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Working Party No. 3 on Co-operation and Enforcement

Criminalisation of cartels and bid rigging conspiracies – Note by Canada

9 June 2020

This document reproduces a written contribution from Canada submitted for Item 1 of the 131st OECD Working Party 3 meeting on 9 June 2020.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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Canada

1. Introduction

1. In Canada, bid-rigging and agreements between competitors to fix prices, allocate markets or restrict output (conspiracies) are criminal offences.¹ Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under the civil agreements provision that prohibits agreements only where they are likely to substantially lessen or prevent competition.

2. This submission focuses on bid-rigging and the criminal conspiracy provisions (sections 47 and 45 of the *Competition Act* (the “Act”), respectively).

2. Conspiracy and Bid-rigging Sanctions

3. Bid-rigging is punishable by a fine in the discretion of the court or a term of imprisonment of up to 14 years, or both. The penalties for conspiracy are imprisonment for a maximum term of 14 years, a fine not exceeding \$25 million, or both.

4. Prohibition Orders are also available for both organizations and individuals in cartel cases. In addition to any other penalty imposed, a Prohibition Order under section 34(1) of the Act prohibits a person² from continuing or repeating the offence or doing any act or thing directed toward the continuation or repetition of the offence. It may also include prescriptive terms requiring positive steps or acts to ensure compliance with the law, such as, 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.

5. Under section 34(2) of the Act, a court may issue a Prohibition Order without a finding of guilt 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.

6. The Competition Bureau (the “Bureau”) may also use a wide variety of other tools to promote compliance with the Act. These tools, which include information visits and warning letters, are outlined in the *Competition and Compliance Framework Bulletin*.³

7. Section 36 of the Act provides a right of private action for the recovery of damages if there has been a violation of the criminal provisions of the Act.⁴ Recovery in proceedings under this provision can be equal to the loss or damage suffered by the plaintiff (as well as the plaintiff’s costs related to the proceedings).

¹ Conspiracies have been criminal offences since the *Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade* was enacted in 1889.

² The term “person” includes natural persons and corporations.

³ Available at: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03982.html>.

⁴ Lawsuits under section 36 may also be initiated due the failure of any person to comply with an order of the Competition Tribunal or another court under the Act.

8. In addition, the federal government as well as some provincial and municipal governments may debar suppliers convicted of conspiracy or bid-rigging offences from their procurement processes.⁵

3. Process for Obtaining Criminal Sanctions

9. The Bureau investigates alleged offences under the Act and may refer matters to the Public Prosecution Service of Canada (“PPSC”) for prosecution.

10. The roles and responsibilities of the Bureau and the PPSC throughout an investigation and prosecution are formalized in a Memorandum of Understanding between the Commissioner of Competition and the Director of Public Prosecutions,⁶ the PPSC Deskbook⁷ and the Immunity and Leniency Programs under the *Competition Act* (“Immunity and Leniency Programs”).⁸ In addition to guiding the Bureau and the PPSC, these documents also provide transparency and predictability for stakeholders.

11. Coordination is facilitated by regular meetings between senior managers of the agencies to discuss priorities, resources and broad issues.

12. While investigating an alleged offence, Bureau Officers benefit from legal advice provided by prosecutors. Bureau investigators may use a range of investigative tools to obtain evidence in an inquiry as provided for under the Act and under Canada's *Criminal Code*⁹ (the “Code”) (searches, production orders for records, provision of written responses to questions, oral examinations and wiretapping). In terms of immunity or leniency¹⁰ requests, the PPSC has the sole authority to grant immunity or leniency to a company or an individual implicated in an offence under the Act. The PPSC consults with the Bureau and gives due consideration to its recommendations, but has the independent discretion to accept or reject them. The PPSC follows the principles set out in its PPSC Deskbook to decide whether to enter into an immunity or plea agreement with an applicant.

13. Whenever the Bureau has evidence that an offence has been committed, it may make a formal referral of the matter to the PPSC, including a recommendation on sentencing. The PPSC will decide whether a prosecution is in the public interest in accordance with the criteria set out in the PPSC Deskbook.

14. Following referral, the Bureau remains active in supporting the prosecution; however, the PPSC has independent carriage of the matter. While the PPSC has

⁵ See the Bureau Submission to the OECD Global Forum on Competition Roundtable on Sanctions in Antitrust Cases for additional information on sanctions (available at: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04150.html>).

