Goodmans LLP Update

Competition Law

February 5, 2018

Federal Court of Appeal Levels the Playing Field for Respondents Before the Competition Tribunal

In *Vancouver Airport Authority v. Commissioner of Competition*, the Federal Court of Appeal recently signalled a fundamental shift in the way that cases are litigated before the Competition Tribunal. No longer is the Commissioner permitted to withhold from a respondent documents or information collected from third parties based upon a blanket assertion of "public interest privilege". Goodmans acted for the Vancouver Airport Authority in this successful appeal.

Background

Since the 1990s, respondents in certain cases brought by the Commissioner of Competition before the Competition Tribunal have operated under a significant procedural disadvantage, because the Commissioner enjoyed a unique and extremely powerful procedural right – one not enjoyed by any other comparable antitrust enforcement agency.

A series of decisions by the Competition Tribunal established that the Commissioner was entitled to withhold from production any document or information he had gathered from third parties in the course of his investigation, by relying upon a blanket "public interest privilege". Although this blanket privilege did not apply in court proceedings alleging criminal offences under the Competition Act, it did apply to all litigation before the Competition Tribunal, such as abuse of dominance cases and contested mergers.

In *Vancouver Airport Authority v. Commissioner of Competition*, the Vancouver Airport Authority argued that the Commissioner's public interest privilege resulted in a serious imbalance in the procedural rights of the parties. While a respondent was obliged to disclose to the Commissioner all relevant documents early in the proceeding, and to answer all relevant and proper questions on examinations for discovery, the Commissioner could, and did, selectively withhold documents and information. In lieu of disclosure, the Commissioner would "summarize" that information on an aggregated basis, removing all indications as to the source of any given piece of information. The respondent was expected to conduct examinations for discovery and prepare for trial based upon those aggregated and anonymized "summaries".

Compounding the difficulties faced by respondents was the fact that the Commissioner could choose to waive privilege over a selection of the withheld information at a time of his choosing, including on the eve of trial, potentially leaving the respondent with a very limited amount of time to review and consider how to make use of the information.

The Production Dispute in the Vancouver Airport Authority Case

In his case against the Vancouver Airport Authority, the Commissioner refused to disclose over 9,500 (out of 11,500) relevant documents on the basis that they were protected by "public interest privilege". The Vancouver Airport Authority brought a motion for production of the 9,500 documents, arguing that the privilege should no longer be recognized. (The Commissioner subsequently agreed to produce approximately 8,300 of the withheld documents, with a further 1000 being produced shortly before trial.)

The Competition Tribunal initially upheld the Commissioner's public interest privilege, but the Federal Court of Appeal accepted the position advanced by the Vancouver Airport Authority, reversed the Tribunal's decision and abolished the privilege.

The Federal Court of Appeal Abolishes the Class-Based Public Interest Privilege

The Court's decision rested upon two pillars. First, it concluded that the privilege was not necessary. It found that there was no evidence supporting the

Commissioner's argument that, without the blanket privilege, third party sources would be less inclined to provide information to the Commissioner owing to a fear of reprisals, thereby making investigations less effective. It further noted that similar "candour" arguments – i.e., that without such a privilege, sources will be less candid in providing information to investigators – have been viewed skeptically by the Supreme Court of Canada, with the skepticism being all the more warranted in the present case, given that competition authorities in the United States, Europe, Australia and New Zealand all manage to carry out their respective investigative mandates without such a privilege. In addition, it noted that the candour argument simply could not apply in relation to documents obtained by the Commissioner by means of the compulsory process of a production order issued under section 11 of the *Competition Act*.

Second, the Court was concerned about the serious unfairness that can result from such a one-sided privilege. Without documentary production, a respondent's ability to prepare its case is significantly impeded. It is denied information about potential witnesses, it lacks access to documents that could prove useful for cross-examination, and it obtains only information that the Commissioner chooses to disclose. The Court held that the entire process is fraught with potential unfairness.

Accordingly, the Court held that, if the Commissioner wishes to assert a "public interest privilege", he must establish such a privilege on a document-by-document or case-by-case basis, with the privilege claim being upheld only if the Commissioner can prove that the public interest to be served by continued secrecy outweighs the possible denial of justice that could result from non-disclosure of a particular document.

The Commissioner has now advised that he will not seek leave to appeal the decision to the Supreme Court of Canada.

Implications of the Federal Court of Appeal's Decision

The Court of Appeal's decision will apply in all contested proceedings before the Tribunal, including those related to contested mergers, abuse of dominance, and unfair trade practices. There is good reason to believe that such a flexible, fact-specific approach offers respondents a much better chance for a fair process before the Tribunal, with both sides being given an equal opportunity to prepare their respective cases, and with decisions being based upon a full record.

For further information in relation to the Court's decision, please contact any member of our Competition Law Group.