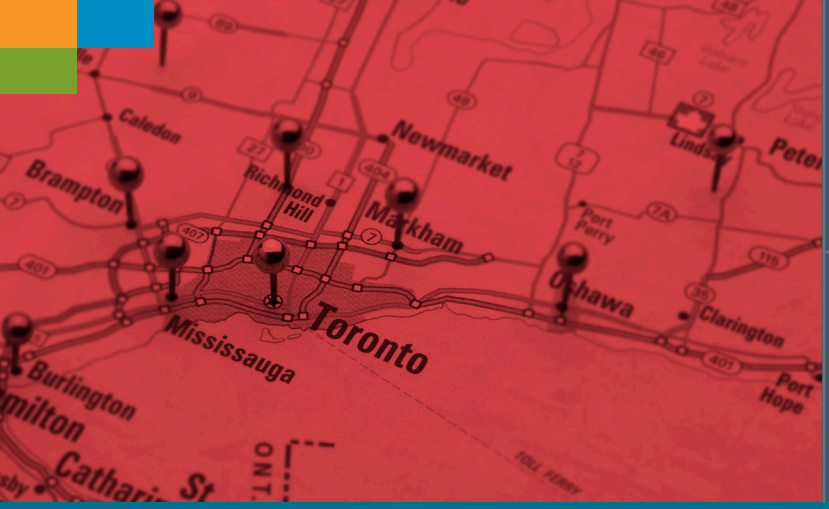

WeirFoulds LLP

CLIENT UPDATE

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Testing the Foundations: Six Lessons from the Competition Bureau's Investigation into the Construction Industry

By Nikiforos Iatrou and Graham Brown

Last week, the media released a 50-page search warrant application that the Competition Bureau filed with the Court in March, 2012. In its application, the Bureau alleges longstanding price-fixing and market allocation agreements among companies that pour concrete foundations for new homes – allegations which, if true, present serious criminal and civil risks for the targets of the investigation. The Bureau further alleges that the conspiracies were facilitated by the trade association that represents the companies and individuals who pour the concrete foundations.

These allegations may be the "foundation" of what is to become a larger-scale effort to crack down on other anti-competitive activity in the construction industry. Participants in this industry need to educate themselves and develop strategies to avoid violating the *Competition Act*. Some companies and trade associations may already be operating under agreements or policies that are illegal, without realizing the gravity of their actions. The consequences of getting caught are too serious to ignore.

LESSON ONE: CONSPIRATORS CAN GO TO JAIL

Section 45 of the *Competition Act* prohibits conspiracies to control a market. The punishment for a s.45 violation was increased in 2010 – it can now result in up to 14 years in prison, or a $25 million fine, or both. With the 2012 enactment of the *Safe Streets and Communities Act*, a custodial sentence for convictions under this section must be served in prison: community service or a conditional sentence is no longer an option for a sentencing judge. The risk of jail time for conspirators is therefore very real.

A conspiracy will be found where two or more competitors agree to:

a) fix, maintain, increase or control the price for the supply of a product or service;
b) allocate sales, territories, customers or markets for the production or supply of a product or service; or
c) fix, maintain, control, prevent, lessen or eliminate the production or supply of a product or service.

Any product or service that is supplied at a construction job site is subject to this provision. To prove the existence of an agreement to conspire, the Bureau does not need a 'smoking gun' e-mail or confession – a Court may infer that there is an agreement to

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fix prices between several competitors, even without direct evidence of communication between the parties involved. In the media report on the concrete foundations case, the Bureau's informant alleged that it was widespread practice in the construction industry for competitors to "have a coffee" and reach a consensus as to the level at which prices should be set. Although the informant also provided the Bureau with incriminating documents and meeting minutes, it is important to note that even without "hot documents", the Bureau can still build a credible case.

The *Competition Act* also includes a prohibition on "bid-rigging" (section 47). Bid-rigging is an agreement or arrangement between two or more people in which one or more of them agrees not to submit a response to a call for bids or tenders, or agrees to withdraw a bid or tender in favour of a would-be competitor. Bid-rigging also involves situations where artificially high quotes are submitted by way of agreement or arrangement between two or more bidders or tenderers. As with conspiracies, a conviction under section 47 can result in a 14 year prison sentence. Notably, there is no maximum on the potential fine.

