

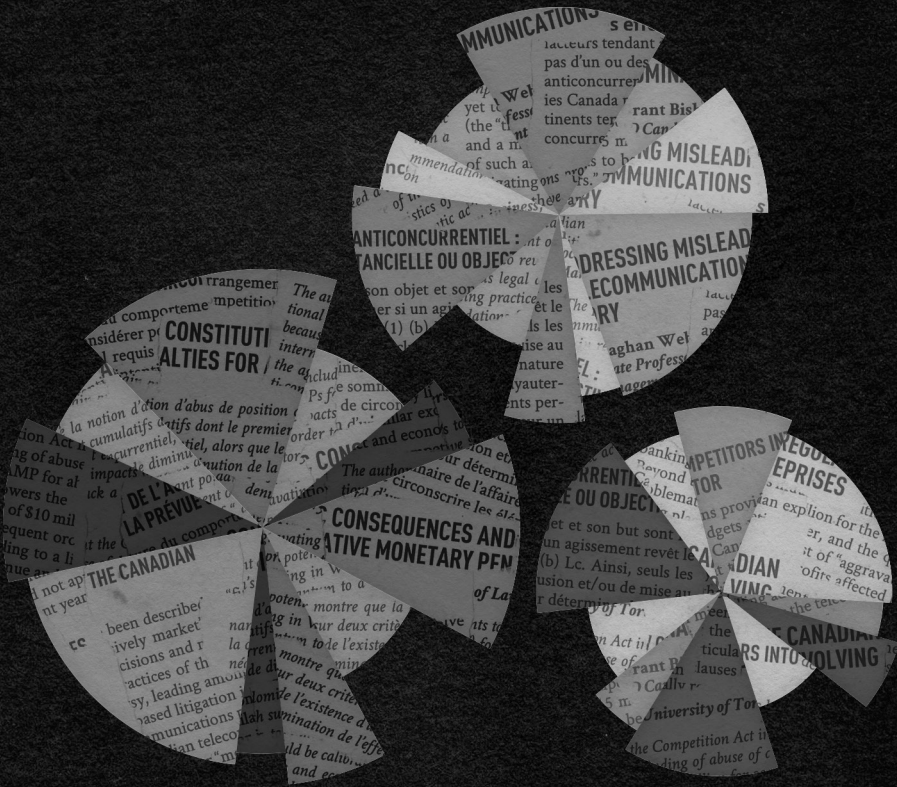


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BID-RIGGING ENFORCEMENT WITHOUT A BID-RIGGING PROVISION: A PROPOSAL FOR THE REPEAL OF SECTION 47 OF THE COMPETITION ACT

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In recent years, the Competition Bureau's enforcement of the bid-rigging offence in section 47 of the Competition Act has captured the attention of the legal profession, government, media, and the public, and there is no indication that this level of enforcement activity will diminish. However, we believe it is time to rethink the ongoing utility of maintaining a separate bid-rigging offence in the Act. In our view, no economic or normative basis exists for the continued co-existence of a general conspiracy offence (in section 45 of the Act) and a distinct bid-rigging offence (in section 47). The argument developed in this article is two-fold: (1) since there is no economic or practical rationale for distinguishing between cartel behaviour under sections 45 and 47, the independent utility of section 47 will be exhausted when pre-2010 cartel offences have been prosecuted; and (2) the continued co-existence of the two offences coupled with an unduly narrow interpretation of section 47, will undermine the effective policing and prevention of the type of behaviour section 47 was meant to prohibit. Our conclusion is that repealing section 47 and prosecuting bid-rigging offences under section 45 would realign the legislative framework with underlying economic harm and avoid the pitfalls of an overly codified approach to the regulation of anti-competitive conduct.

Depuis quelques années, les mesures d'application de l'article 47 de la Loi sur la concurrence (la Loi) prises par le Bureau de la concurrence afin de contrer les infractions relatives au truquage des offres ont retenu l'attention de la profession juridique, du gouvernement, des médias et du public; et rien n'indique que leurs activités d'application de la loi en ce sens ralentiront. Toutefois, nous croyons qu'il est grand temps de repenser l'utilité à long terme du maintien dans la Loi d'une disposition distincte traitant des infractions relatives au truquage des offres. Nous sommes d'avis qu'aucun fondement, d'ordre économique ou normatif, n'existe qui pourrait venir appuyer la présence soutenue d'une infraction générale relative au complot (à l'article 45 de la Loi) et d'une infraction séparée relative au truquage des offres (à l'article 47). L'argument élaboré dans cet article présente deux volets : (1) puisqu'il n'existe aucune raison économique ou pratique de distinguer les comportements collusoires en vertu de l'article 45 et de l'article 47, l'utilité de l'article 47 en soi sera épuisée à l'issue des poursuites intentées relativement aux infractions visant de tels comportements avant 2010; et (2) la présence de ces deux infractions, couplée à l'interprétation indûment restreinte qui est faite de l'article 47, aura pour effet de saper le contrôle et la prévention efficaces du genre d'acte ciblé par cet article. Nous concluons ainsi qu'en abrogeant l'article 47 et en intentant des poursuites en matière de truquage des offres en vertu de l'article 45 au

lieu, il serait possible de réorienter le cadre législatif présentant un préjudice économique sous-jacent et d'éviter les pièges liés à une trop grande codification des règlements en matière de conduite anticoncurrentielle.

