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CRIMINAL LAW, REGULATION & ENFORCEMENT NEWSLETTER

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DO YOU KNOW WHAT YOUR MARKETING/SALES STAFF ARE DOING?

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In the last few years I have received several telephone calls from frightened and shocked CEOs or General Counsel informing me that an armed RCMP officer had greeted them when they arrived at their offices in the morning, and even visited some executives' homes, with search warrants and several investigators and forensic experts seizing documents and computer hard drives. "What should I do now?" is the usual question. Before answering the question, we should consider the background events leading to this seizure.

Why is this raid happening? A competitor's employees had reported to the Competition Bureau that they had been having discussions with your employees, usually in marketing and sales, but occasionally even at higher levels. These discussions were about how to reduce competition, in a manner and for a purpose that is contrary to the *Competition Act*. This will usually mean discussions about pricing, allocation of customers or markets, or reduction of output, resulting in some sort of anti-competitive, unwritten agreement or arrangement.

Because that competitor was the first to approach the Bureau, it will normally receive immunity from prosecution in return for providing evidence against your company and any others involved in such discussions. By the time the search warrant has been executed on your premises, Bureau investigators will have interviewed the competitor's employees in depth and reviewed any relevant written records. The evidence provided by your competitor will have enabled the investigators to receive judicial approval to install wiretaps on your employees' telephones, and to listen in on their conversations, over a period of several months. There may also have been physical surveillance of your premises at various locations. Thus, the search warrant will be closer to the end of the investigative process than the beginning. Even after the search warrant has been executed, telephone conversations may continue to be intercepted and recorded, and physical surveillance may also continue.

The Canadian Competition Bureau will work closely with competition authorities in many other countries, including the US, Europe and Japan. If the agreement or arrangement being investigated in Canada may also be in existence in other countries, other offices of your company in these countries may be experiencing the same visit at the same time. If not, evidence found at your Canadian premises may result in subsequent searches of your premises in other countries.

What to do? The best advice I can give is to cooperate fully with the investigators attending at your offices because obstructing them in any manner would be at least as serious a criminal offence as the potential violation of the *Competition Act*. Any attempt to delete or hide documents (whether in paper or electronic form) would constitute criminal obstruction. If there are any paper or electronic records which contain legally privileged documents (e.g. letters to or from your lawyers), such privilege should

be claimed immediately and documents should be placed in sealed envelopes or other sealed containers and specially marked. It is often helpful to bring in outside legal counsel immediately, both to ensure appropriate cooperation with the investigators by your staff and to assist in identifying and protecting privileged documents.

Although your competitor will have obtained immunity from prosecution by telling tales about your company, all is not necessarily lost. Immediate and full cooperation with the Bureau may enable negotiations for leniency in sentencing if you can meet the conditions of the Bureau's leniency policy. As well, if you have information regarding similar agreements or arrangements in other Canadian geographic markets (e.g., other cities or provinces) which were not reported by the initial immunity applicant, immediate communication of this fact to the Bureau may enable your company to obtain immunity as the first immunity applicant in those markets. Similarly, information regarding other product markets may help you to obtain immunity for those (e.g., if the first immunity applicant receives immunity for gasoline, immunity may still be available for oil or anti-freeze).

It is important, immediately, to retain counsel experienced in obtaining immunity or leniency under these provisions of the *Competition Act* because the race goes to the swiftest. Sometimes, only a few minutes may separate the request for immunity of the successful applicant and the request from the one who is just a bit too late.

It is also important for most companies to provide in-house seminars on compliance with the *Competition Act*, as a precaution. Employees who attend such seminars are less likely to offend than employees who do not. As well, companies who provide such seminars, and whose attendees sign attendance sheets, can raise as a defence against prosecution of the company that it exercised due diligence in attempting to prevent the commission of the offence, and therefore, the only offender would be the employee(s) involved. Any penalty the employee received would be a small fraction of that imposed upon a company that is convicted of an offence, and the company would also have a much better chance of avoiding a large civil damages award in the class actions which inevitably follow the laying of charges for the offence.

