The Confidentiality of Commercial Information in a System of Open Justice

Dr. A. Neil CAMPBELL*

* McMillan Binch, Toronto, Ontario.

The importance of the maxim that "justice must not only be done, but must be seen to be done" has been thoroughly explored by other speakers at the CIAJ's "Open Justice" Conference (Ottawa, October 13-15, 1994) and elsewhere. However, there is also a competing interest in protecting the confidentiality of sensitive information belonging to participants in legal proceedings. This paper will focus on information which business enterprises would regard as confidential, and how such interests — which may have a public as well as a private dimension — should be balanced against the public interest in a system of open justice. Special attention will be paid to proceedings where competitors, customers and suppliers are appearing before a tribunal with a regulatory mandate, since such issues are front and center in these situations. Two examples — the Canadian International Trade Tribunal ("CITT") and the Competition Tribunal ("CT") — will be examined in some detail, after which an attempt will be made to sketch out principles of general application.

I. WHY SHOULD COMMERCIALLY SENSITIVE INFORMATION BE PROTECTED?

Business enterprises have a natural tendency to claim that their commercial information is all highly confidential. Except in the limited situations where there is some perceived advantage to be had from voluntary disclosure (such as a marketing or public relations benefit), claiming confidentiality to the maximum available extent is the path of least resistance and risk. On the other hand, most of the desirable consequences flowing from a system of open justice are public benefits (for example, fairer and more accountable decision-making by tribunals) which are unlikely to register in the calculus of a firm deciding whether to voluntarily disclose information. Even if there is only a remote possibility that the information would result in damage or embarrassment to the firm, non-disclosure is the safer course of action. Thus, as a general rule, business enterprises can be expected to raise more frequent and more extensive confidentiality claims than would be optimal from the standpoint of society as a whole.

Firms should not be criticized for approaching disclosure issues with a view to advancing their self-interest as profit-seeking entities — such behaviour is fundamental to a free market economic system. Moreover, while confidentiality claims must always be evaluated with a certain scepticism in light of the private incentives to "over-protect" commercial information, there are a variety of situations in which there is a matching public interest in protecting confidentiality.

Fairness is one broad public interest category. Most democratic societies view individual privacy and autonomy as important values (as is manifested by privacy legislation and the disclosure exemptions in access to information legislation).[1] Protection against forced self-incrimination is another fairness concern (as is illustrated by the *Charter of Rights and Freedoms*[2] and various statutory regimes). While these rationales are strongest when individuals are involved, legislatures have extended them to business enterprises to varying degrees as well. Disclosure of commercially sensitive information which results in serious economic harm to a private sector enterprise may also —

1. See, for example, *Privacy Act*, R.S.C. 1985, c. P-21; *Access to Information Act*, R.S.C. 1985, c. A-1.

2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, sections 11(c) & 13.

depending on the circumstances — be regarded as having an element of unfairness which is offensive.[3]

Another reason for protecting confidential information is that much of the beneficial competition and innovation in a private enterprise system results from firms investing resources in an effort to earn future profits. Since information by its nature is useable by multiple recipients, (that is there is "non-rival consumption") inadequate protection for commercially sensitive information can easily undermine this important incentive structure.[4]

There is also a public interest in not having extensive sharing of information between competitors. It is possible for competitors in an oligopolistic industry to arrive at a coordinated, cartel-like outcome through information exchanges which fall short of an overt price-fixing agreement.[5] This is an issue of special concern when competitors are parties to a single proceeding, but is also a potential issue when one firm's commercially sensitive information becomes accessible to other members of the industry as part of the public record in a proceeding.

The difficulty with these rationales (and there may be others — the foregoing list does not purport to be exhaustive) for protecting private sector information is that they are highly situation-specific. The type of information, the harm from disclosure and the nature of the legal proceeding all impact on whether a particular claim of confidentiality is one supported merely by private interest or by a compelling public interest. Moreover, the magnitude of any public interest in such situations is no easier to measure than the public benefits which flow from having open justice. Nevertheless, it is at least useful to recognize that there are a limited range of public interest rationales which may, in a particular context, outweigh the public interest in openness.

