



# BID-RIGGING, COLLUSIVE BEHAVIOUR - & - COMPLIANCE

## What Businesses Should be Aware Of

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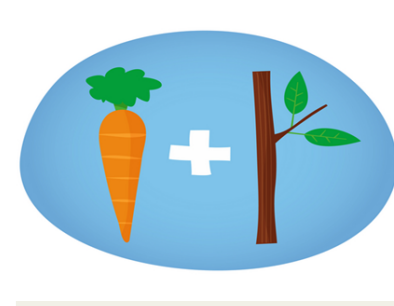
# COMPETITION BUREAU – WHO WE ARE

- Independent federal law enforcement agency
- Headquarters located in Gatineau, Quebec
- Regional offices in Toronto, Montreal and Vancouver
- Approximately 370 employees
- Works closely with the Department of Justice's Public Prosecution Service and the Competition Bureau's Legal Services

# COMPETITION BUREAU – WHAT WE DO

Our role is to help the Canadian marketplace be more competitive and innovative for the benefit of businesses and consumers, through:

- Competition enforcement
- Competition promotion



# COMPETITION COMPLIANCE FRAMEWORK



# COMPETITION PROMOTION

The Competition Promotion Branch actively encourages the adoption of pro-competition positions, policies, and behaviour, through:

- Communication & publications
- Advocacy
- Outreach & promotion
- Education
- Relationship-building

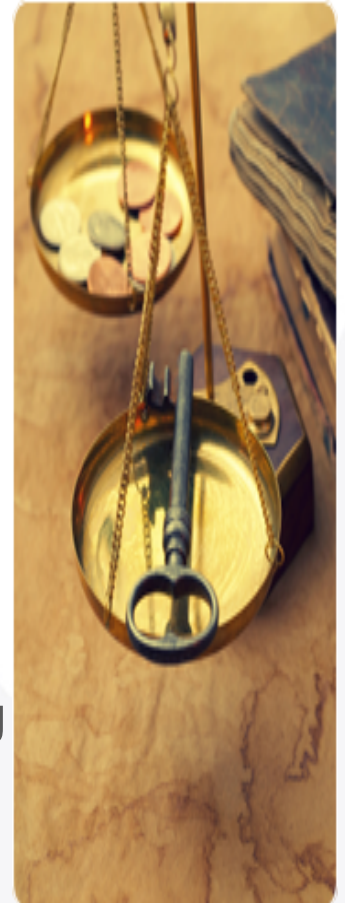
# COMPETITION ENFORCEMENT

The Bureau administers and enforces:

- the *Competition Act* (the “Act”),
- the *Consumer Packaging and Labelling Act* (except as it relates to food)
- the *Precious Metals Marking Act* and
- the *Textile Labelling Act*

# THE *COMPETITION ACT*

- A federal law containing both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace
- The Act applies to **ALL** commercial activity affecting competition in Canada (with limited exceptions)
- Under the Competition Act, the Bureau is responsible for:
  - Investigating criminal conspiracies and bid-rigging
  - Ensuring truth in advertising
  - Preventing abuse of dominance
  - Reviewing mergers



# HOW ENFORCEMENT IS ORGANIZED

## Enforcement Directorates

### Cartels

- Price-fixing
- Allocate customers or markets
- Restrict supply of product
- Bid-rigging

### Deceptive Marketing Practices

- Misleading representations
- Deceptive telemarketing
- Other deceptive marketing practices

### Mergers

- Combinations/amalgamation
- Strategic alliances
- Agreements among competitors

### Monopolistic Practices

- Abuse of dominant position
- Price maintenance
- Agreements between competitors that substantially prevent or lessen competition



# COLLUSION - *NOT* A NEW PHENOMENON...

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”

- Adam Smith, *The Wealth of Nations*, 1776

# CARTEL OFFENCES UNDER THE ACT

**Indictable criminal offences** under the *Act* include:

- **Conspiracy** – Section 45 prohibits agreements between competitors that impose naked restraints on competition
- **Bid-rigging** – Section 47 prohibits covert agreements between suppliers during a tender process

