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Bid-Rigging in Canada: Recent Developments

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The Canadian Competition Act prohibits various types of anti-competitive agreements between competitors. For example, it is a criminal offence for competitors to fix prices, allocate markets, and/or restrict output. Civil proceedings can also be brought against competitors who enter into any other type of agreement that has the effect of substantially preventing or lessening competition.

The Competition Act also contains a specific prohibition against bid-rigging. Thus, section 47 of the Competition Act makes it a criminal offence for persons, in responding to a call or request for bids or tenders, to agree (i) not to submit a bid or tender, (ii) to withdraw a bid or tender already made, or (iii) to submit bids or tenders on terms that have been coordinated, where this agreement has not been disclosed to the person calling for the bid or tender. Bid-rigging is a per se offence, in that the prosecution is not required to establish any adverse market effects. Parties convicted of bid-rigging are liable to a fine in the discretion of the court, imprisonment of up to 14 years, or both.

The bid-rigging offence has acquired more prominence as an enforcement priority in Canada in recent years. For example, allegations of bid-rigging are at the core of several recent pleas involving global agreements affecting the sale of various automobile components. Indeed, in one such plea, Yazaki Corporation agreed to pay the highest fine levied to date for a bid-rigging offence in Canada – CAD $30 million.

Canada's competition authority, the Competition Bureau, has also made it a priority to detect and prosecute bid-rigging arrangements affecting procurement in the public sector. There are several ongoing investigations of this nature and convictions have been obtained against parties involved in bid-rigging affecting government contracts for hospital construction, school bus services, sewer services, lighting for traffic signals, and real estate advisory services.

One positive by-product of the recent focus on the bid-rigging offence is that there is now an expanding body of jurisprudence interpreting section 47 of the Competition Act. Two cases, R. v. Dowdall and R. v. Al Nashar, are of particular interest because they considered the meaning of one of the basic requirements of the bid-rigging offence, namely that there be a "request for bids or tenders".

In Dowdall, for example, which involved requests by federal government departments for IT services, the accused argued that the relevant requests did not qualify as "bids or tenders" because they were intended simply to create a pre-qualification or standing order for the potential provision of IT services if and when such services were required, rather than to award specific contracts for work to be done.

Similarly, in Nashar, which involved requests for sub-contracting services in relation to private condominium projects, the accused argued that the relevant requests were merely invitations to negotiate or compare the prices of different contractors, since the requests explicitly reserved the right of the requester and ultimate client to reject one, some or all submissions in its entire discretion.

Both of these cases involved preliminary inquiries where the judge's role is limited to assessing whether the prosecution has sufficient evidence of an offence to justify proceeding to trial. That said, the judges were required to review the relevant law and come to a reasoned view on whether the evidence could support a guilty verdict on the issue of whether there were calls for bids or tenders within the meaning of section 47 of the Competition Act.

Both courts considered the same authorities and broadly adopted the same analytical approach. It was common ground, therefore, that the Competition Act does not define "bid", "tender" or "call or request for bids or tenders" and that resort must be had to commercial law jurisprudence to interpret these concepts. The up-shot of these commercial cases is that a distinction has to be drawn between mere proposals (or invitations to treat), which do not create contractual relations between the proponents and entities requesting proposals, and solicitations, which do create contractual obligations with bidders such that a bidding contract comes into existence. Bids and tenders involve contractual rights and obligations between the parties, and whether a bidding contract exists is a matter of determining the intention of the parties to contract based on a review of the terms of the request (whatever name it may take, e.g., RFP, request for bids, request for tenders, etc.) and all the relevant circumstances.

Although the two courts canvassed the same law, they came to opposite conclusions when applying the law to the particular facts of their respective cases.

In Dowdall, the preliminary inquiry judge determined that there was some evidence for a jury to consider at trial that the relevant request process gave rise to enforceable rights and obligations of both parties, even if those rights were heavily in favour of the government (i.e., the government was free to decide not to award any work under the agreements at all). This decision was subsequently upheld on appeal.

On the other hand, in Nashar, the preliminary inquiry judge held that there was insufficient evidence to commit the accused to trial. In particular, the judge found it persuasive that the condominium owner had reserved to itself the exclusive right to reject one, some or all of the proposals or to accept any proposals that suited its needs, regardless if not the lowest-priced proposal(s).