⁶ Available at: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03227.html>.

⁷ Available at: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/index.html>.

⁸ Available at: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html>. These programs are jointly administered by the Bureau and the PPSC.

⁹ The *Criminal Code of Canada* R.S.C. 1985 c. C-46, available at: <https://laws-lois.justice.gc.ca/eng/acts/c-46/>.

¹⁰ In Canada, the term “immunity” means full immunity from prosecution, which may be provided to the first party either to disclose to the Bureau an offence pursuant to the Act that it has not yet detected, or to provide evidence leading to a case referral to the PPSC. The term “leniency” refers to lenient treatment upon sentencing for subsequent qualifying applicants who are required to plead guilty under the Leniency Program.

independent discretion regarding the appropriate action to take, it consults with the Bureau and considers its recommendations.

15. Many cases are resolved by negotiated plea agreements, which are subject to court approval. PPSC counsel are responsible for conducting all plea and sentencing discussions in accordance with the PPSC Deskbook. While the Bureau's recommendations are given significant consideration in the negotiation of guilty plea agreements, they are not binding on the PPSC or on the court when a guilty plea is presented to the court for acceptance.

16. If an accused is convicted after a trial, the PPSC makes submissions to the court on an appropriate sentence (after considering recommendations from the Bureau). In all criminal matters in Canada, the determination of the sentence to be imposed is at the sole discretion of the court. Judges are not bound by sentencing recommendations and have the sole authority to determine appropriate sentences with reference to the sentencing objectives and principles set out in Part XXIII of the Code, as well as relevant case law.

17. The Code lists the following sentencing objectives, which also apply to other criminal offences.

1. to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
2. to deter the offender and other persons from committing offences;
3. to separate offenders from society, where necessary;
4. to assist in rehabilitating offenders;
5. to provide reparations for harm done to victims or to the community; and
6. to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

18. In addition, the Code identifies a fundamental principle of sentencing: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. It also states that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender and that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

19. The Code lists the following factors a court should consider when imposing a sentence on an organization.

1. any advantage realized by the organization as a result of the offence;
2. the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
3. 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;
4. the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
5. the cost to public authorities of the investigation and prosecution of the offence;
6. any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;

7. 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;
 8. any penalty imposed by the organization on a representative for their role in the commission of the offence;
 9. any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
 10. any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence (e.g., implementing a corporate compliance program).
20. In the case of leniency applicants, the Immunity and Leniency Programs outline the factors that the Bureau will consider when developing its sentencing recommendations. For business organizations, the variables include an estimated base fine determined by the relevant volume of commerce and an estimation of economic harm; aggravating and mitigating factors, including any credit to be given for the existence of an effective corporate compliance program;¹¹ and the value of the leniency applicant's cooperation to the Bureau's investigation.¹²
21. Regarding individuals, at 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 leniency applicant's current directors, officers or employees.¹³ However, current and former directors, officers and employees of the second and any subsequent leniency applicants may be charged.
22. The Bureau takes into account a number of considerations when developing sentencing recommendations for individuals. These include the role and extent of involvement of the individual in the offence, the degree to which 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.

4. Imprisonment

23. Although the Act provides for terms of imprisonment for up to 14 years, Canadian courts have not imposed a custodial prison sentence for a conspiracy or bid-rigging offence

¹¹ Where the Bureau is satisfied that a compliance program in place at the time the offence occurred was credible and effective, consistent with the approach set out in the Bureau's Bulletin on Corporate Compliance Programs, the Bureau will treat the compliance program as a mitigating factor when making its recommendation to the PPSC in conjunction with an application under the Bureau's Leniency Program. The Bulletin on Corporate Compliance Programs is available at: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html>.

¹² Every leniency applicant will be eligible for a leniency cooperation credit of up to 50%. The amount of credit to be assigned will be based on the value of the leniency applicant's cooperation to the Bureau's investigation.

¹³ Provided that such individuals admit knowledge of or participation in the unlawful conduct and are prepared to cooperate, in a timely fashion, with the Bureau's investigation in a complete and ongoing manner.

in over 20 years.¹⁴ Rather, individuals have received conditional sentences¹⁵ (conditions have included house arrest, curfews and community service). There are indications that cartelists face an increasing possibility of imprisonment in Canada.