Introduction

In recent years, the Competition Bureau's (the "Bureau") enforcement of the bid-rigging offence in section 47 of the *Competition Act* (the "Act")¹ has captured the attention of the legal profession, government, media, and the public. Convictions have been obtained against parties for bid-rigging involving auto parts, government contracts for hospital construction, school bus services, sewer services, gasoline (retail), lighting for traffic signals, and real estate advisory services.² Under the Public Works and Government Services Canada's Integrity Framework, companies convicted of bid-rigging may be banned from bidding on federal contracts for 10 years.³ A similar policy has been adopted in Quebec against the backdrop of an ongoing probe relating to an alleged bid-rigging scheme for municipal infrastructure contracts in St-Jean-sur-Richelieu.⁴ Commissioner of Competition John Pecman has consistently identified the detection, investigation, and prosecution of cartels—including bid-rigging—as top priorities for the Bureau.⁵

There is no indication that this level of enforcement activity will diminish.⁶ However, we believe it is time to rethink the ongoing utility of maintaining a separate bid-rigging offence in the Act.⁷ In our view, no economic or normative basis exists for the continued co-existence of a general conspiracy offence (in section 45 of the Act) and a distinct bid-rigging offence (in section 47). The argument developed in this article is two-fold: (1) since there is no economic or practical rationale for distinguishing between cartel behaviour under sections 45 and 47, the independent utility of section 47 will be exhausted when pre-2010 cartel offences have been prosecuted; and (2) the continued co-existence of the two offences coupled with an unduly narrow interpretation of section 47, will undermine the effective policing and prevention of the type of behaviour section 47 was meant to prohibit. Our conclusion is that repealing section 47 and prosecuting bid-rigging offences under section 45 would realign the legislative framework with underlying economic harm and avoid the pitfalls of an overly codified approach to the regulation of anti-competitive conduct.

I. Drafting History: Adding Teeth to the General Conspiracy Offence

The bid-rigging offence currently prohibits two or more persons, in response to a call or request for bids or tenders, from reaching an

agreement not to submit a bid or tender, to withdraw a bid or tender already submitted, or to submit bids that are arrived at by agreement. The provision was enacted as part of the 1976 amendments to the Act following failed attempts to prosecute cartels successfully, and reflected the widely-accepted view that the then-existing conspiracy offence was ineffective.⁸ Prior to the enactment of section 47, bid-rigging could be prosecuted under either the general conspiracy offence, which required proof that competition had been lessened unduly, or under the fraud provision of the *Criminal Code*, which requires proof beyond a reasonable doubt of an intent to defraud.⁹ In these circumstances, convictions were difficult to obtain even in egregious circumstances.¹⁰

In order to prove an undue lessening of competition, courts were tasked with performing complex economic analyses to define and determine the impact of the conduct on relevant markets. As a result, convictions became effectively unobtainable in all cases except those involving concentrated industries in which all, or almost all, participants agreed to fix prices.¹¹

For example, in *R. v. J.J. Beamish Construction Company Limited et al.*, road surfacing contractors had colluded to determine which of them was to provide the lowest bid for a tender to the government, the quantum of the bids, and the subsequent allocation of profits.¹² Despite egregious facts, the accused were acquitted because they did not control a sufficiently large part of the market for the supply of materials and, therefore, could not “unduly” lessen competition in that market. A report by the research branch of Consumer and Corporate Affairs Canada noted that the unduly requirement “rests largely upon showing substantial market control. Experience with collusive tendering situations, however, has shown that they sometimes involve local firms which may not loom large in the total picture if the market is considered as encompassing a large area.”¹³ In order to maximize chances of success, prosecutions became skewed towards those cases where market shares exceeded 70%.¹⁴

By the time the Economic Council of Canada (the “Economic Council”) released its famous report¹⁵ recommending an overhaul of the *Combines Investigation Act*, the efficacy of section 45 had been undermined by strict judicial interpretation, strong opposition from the business community, and a growing recognition that a vague criminal law was not an effective way to regulate competition. The report concluded that a dual civil and criminal track system would be best suited to maximizing the efficient allocation of resources in the Canadian economy.¹⁶ Under such a system, price-fixing and certain other practices would receive *per se* criminal treatment while “[a]ll other matters of

relevance for competition policy, including mergers and a wide range of trade practices” would be dealt with by way of new civil provisions.¹⁷

Significantly, the Economic Council did not distinguish between bid-rigging and other cartel offences on the basis that “price-fixing and closely related practices” are equally “inimical to the public interest and rarely if ever productive of any substantial public benefit.”¹⁸ The report recommended that five practices receive *per se* treatment, the first of which was “collusive arrangements between competitors to fix prices (including bid rigging on tenders).”¹⁹ The report concluded that, even if the “unduly” standard were retained, it would nevertheless “perhaps be possible to exempt from its scope the rigging of bids on tenders. This practice could surely be prohibited without any qualification whatever.”²⁰

The Economic Council’s recommendations were introduced into the House of Commons as Bill C-256 in 1971 but were ultimately withdrawn due to opposition from the business community.²¹ In 1973, the federal government divided the proposed amendments into Stages I and II, relegating the controversial amendments to the latter stage. The Stage I amendments included a new *per se* bid-rigging offence, which came into force in 1976, but retained the “unduly” standard in the general conspiracy offence. The new bid-rigging offence was introduced to “surmount serious difficulties which have been experienced in attempting to prevent collusive bidding practices.”²² Specifically, the rationale for enacting a standalone bid-rigging offence was to eliminate the necessity in the general conspiracy offence of proving that dealings in “articles” were involved (i.e., thereby including services in the prohibition) and to remove the “unduly” requirement.²³

While the “unduly” standard in the general conspiracy offence was retained, the successful prosecution of hard-core cartel conduct remained elusive; between 1980 and 2010, of the 23 contested prosecutions under section 45, the Crown was successful in only three of them.²⁴ In 1992, the Supreme Court of Canada (the “Court”) added further complexity to the determination of whether cartel behaviour unduly lessened competition. In *R. v. Nova Scotia Pharmaceuticals Society*, the Court held that there were two components to this inquiry: the structure of the market and the behaviour of the parties to the agreement.²⁵ Market power (a necessary but not sufficient element of the analysis) included (but was not limited to) a consideration of the number of competitors and the degree of concentration, barriers to entry, the geographic distribution of buyers and sellers, differences in the degree of integration among competitors, product differentiation, countervailing power, and cross-elasticity of demand.

