

A Privileged Class No More: Federal Court of Appeal Rejects Competition Commissioner's Public Interest Privilege

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For nearly three decades, Canada's Commissioner of Competition has asserted a public interest class privilege over documents collected in the course of its investigations. That assertion has been accepted by the Competition Tribunal, the Federal Court of Appeal, and the Superior Courts in Ontario and British Columbia.

However, in *Vancouver Airport Authority v Commissioner of Competition*,¹ the Federal Court of Appeal upended this jurisprudence and held that the Commissioner does not enjoy any such class privilege. The Court referred to recent Supreme Court of Canada jurisprudence setting stringent criteria for recognizing class privileges, and held that the privilege asserted by the Commissioner could not pass that high hurdle.

The Commissioner has announced that it will not be seeking leave to appeal.² Therefore, *Vancouver Airport* may spell the end of the Commissioner's longstanding claim to a public interest class privilege.

Background

The Commissioner commenced an application before the Competition Tribunal alleging that the Vancouver Airport Authority ("VAA") abused its dominant position at the Vancouver International Airport. The Commissioner indicated that it had roughly 11,500 relevant documents in its possession. It initially refused to produce approximately 9,500 documents on the basis that they were protected by a "public interest class privilege" encompassing all "records created or obtained by the Commissioner, [his] employees, servants, agents, solicitors or obtained from third parties during the Commissioner's investigations."³

VAA moved to compel production of the 9,500 documents. On the day of the motion, the Commissioner waived privilege over roughly 8,300 documents but maintained its privilege claim over the remaining 1,200.

¹ 2018 FCA 24 [*Vancouver Airport*].

² Competition Bureau of Canada, News Release, "Competition Bureau will not appeal court decision regarding public interest privilege" (January 29, 2018), online: https://www.canada.ca/en/competition-bureau/news/2018/01/competition_bureauwillnotappealcourtdecisionregardingpublicinter.html [Bureau News Release].

³ *Vancouver Airport*, at para 14.

The Tribunal sided with the Commissioner and ruled that the documents in issue were protected by a public interest class privilege.⁴ The Tribunal found that the privilege had been recognized by the Federal Court of Appeal, whose decisions were binding on the Tribunal. In addition, the Tribunal agreed with the Commissioner that the class privilege was justified because it protected third parties sharing information with the Commissioner from retribution, encouraged candour, and was necessary to permit the Commissioner to fulfil its mandate under the *Competition Act*.⁵

The Federal Court of Appeal's Decision

VAA appealed the Tribunal's decision to the Federal Court of Appeal and argued that the class privilege claimed by the Commissioner did not exist. Stratas J.A., on behalf of a unanimous Court, allowed the appeal.

Class Privilege vs. Case-by-Case Privilege

Stratas J.A. opened his analysis by explaining the difference between class privilege and case-by-case privilege. Class privilege is a blanket privilege that shields all documents within a given class from disclosure. If a document is a member of a class, then it is presumptively privileged. In contrast, a case-by-case privilege looks at the nature of a particular document and the circumstances surrounding it.

Though not explicitly stated, Stratas J.A.'s decision makes it clear that public interest privilege is a case-by-case privilege. Any claim for public interest privilege, Stratas J.A. noted, represents a clash between competing values. A court must "balance the possible denial of justice that could result from non-disclosure against the injury to the public arising from disclosure of public documents which were never intended to be made public."⁶

To balance these competing interests, courts rigorously assess a claim for public interest privilege on a case-by-case basis using four criteria: (i) the communication must originate in confidence; (ii) the confidence must be essential to the relationship in which the communication arose; (iii) the relationship must be one which should be "sedulously fostered" in the public good; and (iv) in the circumstances of the case, the public interest served by confidentiality must outweigh the public interest in getting at the truth.

A class privilege, however, does not allow for any balancing. If a document falls within a class, it is privileged without any regard to the reason it is sought or its content. This can put class privilege at odds with the interests of justice in a particular case, which is often served by robust disclosure. As Stratas J.A. recognized, a class privilege "can be blunt, sweeping and

⁴ *The Commissioner of Competition v Vancouver Airport Authority*, 2017 CACT 6.

⁵ RSC 1985, c C-34.

⁶ *Vancouver Airport*, at para 39.

indiscriminate in operation, and thus, can work against the truth-seeking purpose of a court or administrative proceeding.”⁷

As a result, courts have been reluctant to create class privileges. Only four have been recognized: legal professional privilege; litigation privilege; informer privilege; and settlement privilege. In recent cases the Supreme Court set a very high bar for new class privileges by requiring that any proposed privilege be supported by a policy rationale as compelling as the policy rationale behind legal professional privilege. That is a high threshold, as legal professional privilege has its roots in the Constitution.