---

3. See, for example, J. Pearson, "Access to Confidential Business Information in Government Files", in this volume of essays.

4. Intellectual property rights are motivated by the same kind of concern.

5. See generally, J. Langenfeld & M. Sanderson, "Practices That May Facilitate Collusion in an Oligopoly: The Canadian and U.S. Experiences" (Address to a Canadian Bar Association Competition Law Section Symposium at the University of Toronto, 20 June 1994).

II. WHAT IS COMMERCIALLY SENSITIVE INFORMATION?

Commercially sensitive information is largely, to paraphrase a famous cliche, "in the eye of the beholder".[6] In some industries there is a high level of publicly available information about prices, sales levels and the like; in others there may be little or none. In some situations a particular piece of information about business strategy or cost structure may be enormously useful to a competitor or supplier; in others the information might come as no surprise or be of little interest. As a general matter, however, the following categories of information would tend to be regarded as sensitive by most business enterprises:

- business strategies and plans;
- prices, sales and market shares;
- costs, production levels and capacities; and
- dealings with particular customers or suppliers.

The foregoing categories are not exhaustive. There may well be other types of information which are genuinely commercially sensitive in specific circumstances. Conversely, not every shred of information falling in one of these categories is invariably commercially sensitive (for example, if a business strategy is largely observable through implementation, then the strategic plan is no longer especially sensitive; if the order of magnitude of sales or capacity numbers are common knowledge within the industry, then the exact amounts cannot realistically be regarded as sensitive; etc.). As a result, any attempt to define confidentiality based on the type of information must be sufficiently flexible to deal with both under-inclusiveness and over-inclusiveness of category definitions on a case-by-case basis.

III. THE CITT'S APPROACH TO DEALING WITH CONFIDENTIAL INFORMATION

The CITT has responsibility for, among other things, adjudicating the issue of material injury to the domestic industry in anti-dumping or subsidy/countervailing duty cases under the *Special Import Measures Act*.[7] Such proceedings involve Canadian manufacturers in the role of complainants and their competitors — foreign exporters and/or Canadian importers of their products — as respondents. The material injury inquiry focuses on whether unfair import competition has suppressed prices or resulted in a loss of

---

6. The discussion which follows is based on a commercial rather than a legal perspective. For a more comprehensive legal analysis, see M. Priest, "Private Commercial Interests on Trial: Regulatory Hearings", in this volume of essays.

7. *Special Import Measures Act*, R.S.C. 1985, c. S-15.

sales, market share, production, employment, etc. for the domestic industry. Commercially sensitive information from both the complainants and the respondents is therefore integral to the decision-making process.

IV. PARALLEL PUBLIC AND PROTECTED PROCEEDINGS

The CITT uses an elaborate two-track procedure to maintain the confidentiality of commercially sensitive information.[8] Except for documents which the party submitting regards as completely non-confidential, there is a "public" and a "protected" version of each document filed in the proceeding (including the pre-hearing report prepared by the CITT's research staff). The public version is supposed to contain a brief explanation of why omitted information is confidential and a summary of its general significance, although this requirement is not always rigorously enforced.

Aside from the CITT panel and staff, the only persons given access to the protected version of documents are the parties' counsel and possibly expert witnesses. As a result, a complainant or respondent who chooses to appear in person can only participate in a portion of the proceedings. An example of the rigidity of this rule occurred when the Director of the Competition Bureau, who was intervening in a proceeding before the CITT (as he is entitled to do under the *Competition Act),*[9] was refused access to the protected part of the record.[10]

Prior to receiving access to protected information, each representative or expert witness must sign a strict confidentiality undertaking which precludes any disclosure of such information (including to their clients), requires that all such information be returned when the proceeding finishes, etc.

