Regina v. Charterways Transportation Limited et al.

32 O.R. (2d) 719
123 D.L.R. (3d) 159

ONTARIO
HIGH COURT OF JUSTICE
DUPONT J.
25TH MAY 1981.

Constitutional law -- Validity of legislation -- Combines Investigation Act -- Offence to engage in "bid-rigging" -- Offence applying to services -- No offence if collusive arrangement among persons bidding on contract made known to persons calling for bids -- Whether legislation intra vires Parliament -- Whether validly enacted under criminal law power -- Combines Investigation Act, R.S.C. 1970, c. C-23, s. 32.2 -- British North America Act, 1867, s. 91(27).

Section 32.2 (enacted 1974-75-76, c. 76, s. 15) of the Combines Investigation Act, R.S.C. 1970, c. C-23, which creates the offence of "bid-rigging" which is defined as "(a) an agreement or arrangement between or among two or more persons whereby one or more of such persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, and (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" is intra vires Parliament as legislation validly enacted under the criminal law power in s. 91(27) of the British North America Act, 1867. The fact that the section may relate to the supply of services or that Parliament has chosen

not to make it an offence where the agreement or arrangement is made known to the person calling for tenders does not affect the constitutionality of the legislation.

[R. v. J. J. Beamish Construction Co. Ltd. et al., [1968] 1 O.R. 5, 65 D.L.R. (2d) 260, [1968] 2 C.C.C. 5, 53 C.P.R. 43; A.-G. B.C. v. A.-G. Can. et al.; Reference re Section 498A of Criminal Code, [1937] 1 D.L.R. 688, 67 C.C.C. 193, [1937] A.C. 368; R. v. Campbell, [1964] 2 O.R. 487, 46 D.L.R. (2d) 83, [1964] 3 C.C.C. 112, 50 C.P.R. 142 [affd [1966] S.C.R. v, 58 D.L.R. (2d) 673n, [1966] 4 C.C.C. 333n], refd to]

Criminal Law -- Trade offences -- Bid-rigging -- Elements of offence -- Bid-rigging defined as submission of bids or tenders by persons "in response to a call or request for bids or tenders" arrived at by agreement among bidders or tenderers -- School board inviting tenders and sending out tender forms -- Such conduct constituting request for bids or tenders not merely invitation to negotiate notwithstanding practice in previous years for board to then negotiate terms of contract with tenderers -- Combines Investigation Act, R.S.C. 1970, c. C-23, s. 32.2.

Criminal Law -- Trade offences -- Bid-rigging -- Accused transportation companies charged with bid-rigging as result of submission of identical bids in response to call for tenders -- Bid-rigging defined as submission of bids arrived at by agreement where agreement not made known to person calling for bids at or before time when bid is "made" -- Bid "made" when opened and not when initially submitted -- Combines Investigation Act, R.S.C. 1970, c. C-23, s. 32.2.

Criminal Law -- Trade offences -- Bid-rigging -- Bid-rigging defined as agreement not to submit tenders "and" submission of tenders arrived at by agreement -- Use of word "and" drafting error and ought to be read as "or'' so that either activity constitutes offence -- Combines Investigation Act, R.S.C. 1970, c. C-23, s. 32.2.

Statutes -- Interpretation -- Drafting error -- Combines Investigation Act defining "bid-rigging" as agreement not to submit tenders "and" submission of tenders arrived at by agreement -- Use of word "and" drafting error and ought to be read as "or'' so that either activity constitutes offence -- Combines Investigation Act, R.S.C. 1970, c. C-23, s. 32.2.

Criminal Law -- Trade offences -- Bid-rigging -- Elements of offence -- Bid-rigging defined as submission of bids arrived at by agreement where agreement not made known to person calling for bids at or before time when bid is made -- Whether affirmative duty on person submitting bid to inform person receiving bid of agreement -- Whether proof of collusion involving fraud required -- Whether offence one of strict liability -- Combines Investigation Act, R.S.C. 1970, c. C-23, s. 32.2.

The offence of being party to bid-rigging contrary to s. 32.2 of the Combines Investigation Act, defined, in part, as "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 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" only requires proof of an intention to enter into the agreement and not proof of collusion and fraud. Further, to avoid the liability the section places an affirmative obligation upon those who join in such an agreement not just to make it possible for the recipient of their bids to become aware that they had made an agreement but affirmatively to notify such persons in some manner other than the mere production of identical bids. The accused will not avoid liability merely because the person calling for the bids could, from experience, determine that there must have been an agreement because of the form in which the bids were made. The offence is one of strict liability, it being open to the accused to defend themselves by showing they took all reasonable care to ensure that the agreement would become known to the person calling for the bids or to avoid the event.

