

Unclassified

English - Or. English

7 November 2022

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

Director Disqualification and Bidder Exclusion – Note by Canada

29 November 2022

This document reproduces a written contribution from Canada submitted for Item 4 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

More documents related to this discussion can be found at
www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm

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1. Introduction

1. This submission provides an overview of director disqualification and debarment mechanisms in Canada. These can be sought by the Public Prosecution Service of Canada (“PPSC”), based on the Competition Bureau’s (“Bureau”) recommendations, or applied by other entities.
2. Some government procurement rules and self-regulating professions provide for director disqualification and debarment. There may also be an option for director disqualification in the *Competition Act* (the “Act”) through Prohibition Orders. This option has been rarely used to date. We are currently considering issuing guidance in this regard.
3. We recognize that debarment can be an effective deterrent for people who might engage in conspiracy or bid-rigging. However, the way debarment policies are designed can reduce the effectiveness of Immunity and Leniency Programs. We strongly recommend that individuals or companies who cooperate through Immunity and Leniency Programs be exempt from debarment.

2. Background

4. In Canada, agreements between competitors to fix prices, allocate markets or restrict output (conspiracies) and bid-rigging are criminal offences. They are found in sections 45 and 47 of the [Act](#). The laws and policies governing director disqualification and debarment in Canada relate to these competition offences, along with offences found in other laws.
5. The Bureau investigates alleged offences under the Act. We can refer matters to the PPSC for prosecution.
6. Penalties for bid-rigging include:
 - a fine in the court’s discretion,
 - a term of imprisonment of up to 14 years,
 - or both.
7. The current penalties for conspiracy are:
 - a fine not exceeding \$25 million,
 - imprisonment for a maximum term of 14 years,
 - or both.
8. In June 2023, [a new wage-fixing and no-poach agreements offence](#) will come into force. Also, fines for conspiracy offences will no longer be limited by a maximum set out in the Act. Fines will be in the court’s discretion.
9. In conspiracy and bid-rigging cases, we can also recommend that the PPSC apply to the court for a “Prohibition Order”. A Prohibition Order under section 34(1) of the Act prohibits a person who has been convicted of an offence from continuing or repeating the

offence. It also prohibits “the doing of any act or thing” directed toward continuing or repeating the offence. The term “person” includes natural persons and corporations.

10. Under section 34(2) of the Act, a court can issue a Prohibition Order without finding the person guilty. This occurs where the court finds that a person has done, is about to do, or is likely to do any act or thing constituting or directed toward the commission of an offence.

11. Prohibition Orders may also include terms that require any person to take certain steps the court thinks are necessary to prevent the commission, continuation or repetition of the offence. They can also include steps agreed to by the person and the prosecution. For example, these requirements could include:

- implementing a corporate compliance program,
- notifying clients of the Prohibition Order and
- removing individuals involved in the offence from their positions of influence within the organization.

12. In addition, the federal government may debar suppliers who are convicted of conspiracy or bid-rigging offences. This means these suppliers are prohibited from participating in procurement processes. Some provincial and municipal governments have similar laws or policies.

3. Director Disqualification

13. A Prohibition Order could be used to prohibit individuals from serving as corporate directors or officers for up to ten years. Director disqualification could be part of a negotiated settlement or a sentence in a contested proceeding.

14. PPSC counsel are responsible for conducting all plea discussions. They also develop sentencing recommendations by following the rules and guidelines in the [PPSC Deskbook](#). PPSC counsel give significant consideration to the Bureau’s recommendations. The court makes the final determination on sentencing.

15. To date, we have not recommended that individuals be broadly disqualified from ever working as a director. Rather, we recommended that key personnel involved in the offence be removed from their positions within the specific company.

16. For example, in 2006, [three companies pleaded guilty and were sentenced to pay a total of \\$37.5 million CAD for a domestic conspiracy on carbonless sheets of paper](#). The court issued a Prohibition Order. It required that key personnel involved in the conspiracy be removed from their positions in the paper merchant business. The personnel were not supposed to have any influence or duties in the paper merchant business. They could work in other business lines, but only in manager positions that were lower than their previous positions.

