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mcmillan competition bulletin

Watch what you Say – Even when fighting alleged crime

The recent Ontario Court of Appeal case of *TPG Technology v Competition Bureau*[1] is a reminder that even in the effort to vigorously enforce the *Competition Act*, and publicize those efforts, the rules of defamation apply. The case arose out of a bid rigging investigation conducted by the Competition Bureau, which led to charges against the plaintiffs as well as a variety of other firms. The Competition Bureau issued to press release announcing the charges.

The plaintiffs sued, alleging that the press release was defamatory. The words alleged to constitute defamation included the following:

> "As a result of the agreement, the bidders were allegedly able to maximize the rates at which services were to be provided to the various departments."
>
> "The Bureau's best weapons to combat these secret criminal anti-competitive agreements."
>
> "Some recent studies suggest that in cases where bid rigging occurs, the price paid for the good or service typically increases by about 20 percent."

[1] *TPG Technology Consulting Ltd. and Donald Powell v Her Majesty the Queen in Right of Canada* as represented by the Minister of Industry Canada and as represented by the Competition Bureau of Canada, John Pecman, Sheridan Scott and Stephen Fitzpatrick, 2012 ONCA 87.

> "The Bureau found evidence indicating that several IT services companies in the National Capital Region secretly coordinated their bids in an illegal scheme to defraud the government by winning and dividing contracts, while blocking out honest competitors."
>
> "Bid rigging is a criminal offence where bidders secretly agree not to compete or to submit bids that have been pre-arranged among themselves. Their goal is to thwart the competitive tendering process and inflate prices to purchasers."
>
> "Bid rigging charges under section 47 of the *Competition Act*. Charges laid against 7 companies and 14 individuals based on allegations that the parties entered into agreements to coordinate their bids in an illegal scheme to defraud the government by winning and dividing contracts for information technology services."

The government brought a motion to strike out the claim of defamation in the pleading, and the motions judge did so. However, on appeal the Court of Appeal noted that the question was whether the defendants went beyond simply stating that the plaintiffs had been charged with bid rigging – did they imply that it was alleged that the plaintiffs engaged in conduct more serious and blameworthy than bid rigging. It noted that it is settled law that reporting that someone is under investigation or has been charged with an offence is not considered the equivalent of saying that the person has committed the crime, unless there is something in the language that more than suggests otherwise. "However, reports of arrest or charges will be capable of conveying a defamatory meaning where it is stated, either directly or by clear implication, that an offence has been committed, and that the qualifications contained in any of the surrounding statements are not sufficient to outweigh or nullify the effect of what appears to be a plain statement of fact." The distinction is between reports which state that a person has been charged and reports which assert directly or by clear implication that the person has engaged in a criminal offence.

In order to establish an offence of bid rigging the Crown does not have to prove that prices were inflated or that anyone was defrauded. These are not ingredients of the offence. The Court of Appeal concluded that it was at least arguable that the challenged statements did indicate that the plaintiffs were guilty of fraud and price inflation, and that this need not be proven as an element of the offence of bid rigging. Apparently those elements did not form a part of the case led by the Crown at the preliminary inquiry. Consequently, the Court of Appeal concluded that it was not plain and obvious that the statements challenged were not capable of bearing a defamatory meaning. The test for striking out a claim is whether it is "plain and obvious" that the challenged statement is not capable of bearing a defamatory meaning. If it is capable of bearing a defamatory meaning, then the question of whether it in fact does do so is a question of fact for determination at trial and not a matter to be dealt with by way of preliminary pleadings motion.

This case, applicable across a broader range of conduct than just competition law, is a timely reminder that statements made about cases – by either the prosecuting authorities or the defence – can take on a life of their own, and that considerable care is required, even in the heat of the moment, when publicizing serious allegations.

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a cautionary note

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