## ONTARIO COURT CLARIFIES BID-RIGGING PROVISION

By: D. Martin Low, QC and Casey W. Halladay[1]
McMillan Binch LLP

The Ontario Superior Court of Justice has recently released an important decision clarifying the scope of section 47 of the *Competition Act*. In *R.* v. *Rowe*[2], two corporations and two executives were charged with bid-rigging, in that they allegedly reached an agreement whereby one of the bidders would withdraw its bid for the City of Toronto's chlorine tender for 1992. The defendants were committed for trial at the preliminary inquiry. On application by the defendants for an order of *certiorari* quashing the committal, German J. of the Superior Court reversed the committal on the grounds that section 47 of the Act does not prohibit bid withdrawals.

Section 47 of the *Competition Act* provides an explicit, statutory definition of the bid-rigging offence:

> 47. (1) In this section, "bid-rigging" means
>
> (a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, or
>
> (b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,
>
> where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

Penalties on conviction may include an unlimited fine and/or prison sentences of up to five years.

In *Rowe*, Welland Chemical Ltd. ("Welland") and Van, Waters & Rogers Ltd. ("VWR"), along with a third company that was not a party to the proceedings, submitted bids in response to the City of Toronto's Request for Quotations for chlorine for the 1992 supply year. Almost two months after the closing date for submission of bids, but before the City had accepted any of the offers, VWR withdrew its bid in writing, indicating that it was no longer able to supply the City with chlorine. The City accepted the withdrawal, either expressly or by implication,[3] and ultimately split the contract award between the other two bidders. (All three companies had quoted the same price for this commodity product.) More than nine years later, in May of 2002,[4] Welland and VWR, along with an employee of each company, were charged with bid-rigging under section 47(1)(a) of the Act, based on the Competition Bureau's allegation that the parties had reached an agreement that VWR would withdraw its bid. In June of 2003, the defendants were committed for trial at a preliminary inquiry.[5]

The defence brought an application for *certiorari* to quash the committal, arguing that the preliminary inquiry justice exceeded his authority by committing the defendants for trial on an offence not known to Canadian law.[6] The Superior Court accepted the defence argument that section 47 exhaustively defined bid-rigging, by use of

the introductory clause "[i]n this section, 'bid-rigging' means", without reference to bid withdrawals.[7] The precise meaning of the scope and definition of the term "bid-rigging" had been previously considered by Canadian courts in the *Charterways*[8] and *Coastal Glass*[9] cases and, in *Rowe*, Justice German adopted similar reasoning, noting that:

> I find as fact that s. 47 is clear and unambiguous on its face. I rely on the decision of Mr. Justice Dupont in *R.* v. *Charterways Transportation* [citation omitted] that the *Competition Act* should be determined by looking at the Act. Withdrawing a bid is not included as prohibited conduct in s. 47.[10] [emphasis added]

Having found the scope of section 47 to be clear and unambiguous, it was unnecessary for Justice German to consider the alternative arguments raised by the defence (i.e. that, as a penal provision, any ambiguity in section 47 must be construed strictly in favour of accused, and that it would be impossible to satisfy the "made known" element in the final paragraph of the section 47 if the offence applied to the withdrawal of bids after the tendering deadline). The defence also argued that there is no need for Canadian law to prevent agreements among bidders reached after the opening of bids, since withdrawal of a bid after the tendering deadline is only possible with the express or implied consent of the party calling for tenders (since that party could refuse the request to withdraw, accept the tender and bind the tenderer to supply in accordance with the terms of the Request for Quotations). The authors also raised one additional argument which, as it may be of future interest to competition practitioners, is discussed in greater detail below.