The hearings follow a similar bifurcated pattern. Each witness begins with public testimony, followed by an often much more lengthy "in camera" cross examination covering areas which are commercially sensitive. Counsel also divide their oral argument into public and *"in camera"* components. Only the CITT panel and staff and counsel who have signed confidentiality undertakings are permitted to be present during the *"in camera"* sessions.

---

8. See *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), ss. 43-49; and *Canadian International Trade Tribunal Rules*, SOR/91-499.

9. *Competition Act*, R.S.C. 1985, c. C-34, s. 125.

10. See *Canada (Director of Investigation and Research, Competition Act)* v. *Canadian International Trade Tribunal* (1994), 52 C.P.R. (3d) 71 (F.C.A.).

A. Lessons

The CITT process is a useful model for proceedings which involve direct competitors. However, there are some aspects which are not entirely satisfactory.

To begin with, institutionalizing parallel open and closed proceedings tends to make confidentiality claims more readily accepted than if they must be put forward on an exception basis. Instead of treating openness as the default position, confidentiality can become somewhat automatic in these circumstances.

Allowing the parties submitting information to be the primary designators of protected information is clearly problematic. For the reasons described previously, this naturally leads to erring on the side of protecting more of the documentary evidence and written submissions than is in the public interest. Similarly, during public testimony witnesses will often repeatedly respond "in camera please" to questions which they would prefer not to answer in public (or would like more time to think about) even though there is little real commercial sensitivity. Unfortunately, the Tribunal has tended not to interfere with the parties' confidentiality claims if opposing counsel do not object. Depending on the counsel involved in a particular proceeding, one of two dynamics is likely to emerge: repeated challenges of opponents' confidentiality claims, or routine acceptance of such claims. The latter scenario is common because it is convenient for each counsel to have their client's confidentiality claims respected in exchange for the *quid pro quo*. However, this is obviously not helpful in advancing the objective of open justice.

The confidentiality undertakings used in CITT proceedings effectively require the erection of a "Chinese Wall" between counsel and client. This is a less than ideal arrangement for both the client (which cannot fully participate or instruct counsel with respect to important parts of the proceeding) and the counsel (who will want to communicate to the maximum extent possible with the client but must take care in every verbal and written communication not to divulge information covered by the undertakings). Non-confidential summaries of protected documents and "in camera" sittings can play an important role in reducing these difficulties. Although summarization in tribunal proceedings is currently not very pithy, one could envision prompt and meaningful summaries being used to create an effectively functioning exchange-between-counsel system for handling confidential information.

V. THE CT'S APPROACH TO DEALING WITH CONFIDENTIAL INFORMATION

The CT has responsibility for adjudicating non-criminal "reviewable practices" proceedings under Part VIII of the *Competition Act*. Reviewable practices include mergers, abuse of dominant position, refusal to deal and various other activities which may have anti-competitive effects in particular circumstances. The only person with standing to initiate such a proceeding is the Director of the Competition Bureau. However, the respondents and intervenors in the proceeding may well include competitors and/or

customers/suppliers. Marketplace dealings between such parties and with other non-parties are invariably central to the issues in dispute.

The CT is a hybrid body consisting of judges from the Federal Court Trial Division and "lay members" with expertise in business, economics and the like. Notwithstanding a statutory admonition that it operates "as informally and expeditiously as the circumstances and considerations of fairness permit",[11] the CT is very much a court-like body and its procedures resemble ordinary commercial litigation to a considerable degree.