17. We have rarely sought the disqualification of directors in cartel and bid-rigging cases. We do not have a formal policy on director disqualification. We think that additional personal consequences for corporate directors would contribute to deterrence. This is particularly for those who view corporate fines as a “cost of doing business.” As a result, we are considering a Director Disqualification policy. It could be included in the Leniency Program and the Bureau’s sentencing recommendations to the PPSC.

18. The Bureau and the PPSC jointly administer the [Immunity and Leniency Programs](#). Full immunity from prosecution may be provided to those who:

- are first to disclose a *Competition Act* offence that the Bureau has not yet detected, or
- provide evidence leading to a case referral to the PPSC.

19. “Leniency” refers to lenient treatment upon sentencing for applicants who qualify later. They are required to plead guilty under the Leniency Program. The Leniency Program outlines the factors that the Bureau will consider when developing sentencing recommendations. For individuals, these considerations currently include:

- the role and extent of the individual’s involvement in the offence,
- how much the individual personally benefited from the offence (e.g., through advancement, salary increases, performance bonuses, etc.), and
- whether the individual has been previously sanctioned for offences in Canada or another jurisdiction.

20. Professional bodies may sanction their members for conduct or allegations that we are investigating. As a result of our infrastructure investigation, five individuals pleaded guilty to [bid-rigging on infrastructure contracts in the City of Gatineau](#). They received conditional prison sentences ranging from 12 to 22 months or were ordered to pay a fine.

21. These individuals were engineers and members of the [Ordre des ingénieurs du Québec](#) (“OIQ”) (the Order of Engineers of Quebec). The OIQ’s mission is to oversee the engineering profession in Québec. It has its own administrative tribunal (the OIQ Disciplinary Council) which intervenes when it receives a complaint against an OIQ member. This tribunal may impose disciplinary sanctions including:

- temporary or permanent disbarment and
- suspension of the right to practise.

22. In the infrastructure case, the OIQ Disciplinary Council removed four of the individuals from the membership roll for 10 to 20 months for contravening the Code of Ethics of Engineers.¹

23. In addition, following a decision by Québec’s Autorité des marchés financiers (“AMF”) (Financial Markets Authority), one of the individuals had to resign from his positions as Director, Partner and Vice President. The individual also had to divest shares in his company.²

¹ The fifth individual was not temporarily disbarred, but had to pay \$3,000 CAD to the OIQ. See: *Ingénieurs (Ordre professionnel des) c. Boulay*, 2014 CanLII 93605 (QC CDOIQ), *Ingénieurs (Ordre professionnel des) c. Famery*, 2016 CanLII 3079 (QC CDOIQ), *Ingénieurs (Ordre professionnel des) c. Marquis*, 2015 CanLII 48958 (QC CDOIQ), *Ingénieurs (Ordre professionnel des) c. Mathieu*, 2017 CanLII 73279 (QC CDOIQ), and *Ingénieurs (Ordre professionnel des) c. Paulhus*, 2015 CanLII 75236 (QC CDOIQ).

² See: *Ingénieurs (Ordre professionnel des) c. Mathieu*, 2017 CanLII 73279 (QC CDOIQ), para. 25 et 26.

4. Bidder Exclusion

24. Federal, provincial or municipal governments may ban suppliers from bidding on future contracts when they have contravened the conspiracy or bid-rigging provisions of the Act (debarment). This happens independently from the Bureau.

4.1. Federal Government

25. Debarment policies at the federal government level are found in the [Integrity Regime](#). The Regime is administered by the main contracting arm of the federal government, Public Services and Procurement Canada (“PSPC”). It includes:

- the [Ineligibility and Suspension Policy](#) (the “Policy”),
- directives, and
- integrity provisions to be included in bid solicitation documents, contracts and real property agreements.

26. The Integrity Regime applies to:

- all federal organizations listed in schedules I, I.1, and II of the [Financial Administration Act](#) and
- contracts or real property agreements over \$10,000 CAD, with some exceptions.