ROOT CAUSE ACCIDENT INVESTIGATIONS, CRIMINAL INVESTIGATIONS AND THE RIGHT TO SILENCE

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Following an industrial accident, company investigators, regulatory officials, coroners, and criminal investigators may become involved in a search for facts and evidence. Of course, the ultimate interests of each of those persons may be different. For example, companies may choose to have a root cause investigation report completed in order to take preventive measures, reassure the public or shareholders and/or to prepare for litigation. Regulatory officials may also require the production of a root cause investigation report in order to deal with safety issues or to decide whether to impose civil penalties. The power to require a root cause investigation report is a common feature of Canadian occupational health and safety and transportation safety legislation. Criminal investigators may institute criminal investigations in order to recommend whether persons should be charged with a criminal offence.

The interests of persons who seek the production of a root cause investigation report may be in conflict with the interests of persons involved in events leading to an industrial accident. An investigation into an accident at a work place may lead to the questioning of employees respecting their role and involvement in an industrial accident. Employees or their counsel may have to decide, for example, how to respond to a request from an employer or a regulatory authority to provide a statement. A decision respecting how to respond to a statement request may be important as authorities may seek to use information obtained in the course of an enquiry in a subsequent criminal investigation.

Questions that may be faced by persons involved in events leading to an industrial accident include the following. Should employees involved in an industrial accident and who are the subject of a criminal investigation remain silent? Can employers discipline employees who stand on their right to silence? These questions were recently addressed in the case of *British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.*, 2008 BCSC 1464.

British Columbia Ferry and Marine Workers' Union dealt with an application for judicial review respecting the suspension of two British Columbia Ferry Services Inc. ("B.C. Ferries") employees. These employees were primarily responsible for the navigation of the Queen of the North when it sank off the B.C. Coast. The RCMP initiated a criminal investigation in connection with the deaths of two passengers. B.C. Ferries initiated a root cause inquiry with a view to producing a public report.

The employees refused to answer questions at the inquiry unless they received an assurance that their answers would be considered privileged and held in confidence by B.C. Ferries pending the outcome of the criminal investigation. B.C. Ferries declined to provide that assurance. The employees refused to provide answers. B.C. Ferries suspended the employees. The employees filed grievances challenging their suspensions.

At an arbitration hearing, the British Columbia Ferry and Marine Workers' Union (the "Union") took the position that the employees were entitled to remain silent as a criminal investigation was ongoing. The grievance was dismissed. The arbitrator concluded that the employees' right to remain silent was outweighed by B.C. Ferries interests in determining the root cause of the accident and making full public disclosure.

The Union applied to the Labour Relations Board (the "LRB") to review the arbitration decision, which was dismissed. The Union sought leave for reconsideration, which was denied. The Union commenced a judicial review application in the Supreme Court of British Columbia respecting the LRB's decision to dismiss the Union's application for review of the arbitration decision. The Union argued that the LRB erred in dismissing the grievance.

The Union relied upon *Tober Enterprises Ltd. and United Food and Commercial Workers International Union, Local 1518* (1990), 7 C.L.R.B.R. (2d) 148. *Tober* indicates that, as a general rule, an employee's refusal to answer the employer's questions respecting conduct is not just cause for discipline in most instances. It argued that B.C. Ferries did not have just cause for discipline because the employees were entitled to remain silent in the face of possible criminal charges. B.C. Ferries relied upon an exception to the general rule in *Tober.* It argued that the employee's refusal to explain their conduct damaged the business interests of B.C. Ferries and this constituted just cause for discipline.

The court dismissed the application for judicial review and upheld the LRB's decision with the result that the suspensions were confirmed. The court ruled the LRB's decision was not patently unreasonable and that it was open to make the decision that it made in the circumstances. The court noted that: "[BC Ferries] had an obligation to account for the tragedy to the public as soon as possible. It required the co-operation of the crew members – and, in particular, the navigational crew – to fulfill that obligation."

It is important to note that this decision only dealt with whether an employee's silence is subordination constituting just cause for discipline. The Union did not argue that the employee's common law rights were engaged or that their rights under the *Canadian Charter of Rights and Freedoms* were infringed. The *British Columbia Ferry and Marine Workers' Union* case, therefore, leaves open the possibility that employees may make further right to silence arguments in the future.

WHAT'S HAPPENING AROUND MILLER THOMSON?

Bruce McMeekin will be speaking about Directors' and Officers' Criminal Law liability at the Federated Press Officers' and Directors' Liability program in Toronto on March 10, 2009.

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