VI. PROTECTIVE ORDERS AND "IN CAMERA" SESSIONS

The CT starts from the premise that all documents, testimony and submissions are a matter of public record unless it issues a protective order restricting access to particular documents and/or agrees to sit "in camera" to deal with specific matters. Prior to recent amendments, the *Competition Tribunal Rules*[12] required that confidentiality claims be made in the affidavit of documents prepared by each party during the discovery process, and provided for an inspection by the Tribunal to determine the validity of those claims opposed by another party in the proceeding. The CT reserved a broad discretion to order that documents be kept confidential and/or that "in camera" sittings be held, but no criteria for making such decisions were provided. However, such criteria have begun to emerge through interlocutory jurisprudence.[13]

Protective orders usually allow opposing counsel access to documents based on an undertaking to maintain their confidentiality.[14] In addition, the CT has recognized the advantage of having expert witnesses "join issue" by facing questioning based on the factual assumptions and arguments presented by opposing parties.[15] This makes it essential for such witnesses to have access to the evidence of opposing parties. As a result, a simple standard-form confidentiality order which includes an undertaking to be signed by the expert has now been developed.[16]

---

11. *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 9(2).

12. *Competition Tribunal Rules*, SOR/87-373 (repealed and substituted by SOR/94-290 — see discussion below).

13. See, for example, *Canada (Director of Investigation and Research)* v. *Southam Inc.* (1992), 38 C.P.R. (3d) 395, where the Tribunal also made the general observation that sensitive information would tend to receive protection unless it was "essential for public understanding" of the Tribunal's decision.

14. For a general discussion of the features and limitations of protective orders, see M. Priest, "Commercial Interests on Trial", in this volume of essays.

15. See F. Roseman & J. Graham, "Expert Evidence in Competition Tribunal Proceedings" (1992), 20 Can. Bus. L.J. 406.

16. See, for example, *Canada (Director of Investigation and Research)* v. *Hillsdown Holdings (Canada) Ltd.* (1992), 38 C.P.R. (3d) 187.

In practice, private parties in tribunal proceedings have tended to be liberal in claiming confidentiality for documents, and the Director of the Competition Bureau has also made considerable use of confidentiality claims (such as to protect documents containing information that might be commercially sensitive to a complainant or informant who had assisted the Bureau). Confidentiality claims are often not contested by opposing counsel and indeed counsel for the Director and the parties have sometimes jointly agreed on a large portion of the documents to be kept confidential. Overall, the result has undoubtedly been a sub-optimal level of openness in CT proceedings.

Recent amendments to the *Competition Tribunal Rules* have introduced a requirement that confidentiality claims be supported by "details of the specific, direct harm" which would result from disclosure.[17] This is precisely the kind of presumption in favour of openness which is appropriate to counterbalance private parties' tendencies to make broad confidentiality claims.

A. Lessons

A fundamental difference between CT and CITT proceedings is that confidential components require an explicit approval; they are not an automatic feature of the standard procedure. This is a useful approach because, as has been noted, a tribunal is much more likely than parties submitting information or opposing counsel to keep over-broad confidentiality claims in check. However, notwithstanding that the process allows for the possibility of meaningful scrutiny of confidentiality claims, there has been a tendency (perhaps exacerbated by time pressures) to accede to requests for broad protective orders without a detailed review of such claims on the merits.

The most striking similarity between the CT and CITT processes is the resort to confidentiality undertakings from counsel and experts as a way of handling commercially sensitive information. Imperfect though it may be, this approach at least permits the testing of evidence through the adversarial system while providing a mechanism to keep genuinely commercially sensitive information from coming into the hands of other parties and the public.

A further lesson from the CT experience is that, when proceedings are on a fixed and tight timetable, confidentiality claims can easily go unreviewed simply because neither the tribunal nor the parties have time to address such issues. The solution to this problem is to ensure that the tribunal itself recognizes that openness of its proceedings is an issue deserving high priority.

B. A Possible Model

17. *Competition Tribunal Rules, supra* note 12 rr. 16 (documents) & 62 (hearings).

There is no single, ideal approach for handling the diverse situations in which commercially sensitive information comes into play in regulatory proceedings. As with administrative law generally, customization to the needs of the tribunal and its mandate is essential. That said, the following general model may provide a useful frame of reference.