# CONSPIRACY OFFENCE: s.45

Agreement between competitors or potential competitors to

- fix prices
- allocate customers or markets
- restrict the supply of a product

# BID-RIGGING OFFENCE: s.47

- Call or request for bids or tenders:
  - Two or more bidders submit bids or tenders arrived at by agreement
  - Two or more persons agree
    - not to submit a bid or tender; or
    - to withdraw a bid or tender
- Person calling for bids or tenders is not informed of the agreement

# CARTEL OFFENCES: PENALTIES

## ➤ **Section 45 (conspiracy)**

- Fines up to \$25 million (per count) and/or
- Imprisonment up to 14 years

## ➤ **Section 47 (bid-rigging)**

- No upper limit on fines (in court's discretion) and/or
- Imprisonment - up to 14 years

## ➤ **Civil (class) lawsuits**

- Victims have a statutory right to sue perpetrators to recover damages caused by criminal competition offences (s. 36)

## ➤ **Criminal record for individuals**

# COMMON FORMS OF BID-RIGGING

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



## SOME THINGS TO BE MINDFUL OF...

- Ensure that all pricing decisions are made without coordinating with competitors or others outside of your company.
- Ensure that legal advice is sought before contacting competitors, and that records of any contacts with competitors are kept where concerns may arise.
- Know that reaching an agreement, including through any informal understanding or discussion, with competitors about pricing, market or customer allocation, production levels, bid rigging or other agreements dealing with an element of competitive rivalry contravenes the Act.
- Know the compliance risks that can arise when a competitor is a customer and/or a supplier or joint venture partner, and seek legal assistance as appropriate.
- Know that agreeing with competitors not to compete for certain customers or in a particular product or geographic market contravenes the Act.
- Know that agreeing with competitors to prevent other businesses from competing in a particular product or geographic market contravenes the Act.
- Know that discussing prices, changes in industry production, capacity or inventories could contravene the Act.

## TRADE ASSOCIATIONS AND RISKS OF VIOLATING THE ACT

- Industry Associations (“Associations”) provide a forum for competitors to interact
- This forum heightens risk of violating the Act unless preventative measures are taken
- Association entities can attract liability under section 45 of the Act by virtue of the aiding (i.e. helping) and abetting (i.e. encouraging) provisions of the *Criminal Code*

***“We have a saying here in this company that penetrates  
the whole company...***

***Our competitors are our friends. Our customers are the enemy.”***

Jim Randall, President, Archer Daniels Midland



## TRADE ASSOCIATION « DOs »

- Exercise care in collecting, sharing and disseminating competitively sensitive information on current or future prices, bidding intentions, production, customers and markets as well as entry or exit plans among Association members
- Ensure that a clear copy of the agenda for all trade association meetings is obtained prior to a meeting. Competing firms should not participate in a meeting where such an agenda is not provided.
- Ensure that the trade association minutes are reviewed and that mistakes are reported.
- Ensure that representatives use caution when participating in trade association events and are alert to the types of discussions that may raise concerns. If improper discussions arise, he/she should leave and have his/her departure recognized (for example, in the minutes). The incident should immediately be reported to the Compliance Officer, legal counsel or any other appropriate individual identified in the business' corporate compliance program.
- Find alternatives to Association recommended fee guidelines

## TRADE ASSOCIATION « DONTs »

- Don't have Association members or staff collect and disseminate competitively sensitive information
- Don't use unreasonable disciplinary measure to coerce members to provide information or data for information sharing purposes
- Don't discuss or exchange competitively sensitive information at Association meetings or social events
- Don't create an impression in recommended fee guidelines or in Association rules that lower prices or fees are indicators of lower quality goods or services
- Don't sanction or discriminate against members that do not adhere to recommended fee guidelines or other rules with respect to competitively important considerations
- Don't use Association rules to establish prices, mandate levels of service, restrict advertising, or to exclude viable competitors from the market

