WeirFoulds LLP

CLIENT UPDATE

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The Road to Compliance in the Paving Industry

By Nikiforos Iatrou and Graham Brown

In recent months, four European competition agencies have targeted what they are calling "asphalt cartels", alleging that various road-paving companies in their respective jurisdictions have engaged in price-fixing, collusion, or other anti-competitive behaviour. In some cases, the agencies' investigations have resulted in crippling fines for offenders. Spain has fined ten construction companies a total of $21 million. Norway has meted out fines of $25 million and $39 million respectively to two offenders. Germany and Finland are still at the prosecution stage, but three years ago, Finland fined seven asphalt companies a total of $109 million, with the cartel leader receiving a $90 million fine. With so much international attention focused on their industry, road-paving companies should be asking themselves what to do if Canada is next.

IS CANADA NEXT?

In the world of competition law, a string of investigations or prosecutions in other countries may be a signal that similar investigations are on their way to one's own jurisdiction. Competition enforcers meet and collaborate frequently. While they are only responsible for enforcement in their respective jurisdictions, they often share information and learn about certain industry practices that may warrant increased scrutiny.

In Canada, the timing of the international focus on road-paving coincides with the ongoing *Charbonneau Inquiry* in Quebec. The *Charbonneau Inquiry* has heard extensive evidence with respect to collusion, price-fixing and bid-rigging in a number of public procurement settings, including the awards of municipal roadwork contracts. This evidence has not gone unnoticed by Canada's Competition Bureau (the "Bureau"). In March of 2013, the Bureau executed search warrants at an engineering firm in Quebec that was the subject of testimony at the *Inquiry*. The search warrants followed on the heels of the Bureau's March 2012 search warrant application connected to an investigation into collusion and price-fixing in Ontario's concrete foundation-pouring industry.

The final sign that industries such as road-paving may be targeted by the Bureau is the appointment of John Pecman as Interim Commissioner of Competition. Mr. Pecman was promoted to Interim Commissioner after four years as the head of the Bureau's Criminal Matters Branch. Since taking office, the Interim Commissioner has made it clear that there will be increased scrutiny of the construction industry, including trade associations and companies that bid on public contracts.

THE PENALTIES COULD BE SEVERE FOR OFFENDING COMPANIES

Section 45 of the *Competition Act* prohibits conspiracies to control a market. The punishment for s.45 violations was increased in 2010 and can now result in 14 years in prison, a $25 million fine, or both.

WeirFoulds LLP
66 Wellington Street
Suite 4100, P.O. Box 35
Toronto-Dominion Centre
Toronto, Ontario, Canada
M5K 1B7
Office 416.365.1110
Facsimile 416.365.1876
www.weirfoulds.com

A conspiracy to control a market may be found where two or more competitors agree to:

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

In the past, only larger companies worried about *Competition Act* offences. This is primarily because, prior to 2010, the Bureau had to not only prove the existence of a conspiracy, but also show that the conspiracy had a significant effect on the marketplace. This is no longer the case. Pursuant to amendments to the *Act* which became effective in 2010, the Bureau can now meet the test to prove a conspiracy exists simply by establishing that an agreement was entered into, even if the agreement had no effect on the market. As such, companies of all sizes should now be concerned about the *Act*'s conspiracy provisions.

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 addresses situations in which artificially high quotes are submitted by way of agreement or arrangement between two or more bidders or tenderers. Penalties for bid-rigging may include a prison sentence of up to 14 years and/or a fine of an unlimited amount. Recently, the Competition Bureau made headlines by obtaining plea agreements in relation to bid-rigging in the auto parts industry. These record-setting fines – of $30 million and $5 million respectively – are a signal that the price of bid-rigging could be very high.

These offences carry the further risk of attracting civil liability. Even in cases where industry participants are able to secure lenient punishment for their criminal activity, the mere fact that the Bureau is investigating an industry often leads to private lawsuits and class actions. In other words, after being fined by the Bureau, a company could also be sued. There are an increasing number of civil lawsuits commenced by consumers to collect money lost due to anti-competitive behaviour. The amounts claimed in these lawsuits are often very high and could be particularly damaging for a company still stinging from a Bureau investigation.

