Amendments Expressly Ban Judicial Disclosure of Information Exchange Between Financial Institutions and OFSI

February 22, 2016

Overview

A previous bulletin commented on a decision[1] rendered by the Québec Court of Appeal which upheld a judgment[2] allowing for the judicial disclosure of information exchanged between an insurance company and the Office of the Superintendent of Financial Institutions ("OSFI"), despite the statutory framework aimed at ensuring the confidentiality of such sensitive information.

Parliament has stepped in to clarify its intent and prevent any adverse effects that this ruling might have caused. Changes have been made to various statutes to expressly ban the use of such information as evidence in civil proceedings. We believe that these amendments, which came into force on June 23, 2015, will contribute to maintaining the quality of exchanges between financial institutions and OSFI, thus preserving the effectiveness of regulatory controls over the financial system.

Context

OSFI is responsible for overseeing banks and federally registered insurance companies, cooperative credit associations and trust and loan companies to make sure that such institutions remain in good financial health and comply with laws. In fulfilling its mandate, OSFI exchanges documents with regulated institutions. Parliament has always recognized how sensitive such information could be. Accordingly, the *Office of the Superintendent of Financial Institutions Act*[3] provides for the confidentiality of information obtained from financial institutions. In addition, a series of regulations[4] prohibit financial institutions from disclosing, directly or indirectly, so-called "*prescribed supervisory information*" such as ratings assigned by or reports prepared by OSFI.

The Court of Appeal's Decision

In December 2014, in the context of a certified class action against Manulife Financial, a divided ruling from the Québec Court of Appeal upheld the trial judge's decision to force

the insurance company to disclose documents containing prescribed supervisory information.

The majority reiterated that the search and discovery of the truth remains the cardinal principle in civil proceedings and that the rule of relevancy governs the disclosure of information.

According to the majority, it was not clear enough, from the language used in the relevant statutes and regulations that Parliament intended to implement an absolute ban on disclosure, even in the context of legal proceedings. From this perspective, the supervisory information regulations merely imposed a duty of confidentiality upon financial institutions.

The Legislative Changes

Parliament moved quickly to shut the door to the judicial disclosure of prescribed supervisory information. Through the 2015 budget implementation bill[5], the legislator amended the *Trust and Loan Companies Act*[6], the *Bank Act*[7], the *Insurance Companies Act*[8] and the *Cooperative Credit Association*[9] by adding that "*prescribed supervisory information shall not be used as evidence in any civil proceedings and is privileged for that purpose*". These changes came into force, a mere six months after the Québec Court of Appeal's decision and before the Supreme Court of Canada had a chance to rule definitively on the issue.

These amendments produce retroactive effects with respect to civil proceedings for which no final decision has been made before the coming into force[10]. This means that information already used or documents already produced as evidence may be deemed inadmissible.

The amendments provide for a few, but significant exceptions to the immunity from disclosure[11]. For instance, the Superintendent and the Attorney General of Canada may still use prescribed supervisory information as evidence in any proceedings. A court may also order OSFI to disclose documents or to give oral testimony in civil proceedings commenced by Superintendent or the Attorney General of Canada in relation to the enforcement of the *Office of the Superintendent of Financial Institutions Act*.

Conclusion

For all intents and purposes, Parliament's intervention overruled the Québec Court of Appeal's decision. This is a reminder that bans on disclosure should not be construed too narrowly when there are strong policy reasons for protecting the confidentiality of sensitive information.

We believe the amendments should reassure financial institutions as to the confidentiality of their communications with OSFI. The swift legislative response to the Québec Court of Appeal's ruling confirms that Parliament's intent has always been to protect prescribed supervisory information from judicial disclosure, in order to foster a climate of trust, transparency and openness between financial institutions and OSFI and prevent economically sensitive information from being made public inadvertently.

[1]Société financière Manuvie c. *D'Alessandro*, 2014 QCCA 2332, motion for leave to appeal to the Supreme Court of Canada withdrawn.

[2]Mouvement d'éducation et de défense des actionnaires (MEDAC) c. Société financière *Manuvie*, 2014 QCCS 2001.

[3] R.S.C. 1985, c. 18 (3rd Supp.), Part I.

[4]*Supervisory Information (Insurance Companies) Regulations*, SOR/2001-56; *Supervisory Information (Banks) Regulations*, SOR/2001-59; *Supervisory Information (Trust and Loan Companies) Regulations*, SOR/2001-55; *Supervisory Information (Cooperative Credit Associations) Regulations*, SOR/2001-57; *Supervisory Information (Authorized Foreign Banks) Regulations*, SOR/2001-58.

[5] See sections 232 to 238 of the *Economic Action Plan 2015 Act, No. 1*, S.C. 2015, c. 36 (Bill C-59).

[6] S.C. 1991, c. 45, section 504.

[7] S.C. 1991, c. 46, sections 608, 638 and 956.1.

[8] S.C. 1991, c. 47, sections 672.2 and 999.1.

[9] S.C. 1991, c. 48, section 435.2.

[10] See sections 239 to 245 of the *Economic Action Plan 2015 Act, No. 1*, S.C. 2015, c. 36.

[11] For instance, see section 638 (3) and (4) of the *Bank Act*, S.C. 1991, c. 46.

By

Patrick Plante

Expertise

Commercial Litigation, Disputes

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749