Even accepting that both of these cases were decided at the preliminary inquiry level, it is now possible to make several important observations about this key aspect of Canada's bid-rigging offence.

First, the scope of "requests for bids or tenders" under section 47 may not be as broad as one would initially think. The key issue is whether the parties intended to create contractual obligations.
Second, the relevant analysis is very much case specific and involves a review of all of the relevant circumstances surrounding the alleged call for bids and the intention of the requesting and bidding parties. As such, it will not always be easy to predict which way a court may decide.

Third, and subject to what decision ultimately emerges at trial in Dowdall, one might expect the Competition Bureau to take the above uncertainties into account in future bid-rigging cases and recommend to the prosecution that parallel charges also be laid under the Competition Act's conspiracy offence (section 45). Prior to 2010, the conspiracy offence required the prosecution to prove that the impugned conduct "unduly" lessened competition, i.e., had a negative market impact. That requirement arguably limited the relative utility of the conspiracy offence vis-à-vis the per se bid-rigging offence. However, the market impact element of the conspiracy offence was eliminated as of March 2010. As such, and depending on the circumstances, the Bureau might decide that the chances of success are improved by also relying on the new conspiracy offence, which would appear to cast a wider net than the specific terms of the bid-rigging offence, while retaining the advantage of per se treatment.

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Mark has appeared at every level of court in relation to competition matters, including the Supreme Court of Canada, and has acted as counsel on several leading cases before the Competition Tribunal, including the first abuse of dominance and merger cases heard by that body. He also provides advice with respect to the application of the Investment Canada Act.

Mark has authored a wide variety of articles and conference papers on competition law matters and contributed to a number of texts and treatises in the area, as well as authoring and presenting policy briefs for clients on a variety of domestic and international competition-related matters. Mark is most recently co-author of The Competition Law Guide for Trade Associations in Canada. Mark is also a member of the editorial board for Competition Law Insight and a regular contributor to the Kluwer Competition Blog.

Mark is very active in the American Bar Association and Canadian Bar Association, including serving currently as the co-chair of the international antitrust law committee of the ABA section of international law and the immediate past chair of the criminal matters committee of the CBA section of national competition law.

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Charles has experience in a wide variety of industries, including credit card issuing and acceptance, wireless communications, music recording, grocery retailing, carrier and postal services, pharmacies and pharmaceuticals, electricity generation and distribution, building materials, packaging, timber milling, real estate and real estate brokering, newspapers, equipment finance, and transportation.

Prior to rejoining the firm in 2012, Charles was Deputy General Counsel at the New Zealand Commerce Commission, which has responsibility for enforcing competition and fair trading law. In that role, Charles managed the in-house legal team and had strategic management responsibilities for the Commission's major litigation portfolio. He was lead in-house counsel in a variety of complex competition proceedings before all levels of court in New Zealand and represented the Commission in negotiating settlements involving competition remedies and financial penalties. In addition to litigation work, Charles advised the Commission on merger review, the use of investigative powers, and the drafting of enforcement guidelines and policies, including those related to cartel immunity and leniency. He also provided advice in relation to board governance matters.

Matters in which Charles acted as counsel to the New Zealand Commerce Commission included, among others, those in relation to:

- *the Visa and MasterCard rules around credit card interchange fees and credit card acceptance by merchants, leading to a precedent-setting settlement modifying key aspects of the applicable credit card scheme rules in New Zealand;*
- *alleged cartel conduct in relation to the provision of air cargo services to and from New Zealand;*
- *cartel conduct in the freight forwarding industry;*
- *alleged misuse of market power by incumbent telecommunications carrier, Telecom, in relation to dial-up internet services and in relation to the wholesale supply of 'data tails' required for the provision of data transmission services; and*
- *the blocked acquisition of Mana Coach Services by New Zealand Bus Ltd.*

Prior to first joining Davies as an associate in 2001, Charles attended the University of Edinburgh in 1999/2000, where he studied competition and trade law of the European Union. He spent his articles of clerkship at the Federal Court of Appeal in Ottawa.

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