



New Class Actions for Price Fixing

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On October 31, 2013, the Supreme Court of Canada released a trilogy of cases (*Sun-Rype, Pro-Sys Consultants and Infineon Technologies*) relating to the right of “indirect purchasers” to bring class actions against suppliers for price fixing.

Under the *Competition Act*, any “person” can bring an action against two or more people or entities that conspire to fix prices or for bid rigging. The difficulty in the past was that “indirect purchasers” of those products or services were foreclosed from claiming damages as they had no direct commercial relationship with the parties who conspired. The indirect purchasers were too far down the food chain to claim the damages that they suffered by overpaying for products or services. The Supreme Court of Canada had previously declared that damages were suffered or deemed to be suffered by the “direct purchaser” and hence the same damages could not be suffered by the indirect purchasers, as that would result in double recovery. This judicial finding arose notwithstanding that the actual damages were typically passed on to the ultimate consumer or the “indirect purchaser”.

With this trilogy of cases, the Supreme Court of Canada has now confirmed that both direct and indirect purchasers can claim the same damages and prosecute class actions against price fixers.

What does this mean to businesses and specifically those in the construction industry? Now, any group of purchasers, including home purchasers, can and will initiate class actions against industry associations or groups that have participated in any form of collective price fixing. Discussions related to the pricing for any bid in respect of any project or an agreement to withdraw from a particular bidding process are in the nature of a conspiracy to set prices. Construction industry associations are particularly vulnerable because, by their very nature, they are a group of competitors joined to discuss industry issues, which can and often will relate to pricing issues.

Everyone in the construction industry should be mindful of these issues particularly because of the proceedings which are ongoing at the Competition Bureau relating to the low rise residential forming sector. The allegations made in that sector suggest that price fixing may have increased the price of the foundation of a new residential home by \$1,500 to \$4,000 per house. Damage estimates range up to one billion dollars in the sector. While the builders may not have any incentive to initiate a class action against the forming contractors, there is now nothing to stop the ultimate purchasers, the home owners, from banding together to claim these damages. It is a whole new game.

Construction Industry Associations are forewarned to ensure that any discussions regarding pricing and bidding practices are avoided and never become the subject of any discussions in or around association business. Best practices must include the following:

1. Educate members of Trade Associations in relation to what constitutes a violation of the *Competition Act*.
2. Trade Associations should never formally or informally discuss or exchange pricing or other sensitive bidding information.
3. Trade Associations should be conscious of the descriptions used of their discussions in the written minutes of their meetings.
4. Be aware of the consequences, both regulatory and civil, of prosecution for price fixing or bid rigging. ■