[Re Travelways School Transit Ltd. et al. and The Queen (1980), 52 C.C.C. (2d) 399, 52 C.P.R. (2d) 63 [affd loc. cit., p. 406n C.C.C., p. 70n C.P.R.], folld; R. v. Container Materials Ltd. et al., [1941] 3 D.L.R. 145, 76 C.C.C. 18; affd [1942] S.C.R. 147, [1942] 1 D.L.R. 529, 77 C.C.C. 129; R. v. Moffats Ltd., [1957] O.R. 93, 7 D.L.R. (2d) 405, 118 C.C.C. 4, 28 C.P.R. 57, 25 C.R. 201; R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 40 C.C.C. (2d) 353, refd to]

Criminal Law -- Trade offences -- Bid-rigging -- Elements of offence -- Transportation companies agreeing to submit identical bids to school board -- Provincial legislation requiring that rates must be approved by Minister after contract arranged with school board -- Accused arguing that offence requires proof that agreement prevented Minister from effectively exercising power vested for protection of public -- Even if such requirement element of offence, proof of bid-rigging in circumstances evidence that conduct did so affect Minister -- Combines Investigation Act, R.S.C. 1970, c. C-23, s. 32.2.

[R. v. Canadian Breweries Ltd., [1960] O.R. 601, 126 C.C.C. 133, 34 C.P.R. 179, 33 C.R. 1, refd to]

TRIAL of the accused on a charge of bid-rigging contrary to s. 32.2 of the Combines Investigation Act (Can.).

J. E. Thompson and J. W. Leising, for the Crown.

J. F. McGarry, Q.C., for accused, Charterways Transportation Limited.

G. H. Marsden, Q.C., for accused, Lorne Wilson Transportation Limited and Arthur James Elen.

A. Riswick, for accused, Travelways School Transit Ltd.

DUPONT J. (orally):-- The accused stand charge that they, between March 8, 1977, and March 30, 1977, at the City of Mississauga, in the Judicial District of Peel, and elsewhere in the Province of Ontario, unlawfully were each a party to bid-rigging, namely, the submission by each of them in response to a call or request for tenders by the Peel Board of Education for the school year 1977-78, of tenders for school transportation for such period that were arrived at by agreement or arrangement among them, where such agreement or arrangement was not made known to the said Peel Board of Education, at or before the time when such tenders were made by them, and did thereby commit an offence contrary to s. 32.2(2) of the Combines Investigation Act, R.S.C. 1970, c. C-23, as amended.

It is convenient at this time to set out the provisions of the amendment to the Combines Investigation Act, by 1974-75-76 (Can.), c. 76, s. 15, under which the charge was laid.

Section 32.2(1) reads as follows:

> 32.2(1) In this section, "bid-rigging" means
>
> (a) an agreement or arrangement between or among two or more persons whereby one or more of such persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, and
>
> (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.

At the opening of trial, counsel for Travelways filed a notice of motion, more particularly a notice of intention to bring into question during the trial the constitutional validity of s. 32.2(1)(b) of the Combines Investigation Act as amended. Although proper notice of this motion was served upon the Attorney-General of Canada and for Ontario the latter elected not to intervene.

The grounds advanced on the motion are as follows:

a) If the Section aforementioned purports to regulate the manner or form in which a tender or bid can be made then it is ultra vires the legislative powers of the Parliament of Canada.

b) If the Section aforementioned purports to regulate the manner or form in which an agreement or arrangement among persons responding to a call for bids or tenders must be made known to the person calling for or requesting the bids or tenders, then the Section aforementioned is ultra vires the legislative authority of the Parliament of Canada.

c) That the Section aforementioned is in pith and substance legislation dealing with property and civil rights within the Province of Ontario or with matters of a local or private nature and is therefore ultra vires the legislative authority of the Parliament of Canada.

It is argued that the impugned provision would be unassailable if it did not incorporate the latter part of the provision commencing with the words, "where the agreement or arrangement is not made known to the person calling for or requesting the bids ..." et cetera. Counsel contends that the insertion of those words has the effect of removing the provision from the legislative competence of the Parliament of Canada and constitutes an intrusion into the Ontario provincial legislative authority as it relates to property and civil rights.

