

CITATION: Commissioner of Competition v. X, 2018 ONSC 3730

COURT FILE NO.: 17-13302

DATE: 2018/06/14

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
COMMISSIONER OF COMPETITION)
) Respondent) Marisa Ferraiuolo and Gary Caracciolo,
) Public Prosecution Service of Canada,
- and -) Competition Law Section, for the
) Respondent
)
)
X)
) Applicant) Scott K. Fenton and Lynda E. Morgan, for
) the Applicant
)
- and -)
)
)
THE GLOBE AND MAIL INC.,)
CANADIAN BROADCASTING)
CORPORATION, POSTMEDIA)
NETWORK INC., AND CTV NEWS,)
A DIVISION OF BELL MEDIA INC.)
) Interveners) Tae Mee Park and Peter M. Jacobsen, for the
) Interveners
)
)
) **HEARD:** By Written Submissions

RULING REGARDING NON-PUBLICATION ORDER

RATUSHNY J.

[1] On May 30, 2018, I released my decision on the application by Person X for a non-publication order (the “Decision”).

[2] In paragraph 75 of the Decision, the parties were invited to contact me to settle any further details.

[3] The parties have contacted me as set out in my e-mail to them dated June 1, 2018 and subsequently, there have been further letters dated June 12, 2018, from the Crown for the Commissioner of Competition and from Mr. Fenton, for the Applicant.

[4] That further letter from the Crown sets out both the resolution and non-resolution of issues among the parties regarding the form of the “Revised ITOs”, as that term is referred to in the letter, and which are able to be published and made available to the public in accordance with the Decision. The Crown has very helpfully, and I thank them for this, summarized differing positions on certain issues.

[5] The further letter from Mr. Fenton emphasizes, as I understand his comments, the terms of my Order set out in paragraph 74(1) of the Decision, namely, “An Order prohibiting the publication of information that could directly or indirectly reveal the Applicant’s identity, including from the 8 Paragraphs in the ITOs and from all materials filed on this application”.

[6] The unresolved issues are two in number regarding gender-identifying pronouns in the “8 Paragraphs”, as defined in the Decision, and a third issue involving the form of the Revised ITOs able to be published and made available to the public in accordance with the Decision.

Paragraphs 4.25/4.16

[7] I have concluded that the first of the two disputed pronouns could well have been an omission in complying with the Order of Justice Ryan Bell dated December 18, 2017, regarding the redaction of “the names, and other identifying information, related to individuals who have co-operated with the Competition Bureau’s investigation to date”. This applies to paragraph 4.25 of ITO #1 and paragraph 4.16 of ITO #2, as defined in the Crown’s letter dated June 12, 2018, and that are part of the 8 Paragraphs.

[8] I order, therefore, the gender-identifying pronoun in those paragraphs 4.25 and 4.16 be redacted so that this redaction is consistent with the same redaction in paragraph 4.25 of ITO #3 and ITO #4, again as defined in the Crown’s letter dated June 12, 2018, and also for consistency among the 8 Paragraphs in all four ITOs and among the “Further Redacted 8 Paragraphs” in all four ITOs, as defined in the Decision.

Paragraphs 4.27/4.18

[9] The second gender-identifying pronoun in dispute is in paragraph 4.27 of ITO #1, ITO #3, ITO #4 and paragraph 4.18 of ITO #2, again as defined in the Crown's letter dated June 12, 2018. My re-reading of the language in these paragraphs leads me to conclude that this pronoun should have been replaced by "it" in the Decision and specifically in its paragraph 68, to be consistent with the general Non-Publication Order in paragraph 74(1) of the Decision and the gender pronouns in the other 8 Paragraphs that were ordered to be subject to the Non-Publication Order.

[10] I order, therefore, the gender-identifying pronoun in those paragraphs of each of the ITOs be replaced by "it".

The Form of the Further Redacted 8 Paragraphs in the Revised ITOs Available to the Public

[11] The last unresolved issue involves the form of the "Further Redacted 8 Paragraphs" referred to in paragraph 74(3) of the Decision that are to be included in the Revised ITOs made available to the public in the court file and able to be published in accordance with the Decision and this Ruling.

[12] Except for perhaps the Media Conglomerate and Person X, the other parties referred to in the Crown's letter dated June 12, 2018 appear to agree or not object to the Crown's proposal that the Further Redacted 8 Paragraphs, subject to the two unresolved issues, contain the "Warning" depicted on each of the Revised ITOs attached to that letter. The Warning cautions against publication but leaves for public viewing information that identifies Person X, even though explicitly indicated as being subject to the Non-Publication Order in the Decision.

[13] On June 1, 2018, Ms. Park, for the Media Conglomerate, attached a suggested draft for the Further Redacted 8 Paragraphs that could be published. Her draft simply redacted information that could reveal the Applicant's identity, all in accordance with paragraph 74(3) of the Decision.

[14] I have reviewed that draft from the Media Conglomerate and conclude it is a preferable format to the Warning format of the Crown's proposed Revised ITOs. Although I understand


that the Warning format strives to interpret the request for and granting of a non-publication order in its least restrictive sense, it does reveal the Applicant's identity and in all the circumstances of this matter, has the real potential to directly or indirectly reveal the Applicant's identity, contrary to the general Non-Publication Order in paragraph 74(1) of the Decision.

[15] Section 487.3 (1) of the *Criminal Code*, R.S.C., 1985, c. C-46 ("the *Code*") allows for "an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization..." The Applicant sought a non-publication order in accordance with section 487.3 of the *Code* which, as stated, refers to an order "prohibiting access to and the disclosure of" certain information. Paragraph 56 of the Decision concludes there should not be disclosure of the Applicant's identity.

[16] While I recognize that the redaction method of giving effect to the Non-Publication Orders in the Decision can be characterized as amounting to a wide interpretation of a non-publication order, I conclude that this degree of implementation of the Non-Publication Orders is necessary in all of the circumstances of this matter as referred to in the Decision.

[17] I clarify, therefore, that the Non-Publication Orders referred to in paragraph 74 of the Decision are Orders that include, as stated in section 487.3 of the *Code*, Orders prohibiting access to and the disclosure of any information that could directly or indirectly reveal the Applicant's identity.

[18] For these reasons, I order that the form of the Further Redacted 8 Paragraphs follow the draft submitted by Ms. Park in her letter dated June 1, 2018, except including the two amendments referred to above for paragraphs 4.25/4.16 and paragraphs 4.27/4.18. It is this amended draft form that is to become the Further Redacted 8 Paragraphs included in the Revised ITOs and placed in the public court file as soon as possible. This form of the Revised ITOs is then able to be copied to requesting members of the public.


The Honourable Madam Justice Lynn Ratushny

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BETWEEN:

COMMISSIONER OF COMPETITION

Respondent

– and –

X

Applicant

– and –

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Interveners

**RULING REGARDING NON-PUBLICATION
ORDER**

RATUSHNY J.