# SOURCES OF INFORMATION



**Complaints &  
Media Monitoring**

**Informants &  
Whistleblowers**



**COMPETITION  
BUREAU**



**Immunity & Leniency  
Programs**

**Law Enforcement  
Partners**



# HOW (CRIMINAL) ENFORCEMENT HAPPENS



# IMMUNITY PROGRAM

- To uncover and stop criminal anti-competitive activity and to deter others from engaging in criminal behaviour
  - Available to both businesses and individuals, but can only be applied to the first-in applicant
  - Method also commonly used by our international counterparts in detecting criminal activity
  - Requirements:
    - Party is first to disclose the offence to the Bureau; or
    - The Bureau is aware of an offence and the party is the first to come forward before there is sufficient evidence to warrant a referral to the DPP
    - Party has terminated anti-competitive conduct
    - Party provides complete, timely and ongoing cooperation at own expense
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## LENIENCY PROGRAM

- Complements our Immunity Program by supporting the effective and efficient enforcement of the *Competition Act*
  - Leniency is available to parties subsequent to the immunity applicant
  - Under the Leniency Program, the Bureau may recommend to the Director of Public Prosecutions that cooperating parties not eligible for immunity be considered for lenient treatment in sentencing
  - Requirements:
    - Party discloses an offence to the Bureau
    - Party has terminated anti-competitive conduct
    - Party provides complete, timely and ongoing cooperation at own expense
    - Party agrees to plead guilty
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## WHISTLEBLOWING INITIATIVE

- A way for members of the public to provide information to the Competition Bureau regarding possible violations of the criminal cartel provisions of the *Competition Act*.
- A **whistleblower** is a person who voluntarily provides information to the Bureau about a possible violation of the Act that has occurred, is occurring or is about to occur.
- The Act includes specific provisions protecting the identity of a whistleblower and protecting them from being dismissed, disciplined or harassed by their employer, as a result of providing information.
- The whistleblower's information will be examined to determine whether a formal inquiry should be commenced under the Act.

## RECENT CRIMINAL CONVICTIONS

- The Bureau has pursued investigations with respect to a wide variety of goods and services
- Over the last several years, the Crown has been successful in securing cartel convictions for companies and individuals in multiple industries





# BEST PRACTICES TO AVOID VIOLATING THE ACT

- Businesses could implement a **corporate compliance program** which is updated on a regular basis that includes training for company officers, directors, and employees on the criminal provisions of the Act
- Exercise caution in the following situations:
  - Participating in strategic alliances with competitors;
  - Communicating with competitors during formal tendering processes;
  - Information sharing with competitors;
  - Benchmarking with competitors; and
  - Trade association activities.
- Businesses should avoid improper communications with competitors on prices, output, markets and customers, as well as bids
- Seek legal advice if you are uncertain about a proposed course of action

## COMPLIANCE PROGRAMS – HOW CAN THEY HELP?

- A corporate compliance program is a system which is designed to detect and minimize violations of the law
- Businesses who have compliance programs and who comply with the law minimize their risk of engaging in bid-rigging and collusive behaviour

## PURPOSE – BUSINESS PERSPECTIVE

- Inform parties of how to minimize contraventions of the Acts
- Detect at an early stage actions that may contravene the Acts
- Identify circumstances where a party is potentially affected by anti-competitive conduct of other parties

## BENEFITS – BUSINESS PERSPECTIVE

- Reduces cost of non-compliance such as exposure to criminal or civil liability
- Triggers early warnings
- Can assist a business in its dealings with the Bureau
- May allow a business to qualify for favorable treatment
- Increased awareness of anti-competitive activity from third parties
- Improves a businesses' ability to:
  - attract and retain customers;
  - recruit and retain skilled staff
- Helps maintain a good reputation