No one has ever served time in a Canadian prison for a conviction under one of these provisions, but this is likely to change. The 2010 amendments to the *Competition Act* and the 2012 enactment of the *Safe Streets and Communities Act* show that Parliament is taking these crimes very seriously. The Chief Justice of Canada of the Federal Court of Canada has also come out in favour of harsher sentencing, even for people who voluntarily plead guilty to the charges. In the 2012 case of *R. v. Maxzone Auto Parts*, an auto parts supplier admitted to participating in an international conspiracy involving the sale of aftermarket auto parts. Citing the impacts of price-fixing agreements on the Canadian economy, the Chief Justice said that such offences "ought to be treated at least as severely as fraud and theft, if not even more severely".

LESSON TWO: CONSPIRATORS CAN ALSO BE SUED

From a commercial point of view, the prospect of "follow on" litigation is equally disquieting. The *Competition Act* provides that purchasers may sue alleged price-fixers to recover damages stemming from the conspiracy. Typically, lawsuits are brought after successful prosecutions by the Bureau, and can result in class actions or other civil proceedings. The cost of defending such lawsuits is large, and the damages claimed can be in the millions of dollars.

This year, the Supreme Court of Canada will release a judgment clarifying which parties have the right to bring follow on litigation. Such clarification is necessary, given that the effects of price-fixing are passed on not only to the direct purchaser, but also to secondary or "indirect" purchasers. In the concrete foundations case, for example, the alleged increased cost of the concrete foundation work not only would have increased the cost for the home builder or contractor (the direct purchaser), but also for the eventual home buyer (the indirect purchaser). The Supreme Court's decision is expected to determine how far down the chain the potential liability goes. If it concludes that both direct and indirect purchasers can sue, then the financial exposure for price-fixers will increase significantly. To put this potential liability into perspective, the media estimated that the alleged overcharge in the cement foundations case may have been between $1,500 to $4,000 per house. Down the chain, the aggregate effect of that price-fixing may have amounted to increased costs for homebuyers of between $363 million and $969 million: a sum well-worthy of a class action suit.

LESSON THREE: IF YOU UNCOVER A VIOLATION, YOU CAN MINIMIZE YOUR RISK

The Bureau has two related programs that encourage parties to a conspiracy to cooperate with an investigation: the *Immunity Program* and the *Leniency Program*.

The *Immunity Program* permits a "first-in" participant (i.e., the first to contact the Bureau) in a bid-rigging scheme or conspiracy to receive full immunity in exchange for an agreement to make full disclosure of the anti-competitive activity and full participation in any subsequent prosecution. One particularly attractive feature of the program is that the immunity also applies to an applicant's employees and directors, assuming they are similarly cooperative.

For guilty parties who approach the Bureau subsequent to the immunity applicant, the *Leniency Program* allows for a more lenient punishment, typically in the form of a lower fine or shorter sentence. To qualify, a leniency applicant must have voluntarily contacted the Bureau to admit its guilt and already terminated its own illegal conduct. The order in which parties contact the Bureau to obtain leniency has important consequences. For example, while the first leniency applicant may receive a reduction of up to 50% of the recommended fine, the next applicant may only qualify for a reduction of up to 30%. The first leniency applicant also typically obtains leniency for its employees and directors; the chance of similar extensions of leniency is lessened with each subsequent applicant.

Typically, a party seeking immunity or leniency will have

its lawyer contact the Bureau to obtain a "marker". At first, this can be obtained on a hypothetical, no-names basis. The marker establishes a party's position in line relative to other parties seeking to cooperate. Once a marker is recorded, the applicant has a limited period of time to identify him or herself to the Bureau and provide the Bureau with a statement that describes the illegal activity any related evidence the Bureau would need for its case. When the applicant has provided the Bureau with all relevant information, the Bureau will make a leniency recommendation to the Public Prosecution Service of Canada. The PPSC then typically works with the Bureau and the applicant to prepare a statement of admissions that is relied on by the Court to determine guilt and impose a sentence.