As a result of the strict interpretation of the “unduly” requirement

in section 45, securing convictions became tremendously difficult. In 1995, the Crown suffered a major defeat in the *Freight Forwarders* case in which the court held that the unduly standard required market power, understood as the ability to behave relatively independently of the market.²⁶

In 2009, the Act was amended to remove the “unduly” requirement in section 45.²⁷ (The new provision came into force on March 12, 2010.) As currently formulated, agreements between competitors to fix prices, allocate markets or customers, or to restrict output are *per se* illegal under section 45, whether or not the agreement results in any economic harm. Section 45 provides an ancillary restraints defence where the agreement at issue is directly related to, and reasonably necessary for giving effect to, a broader and lawful agreement.

The stated purpose of the amendment to section 45 was to create a more effective mechanism for the criminal prosecution of the most egregious forms of cartel activity between competitors and to introduce a civil review process for other forms of competitor collaborations.²⁸ These amendments were consistent with an international trend at the time that gained traction when the Organization for Economic Co-operation and Development (OECD) adopted its 1998 Recommendation Against Cartels, describing them as the most egregious violations of competition law.²⁹

As a result of the 2009/2010 amendments, sections 45 and 47 are partially and imperfectly overlapping offences. Both provisions create *per se* offences targeting “hard core” cartel conduct assumed to have such negative effects on the market (*e.g.*, increasing prices or reducing supply) as to render any other benefits, such as efficiency gains, irrelevant. Moreover, section 45 clearly could apply to situations where two or more competitors agree to fix the price for the supply of a product in response to a bid or tender, or where competitors “fix” prices by agreeing to not submit or withdraw a bid.³⁰ Indeed, nothing in the Act would prevent proceedings from being commenced under both sections 45 and 47 in cases of alleged bid rigging.³¹ In other words, section 45 substantively covers the same underlying conduct as section 47 with the same underlying theory of economic harm (and moral justifications *per se* treatment). As a consequence, Canada has a legislative regime dissimilar to its major trading partners. The laws in the United States,³² the United Kingdom³³ and Australia³⁴ do not make a distinction between bid-rigging and other cartel-like agreements.

In our view, based on its original legislative purpose, the utility of section 47 will be exhausted once all pre-2010 bid-rigging cases have been prosecuted. The purpose of section 47 was to remedy a problem

caused by the “unduly” standard in section 45 (a problem that was corrected in section 45 itself as of 2010). It is therefore worth considering whether there continues to be any practical reason for the continued existence of both offences in Canada. As discussed in more detail below, our view is that section 47 ought to be repealed and cases of bid-rigging prosecuted under section 45. This is not simply a question of legislative housekeeping designed to eliminate an unnecessary statutory overlap. Rather, we believe that the continuing co-existence of the two offences has the potential to create not only ambiguity but also to undermine the effective prevention and prosecution of bid-rigging behaviour.

II. The Pitfalls of Co-Existence

The Bureau’s *Competitor Collaboration Guidelines* set out the circumstances in which the Bureau will assess an arrangement under sections 45, 47, or 90.1³⁵ of the Act.³⁶ Where an agreement between competitors is “limited” to bid-rigging as defined in section 47, the agreement will be assessed under section 47 or section 90.1.³⁷ Where an agreement includes other restraints on competition apart from bid-rigging that may contravene the conspiracy offence in section 45 (e.g., where competitors agree to rig bids and allocate markets) or if the bid-rigging is part of a broader conspiracy to lessen competition, “the agreement may be assessed under either or both of sections 45 and 47.”³⁸

Although this approach is reasonable, in practice it is problematic due to the narrow approach courts have taken to section 47. Since the Act does not define a “bid,” “tender,” or “call or request for bids or tenders,” judges and juries focus on the distinction between bids and “mere proposals,” which do not establish contractual relations between the parties.³⁹ Since the bid-rigging offence presupposes the existence of a “bid,” courts have held that a finding of a “mere proposal” or other non-binding arrangement shields parties from liability under section 47.

The effect of a standalone bid-rigging offence is to add a layer of legal analysis focused on the intention of the party calling for tenders, rather than on the impugned behaviour. In other words, rather than focusing solely on whether tendering parties conspired to fix prices, courts also consider the intention of the party requesting the bids. Consideration of this intention, in turn, invites an analysis of whether a valid, binding contract exists between the parties. In the context of contract law, this analysis is used (and is well-suited) to settle rights between private parties. In the bid-rigging context, however, broader public interest considerations come into play.

