PUBLIC INTEREST PRIVILEGE: WHAT SECRETS CAN THE COMPETITION BUREAU KEEP?

Posted on February 5, 2016

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The long running and jurisprudently bountiful class action involving Pro-Sys Consultants Ltd. and Microsoft has resulted in another interesting gift.[1] In this most recent decision the British Columbia Supreme Court considered whether the Competition Bureau was required to provide to plaintiffs in a class action all documents related to two of its prior investigations, which were not directly related to the current class action proceedings, and which the Competition Bureau had conducted some 10-15 years prior. Both Microsoft and the Competition Bureau opposed the application on the basis that the documents were privileged, and as well on the basis that they were not relevant, that the request was overbroad, and that the production of such documents would be disproportional.

In making its decision the court first noted that the fact that the Bureau's investigations were undertaken under the reviewable practices provisions of the *Act*, while the class action alleged breach of the conspiracy provisions, did not necessarily make the documents sought irrelevant to a civil claim for conspiracy. The court then considered the question of public interest privilege. It noted that earlier case law indicates that Bureau documents are subject to a class based public interest immunity in the context of legal proceedings which the Bureau is engaged with Respondents. The Bureau argued that in the course of conducting its investigation it receives confidential, proprietary and commercially sensitive information from third parties who seek assurances from the Bureau that the information will remain confidential.

The court distinguished the case of *Imperial Oil v. Jacques*,[2] which dealt with the disclosure of wire tap evidence collected by the Bureau in a cartel investigation to plaintiffs in a follow-on civil class action. The court noted that the *Imperial Oil* case dealt only with communications between the parties to the civil action, all but one of whom were also parties to the criminal proceeding. Therefore it did not involve information collected from third parties not involved in litigation. Secondly, the disclosure there sought only information already made available to defendants in the criminal proceeding. The court also considered the decision of the New Brunswick Court of Appeal in *Forest Protection Ltd. v. Bayer A.G.*.[3] There the plaintiffs sought documents from the Competition Bureau which had been seized from one of the convicted parties in the criminal proceedings, and from an individual defendant associated with another of the companies convicted in the

criminal proceeding. The court noted in the Forest Protection case that third parties might be affected by document disclosure, but that was not relevant to the specific case before it.

The court in the current *Microsoft* case also noted that in neither the *Imperial Oil* nor *Forest Protection* case was the issue of public interest immunity considered. In making its decision in the present case the British Columbia Supreme Court noted that public interest privilege in the context of competition law has developed into its own unique way and is now well established. It concluded that there was not a difference in principle in the application of such privilege claims to an investigation under the *Act* versus a private action under Section 36 of the *Act*. It noted that third parties provide information on the basis that it will remain privileged unless used by the Bureau in litigation. "If this principle is to be un-done, I think it should be left to a higher court".[4]

With respect to information which Microsoft itself had given to the Bureau and which was now sought from the Bureau, the court noted the concerns about confidentiality did not apply to that information. Such information might be subject to settlement or other legal privilege but that there was not sufficient information in the current record to make such a determination. With respect to business documents which Microsoft had provided to the Bureau the court noted that they would be caught in a production order made against Microsoft directly in any case.

The result of the case represents a continuing refinement of the balance struck between disclosure to plaintiffs in *Competition Act* lawsuits and protection of confidential information in the possession of the Competition Bureau, with particular implications for the Bureau's ability to gather information and give assurances of confidentiality to those who provide it. No doubt it will not be the last word on the topic.

by James B. Musgrove

[1] Pro-Sys Consultants Ltd. v Microsoft Corporation, 2016 B.C. S.C. 97.[ps2id id='1' target='/]

[2] Imperial Oil v. Jacques, 2014 S.C.C. 66.[ps2id id='2' target='/]

[3] Forest Protection Ltd. v. Bayer A.G., [1996] N.B.J. No. 238, Affirmed in part [1998] N.B. J. No. 484.[ps2id id='3' target='/]

[4] Note 1 at ¶ 25.[ps2id id='4' target='/]

A Cautionary Note


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