# COST OF NON-COMPLIANCE

- Prosecution for offences
- Legal costs of representing the company
- Time taken to respond to the Bureau's investigation
- Disruption of a business' activities
- Loss of reputation



# ***CORPORATE COMPLIANCE PROGRAMS BULLETIN***

- Revised version published in June 2015
- Provides guidance and incentives for Canadian businesses to develop and maintain a compliance program
- Raises the standards for compliance acceptable to the Bureau
- Outlines the seven requirements for a credible and effective program
- Provides incentives
- Provides tools designed to help businesses through the process step-by-step



# BASIC REQUIREMENTS: 7 ESSENTIAL ELEMENTS

1. Management Commitment and Support
2. Risk-based Compliance Assessment
3. Compliance Policies and Procedures
4. Training and Education
5. Monitoring, Verification and Reporting
6. Consistent Disciplinary Procedures and Incentives
7. Program Evaluation



# 1. Management Commitment and Support

- Compliance starts at the top
- Management fosters a culture of compliance
- Managers need to actively and continuously support the compliance program
- A dedicated compliance officer should be appointed
- Involvement of the Board of Directors





## 2. Risk-based Compliance Assessment

- Identifying what business areas and types of employees face the biggest risk of non-compliance
- The compliance program will address these risks
- Compliance measures should be proportionate to the level of risk involved
- Internal and external changes should be monitored and risk assessments modified as required



### 3. Compliance Policies and Procedures

- Policies and procedures act as a « compliance roadmap »
- Reflect the company's risk profile
- Allows for the establishment of internal controls designed to prevent contraventions from happening

## 4. Training and Education

- Mandatory, on-going training is essential
- All staff members need to understand the parameters of acceptable behaviour, as well as the range of penalties and remedies for non-compliance
- Various training and communication methods can be utilized based on the company's size and compliance risk



“What if, and I know this sounds kooky, we communicated with the employees.”

## 5. Monitoring, Verification and Reporting Mechanisms

- Help prevent and detect contraventions and high-risk conduct
- Helps educate staff and provides both employees and managers with the knowledge that they are subject to oversight
- Enables businesses to identify areas of risk, areas where additional training is required, and areas where compliance issues may require new and/or additional policies



## 6. Disciplinary Procedures and Incentives

- These measures demonstrate the seriousness with which the business views conduct in breach of the Acts and its commitment to compliance
- A compliance program needs to set out procedures and potential disciplinary actions for those who break the rules
- All disciplinary actions and procedures should be recorded
- Incentives help ensure the employees follow the program and play an important role in fostering a culture of compliance



## 7. Program Evaluation

- Is it working?
- A compliance program must be evaluated on a regular basis
- Helps ensure that the compliance program has met its objectives
- Allows for an assessment of whether the program captures new or emerging risks
- Helps determine whether the compliance program needs to be updated
- The review should extend to include the resources provided by the business to support the compliance program

# TOOLS TO ASSIST BUSINESSES

- There are many tools found in the Bulletin's appendices:
  - Corporate Compliance Program Framework
  - Employee Certification letter
  - Due Diligence Checklist
  - Hypothetical Case Examples
- There are many additional resources available to assist in the development and elaboration of corporate compliance programs:
  - ICC Compliance Toolkit
  - Society of Corporate Compliance & Ethics
  - Autorité de la concurrence (France)



# HOW TO CONTACT THE COMPETITION BUREAU

- File a complaint online.
- Become a **whistleblower** by calling 1-800-348-5358 and pressing “0” to speak with an Information Officer of the Competition Bureau.
- If your information relates to federal contracts, please call the **Federal Contracting Fraud Tip Line** at 1-844-365-1616 or file your tip online. You do not have to provide your name. The tip line is joint initiative of the Bureau, PSPC and RCMP.
- If you are a current or former cartel participant and you help the Bureau unveil illegal activities, you may be eligible for the **Immunity** or **Leniency Program**.



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