If you suspect that your business or your employees have engaged in any form of price fixing, you should seek legal advice. Your lawyer may advise that you should move quickly to obtain a marker, particularly if you think that the conspiracy is likely to come to the Bureau's attention through some other means.

LESSON FOUR: WHEN THE BUREAU COMES KNOCKIN'…

Once the Bureau has sufficient information to ground a request for a search warrant, it may apply to a Court for the right to enter a suspect's premises to seize data, records, documents, and electronic files.

If the Bureau executes a search warrant, you should contact legal counsel immediately. If you advise the Competition Bureau officers that your lawyer is on the way, the officers will typically delay their search until your lawyers arrive, so long as there is no risk of any evidence being destroyed.

Here are a few tips on dealing with what can be a tense situation:

- Read the warrant carefully to determine which premises the Bureau may search, who may conduct the search, and the scope of the search. The Bureau's rights are dictated by the terms of the warrant.
- Advise your employees that they are not obligated to engage in any discussion with the investigating officers. That said, your employees must not hide, destroy or delete any records, as such actions could lead to obstruction charges, which can carry severe penalties.
- Keep a detailed record of events from the arrival to the departure of the officers. Include details such as the names of the officers, the areas of the premises that were searched, the documents examined, or any discussion between officers and employees. This record may be useful in later proceedings, especially if the Bureau officers exceed the powers granted to them under the warrant.
- Protect solicitor-client privileged documents. The Bureau is not allowed to review privileged documents. If some of the documents to be seized are privileged, flag that possibility and ask that those records be segregated. Your lawyer can work with the Bureau later to have the privilege confirmed and the documents returned. A recent Bureau prosecution was abandoned when it became apparent that the Bureau Officers had reviewed privileged documents.

LESSON FIVE: TRADE ASSOCIATIONS ARE AT RISK

The Bureau has publicly stated that it sees special risks in trade associations. Trade associations are, by their nature, at risk of fostering anti-competitive behaviour because they provide a means of collaboration among competitors. For this reason, compliance programs are of the utmost importance to trade associations. While the Bureau does not consider the act of participating in or operating a trade association to be inherently bad, the Bureau does monitor trade associations closely to ensure compliance with the *Competition Act*. In the cement foundations case, the Bureau alleges that the related trade association may have aided and abetted the suspected anticompetitive activity.

To protect themselves, trade associations should:

- incorporate a compliance program to educate their members and employees;
- exercise caution when allowing their members to share potentially sensitive information;
- ensure accurate minute-taking in meetings; and
- follow a strict and defined agenda at meetings.

LESSON SIX: AN OUNCE OF PREVENTION

Developing a compliance program may assist in ensuring that you and your employees are aware of your obligations under the *Competition Act*. A compliance program will:

- reduce the risk of violations of the *Competition Act*;

- reduce the financial and reputational costs resulting from an investigation by the Bureau;
- increase awareness of the *Competition Act* among employees, business associates, customers and suppliers;
- reduce the risk of potentially illegal conduct and exposure to civil, criminal or penal liability; and
- assist a company and its employees in their dealings with the Bureau, particularly if seeking for leniency.

In creating a compliance policy, obtain the advice of experienced competition lawyers. To be effective, compliance policies require buy-in and comprehension at all levels of your organization. The existence of a well-implemented compliance program will be viewed positively by the Bureau even if, despite your best efforts, anticompetitive conduct occurs.

Do you have questions? The lawyers at WeirFoulds LLP are well-versed in both construction law and competition law, and would be happy to help explain these important developments.

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Nikiforos Iatrou is a partner at WeirFoulds, specializing in competition law. He recently returned to the firm after a three year special appointment as counsel to Canada's Commissioner of Competition. There, he acted as lead counsel on dozens of the Competition Bureau's high-priority cases, and most notably, successfully litigated the first contested merger that the Bureau had brought in six years. He now helps companies of all sizes deal with Bureau investigations.

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