Prior to the enactment of the present s. 32.2 of the Act,

generally the competitive practices and economic activities which were restricted or controlled by the Combines Investigation Act, were basically directed towards the transporting, producing, manufacturing, supplying, storing, rentals or other dealings with articles in which or under which the prosecution of the Crown was required to show that competition had been lessened unduly. The issue of services was incidental only to the consideration of articles of trust. The onus on the Crown was not easily satisfied as revealed by several reported decisions referred to by counsel.

The enactment of s. 32.2, as it now exists, represents a departure of the previous state in the sense that it is directed to the control of services. It is also significant to note that it is thereunder not incumbent on the Crown to prove resulting undue lessening of competition.

The case of R. v. J.J. Beamish Construction Co. Ltd. et al., [1968] 1 O.R. 5, 65 D.L.R. (2d) 260, [1968] 2 C.C.C. 5, a decision of the Ontario Court of Appeal, is illustrative of alleged inadequacy of the law to effectively deal with certain undesired commercial bidding activities. The Court of Appeal was there concerned with a bidding procedure adopted by several companies whose main business was the supplying of materials for the surface treatment of roads and highways principally for provincial and municipal Governments. Twelve companies were charged under s. 32(1)(c) as it then was.

The alleged agreement between the companies effectively permitted them to agree who, among themselves, would be the successful bidder by a scheme, whereby bids would be submitted which would ensure such results, notwithstanding the appearance of free competition or free competitive tenders.

The trial Court's decision, as reported at [1966] 2 O.R. 867, 59 D.L.R. (2d) 6, [1967] 1 C.C.C. 301, had found that 11 of the companies had been parties to a conspiracy or arrangement, the effect of which was to lessen competition in transportation and the supply of asphalt, sand and stone chips, but concluded that the effect of the conspiracy did not "lessen competition unduly" for several stipulated reasons, including the fact that

the accused firms represented less than one-third of the total number of companies engaged in the surface treating of roads and highways, thereby depriving such accused companies of the control and power required to unduly lessen competition.

Mr. Justice Schroeder, delivering the judgment of the Court of Appeal, while considering whether the conduct of the companies fell within the penal provisions of s. 32 of the Combines Investigation Act, concluded that the contracts, or the contract, were predominantly contracts for work and labour in which the materials were supplied as an incidental and convenient service to the road authority, and stated at p. 17 O.R., p. 272 D.L.R., pp. 18-9 C.C.C., of his judgment:

> On a consideration of the evidence as a whole I cannot be persuaded that the Crown has proven anything beyond a conspiracy to prevent or lessen unduly competition in the performance of work and labour in the resurfacing of provincial and municipal roadways. Even if it can be said that there was some degree of lessening or prevention of competition in the incidental sale, supply or transportation of commodities of trade, in the absence of any proof of efforts on the part of the accused directed towards a restriction of the ready availability thereof or of the facilities for transportation thereof at competitive prices to all potential purchasers, the essential element of undueness can scarcely be held to have been established. It follows that greatly as one must deplore the conduct of the respondents in hoodwinking the Department of Highways and the municipalities with which they dealt, the offence charged has not been proven and, not without some reluctance, I would dismiss the appeal.

Thus, the enactment of s. 32.2, with its definition of bid-rigging, as it relates to services in contrast to materials, is indeed significant.

The public entitlement of the benefit of free competition, and the injustices and harm that flow from failure to control such commercial competitive activities, has been the subject of much past judicial comment. The federal Government, vested with

the need and duty to protect society from conduct which is detrimental to the public, has deemed it necessary to enact legislation creating an offence of a criminal nature, that is, bid-rigging, oriented to services as defined in s. 32.2, in order to prevent public injustices which would otherwise result from such conduct.

The federal legislative power in this respect is well established. I need refer to but one case as illustrative of such authority, namely, the A.-G. B.C. v. A.-G. Can. et al.; Reference re Section 498A of Criminal Code, [1937] 1 D.L.R. 688, 67 C.C.C. 193, [1937] A.C. 368, a decision of the Judicial Committee of the Privy Council. I quote from the reasons for judgment of Lord Atkin at p. 690 D.L.R., p. 195 C.C.C., as follows:

> The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92. It is no objection that it does in fact affect them. If a genuine attempt to amend the criminal law it may obviously affect previously existing civil rights. The object of an amendment of the criminal law as a rule is to deprive the citizen of the right to do that which apart from the amendment he could lawfully do.