Although courts have disagreed on how formalized and enforceable a contractual relationship must be in order to ground a finding of

a “bid” or “tender” for the purpose of section 47—thereby adding additional and unnecessary ambiguity to the bid-rigging inquiry—parties have generally been able to escape liability where there is no intention to enter into a contractual relationship with the party calling for the tenders. Older cases, such as *R v. York-Hanover Hotels Ltd.*, held that if tenderers are invited to submit revised proposals, the original offers (even if they were the product of a conspiracy between bidders) would not constitute bids or tenders for the purpose of section 47.⁴⁰ A similar view was adopted by the *Quebec Superior Court* in *R. v. Al Nashar*, which held that there was no contractual relationship between general contractors that had requested bids from potential subcontractors because they did not consider themselves to be under any obligation to accept the subcontractors’ bids.⁴¹ As a result, the court held that there was no “call or request for bids or tenders” and section 47 could not be applicable to the facts.

In stark contrast, in *R. v. Dowdall*, the Ontario Court of Appeal held that requests for proposals may be “calls or requests for bids or tenders” even when they do not result in reciprocal and enforceable contractual rights. Nevertheless, the court held that the analysis should focus on the intention of both parties (i.e., as opposed to just the tenderers’ intention to conspire) and whether they intended to enter into contractual arrangements.⁴²

The court’s approach in *Dowdall* aligns with commentators’ recommendations that the best way forward is for courts to look for the presence of a “bid/tender paradigm” rather than to strictly apply the principles developed as part of the law of tenders. For example, Hoffman & Pinsonnault have expressed the view that:

...courts should generally infer the existence of a “call or request for bids or tenders” under section 47 of the Act in the presence of (a) an offer to evaluate bids or tenders presented in compliance with a sufficiently structured and detailed procurement process, (b) the parties’ intention to initiate contractual relations upon the submission of a bid or tender, and (c) the lack of a possibility to negotiate the fundamental details of the procurement process and final contract.⁴³

The major shortcoming of this approach, however, is that it takes for granted the relevance of some type of contractual relationship between the parties. Importing contract law concepts into bid-rigging analysis to determine whether a “bid” exists ignores the fact that bid-rigging can have negative economic effects even where the party requesting tenders has no obligation to accept a bid. An artificially priced bid may still

deceive the party requesting tenders into concluding an economically inefficient contract or otherwise skew a subsequent negotiation.⁴⁴

An important rationale for condemning price fixing and other cartel-like agreements is economic: ensuring that consumers benefit from free competition. There is no corresponding public interest consideration in standard contract analysis. Therefore, contract law has developed as a series of formalized tests and indicators to determine the scope of rights between private parties. In the bid-rigging context, such a formalized approach produces counterintuitive results. For instance, section 47 has been strictly construed to require a direct relationship between the party requesting tenders and the tenderer, resulting in price quotations by subcontractors to general contractors being deemed to not constitute responses to a request for tenders where the general contractors were the ones that actually submitted the bids.⁴⁵

In addition, adopting a “bid/tender paradigm” represents a *de facto* reintroduction of an effects-based analysis that undermines the *per se* nature of the offence. According to the Bureau, the 2009/2010 amendments were directed at horizontal agreements which are “so likely to harm competition and to have no pro-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effects.”⁴⁶ By focusing on the intentions of the party requesting tenders to enter into binding contractual relations—as evidenced by the existence of privilege clauses, tender forms that stipulate that there is no obligation to accept the lowest bid or any tender submitted, or multiple stages in a single procurement process—courts are essentially focusing on whether the bidders’ conspiracy is likely to materialize. This reasoning undermines Parliament’s stated objective of removing an economic effects requirement for egregious forms of cartel behaviour.

Finally, to treat a lack of intention to enter into a contract as a complete defence to an allegation of bid-rigging also requires that additional time and expense be incurred on formalistic legal arguments. For this reason, and the others mentioned above, we believe that section 47 should be repealed and bid-rigging offences prosecuted under section 45. We discuss this proposal in more detail in the following section.

III. Shifting Bid-rigging to the Section 45 Framework

The Section 45 Framework Sidesteps the Need for Bid/Tender Analysis

The 2010 amendments to the Act removed the requirement that an agreement or arrangement result in an “undue” prevention or lessening

of competition before it could be sanctioned by the courts. Section 45 now provides that every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges to: (a) fix, maintain, increase or control the price for the supply of the product; (b) allocate sales, territories, customers or markets for the production or supply of the product; or (c) fix, maintain, control, prevent, lessen or eliminate the production or supply of the product. Conduct that was carried out before but concluded after March 2010, and conduct that was wholly carried out after March 2010, will be subject to the new provision.⁴⁷

The *Competitor Collaboration Guidelines* outline the three types of agreements prohibited by the Act, all of which constitute “naked” restraints on competition rather than a legitimate collaboration, strategic alliance or joint venture.⁴⁸ These include price-fixing agreements between competitors, customer and market allocation agreements, and agreements to restrict product output.

Shifting bid-rigging enforcement to the section 45 framework would focus the Crown’s case—and jury charges—on the only question that is relevant in the context of the most egregious forms of cartel conduct: “whether two or more persons wrongfully combine[d] by joining together their acts and activities to accomplish a result or by co-operating with the other for the desired end?”⁴⁹ This analysis, in turn, does not ascribe weight to the intention of the parties requesting or responding to tenders, or the existence of Contract A and Contract B. Rather, the analysis distinguishes between those “aspects of the bids or tenders happened by chance, based upon the [tenders’] collective knowledge of the industry and market force” and those based upon tenders’ intentions to arrive at their bid submissions by agreement or arrangement.⁵⁰

In circumstances where competitor agreements are not “naked restraints” on competition but nevertheless substantially lessen competition, section 90.1 provides a mechanism to redress the resulting economic harm.⁵¹ The Bureau may seek remedies where it can establish, by adopting traditional merger analysis, that an agreement between competitors is likely to create, maintain, or enhance the ability of the parties to exercise market power.⁵²

