

RIGGING THE BID: FINDING FRAUD IN A REGULATED SETTING

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In the recent decision of *R v Fedele*,^[1] the Court of Québec has effectively adopted the approach set out by the Supreme Court of Canada in *R v Riesberry*^[2] regarding the interpretation of “other fraudulent means” under section 380(1) of the *Criminal Code* (i.e., the general offence of fraud). While not directly citing the Supreme Court, the holding in *Fedele* demonstrates a similar approach to finding fraud in the context of regulated settings, although this case regards bid rigging on construction contracts rather than horse racing. We contemplated this scenario in our previous commentary on *Riesberry*.^[3]

In *Fedele*, an agent and three officers of a Québec corporation (“**CIV-BEC**”), including its president and director, were arrested by the Québec provincial police as part of a joint investigation conducted by the Competition Bureau and the UPAC task force, Québec’s Permanent Anticorruption unit. Evidence revealed the existence of a collusion scheme set up by the agent and officers of CIV-BEC with other general contractors in the Saint-Jean-sur-Richelieu region to withdraw or not bid on public contracts from the local municipalities, thus allowing CIV-BEC to win the contracts at a higher margin. The arrested individuals and the corporation were subsequently charged with numerous counts of fraud, secret commissions and forgery before the Court of Québec. The accused were also charged with bid-rigging under the *Competition Act* under separate criminal proceedings, but these were eventually abandoned due to the applicable presumptive ceiling set out in *R v Jordan*^[4] being exceeded.

“Other Means of Fraud” from *Riesberry*

The *actus reus* of fraud consists of dishonest conduct that results in at least a risk of deprivation to the victim.^[5] Such dishonest conduct may come in the form of an act of deceit, a falsehood or “some other fraudulent means” as per section 380(1) of the *Criminal Code*. In *Riesberry*, the Supreme Court of Canada indicated that, in all cases of fraud, there must be a causal link between the fraudulent act and the victim’s risk of deprivation. There is no need to prove, in all cases, that the victim relied on the fraudulent conduct or was induced by it, to their detriment.^[6] In that case, *Riesberry*’s acts were found to be “other fraudulent means” since his conduct, consisting of injecting racehorses with performance enhancing drugs, is something which could be “properly be stigmatized as dishonest” given the highly regulated setting of horse races. He consequently risked depriving the other bettors, but for his dishonest act, of something they may have

obtained.^[7]

Dishonest Behaviour in Regulated Settings

Although the bid-rigging charges under the *Competition Act* were eventually abandoned in *Fedele*, the criminal charges of fraud resulted in the conviction of the accused. In his decision, the trial judge concluded that the municipalities against which CIV-BEC engaged in bid-rigging were the victims of fraud. The collusion of the contractors orchestrated by CIV-BEC and Fedele caused the deprivation of the municipalities, since the municipalities were forced to award higher than normal contracts in a tainted bidding process.^[8] By offering subcontracts to other contractors in exchange for the withdrawal of their bids, CIV-BEC was removing the competition from what should be a competitive bidding process and thus ensuring that other bidders would not undercut its inflated bids. CIV-BEC was found to have undermined the process, unbeknownst to the municipal authorities that believed the process was following its normal course. This dishonest conduct was considered by the court to consist in “other fraudulent means” within the meaning of 380(1) of the *Criminal Code*.^[9]

Commentary

Although the decision in *Fedele* did not directly cite *Riesberry*, parallels can be drawn between the logic used by the judges to find criminal liability for fraud in both cases. Arguably, the conduct of the accused in *Fedele* (bid-rigging) can “properly be stigmatized as dishonest”, in part due to the highly regulated nature of the activities in which CIV-BEC was engaged, i.e. public contract bidding.

Therefore, in regulated settings, such as public contract bidding and government procurement, offences such as bid-rigging under the *Competition Act* may also result in a conviction for fraud where the elements of fraud can be proven. This applies regardless of whether such offences under the *Competition Act* are proven in court, as seen in the case of *Fedele*.

Although further instances may be necessary to confirm the trend, it would appear that courts are heading towards a broader scope of acts considered “other fraudulent means” under the *Criminal Code* when it comes to regulated settings. Individuals operating in these spheres should thus be prudent, given that a conviction for fraud carries a minimum sentence of two years of imprisonment in cases where the total value of the offences exceeds one million dollars. Organizations should also make sure to take steps, such as implementing and actively enforcing an effective compliance program, to prevent criminal fraud and bid-rigging offences from being committed by their employees and agents, as they may be convicted and fined as parties to such offences under the *Criminal Code* in certain circumstances where senior officers are involved.^[10] Aside from substantial fines, organizations should be cognisant of the fact that a criminal conviction can also result in a bar from governmental procurement contracts.^[11]

par Guy Pinsonnault, Pierre-Christian Collins Hoffman et Thomas van den Hoogen, étudiant en droit

[1] 2017 QCCQ 6793 [*Fedele*].

[2] 2015 SCC 65 [*Riesberry*].

[3] Guy Pinsonnault, Pierre-Christian Collins Hoffman, "[Fraud in Regulated Settings: Detrimental Reliance by the Victim not always Required](#)" (January 2016), McMillan Competition and Antitrust Bulletin.

[4] 2016 SCC 27.

[5] *Riesberry*, *supra* note 2 at para 17.

[6] *Ibid*, at para 22.

[7] *Ibid*, at paras 25, 26.

[8] *Fedele*, *supra* note 1 at paras 11, 197, 202.

[9] *Ibid*, at para 127.

[10] *Criminal Code*, s. 22.2.

[11] Notably, under the [Ineligibility and Suspension Policy](#) of the Government of Canada's Integrity Regime, a contractor may be debarred from government procurement for a 10-year period where such contractor is convicted of, or pleads guilty to, "integrity offences", including fraud committed against Her Majesty and bid-rigging (however, in certain circumstances, a reduction of up to 5 years is possible for bid-rigging). This harsh sanction arguably constitutes the equivalent of a "corporate death penalty" for organizations whose business mainly derives from government contracts. Also, in the Province of Québec, the Autorité des marchés financiers may refuse to issue or renew an authorization, and may revoke a prior authorization, to participate in public contracts ([which is required for certain types of public contracts, including those involving expenditures of a certain amount](#)) where an organization has been found guilty of having committed criminal fraud or bid-rigging.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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