C. Basic Principles

The foregoing analysis suggests several fundamental principles which should be considered in the design of a confidentiality regime:

1. The Public Interest in Openness Should Only be Overridden When There is a Public Interest in Confidentiality

The public interest in open justice is always substantial, and should only be dispensed with when (and to the extent that) there is a compelling public interest in keeping part of the decision-making process confidential. Such a public interest may include protection of some of the interests of private parties (such as privacy, self-incrimination or other fairness considerations, etc. — see above), but the public interest is much narrower than a private enterprise's typical desire to maximize the confidentiality of its information.

2. The Tribunal Must Take Responsibility for Openness

Since parties submitting information have incentives to make over-broad confidentiality claims, opposing parties and counsel cannot be relied upon to police such claims, and members of the public face a huge "collective action problem"[18] in asserting the public interest in openness, the tribunal itself must take primary responsibility for protecting this public interest. Such a task could be delegated in large part to the tribunal's counsel or other in-house professional staff, with the tribunal itself only becoming involved when there is a disagreement between one or more parties and the staff.

3. There Should be a Rebuttable Presumption of Openness

The incentive of private enterprises to make over-broad (from society's perspective) confidentiality claims, coupled with the fact that they are best-positioned to appreciate the real nature and extent of commercial sensitivity of any particular piece of

18. See generally M.J. Trebilcock, "Winners and Losers in the Modern Regulatory State: Must the Consumers Always Lose?" (1975) 13 Osgoode Hall L.J. 619.

information, makes it appropriate to place the onus on them to provide justifications for all confidentiality claims.

4. Non-Confidential Summaries of All Confidential Information Should be Prepared

Meaningful summarization of all information which has been granted confidentiality protection goes a long way to minimizing incursions on the public interest in openness. It also allows the parties to the proceeding to instruct their counsel more effectively.

5. Efficient Procedures for Resolving Confidentiality Claims are Essential

In any sizeable case, a huge number of documents and areas of testimony may be considered commercially sensitive by the parties. A commitment to openness entails weeding out all those documents, or portions of documents, and segments of testimony which do not really merit confidentiality protection. Ways must be found to make these determinations without spending undue time or cost on issues which, though important, are ultimately ancillary to the purpose of the proceeding. The remainder of this paper will explore possible procedures for doing so.

D. Administrative Guidelines

The most important step for ensuring that confidentiality claims are dealt with efficiently is for a tribunal to produce guidelines which outline categories of information that will normally be given confidentiality protection. Such guidelines need not be overly complex, and should be customized to focus on the types of commercial information most commonly encountered in proceedings before the tribunal in question. Guidelines ought not to be binding; their purpose is simply to provide parties, counsel and tribunal staff with a common frame of reference as to the types of information which will generally be accepted as commercially sensitive. Criteria for evaluating claims of commercial sensitivity which do not fall in the standard categories should also be set out. In addition, guidelines might restrict confidentiality protection based on time considerations (for example, strategic plans more than, say, three years old will be assumed to no longer be sensitive) or where similar information is already in the public domain. Each tribunal will have its own specific needs and concerns.

E. Confidentiality Claims

Every confidentiality claim should be required to be accompanied by a justification. Most would take the form of a simple reference to one of the standard categories in a tribunal's guidelines. In such cases it should be relatively straightforward for the tribunal staff to accept or reject the claim. Detailed justifications should only be required for information falling outside the categories in the guidelines. This should be a manageably small sub-set of the total claims.

F. Summaries

Every claim for confidentiality for all or part of a document should be accompanied by the non-confidential summary that the claimant would propose be placed on the public record. (It would be a rare situation where the existence or title of a document — as distinct from its contents — would merit confidentiality protection.) Placing the initial responsibility for summarization on the claimant is not unfair since it is the main beneficiary of confidentiality. However, tribunal staff should be responsible for reviewing such summaries and, where appropriate, ensuring that they are upgraded to be as meaningful as possible without undermining the confidentiality protection.