Analyzing bid-rigging under section 45 should also help clarify currently opaque issues. For instance, questions about the degree of acceptable collaboration between small and medium-sized businesses when bidding on contracts remain unanswered under section 47. Small companies have a competitive advantage in the tendering process due to their lower costs, but also need to form alliances and subcontract

with one another in order to be able to respond to government requests for proposals or tenders. The jurisprudence, as it has developed under section 47, offers little, if any, guidance on the scope of legitimate collaboration between competitors in this context.⁵³

The recent prosecution in *Durward et al.* illustrates this point. In that case, several of the defendants employed a small team of full-time managers who secured federal contracts and coordinated the activities of dozens of independent experts.⁵⁴ The protracted trial—which lasted more than seven months and included more than 90 days of testimony by 22 witnesses and thousands of electronic exhibits—was unnecessarily complicated by arguments relating to the proper characterization under contract law of the ten requests for proposals at issue. In her charge to the jury, Judge Warkentin directly imported principles of contract formation to guide jurors in determining whether the proposals constituted a bid or tender. For example, the jury was required to consider that “the basic elements of contract formation are: offer, acceptance, and consideration,” to note that an offer that “does not indicate an intention to be legally bound... is merely an indication of one’s willingness to accept offers,” and to differentiate between intentions to enter “Contract A” and “Contract B.”⁵⁵ In our view, a section 45 analysis would have been more helpful by orienting the inquiry towards the real issue of concern, namely whether there was a price-fixing agreement among the parties.

“Made Known” Defence in Section 47 is Broad and Imprecise

The defence in section 47 to an allegation of bid-rigging is disclosure of the agreement to the party calling for the bids. If such disclosure is made before the deadline for submission of bids, there is no violation of section 47.

The ancillary restraints defence in section 45, on the other hand, saves an agreement (or term of an agreement) that ostensibly contravenes section 45 but that is directly related to, or reasonably necessary for, giving effect to a broader and lawful agreement. In order to establish this defence, the parties must show that: (1) the restraint was ancillary to a broader or separate agreement that includes the same parties; and (2) the restraint was directly related to, and reasonably necessary for giving effect to, the objective of the broader agreement. If both elements are established, and if the broader agreement considered in the absence of the restraint does not contravene section 45, then the agreement will not be found to violate the Act.

The ancillary restraints defence is better tailored to weeding out problematic agreements and facilitating valid collaboration between

parties wanting to respond jointly to bids than the “made known” defence in section 47. Only those collaborations that are ancillary to legitimate joint ventures or teaming arrangements would be saved under section 45. The “made known” defence, on the other hand, may serve to validate otherwise socially adverse agreements solely because of the formality of disclosure.

This distinction is especially important where the party requesting the tender has little bargaining power vis-à-vis the tenderers, as in concentrated markets where there are few tenderers submitting bids in the first place. In these circumstances, the few possible bidders could decide to rig bids, notify the party requesting the tenders and thereby leave them with the choice of either accepting an artificially inflated bid or abandoning the tendering process altogether. Legislatively permitting such an outcome would suggest that bid-rigging is a less egregious form of cartel behaviour, a conclusion that is not borne by either legislative history or economic theory.

Similarity of Fines Under Sections 45 and 47

It is worth also considering the distinction in maximum penalties under sections 45 and 47. Every person who violates section 45 may be imprisoned for a term not exceeding 14 years or may be required to pay a fine not exceeding \$25 million, or both. In contrast, there is no maximum fine for bid-rigging: every person who violates section 47 may be imprisoned for a term not exceeding 14 years or may be required to pay a fine in the discretion of the court, or both.

In practice, this is proving to be a distinction without difference. Fines under sections 45 and 47 have been similar: for instance, the largest single fine for a conspiracy conviction was \$50.9 million (for multiple counts against F Hoffmann-La Roche in 1999)⁵⁶ and \$30 million for bid-rigging (against Furukawa in 2013).⁵⁷ This penalty convergence is consistent with the sentencing principle enshrined in section 718.2(b) of the *Criminal Code*, which requires that sentences be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. In addition, the Bureau’s *Leniency Program*, which sets out the factors and principles that the Bureau considers in making a recommendation to the Crown for lenient treatment in the sentencing of individuals or business organizations accused of criminal cartel offences, does not distinguish between bid-rigging and other cartel offences.⁵⁸ Prosecuting bid-rigging under section 45, therefore, should not affect the overall quantum of collected fines.⁵⁹

Conclusion

Based on a review of the legislative history of section 47 and its treatment by the courts, the independent utility of section 47 will be exhausted when pre-2010 cartels are prosecuted. There is no principle of economic or moral harm that would justify treating an agreement as legal under section 47 and illegal under section 45. Rather than providing “teeth” for section 45, as it did prior to 2010, section 47 now simply creates ambiguity, invites an overly formalistic and irrelevant legal inquiry into the intentions of the party requesting tenders to enter into binding contractual relations, and contributes to the length and complexity of bid-rigging trials. For these reasons, we believe that section 47 should be abolished and that bid-rigging offences should be prosecuted under section 45, thereby re-aligning the prohibition with the underlying harm.