Perhaps most importantly, competition offences are generating greater interest in the courts, with judges expressing little sympathy for offenders. In a recent conspiracy case, the Chief Justice of the Federal Court of Canada wrote that such offences "ought to be treated at least as severely as fraud and theft, if not even more severely". In another case, the wrongdoer paid a $5 million fine, where the overall volume of commerce for the entire industry – not just that company's business – was $41 million dollars. Given the seriousness of these developments, companies would be wise to enact policies and practices to avoid falling afoul of the rules.

BEST PRACTICES FOR CANADIAN PAVERS

Canadian businesses can take a number of steps to be proactive in dealing with their obligations under the *Competition Act*. First and foremost: those businesses operating in industries that are subject to increased scrutiny should implement compliance programs. Compliance programs are educational tools designed to ensure that a company's employees and managers understand their obligations under the *Competition Act*. A compliance program will:

a) reduce the risk of violations of the *Competition Act*;

b) reduce the financial and reputational costs resulting from an investigation by the Bureau;

c) increase awareness of the *Competition Act* amongst employees, business associates, customers and suppliers;

d) reduce the risk of potentially illegal conduct and exposure to civil, criminal or penal liability; and

e) assist a company and its employees in their dealings with the Bureau, particularly if the company is seeking leniency.

A well-crafted compliance program will address how an organization governs its:

a) relationships with competitors. This may include an evaluation of dealings with competitors or potential competitors. There may also be cause to examine market conditions, industry history, involvement in trade associations, or information-sharing amongst competitors;

b) pricing and distribution practices. This may involve an examination of practices which might have a tendency to

influence market prices, discriminate against certain customers, or price competitors out of the market. On the latter two points, it is important that companies deemed to have dominance in a market be particularly vigilant in ensuring that their practices are not exclusionary, predatory or disciplinary

c) advertising practices. Deceptive or false advertising, whether made knowingly or recklessly, attracts both criminal and civil liability.

Compliance programs help organizations train their employees to spot potentially risky activity, and can be particularly useful for companies – like road-paving and construction companies – that are: involved in trade associations, frequently involved in bidding and tendering situations, or operating in industries subject to increased Bureau scrutiny. In creating a compliance program, it is important to obtain the advice of experienced competition lawyers, who will ensure that a company's employees and staff understand the program and the importance of abiding by it. The existence of a well-implemented compliance program will be viewed positively by the Bureau even if, despite a company's best efforts, anti-competitive behaviour takes place.

Given their heightened risk of violating the *Competition Act*, trade associations should strongly consider offering compliance training for their members. As the Interim Commissioner noted in a recent speech, many cartel prosecutions have involved trade associations, as trade associations are often used to conduct illegal activity. Even well-meaning trade association activity can result in violations of the *Competition Act* and severe penalties for an offending association and its members. Compliance programs can be tailored to train trade association staff and members so as to ensure organizational compliance with the *Competition Act*.

WHAT IF IT'S TOO LATE?

It is never 'too late' to implement a compliance program. However, if anti-competitive behaviour has already occurred and there is a risk of penalty, there are options available to an organization facing charges. The Bureau offers two programs – the *Immunity Program* and the *Leniency Program* – which respectively permit it to grant immunity from prosecution or agree to lessened penalties in cases where an organization comes forward to reveal or admit participation in an anti-competitive scheme.

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.

Author **Nikiforos Iatrou**

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.

Contact Nikiforos at 416.947.5072 or niatrou@weirfoulds.com

Author **Graham Brown**

Graham Brown is a litigator in WeirFoulds' construction group, one of Canada's pre-eminent construction law practices. Graham represents clients from all levels of the construction pyramid and assists clients on all aspects of construction projects, from inception to completion. The construction group's expertise in procurement issues makes it particularly well suited to assist with tendering and bidding issues.

Contact Graham at 416.947.5073 or gbrown@weirfoulds.com

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