In the case of "in camera" testimony or submissions, tribunal staff are the best candidates to prepare prompt, thorough and balanced summaries. A simple and expeditious approach would be for a staff member attending each such session to immediately prepare a written summary of what transpired, excluding any references to specific information which appears to be confidential. A more useful, but more time-consuming, alternative would be to await delivery of the transcript of the "in camera" proceeding and then have a staff member edit out the confidential elements and replace them with non-confidential summaries, in the same way that a document containing some but not all commercially sensitive information would be edited for purposes of the public record. Under either approach, it would be desirable to give counsel for the affected party a short window of opportunity (such as 24 hours) in which to object to any remaining material regarded as commercially sensitive before the summary enters the public domain.

G. Sunset Periods

Most commercially sensitive information has a short useful life. A three years strategic plan prepared in 1994 may be out of date within a year or two. Similarly, while recent price or cost information may be highly sensitive, comparable data which is five or ten years old often will not be. As a result, there should be little objection to making the confidential record of every regulatory proceeding public after some appropriate period of time has elapsed.[19] Four or five years from the conclusion of a proceeding would generally seem to be a sufficient sunset period.

---

19. This suggestion was made in the context of CT proceedings by a participant at a symposium entitled "Reviewing the Merger Review Framework in Competition Law" held at the University of Toronto, February 25, 1994.

Critics of this proposal might argue that hardly anyone will bother to read such belated disclosures. However, the main benefits come from the possibility of close scrutiny, regardless of whether it actually occurs. An awareness that the confidential record in a proceeding will become open to future inspection by academics, journalists and other interested parties is likely to motivate parties and their counsel to tone down overly-aggressive confidentiality claims and take greater care to ensure that non-confidential summaries of such information do not obfuscate or mislead. In addition, tribunal members and staff will tend to be more conscientious in ensuring that only legitimate confidentiality claims are accepted, and will be more attentive to the use which is made of such information.

There would be little cost or downside risk involved in implementing such a system. It would be appropriate for the tribunal to send a reminder notice to the parties to a proceeding and their counsel a few months before the sunset date. Any party should have the option of objecting to the release of particular information provided they can rebut the presumption that commercial sensitivity will have eroded by the end of the sunset period. Only interested parties need participate in this process, which would culminate in a tribunal decision authorizing immediate release or, in exceptional cases, fixing some appropriate future release date.

H. Reasons for Decision

Reasons for decision are obviously fundamental to any system of open justice. To the extent that confidential documents and "in camera" hearings have influenced a decision, the tribunal is faced with a tension between fully explaining its decision-making and preserving confidentiality. The minimum acceptable approach is to ensure that the nature and impact of the confidential evidence is described in the reasons, even if the specifics must be left out. Examples can be observed in CITT and CT decisions from time to time, although one senses that the efforts made are *ad hoc* and not particularly vigorous.

The foregoing sunset period proposal opens up a new and interesting possibility. A tribunal could prepare a confidential addendum to (or a comprehensive confidential version of) its reasons for judgment which outlines the fact finding, legal analysis and reasoning which is linked to confidential evidence. This material would be released to the public at the same time the rest of the confidential record is opened up. It would also be possible for the confidential reasons to be provided immediately to all counsel in the proceedings who have given confidentiality undertakings, and for appeal proceedings to consider such reasons alongside the confidential part of the record.

I. Concluding Observations

It is easy for regulatory tribunals to accede to requests for confidentiality when the parties seeking confidentiality are before the tribunal and the public — which has few

practical alternatives for asserting its interest in transparency — is not. While there are also public interests in protecting commercially sensitive information in various circumstances, the confidentiality claims made by private parties will generally be broader than is socially optimal. The model outlined in the concluding section of this paper is an attempt to provide tribunals with a framework for balancing these competing interests more efficiently and effectively.