Repealing the bid-rigging offence would also help ensure that that egregious form of conduct can be effectively prosecuted—under the general price-fixing provision—rather having to rely on a codified, compartmentalized, and ultimately redundant section 47. Prosecuting bid-rigging under section 45 would eliminate the legal complexity, irrelevancy, and practical expense of bid/tender analysis and the potentially anomalous outcomes of the “made known” defence. The continued co-existence of sections 45 and 47 is also likely to lead to more rigid jurisprudence on the meaning of “bids” and “tenders,” thereby allowing a specific provision of the Act to undercut the efficacy of a general one. Although a repeal of section 47 may not be politically desirable or feasible in the short-term, doing so would in our view end this particular chapter of “the tortured legislative development of Canadian combines law.”⁶⁰

Endnotes

* The authors are members of the Competition and Foreign Investment Review Group at Torys LLP. The comments of Jay Holsten, Mark Katz, and Brian Radnoff on an earlier draft of this paper are gratefully appreciated.

¹ *Competition Act*, RSC 1985, c C-34, s 47 [*Competition Act*].

² See Canada, Competition Bureau, “Penalties Imposed by the Courts,” Legal Actions and Opinions, online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01863.html>.

³ Public Works and Government Services Canada, “Integrity Framework”, online <www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html>. As a result of changes to the program implemented in July 2015, the 10-year ineligibility period can be reduced by five years for companies that demonstrate that they have cooperated with law enforcement authorities or have undertaken remedial action to address the wrongdoing.

⁴ Canada, Competition Bureau, “Competition Bureau lays additional criminal

charges related to infrastructure projects in Quebec” (2 December 2014), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03857.html>.

⁵ See e.g., Canada, Competition Bureau, “Seventh guilty plea in Competition Bureau’s investigation involving motor vehicle components” (11 December 2014), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03860.html>; Canada, Competition Bureau, “Company Pleads Guilty to Bid-rigging of Federal Government Contracts” (30 July 2012), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03484.html>; Canada, Competition Bureau, “Guilty Plea and \$425,000 fine for Bid-rigging in Montreal” (19 July 2011), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03391.html>.

⁶ Most recently, on June 16, 2015, the Bureau laid 44 criminal charges against three companies and four individuals accused of rigging bids for the supply of water services to municipalities in Quebec. See Canada, Competition Bureau, “Criminal charges laid in a Competition Bureau Investigation” (23 June 2015), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03964.html>>. On May 21, 2015, a former employee of an Ottawa-based information technology company received an 18 month conditional sentence and was ordered to pay a \$23,000 fine after pleading guilty to participating in an alleged conspiracy to rig bids for the supply of professional information technology services to Library and Archives Canada. See Canada, Competition Bureau, “Ontario individual sentenced after pleading guilty to bid-rigging” (21 May 2015), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03936.html>>. Many of the Bureau’s successes in bid-rigging enforcement stem from guilty pleas pursuant to its leniency program. Contested proceedings have proven less successful for the Bureau due to the standard of proof in criminal trials. A recent example is the Crown’s failure to discharge its burden on April 27, 2015, when a jury returned several not-guilty verdicts against seven individuals and three companies charged with bid-rigging for government contracts for the supply of computer service technicians. See Canada, Competition Bureau, “Competition Bureau to consider not-guilty verdicts in major bid-rigging case” (27 April 2015), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03912.html>>.

⁷ We acknowledge that repealing section 47 is unlikely to be a priority when there is widespread political and popular concern about the practice. For example, in Quebec, the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry is currently preparing a report on corruption and bid-rigging in the management of public contracts.

⁸ See e.g. Consumer and Corporate Affairs Canada, “General Proposals for a New Competition Policy for Canada, First Stage, Bill C-227: November 1973” (Ottawa: Information Canada, 1973) at 35-38 [General Proposals].

⁹ *Criminal Code*, RSC 1985, c C-46. Under section 465(1), “every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) [murder] or (b) [false prosecution] is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable.”

¹⁰ Paul K Gorecki, “The Administration and Enforcement of Competition

Policy in Canada, 1960 to 1975: An Application of Performance Measurement” (Ottawa: Consumer and Corporate Affairs Canada) at 295-96.

¹¹ See e.g. Al Gourley, “A Report on Canada’s Conspiracy Law: 1889 – 2001 and Beyond” (2001) at 5, online: Competition Bureau <[www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/gourleyrep.pdf/\\$FILE/gourleyrep.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/gourleyrep.pdf/$FILE/gourleyrep.pdf)> [Conspiracy Report].

¹² *R v JJ Beamish Construction Company Limited*, [1966] 2 OR 867, [1967] 1 CCC 301 (HC), aff’d *R v JJ Beamish Construction Company Limited* (1967), [1968] 1 OR 5, [1968] 2 CCC 5 (CA).

¹³ General Proposals, *supra* note 8 at 295.

¹⁴ Conspiracy Report, *supra* note 11 at 3.

¹⁵ Economic Council of Canada, “Interim Report on Competition Policy” (Ottawa: Queen’s Printer, 1969) [Interim Report].

¹⁶ The Report advocated the adoption of a single objective for competition policy: the improvement of economic efficiency and the avoidance of economic waste. See *ibid* at 19.

¹⁷ *Ibid* at 100-01.

¹⁸ *Ibid*.

¹⁹ *Ibid* at 102. The other practices were: collusive arrangements between competitors to allocate markets; collusive arrangements between competitors to prevent the entry into markets of new competitors or the expansion of existing competitors; resale price maintenance; and misleading advertising.

²⁰ *Ibid* at 103.