Additionally, the power to control the conduct described in s. 32.2 is not expressly vested in the province of the British North America Act, 1867. It cannot be said that the enactment is in substance an encroachment on any of the classes of subjects enumerated in s. 92, but is, if anything, an exercise of federal legislative authority pursuant to s. 91(27) of the British North America Act, 1867 related to criminal law. See in this regard R. v. Campbell, [1964] 2 O.R. 487, 46 D.L.R. (2d) 83, [1964] 3 C.C.C. 112 [affirmed [1966] S.C.R. v, 58 D.L.R. (2d) 673n, [1966] 4 C.C.C. 333n].

I cannot accept the argument of Mr. Riswick that the "notice" or "make known" provisions of s. 32.2 renders it any less

competent of the federal Legislature. The federal Government's decision to exclude from the provision, tenders arrived at, otherwise in contravention of the section, where the "notice" or "make known" provisions are complied with, is within the legislative competence of the federal Government to define criminal offences. The motion is therefore denied.

The three corporate accused, each incorporated under the laws of Ontario, had carried on the business of transportation separately. The accused, Arthur James Elen, operates a similar business in his own name.

Prior to the 1977-78 school year each accused was under contract with the Peel Board of Education for the transportation of students. The board is responsible to provide transportation services for approximately 16,000 students, and prior to 1977-78, at a cost in excess of three million dollars. The accused's firms provided approximately 73% of such services.

Such firms have expanded substantially in relatively few years, brought about in part by their purchase of smaller bus firms. As an example, Charterways operates 1,157 school buses in Ontario. While it would not be accurate to suggest that such firms monopolized the school bus services as it relates to Peel County, the evidence suggests that they had or have a stranglehold on it in the sense that the Peel School Board would indeed be hard pressed to provide the required school transportation services without the use of the buses owned by the accused.

In preparation for the 1977-78 academic year transportation requirements, tender forms, conditions of tendering and general conditions, were forwarded by Mrs. E. Britten, the regional business officer for the Peel Board of Education, to each accused in February of 1977, allegedly as an invitation to tender for such academic year. This procedure was followed by her during previous years for similar purposes.

It was her duty to call for tenders by advertising and by personal invitation to existing operators. Following receipt

and opening of the bids, she would negotiate tentative contracts with the successful bidders following which the board would determine the award based upon her recommendations.

Prior to March, 1977, the accused had consulted one another and discussed mutual problems related to school busing business in what was described as "on a loose, informal association basis". They met on March 10, 1977, and formally formed an association under the name of "Peel County School Bus Operators Association".

At such meeting, Messrs. G.P. Davies and L.J. Wilson, officers of the Charterways and Lorne Wilson firms, corporate accused, were appointed president and secretary, respectively. Several matters were discussed and agreed upon at such meeting, relating in particular, to concern over several conditions stipulated in the tender documents previously received by each of them, and the rates to be quoted in the tenders to be submitted by each accused in answer to the alleged call for tenders from Mrs. Britten on behalf of the Peel Board of Education.

Particulars of the agreement reached by the accused at such meeting are contained in a letter from Mr. Davies, the president, to association members, which letter is dated March 14, 1977, written on Charterways letterhead, and which reads in part as follows:

> At our meeting on March 10, 1977, held at the Thunderbird Motel in Brampton, we discussed various matters concerning the conditions and rates pertaining to the Peel County Board of Education tenders for the 1977-78 school year. The purpose of this letter is to reiterate the points we discussed and our conclusions.

The letter sets out the relevant conditions of concern and a detailed schedule of non-charter rates for buses which provided varying rates for four different sizes of vehicles for up to 60 miles per day and a rate of charge where the services exceed such per diem mileage.

The schedule provides alternative rates: The first, based on the existence of a gasoline escalator clause, and the second, in the absence of such clause.

The letter then deals with charter rates as to service and home economic runs, and concludes as follows:

> It was suggested that Service Runs and Home Economics trips be priced at $25.00 each with a $10.00 additional charge if the trip interferes with the time of the regular routes.
>
> I am not sure that any general concensus was reached on charter prices; however, we did decide to quote only on local moves and trips to Metro Toronto and to stipulate that the prices were subject to change in conjunction with changes in the carriers charter tariff rates.