In light of this, Stratas J.A. concluded, “it is now practically impossible for a court, acting on its own, to recognize a new class privilege.”⁸

Commissioner’s Privilege not Recognized in Prior Federal Court of Appeal Decisions

The Commissioner argued that the Court was not being asked to recognize a new class privilege and only had to apply “long standing and unanimous” case law recognizing its asserted privilege. In addition to numerous decisions of the Competition Tribunal and a few from Superior Courts in Ontario and British Columbia,⁹ the Commissioner relied on two decisions of the Federal Court of Appeal: *D&B Companies of Canada Ltd v Canada (Director of Investigation & Research)*¹⁰ and *Hillsdown Holdings (Canada) Ltd v Canada (Director of Investigation & Research)*.¹¹

Stratas J.A. rejected this argument. He held that, in both cases, the Federal Court of Appeal applied a deferential standard of review and merely decided that the Competition Tribunal had made a reasonable decision. The Court never said that the Competition Tribunal was correct to recognize a class privilege.

Even if *D&B* and *Hillsdown* had affirmed the Commissioner’s public interest class privilege, Stratas J.A. added that such a holding could no longer stand in light of later Supreme Court cases setting a high threshold for recognizing class privileges.

No Justification for Asserted Class Privilege

Stratas J.A. next turned to whether the Competition Tribunal could have recognized a new class privilege in these circumstances. The answer was a resounding no.

Recent Supreme Court jurisprudence emphasized that new class privileges should generally be created by Parliament. However, Parliament had already spoken to confidentiality concerns in

⁷ *Vancouver Airport*, at para 49.

⁸ *Vancouver Airport*, at para 62.

⁹ See, for example, *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2013 ONSC 5386 at para 15; *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2016 BCSC 97 at paras 11 and 25.

¹⁰ *D&B Companies of Canada Ltd v Canada (Director of Investigation & Research)* (1994), 58 CPR (3d) 535 (FCA) [*D&B*].

¹¹ *Hillsdown Holdings (Canada) Ltd v Canada (Director of Investigation & Research)*, [1991] FCJ No 1021 (FCA) [*Hillsdown*].

the competition law context by enacting provisions protecting confidentiality (albeit in a more limited way than a class privilege would have) in the *Competition Act* and *Competition Tribunal Rules*.¹² Parliament had not seen fit to create a class privilege, which strongly indicated that the Court and the Tribunal should not construct one either.

In any event, Stratas J.A. held that any decision to create a class privilege would require clear evidence that such a privilege was necessary. The Commissioner argued that a class privilege was justified because it would protect the confidentiality of third-party sources and encourage candour. This was insufficient for Stratas J.A. The Commissioner needed to prove that anything less than blanket confidentiality would substantially impair its relationship with third-party sources and frustrate the Commissioner's ability to discharge its legislative responsibilities. However, the Commissioner put forward no evidence at all that blanket confidentiality was needed.

While the Tribunal could accept in a general way that third party sources might fear reprisal without confidentiality protections, it could not draw definitive conclusions without evidence. The Tribunal's previous decisions recognizing the Commissioner's class privilege did not rigorously examine whether a class privilege was necessary for the Commissioner to carry out its statutory mandate. Therefore, it was incumbent on the Commissioner to adduce evidence in this case establishing the need for a class privilege. It failed to do so.

Setting aside the lack of a satisfactory evidentiary record, Stratas J.A. found that measures short of a blanket class privilege could protect the confidentiality interests at stake. Relationships between the Commissioner and third-party sources varied; therefore, a rigid class privilege was inapt. In some cases, a third-party source may not need an assurance of confidentiality; in others, such an assurance may be unreasonable. The asserted privilege was unnecessarily broad and detached from the compelling public interest asserted by the Commissioner. A tailored case-by-case privilege that could take into account these variable circumstances was more appropriate.

In closing, Stratas J.A. observed that a class privilege clashed with the Tribunal's procedural fairness obligations. The Tribunal was subject to high procedural fairness obligations, akin to courts. But a class privilege would allow the Commissioner to withhold all documents obtained from third parties - potentially the bulk of its case. Stratas J.A. concluded that this was "fraught with potential interference with procedural fairness rights and the truth-finding function of these proceedings."¹³

Implications

The Commissioner's ability to rely on a class privilege was always exceptional. As Stratas J.A. noted, neither the parties nor the Court was aware of any "any other regulator, competition or otherwise, domestic or foreign, [that] found it necessary to assert the sort of class privilege

¹² SOR/2008-141.

¹³ *Vancouver Airport*, at para 113.

the Commissioner [sought]”.¹⁴ This privilege has been criticized for unfairly shifting the balance in Tribunal proceedings in favour of the Commissioner and for unduly impeding the search for the truth.¹⁵

The full impact of *Vancouver Airport* will become clear over time. As noted by Stratas J.A., the Commissioner can still rely on a case-by-case privilege. Further, in a recent press release, the Commissioner announced that it will continue relying on other tools like the confidentiality provisions of the *Competition Act* and confidentiality orders to protect confidential information obtained during its investigations.¹⁶ However, it is clear that after *Vancouver Airport*, the Commissioner can no longer assume its assertions of privilege will be accepted and will have to prove its privilege claims with evidence in each and every case. That will undoubtedly transform the dynamic in future proceedings before the Tribunal.

¹⁴ *Vancouver Airport*, at para 106.

¹⁵ Kent Thomson, Charles Tingley and Anita Banicevic, “Truncated Disclosure in Competition Tribunal Proceedings in the Aftermath of Canada Pipe: An Experiment Gone Wrong,” (2006), 31 *The Advocates’ Quarterly* 67 at p 106.

¹⁶ Bureau News Release.