education and awareness. Presentations to the PWGSC generated a case in the information technology sector.
- c) **Anti-cartel Day:** As part of the annual Fraud Prevention Month, the Bureau also holds an Anti-cartel Day, and has developed a number of resources to assist businesses and trade associations in recognizing and preventing cartel activity, including videos on cartels and bid-rigging. The Bureau also partnered with two Canadian universities to provide information sessions to MBA students to educate future business leaders on criminal breaches of the Act.
- d) **Partnerships with Canadian police forces:** The Bureau has partnerships with several Canadian police forces. An example of effective collaboration in relation to the construction industry involves a joint investigation conducted by the Bureau and UPAC. The investigation uncovered evidence of a sophisticated criminal scheme giving preferential treatment to a group of contractors in order to obtain municipal contracts, mainly for infrastructure projects in Saint-Jean-sur-Richelieu and surrounding areas.
- e) **Bureau website:** To promote awareness and compliance, the Bureau maintains a page on its website dedicated to the construction industry.²⁰ This page provides key information relevant to the industry, including what constitutes a cartel, how to access the Bureau’s immunity and leniency programs, and how procurement officials can detect collusion.

22. In addition to the initiatives described above, which are largely focussed on the construction industry, the Bureau recently updated its *Corporate Compliance Programs* bulletin to promote compliance with the Act, which includes the cartel and bid-rigging provisions. This bulletin provides updated guidance for the private sector on how to develop and maintain credible and effective compliance programs, including the need to conduct a thorough risk-based corporate compliance assessment. It also reflects a more modern, incentives-based approach to such programs by providing the possibility of fine reductions for companies with a credible and effective program, but who are nonetheless involved in a violation of the Act.

8. Conclusion

23. While history has shown that collusion in the construction industry in Canada has been extensive, authorities are actively working to combat criminal cartels in this area by making policy and legislative changes to increase deterrence for collusive conduct; introducing initiatives to educate market participants; and increasing efforts to detect and investigate collusive conduct. While these are significant measures, it is difficult to assess the deterrent effect of these initiatives given the secretive nature of the conduct and the multitude of factors that facilitate collusion. The Bureau will continue to work with domestic and international stakeholders to refine its compliance and enforcement efforts in the construction industry.

²⁰ See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03877.html>.