²¹ Bill C-256, *An Act to promote competition, to provide for the general regulation of trade and commerce, to promote honest and fair dealing, to establish a Competitive Practices Tribunal and the Office of Commissioner, to repeal the Combines Investigation Act and to make consequential amendments to the Bank Act*, 3d Sess, 28th Parl, 1970-71, cl 16. The proposed section provided that “[n]o person shall conspire, combine, agree or arrange with another person, (a) to fix or determine, in any manner whatever, the minimum price or any other term of condition at or upon which any commodity or service will be supplied or the maximum price or any other term or condition at or upon which any commodity or service will be supplied or the maximum price or any other term or condition at or upon which a commodity or service will be acquired by such persons to or from any other person, whether determined or undetermined, (b) to fix or determine, in any manner whatever, the minimum price or any other term of condition at or upon which a tender will be submitted for the supply of a commodity or service or the maximum price or any other term or condition at or upon which a tender will be submitted for the supply of a commodity or service or the maximum price or any other term or condition at or upon which a tender will be submitted for the acquisition of a commodity or service or to refrain or cause any other person to refrain from submitting such a tender, (c) to divide or allocate between or among themselves any market for the acquisition or supply of a commodity or service, (d) to lessen or limit the production of a commodity or service, or the supply of a commodity or service for or in any market, (e) to lessen or limit the quality, grades or kinds of a commodity or service that is or are supplied to or may be acquired in any market, (f) to lessen or limit facilities for the production, acquisition, supply or distribution of a commodity or

service for or in any market, (g) to lessen or limit the channels or methods of acquisition, supply or distribution of a commodity or service for or in any market, (h) to prevent or impede the entry of any person into, or the expansion of the business of any person in, any market, (i) to cause any person to abandon or withdraw from any market, or (j) to boycott the suppliers or acquirers of a commodity or service to or in any market, and no person shall do anything within Canada that is directed to the implementation of a conspiracy, combination, agreement or arrangement, wherever entered into, that has, is intended to have or, if implemented would be likely to have, in Canada, one or more of the effects described in paragraphs (a) to (j).” See also MT MacCrimmon & WT Stanbury, “Policy Death by Administrative Restriction: The House Committee’s Report on Bill C-42, The Competition Act of 1977” (1977) 15 Osgoode Hall LJ 485 at 486-87.

²² Interim Report, *supra* note 15 at 35.

²³ *Ibid.* The report noted the Crown’s failure in the *Beamish* case in particular and stated that “most situations involving bid-rigging that come to the attention of the Director of Investigation and Research involve local firms with only small shares of the construction market.”

²⁴ Adam Fanaki, “Cops, Copperweld and Copping Out: Recent Amendments to Canada’s Conspiracy Regime” (Paper delivered at the Canadian Bar Association Competition Law 2010 Spring Forum, 17 May 2010) at 7, online: Canadian Bar Association <www.cba.org/cba/cle/PDF/SpComp10_Fanaki_paper.pdf>.

²⁵ *R v Nova Scotia Pharmaceuticals Society*, [1992] 2 SCR 606.

²⁶ *R v Clarke Transport Canada Inc*, 130 DLR (4th) 500, 29 WCB (2d) 83 (Ont Ct J (Gen. Div)).

²⁷ Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on 27 January 2009 and related to fiscal measures*, 2nd Sess, 40th Parl, 2009. Under the new section 45(1), “[e]very person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges (a) to fix, maintain, increase or control the price for the supply of the product; (b) to allocate sales, territories, customers or markets for the production or supply of the product; or (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.”

²⁸ Canada, Competition Bureau, “Competitor Collaboration Guidelines”, Enforcement Guidelines (Ottawa: Competition Bureau, 23 December 2009) at Preface, online: <[www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/\\$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf)> [*Competitor Collaboration Guidelines*].

²⁹ OECD, Committee on Competition Law and Policy, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, Doc No C(98)35/FINAL (1998), IA2(a), online: <www.oecd.org/daf/competition/2350130.pdf>.

³⁰ In our view, section 45 should capture situations of non-action such as agreeing not to bid or withdraw a bid through broad concepts such as agreeing to “allocate” markets or “control” prices, production, or supply. As long as there is a horizontal agreement to control, the exact manner in which it is carried out (*i.e.*, whether by action or inaction) ought to be irrelevant.

³¹ *Competition Act*, *supra* note 1. Section 45.1 states that “[n]o proceedings may be commenced under section 45(1) against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92”, but not section 47.

³² Agreements to rig bids, fix prices or output, allocate customers, suppliers, or markets are typically treated as criminal and *per se* illegal under section 1 of the *Sherman Act*: see Federal Trade Commission & US Department of Justice, “Antitrust Guidelines for Collaborations Among Competitors” (Washington, DC: April 2000) at 8, online: US Department of Justice < www.justice.gov/atr/public/guidelines/jointindex.html>.

³³ *Enterprise Act 2002* (UK), c 40. Section 188 contains the primary prohibition on cartel conduct which includes price fixing, market/customer sharing, bid-rigging, and output limitation.

³⁴ *Competition and Consumer Act 2010* (Cth). Division 1 of Part IV, containing provisions 44ZZRA - 44ZZRV, now contains the primary prohibition on cartel conduct (in the form of price fixing, bid rigging, market division and restricting outputs) in Australia. This Division was inserted by the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 and entered into operation on 24 July 2009.

³⁵ Section 90.1 is the civil prohibition on arrangements—whether existing or proposed—between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market.

³⁶ *Competitor Collaboration Guidelines*, *supra* note 28 at 2. Notably, this is the only paragraph in the *Competitor Collaboration Guidelines* that addresses bid-rigging as being separate or distinct from other cartel conduct.