As I indicated earlier, prior to the 1977-78 academic year, the accused and the other busing firms submitted their tenders pursuant to a call by the board. Following their opening at a previously stipulated date and place, negotiations were entered into by Mrs. Britten on behalf of the board with each successful bus firm, which usually resulted in a compromise price being agreed upon. The evidence suggests that each firm set their bid rates knowing that such would be subject to negotiations.

The parties admit to the possibility of an award being granted on a bid which would, without negotiations, meet the budget requirement of the board.

In carrying out such negotiations, Mrs. Britten had, and used to the board's advantage, the several bids, some of which were lower than others, a procedure which seems understandable. It was felt by the accused that such procedure constituted an unfair tactic and provided the board with an unfair advantage.

Displeasure with the tender method was communicated by at least some of the accused to Mrs. Britten for some years prior to the 1977-78 school year.

To counteract such tactic and advantage, made possible by the presence of lower tenders associated with the open tender method, the accused agreed to, and did submit, identical tenders.

In the sense that an agreement is a concensus of minds relative to conduct performed, or to be performed, I find that what occurred at the March 10, 1977 meeting, constitutes an agreement as contemplated by s. 32.2 of the Act, and further, that such meeting brought about a plan of action to which each accused undertook to participate thereby constituting an arrangement within the same section.

The evidence clearly establishes that each accused submitted its or his tender pursuant to such agreement and arrangement, which tenders were very substantially identical.

It was argued by defence counsel that the alleged initial call for tenders by Mrs. Britten did not constitute a call or request for bids or tenders as understood by s. 32.2 of the Act, and that her actions ought to be interpreted as an invitation to commence negotiations.

Each accused, in February, 1977, received a letter from Mrs. Britten on behalf of the board, which provided as follows:

> We are enclosing two copies of the Tender of School Transportation for the school year 1977-1978. Please read fully the Conditions of Tendering and the General Conditions as additions have been made.

The conditions enclosed in that letter included the following provision:

> The Tender shall be sealed and marked "Tender on School Transportation" and shall be in The Board of Education Office by March 28, 1977 at 3:00 p.m.

Additionally, Mrs. Britten advertised for tenders for the benefit of the public. All accused submitted sealed tenders within the stipulated time-frame.

The evidence does not support defence argument in this respect and I find that there was a call or request for tenders by the board. The fact that negotiations usually followed the opening of such bids to arrive at compromises does not prevent the acts of Mrs. Britten from constituting a call or request for tenders.

The tenders submitted by the accused were not only drawn pursuant to the agreement and arrangement, as earlier found, but were also delivered or submitted pursuant to the call or request for tenders.

It was alleged by defence counsel that what was submitted by all accused to the board pursuant to the agreement or arrangement, following the receipt of the invitation to tender referred to earlier, does not constitute a bid or tender at law but was merely a step in negotiations. In support of that argument, it was pointed out that the alleged bid or tender could not at law be considered an offer capable of acceptance by the board as it was lacking in particulars, in that the number of buses available or routes to be serviced are not therein detailed.

It is relevant in this respect to consider parts of the letters of Charterways and Travelways by which the said corporations submitted their offer. The letter of Travelways is dated March 22, 1977, and provides:

> We are pleased to submit for your consideration the enclosed transportation tender. Rates quoted apply to all routes we serviced in 1976-1977 and any new routes in our immediate area.

The letter from Charterways is dated March 28, 1977, and provides:

> Charterways Transportation Ltd. is pleased to submit the following in reply to transportation tenders for the School Year 1977-1978.

Mrs. Britten testified that the invitation to tender directed to the accused was as usual in general terms, and not limited to routes or number of buses, that it was generally understood that the companies were tendering on routes they had serviced in the previous year, and while a tender may not specify the route desired, such preference may, notwithstanding, be incorporated in the bid. Indeed, such was the case, in the submissions of Charterways and Travelways, for the relevant year.

It was also understood from past practice that the number of buses to be provided under the contracts awarded was to be determined at a later date. The procedure followed by the board in inviting, advertising for tenders, the detailed conditions of tendering and the general conditions enclosed in the invitation for tender forwarded to each accused, considered in the light of the general understanding between the parties from past practice and procedure, leads me to the conclusion that the submissions of each accused was a tender or bid, as understood in s. 32.2 of the Act.

In support of this view is the fact revealed by the evidence that the accused treated this procedure as one of tendering, although one with which they were displeased.