27. Under the Policy, parties who have been *convicted* of conspiracy or bid-rigging offences in the past three years (or other offences listed in the Policy) are not eligible for contracts or real property agreements with the federal government for ten years. The supplier can request that this period be reduced by up to five years through an administrative agreement. The supplier needs to show cooperation with law enforcement authorities or remedial action(s) to address wrongdoing.

28. The debarment policy does not appear to apply to immunity applicants. This is because they are not *convicted* of any offences, since they do not plead guilty in court. In addition, [the 2013 Memorandum of Understanding between the Bureau and PSPC’s predecessor \(Public Works and Government Services Canada \(“PWGSC”\)\)](#) excludes immunity applicants from debarment.

29. However, there is some uncertainty about whether Immunity Applicants could be suspended from government contracting. The uncertainty arises from language used in the *Ineligibility and Suspension Policy*. The Policy says that suppliers who have *admitted guilt* to conspiracy or bid-rigging offences may be suspended from contracting or entering into a real property agreement with Canada for 18 months (or longer if extended). It is possible for the suspension to be stayed by an administrative agreement.

30. Immunity Applicants are required to show that they committed an offence under the Act as part of their immunity application. They must also admit their role in the offence if they are required to testify in court against the other conspirators. It is uncertain whether PSPC would consider this “admitting guilt” and use their discretion to impose a suspension. In our view, it appears that the suspension policy is aimed at suppliers who have been charged with or pleaded guilty to an offence in court, which is not the case for Immunity Applicants.

4.2. Provincial Governments

31. Certain provincial governments also have debarment laws or policies. For example, New Brunswick’s [General Regulation - Procurement Act](#) lists a number of offences that will disqualify a supplier from providing goods and services to certain provincial entities for a period of time. If a supplier is guilty of conspiracy or bid-rigging, they are disqualified for five years.

32. Another example is Québec’s [Act Respecting Contracting by Public Bodies](#). Under this law, a company that is found guilty of conspiracy or bid-rigging (or other specified offences) is not eligible for public contracts in the province of Québec for five years. The company is also added to the [publicly accessible register of enterprises ineligible for public contracts](#). The [Autorité des marchés publics](#) (“AMP”) (Public Procurement Authority) oversees public procurement and the application of legislation and regulations governing public contracts in Québec, except for the City of Montreal. (Previously, this was the responsibility of the AMF.)

5. Bureau Recommendations

33. The debarment of suppliers who have been convicted of conspiracy or bid-rigging from bidding on future tenders can be an effective deterrent. However, we strongly believe that any debarment policies or laws should exempt bidders who have received immunity or leniency pursuant to the Immunity and Leniency Programs. These Programs are among the Bureau’s most effective tools for uncovering and stopping unlawful conduct. This is because the secret nature of cartels makes them difficult to detect and prove.

34. The threat of debarment can hinder parties from participating in the Bureau’s Immunity and Leniency Programs. In fact, lawyers who practice competition law in Canada have said that one of the reasons for the decline of leniency applications is the risk of debarment by government procurement agencies.

35. We recommend that in some cases, procurement authorities allow companies to continue to bid on government contracts after a bid-rigging or conspiracy conviction. They should consider whether the company:

- Provided full, timely and meaningful cooperation to Canadian law enforcement and the prosecution. This could be through the Immunity or Leniency Programs or other cooperation,
- Pleaded guilty to offences at an early stage,
- Has written confirmation from the enforcement agency regarding its cooperation and guilty plea, which can be provided to the procurement authority,
- Put in place, or enhanced, a credible and effective corporate compliance program,
- Provided evidence to show that the company appropriately disciplined the individuals who were involved in the criminal conduct and
- Has not previously been convicted of any offences outlined in the debarment legislation.

36. Removing the threat of debarment for immunity and leniency applicants will:

- help to encourage responsible corporate behaviour,
- assist law enforcement to advance and resolve difficult criminal investigations and

- provide the public with the assurance that the company in question has taken steps to reform.