³⁷ The amended criminal prohibition is reserved for agreements between competitors to fix prices, allocate markets or restrict output that constitute “naked restraints” on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture). Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under a civil agreements provision that prohibits agreements only where they are likely to substantially lessen or prevent competition. See *ibid* at 3.

³⁸ *Ibid*. Despite the Bureau’s attempts to clarify the relationship between sections 45 and 47, compliance challenges for businesses remain. For example, even if tenderers notify the party requesting tenders of an agreement between themselves (thereby precluding prosecution under section 47), the agreement could nevertheless contravene section 45 if there are “other restraints on competition” or a “broader conspiracy,” effectively requiring the parties to ensure compliance with both offences.

³⁹ For a comprehensive discussion of the courts’ adoption of tender law principles under the bid-rigging offence, see Pierre-Christian Collins Hoffman & Guy Pinsonnault, “The Characterization of a Procurement process as a ‘Call or Request for Bids or Tenders’ under Section 47 of the Competition Act” (2014) 27:2 Can Comp L Rev 323 [*Hoffman and Pinsonnault*].

⁴⁰ *R v York-Hanover Hotels Ltd* (1986), 9 CPR (3d) 440 (Ont Prov Ct).

⁴¹ *R v Al Nashar*, (1 February 2013), Montreal 500-73-003533-104 (CQ).

⁴² *R v Dowdall*, 2013 ONCA 196. It should be noted that the Crown's most recent section 47 trial, which involved allegations of bid-rigging in the context of government contracts for the supply of computer service technicians, resulted in the acquittal by a jury of all of the defendants. Although the issue of whether the requests for proposals at issue constituted requests for bids or tenders was argued during the course of the trial, a jury does not have to provide reasons and so the decision has not advanced the jurisprudence on this point. See *Her Majesty the Queen v Marina Durward, Susan Laycock, Philip McDonald, Donald Powell, Thomas Townsend, Ronald Walker, The Devon Group Ltd, Spearhead Management Canada Ltd. and TPG Technology Consulting Ltd.* (27 April 2015), Ottawa 09-300-68 (Ont Sup Ct) (Final Instructions to the Jury).

⁴³ *Supra* note 39 at 347.

⁴⁴ *Ibid* at 341.

⁴⁵ *R v Coastal Glass & Aluminum Ltd* (1986), 27 CCC (3d) 289, 11 CPR (3d) 391 (BCCA).

⁴⁶ *Supra* note 27 at 13.

⁴⁷ Omar Wakil, *The 2015 Annotated Competition Act* (Toronto: Thomson Reuters, 2015) at 102.

⁴⁸ *Supra* note 28 at 10-12.

⁴⁹ Final Instructions to the Jury, *supra* note 42 at 44-46.

⁵⁰ *Ibid*.

⁵¹ *Hoffman and Pinsonnault*, *supra* note 28 at 3.

⁵² In the *Competitor Collaboration Guidelines*, the Bureau indicates that it will apply principles outlined in the *Merger Enforcement Guidelines* to agreements that fall within the scope of s. 90.1. See *supra* note 28 at 19.

⁵³ During the course of the trial, Ontario Superior Court Judge Warkentin recognized that some collaboration between competitors in the tendering process will not contravene s. 47. She questioned whether it was "the Crown's position that because the defendants were working together to gather resources ... but each submitted their own pricing in their proposals, that that's an offence of bid-rigging?... Because I'm going to need some law on how that constitutes bid-rigging. That's a pretty long shot for the Crown." See James Bagnall, "Bid-rigging trial: After complete rout, prosecution ponders next steps" *Ottawa Citizen* (1 May 2015), online: <ottawacitizen.com/news/local-news/bid-rigging-trial-after-complete-rout-prosecution-ponders-next-steps>.

⁵⁴ James Bagnall, "Rules of the game: Government contracting on trial" *Ottawa Citizen* (14 August 2014), online: <ottawacitizen.com/business/local-business/rules-of-the-game-government-contracting-on-trial>.

⁵⁵ Final Instructions to the Jury, *supra* note 42 at 44-46.

⁵⁶ Canada, Competition Bureau, "Penalties Imposed in Cases Against International Cartels for Violations of the Competition Act," (January 2000) online: Department of Justice <www.justice.gov/atr/icpac/canada.htm>.

⁵⁷ Canada, Competition Bureau, "Record \$30M Fine Obtained by Competition Bureau Against Japanese Auto Parts Supplier" (18 April 2013), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03560.html>. Since the commencement of its investigation into bid-rigging in the auto parts industry in 2009, the Bureau has collected fines of over \$56 million.

⁵⁸ For the purposes of the *Leniency Program*, cartel offences include “cartel offences include conspiracy (i.e., notably section 45, but also sections 48 and 49 of the Act), foreign directives (i.e., section 46 of the Act) and bid-rigging (i.e., section 47 of the Act).” See Canada, Competition Bureau, “Leniency Program” (29 September 2010), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html>.

⁵⁹ It may be questioned whether a capped fine is appropriate for the most egregious forms of cartel behaviour, particularly in those cases involving one agreement and significant associated commerce. In our view, the \$25 million cap does not pose a problem in practice, but ultimately, fine quantum is a policy issue separate and apart from questions relating to the substantive inadequacies of section 47.

⁶⁰ Dr Lawrence A Skeoch & Bruce C McDonald, *Dynamic Change and Accountability in a Canadian Market Economy: Proposals for the Further Revision of Canadian Competition Policy by an Independent Committee Appointed by the Minister of Consumer and Corporate Affairs* (Ottawa: Printing and Publishing Supply and Services Canada, 1976) at i.