24. As a result of the *Safe Streets and Communities Act* (2012), judges can no longer sentence individuals convicted of conspiracy or bid-rigging offences to conditional sentences. Rather, any prison sentence ordered by the court must be served behind bars.

25. In addition, a November 2018 decision by the Quebec Court of Appeal (*R. c. Fedele*)¹⁶ sends a strong signal that bid-rigging offences, particularly those targeting public contracts, will be treated very seriously by the court and warrant mandatory prison sentences.

26. In this case, the provincial Crown prosecutor pursued various fraud and forgery charges against the accused. The trial judge found three individuals guilty of those offences and sentenced them to conditional sentences ranging from 18 months to 24 months less a day to be served in the community. The provincial Crown prosecutor appealed these sentences. As a result, the Quebec Court of Appeal invalidated the community sentences and instead sentenced the accused to prison for terms ranging from 18 to 36 months.

27. The Court of Appeal found that the trial judge was wrong to minimize the seriousness of the crimes committed and that the conditional sentences were inconsistent with the principles of public condemnation, deterrence and denunciation. It stressed that fraud in respect of public contracts was particularly egregious because of the threat such conduct poses to the credibility of political and social institutions and the risk of undermining the rule of law. The Court stated:

28. “The very serious consequences, both financial and social, of an organized system of collusion in the granting of public works contracts require the imposition of penalties which demonstrate that such systems will not be unmarked or tolerated by the Courts.” (translated from French)

29. If the Bureau obtains evidence that implicates individuals in criminal activity, it will not hesitate to recommend to the PPSC, where appropriate, that those individuals be charged and if convicted, sentenced to serve terms of imprisonment. The Bureau believes that in order to achieve effective deterrence, individuals must face a very real prospect of serving time in prison.

5. International Cooperation

30. The Bureau has a range of tools and mechanisms to facilitate and enable cooperation with its foreign counterparts. Its international cooperation agreements and arrangements relating to the application of competition law apply to both the criminal and

¹⁴ In 1996, Jacques Perreault was sentenced to a one year prison term for conspiracy to fix prices and other offences under the Act. A summary of penalties imposed by the courts for offences under the Act is available at: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01863.html>.

¹⁵ Sentences of less than two years to be served in the community under court-mandated conditions and terms, rather than in custody (for those who qualify).

¹⁶ R. c. Fedele, 2018 QCCA 1901, Available at: <https://www.canlii.org/fr/qc/qcca/doc/2018/2018qcca1901/2018qcca1901.html?autocompleteStr=R%20c.%20Fedele&autocompletePos=1>.

civil provisions of the Act.¹⁷ These instruments provide formal mechanisms that expressly favour the exchange of information and formal notifications, except where prohibited by law or contrary to important domestic interests.

31. Under section 29 of the Act, communication of information obtained during an investigation, including information produced voluntarily or obtained pursuant to the exercise of formal powers, is permitted “for the purposes of the administration or enforcement of the Act.” This allows information that is considered confidential under the Act to be communicated to a foreign counterpart where the purpose is the administration or enforcement of the Act (e.g., where communication of this information would advance a specific investigation).

32. When confidential information is communicated to a foreign agency, the Bureau takes rigorous steps to maintain the confidentiality of the information. The Bureau will not disclose the identity or information obtained from an immunity or leniency applicant to any foreign law enforcement agency without the consent of the applicant; however, as stated in the Immunity and Leniency Programs, applicants are expected to grant such consent, absent compelling reasons.

33. The aforementioned mechanisms apply to both criminal and civil provisions of the Act. For criminal matters, the Bureau may also rely on Mutual Legal Assistance Treaties (“MLATs”). The MLAT and its enabling statute, the *Mutual Legal Assistance in Criminal Matters Act* (“MLACMA”), permit law enforcers, including competition agencies, to request formal assistance in obtaining and transmitting evidence relating to criminal matters, for example, by providing documents or executing requests for search and seizure. The MLACMA also contains provisions regarding the admissibility in Canada of evidence obtained in foreign jurisdictions.

34. For more information about the Bureau’s international cooperation in cartel investigations, see Canada’s contribution to the OECD Global Forum on Competition, “Improving International Co-operation in Cartel Investigations.”¹⁸

¹⁷ A list of Canada’s international instruments relating to cooperation in the enforcement of competition law is available online at: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03763.html#tab2>.

¹⁸ Available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2012\)37&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2012)37&doclanguage=en).