Following the submission of identical bids and subsequent negotiations, they succeeded in convincing Mrs. Britten to recommend to the board the altering of contract award procedure from the tender, to the straight negotiating method, which recommendation was subsequently adopted by the board.

Subsequent to the March 10th meeting, and prior to the opening of tenders, letters were directed by the association to the board and Mrs. Britten, which correspondence revealed the formation of the association. It is significant that the contents, however, do not allude to or reveal the existence of the agreement or arrangement to submit identical tenders.

It has been strenuously argued before me that the submission of four substantially-identical tenders to the board by the accused, constitutes compliance with the requirement under s.

32.2, of making the agreement or arrangement known to the board, at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

The time when any bid or tender is made, I find to be the moment the contents of the tender were communicated to Mrs. Britten on behalf of the board. I am referring, of course, to the occasion of tenders opening on March 26, 1977, at 3.00 p.m.

Mr. Davies, who testified on behalf of, and is president of Charterways, stated that while the accused agreed to submit like bids to eliminate and counteract the negotiating advantages of the board, brought about by the separate and independent bids, there was never an intention to conceal the existence of such agreement from the school board. When questioned as to the absence of such information from his correspondence with the board preceding the submission of tender and openings, he stated he felt confident the message would be obvious on opening of such tenders.

Understandably, upon observing four identical tenders, revealed upon their opening, Mrs. Britten was surprised. She testified that upon realizing the significance of such state, she was led to the conclusion that the tenders were the product of an agreement between the bidders.

It is argued by defence counsel that such inference drawn by Mrs. Britten constitutes compliance with the notice requirements of the relevant section. I cannot accept such argument.

Admittedly, the fact that the identical tenders submitted would ultimately, logically, and did in fact lead the bid-caller to a necessary inference that the bids were drawn pursuant to an agreement or arrangement, such, notwithstanding, does not amount to making known as required by the section.

I have reviewed the reasons of my brother, Osler J. in Re Travelways School Transit Ltd. et al. and The Queen (1980), 52 C.C.C. (2d) 399 at p. 405, 52 C.P.R. (2d) 63 [affirmed loc. cit., p. 406n C.C.C., p. 70n C.P.R.] and adopt the view

expressed in the following excerpt from the judgment:

> ... there is an affirmative obligation upon those who join in such an agreement not just to make it possible for the recipient of their bids to become aware that they had made an agreement but to affirmatively notify such persons in some manner other than the mere production of identical bids.

I therefore conclude that the accused, who are all the parties to the agreement, did not make known to the person calling for or requesting bids or tenders, the existence of the agreement or arrangement at or before the time the bid or tender was made.

Defence counsel has referred to the fact that the word "and" as it exists between s. 32.2(1)(a) and s. 32.2(1)(b) is a term which is usually construed conjunctively and not disjunctively. A reading of the section indicates that such interpretation would render the section completely inoperative and therefore absurd. I can only conclude that the word "and" was a mistake in drafting and ought to be read as "or", in other words, disjunctive.

A definition of "rigging" by considering references outside the Act was urged upon the Court. However, where, as in this case, the section provides its own definition, that is, of "bid-rigging", the Court is to be guided by such and not to any other definition, which may have been expounded in a different context.

In support of a further contention, Mr. Riswick relies upon the decisions in Container Materials Ltd. et al. v. The King, infra, and R. v. Canadian Breweries Ltd., [1960] O.R. 601, 126 C.C.C. 133, 33 C.R. 1.

It is argued that the public is entitled to the benefit of free competition except in so far as it may be interfered with by valid legislation, and that when a provincial Legislature has conferred on a body the power to regulate an industry and fix prices, and the power is exercised, there is a presumption that the power was exercised in the public interest.

It is thus contended, on the basis of the quoted authorities, that to succeed in a combines prosecution under the Act alleging the existence of a combine, the Crown must show that the combine would or did operate so as to hinder or prevent the provincial body from effectively exercising the power therein vested for the protection of public interest.

The above statement of law, it is alleged, was expounded by Chief Justice McRuer, as he then was, in the Canadian Breweries Ltd. case, where he considered a charge alleging the formation of a combine, to wit, a merger, trust or monopoly which operated, or was likely to operate, to the detriment or against the interest of the public. The Court was much influenced by the existence of provincial controls in various Provinces of Canada through its liquor boards, exercised with reference to the sale and price of beer.

