

Criminal Conspiracy and Bid-Rigging: Recent Changes to the Canadian *Competition Act*

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Outline

- **The Competition Act**
- **The Key Players**
- **The Amendments**
- **Criminal Conspiracy**
- **Bid-Rigging**
- **Issues Specific to Trade Associations**
- **Questions**

The Competition Act

- The *Competition Act* (the “Act”) is the principal source of competition law in Canada.
- The Act is a law of general application – applies across all industry sectors, with limited exceptions.
- The goal of the Act is to maintain & encourage competition in order to, among other things, provide consumers with competitive prices and product choices.
- The Act contains a combination of criminal and “reviewable” provisions governing business-related conduct.

The Key Players

- **The Act is administered by the Canadian Competition Bureau (the “Bureau”) – an independent law enforcement agency.**
- **The head of the Bureau is the Commissioner of Competition. In many cases, she is the only person who can bring a challenge to civil reviewable conduct.**
- **The Public Prosecution Service of Canada (led by the Director of Public Prosecutions – “DPP”) is responsible for prosecution of criminal competition offences.**



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The Amendments

- **Bill C-10, the *Budget Implementation Act, 2009*, brought about the most significant amendments to the Act in 25 years.**
- **All amendments are now in force (some only came in force last March).**
- **The amendments generally increased applicable penalties for contraventions of the Act.**
- **Today, we will focus on two provisions which were modified as a result of the recent amendments.**

Criminal Conspiracy

- **Section 45 of the Competition Act creates the criminal offence of conspiracy.**
- **Investigating and eliminating conspiracies is a major priority for the Bureau.**
- **What is a conspiracy for the purpose of s.45? An agreement between competitors to:**
 - a) fix or control prices
 - b) allocate customers, markets or territories
 - c) fix or restrict production/output

Criminal Conspiracy

- Agreement has to be between competitors (or potential competitors).
- Agreement has to fall within one of the categories.
- Such agreements are now *per se* criminally illegal.
- Some exceptions/defences available (eg. Ancillary Restraint, agreement between affiliates)
- Increased penalties: up to 14 years in jail and/or fine of \$25 million.

Evidence of An Agreement

- **Existence of an agreement must be proved beyond a reasonable doubt.**
- **The Bureau will consider whether the parties reached a “meeting of the minds”, either explicitly or tacitly.**
- **Section 45 applies to all forms of agreements:**
 - Formal / Informal
 - Implemented or not
- **Existence of an agreement can be inferred through a course of conduct / circumstantial evidence - with or without direct evidence of communications between parties.**

Bid-Rigging

- **Bid-rigging is an agreement among two or more persons where, in response to a call for bids or tenders:**

- One or more persons agrees not to submit a bid;
- One or more persons agrees to withdraw a bid already submitted; or
- Two or more bidders agree to submit bids that have been prearranged among themselves

AND the agreement is not made known to the person calling for bids.

- **As with conspiracy, bid-rigging offences are criminal and *per se* illegal.**
- **Penalties include fines in the discretion of the court and/or up to 14 years imprisonment.**

Recognizing Bid-Rigging

- **Cover bidding – fake bidding**
- **Bid suppression – withholding bids**
- **Bid rotation – rotating agreed best bid**
- **Market division – carving up the market**

- **Certificate of Independent Bid Determination which requires disclosure of communications between bidders**

Liability as a Result of Conspiracy or Bid-Rigging Conduct

- **Commissioner of Competition refers case to the DPP, who decides whether to lay charges.**
- **Both conspiracy and bid-rigging carry penalties (per count) of up to 14 years in prison and/or significant fines.**
- **Immunity Program.**
- **Victims have a statutory right to sue perpetrators to recover damages caused by conduct contrary to the criminal provisions in the Act.**

Industry / Trade Associations

- **Participation in trade association activities is not objectionable PROVIDED competition laws are not infringed.**
- **Trade associations can allow/facilitate information exchange between competitors.**
- **Association Membership can raise issues.**
- **Fee Guidelines / Codes of Conduct can be problematic.**

Industry / Trade Associations

Both the members of an association, and the association itself need to be careful to not violate the law.

- Liability for the Association
- Association can be principal party to an offence or may be subject to prosecution through s.21 of Criminal Code (aiding & abetting)
- Liability for Members
- Rules, policies, bylaws or other initiatives enacted and enforced by an association with approval of members (who are competitors) constitutes an agreement between competitors and member firms/individuals can be liable.

Industry / Trade Associations

- **DO:**

- Discuss general topics of interest to your industry – e.g. legislative changes.
- Set an agenda for association meetings; have it approved beforehand by legal counsel to ensure topics are legitimate areas for discussion.
- Adhere to the agenda during the meeting, leave meeting if improper discussions begin, ensure your absence is recorded in the meeting minutes and report the incident to legal.
- Obtain legal advice on sensitive issues like data collection.
- Maintain association membership as voluntary.
- Adopt a corporate compliance program and educate members on competition laws.

Industry / Trade Associations

- **DON'T:**

- Discuss prices or price adjustments, output levels, costs, etc.
- Discuss future strategic plans – *e.g.* bidding for a particular contract
- Share competitively sensitive information
- Explicitly or implicitly require membership adherence to particular price or trade terms
- Impose regulation on members that restricts entry into the market

Questions?

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