In argument over whether or not section 47 could be interpreted as extending to bid withdrawals, the defence pointed out that bid withdrawal is already an offence under another statute. Section 121(1)(f) of the *Criminal Code*[11] prohibits the withdrawal of bids or tenders to a "government" authority in return for any reward or consideration. Importantly, the term "government" is defined in section 118 of the Code to mean only the federal or provincial governments – thus, section 121(1)(f) would not have applied in *Rowe* as the alleged agreement between the defendants related to a bid to a municipal government. Still, in addition to the arguments raised above concerning the limited scope of section 47, section 121(1)(f) shows that Parliament has addressed the issue of bid withdrawals elsewhere.

In reaching its decision, the court rejected the Crown's submission that section 47 proscribes "all collusive conduct to manipulate the bidding and tendering process in Canada". Such an expansive approach would clearly have exceeded the language of the statute and potentially raised fairness concerns about the predictability of the law – for, as Justice German noted, "there are serious consequences for a finding of guilt including fines and prison terms" and "[p]ersons are entitled to plan their conduct so that they are not in breach of s. 47".[12]

Contested cases under Part VI of the *Competition Act* are very rare. Bid-rigging cases are even more uncommon – prior to *Rowe*, there had not been a litigated case for more than six years. The *Rowe* decision provides essential clarity to marketplace participants about the scope of section 47 and the Competition Bureau's expansive interpretation of it. While this decision may result in the Crown attempting to prosecute bid withdrawal agreements

under other provisions of the *Competition Act* (for example, the general conspiracy provision),[13] or under section 121 of the Code, the law is clear for the moment – bid withdrawal does not constitute "bid-rigging" in Canada.

**Notes**

1 The authors are members of the Competition Group at McMillan Binch LLP in Toronto, and represented two of the defendants throughout all stages of this case. The other defendants were represented by Scott K. Fenton of Fenton Smith (Toronto) and John L. Finnigan of Thornton, Grout, Finnigan (Toronto).

2 (2004), 29 C.P.R. (4th) 525 [hereinafter *Rowe*].

3 *Ibid.* at 527.

4 There is no limitations period for the prosecution of indictable offences under the *Competition Act.*

5 *R.* v. *Rowe et al.*, Reasons for Judgment of Cavion J., June 24, 2003 (unpublished). At the preliminary inquiry, the Crown also sought committal on a second charge involving a mutually exclusive theory of liability which alleged that the parties agreed to submit identical bids, contrary to section 47(1)(b) of the Act. That charge was dismissed for lack of evidence.

6 See, *e.g.*, *R.* v. *Bolduc* (1981), 60 C.C.C. (2d) 357 (Que. C.A.), aff'd [1982] 1 S.C.R. 573.

7 The use of the word "means" (instead of, for instance, "includes") indicates a clear Parliamentary intention to exhaustively define the term "bid-rigging" and limit the scope of section 47 to the conduct described therein. For further authorities on this point, see: *Yellow Cab* v. *Board of Ind. Relations*, [1980] 2 S.C.R. 761 at 768-69, and R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 51.

8 *R.* v. *Charterways Transportation Ltd. et al.* (1981), 57 C.P.R. (3d) 230 at 240 per Dupont J. (Ont. H.C.J.), aff'd [sub. nom. *R.* v. *Lorne Wilson Transportation Ltd. and Travelways School Transit Ltd.*] (1982), 67 C.P.R. (2d) 188 (Ont. C.A.).

9 *R.* v. *Coastal Glass and Aluminum Ltd. et. al* (1985), 8 C.P.R. (3d) 46 (B.C.S.C.), aff'd (1986), 11 C.P.R. (3d) 391 (B.C.C.A.).

10 *Rowe*, *supra* note 2 at 529.

11 R.S.C. 1985, c. C-46 (the "Code").

12 *Rowe*, *supra* note 2 at 529.

13 Of course, unlike bid-rigging, section 45 cases are tested under a quasi-"rule of reason" analysis that requires the Crown to prove that the conspirators had market power and that the conspiratorial conduct had an "undue" effect on competition, which imposes a greater prosecutorial burden.