Defence counsel draws an analogy with the facts of the present case by virtue of ss. 10 and 11 [rep. & sub. 1971, Vol. 2, c. 50, s. 74(5); s. 11 am. 1980, c. 46, s. 11] of the Public Vehicles Act, R.S.O. 1970, c. 392, whereunder the tolls charged by school bus operators for services rendered pursuant to its operating licence, are subject to the approval of the Minister. However, unlike the Canadian Breweries Ltd. case, the bus rates in this case, which are submitted for ministerial approval, are firstly, and unknown to the Ministry, subject to and the product of alleged bid-rigging. An affirmative finding of such bid-rigging, as defined in s. 32.2 would be evidence from which an inference could be drawn that such conduct has operated, or is likely to operate, so as to hinder or prevent the provincial authority from effectively exercising the power given to protect the public interest.

I find the distinction, therefore, between the facts of the present case and those considered by the Court in the Canadian Breweries Ltd. case to be significant.

It was contended that it is not sufficient for the Crown to show a bid or tender arrived at by agreement or arrangement between the accused, the submission of the bid or tender in

response to the call or request for bids or tenders, and failure to make the agreement or arrangement known to the bid-caller at or before the time when the bid or tender is made. It is argued that the Crown must prove the element of deception or fraud, that is, that the accused intentionally and deliberately withheld knowledge of the fact of the existence of the agreement or arrangement from the school board.

In support, defence counsel rely upon the decisions in R. v. Container Materials Ltd. et al., [1941] 3 D.L.R. 145, 76 C.C.C. 18, later affirmed by the Supreme Court of Canada at [1942] S.C.R. 147, [1942] 1 D.L.R. 529, 77 C.C.C. 129, and R. v. Moffats Ltd., [1957] O.R. 93, 7 D.L.R. (2d) 405, 118 C.C.C. 4, and R. v. Campbell, [1964] 2 O.R. 487, 46 D.L.R. (2d) 83, [1964] 3 C.C.C. 112.

The Court in the Container Materials case was concerned with a charge under s. 498 of the Criminal Code of having unlawfully conspired, combined, agreed or arranged together and with one another and with 10 other named companies or individuals not indicated, to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, et cetera, of certain boxes or containers.

The Courts in the Moffats and Campbell decisions were concerned with charges under s. 34 of the Combines Investigation Act alleging unlawful agreements, threats or promises, or other means, to attempt to induce a firm to resell articles at prices not less than prices specified by the accused.

In each of such cases, the issue of mens rea, as it relates to certain specific intentions, was considered by the Court. It was generally concluded that the Crown need only prove the existence of the alleged agreement or arrangement, that the accused had entered into the agreement advertently and that such agreement resulted in the alleged effect, that is, either unduly lessening competition or inducing the resale of articles at certain low prices as alleged. Mens rea was otherwise held not to be an ingredient of the offence as charged.

The variation in the wording of s. 32.2 herein concerned, from the provisions of the Combines Investigation Act considered by the Courts in the above cases, renders such decisions of limited assistance.

Mr. Justice Dickson in R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299, also reported, 85 D.L.R. (3d) 161, 40 C.C.C. (2d) 353, at p. 1326 S.C.R., pp. 182-2 D.L.R., p. 374 C.C.C., concluded that there were three categories of offences. The second category, which prima facie would encompass public welfare offences, he described as follows:

> Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.

The Court here is dealing with legislation enacted to ensure a specific benefit to the public, that is, benefits to be derived from free competition which flow from unrigged bids or tenders. Failure to ensure freedom from such conduct can only militate much to the financial and other detriment of society. Although s. 32.2 creates a criminal offence, I have concluded that such offence as described in the provision, defines all the elements of the offence and thereby creates an offence per se. Such offence falls within the category of strict liability. The evidence does not reveal that the accused, or any of them, took all reasonable care to make the agreement known to the school board, or to avoid the event.

The Crown, upon whom the onus of proof beyond a reasonable doubt rests at all stages of the trial, in order to succeed must nevertheless prove mens rea in the sense that the accused intentionally and advertently entered into an agreement or

arrangement with one or more bidders pursuant to which a bid or tender is arrived at. Additionally, the Crown must similarly prove beyond a reasonable doubt that the bid or tender was in response to a call or request for bids or tenders and that the agreement or arrangement was not made known to the person calling for or requesting the bids or tenders at or before the time when the bid or tender is made by any party to the agreement or arrangement.

In the opinion of this Court, the Crown has discharged such onus and there will be a conviction.

Accused convicted.