



Vancouver airport ruling could boost 'procedural fairness' before Canadian Competition Tribunal—lawyers

09 March 2018 | 19:56 EST

- Decision overturns 'blanket' privilege
- Possible earlier access for respondents
- Regulator promises 'confidentiality'

A Canada Federal Court of Appeal decision on class privilege could boost procedural fairness for respondents in contested merger or abuse of dominance matters heard by the country's Competition Tribunal, according to attorneys.

The ruling held that the Commissioner of Competition can no longer claim a "class-based public interest privilege" on information resulting from an investigation by the Canadian Competition Bureau (CCB) in proceedings before the tribunal and must instead establish such a privilege on a document-by-document, or case-by case basis.

The appellate court decision resulted from underlying and ongoing litigation in the *Vancouver Airport Authority v. Commissioner of Competition* contested abuse of dominance case before the tribunal. It is a specialized administrative tribunal where applications filed by the Commissioner of Competition are heard by a panel of three federal court judges and lay persons.

The litigation process before the tribunal "will be considerably fairer and subject to a more level playing field" for respondents as a result of the appeal court ruling, said Cal Goldman, chair of the competition, antitrust and foreign investment group at Goodmans, the law firm that won the appeal on behalf of the **Vancouver Airport Authority**.

Before the ruling, respondents before the tribunal had to disclose all relevant documents to the commissioner, but the commissioner was entitled to claim public-interest class privilege to withhold from disclosure to respondents every document and all information from third-parties for an



investigation until the eve of trial, said Julie Rosenthal, the Goodmans' litigator who argued the bulk of the appeal.

This "blanket" privilege precluded respondents from conducting oral depositions on the content of withheld documents and other early-stage preparation, said Rosenthal. The appellate court rejected arguments from the bureau that not having the privilege would discourage informants to come forward. It also noted that competition authorities in other jurisdictions, including the US, Europe, Australia and New Zealand, had not found it necessary to have a class privilege over documents from third parties.

Andrew Little, an antitrust attorney with Bennett Jones in Toronto and former general counsel at the competition bureau, agreed that eliminating class-based public interest privilege could result in a simpler, fairer process, particularly if respondents can obtain information earlier in the litigation process.

But the attorney said that could depend on if and how the CCB decides to employ the document-by-document public interest privilege outlined by the appeal court, or other privilege tools at its disposition to maintain confidentiality, including section 29 of the Competition Act; confidentiality orders; or litigation privilege.

The CCB, which decided quickly not to appeal the Federal Court of Appeal ruling, said in statement to PaRR that it remains committed to protecting confidential records received from third parties and "this includes by asserting any attaching privileges where appropriate."

The bureau said it will continue to rely on section 29 confidentiality provisions during its investigations. During legal proceedings, in addition to the attaching privileges, the bureau said it could use the confidentiality order to protect third-party records from disclosure to the public.

Paul-Erik Veel, an antitrust litigator with Lenczner Slaght in Toronto, noted that with the limitations the appellate court has now placed on public interest privilege, the bureau has less ability to withhold production of documents that it might not want to disclose.

While there was never a guarantee that confidential documents provided to the bureau would not be disclosed to a third party



in enforcement or in litigation on a protected basis, the court of appeal ruling makes it virtually guaranteed that documents will be disclosed, said Veel.

by Kathryn Leger in San Francisco