Federal Court of Appeal  Cour d'appel fédérale

Date: 20180124

Docket: A-149-17

Citation: 2018 FCA 24

CORAM: **STRATAS J.A.**
BOIVIN J.A.
LASKIN J.A.

BETWEEN:

VANCOUVER AIRPORT AUTHORITY

Appellant

and

COMMISSIONER OF COMPETITION

Respondent

Heard at Ottawa, Ontario, on October 17, 2017.

Judgment delivered at Ottawa, Ontario, on January 24, 2018.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: BOIVIN J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The Vancouver Airport Authority appeals from the order dated April 24, 2017 of the Competition Tribunal (*per* Gascon J.): 2017 CACT 6.

[2] In the Competition Tribunal, the Commissioner of Competition has brought competition proceedings against the Airport Authority for alleged abuse of dominant position. In proceedings

such as these, parties whose conduct is impugned are entitled to pre-hearing disclosure. The Commissioner has disclosed many documents to the Airport Authority. But he has refused to produce roughly 1,200 documents. He says that these documents are covered by a class privilege that protects the confidentiality interests of those who have given him documents and information during his investigations.

[3] In response, the Airport Authority brought a motion seeking disclosure of the documents. Before the Competition Tribunal, it submitted that the alleged class privilege does not exist and so the documents should be disclosed.

[4] In well-expressed, clear and comprehensive reasons, the Competition Tribunal found that the alleged class privilege exists. Key to its reasons is its application of earlier authorities of this Court that it believed confirmed the existence of a class privilege. By order dated April 24, 2017, the Competition Tribunal dismissed the Airport Authority's motion for disclosure.

[5] The Airport Authority appeals from that dismissal. The appeal turns on whether the alleged class privilege exists. I find that it does not. The earlier authorities of this Court that the Competition Tribunal invoked in support of its decision do not apply. In any event, they have been overtaken by later Supreme Court jurisprudence. This jurisprudence is against recognizing a class privilege in this case.

[6] Therefore, I would allow the appeal, quash the order of the Competition Tribunal and remit the motion to it for redetermination.

A. Background

[7] The Commissioner of Competition has applied to the Competition Tribunal for relief against the Airport Authority under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34. The relief stems from the Airport Authority's decision to allow only two in-flight caterers to operate at the Vancouver International Airport.

[8] In his application, the Commissioner alleges that the Airport Authority controls the market for "galley handling" at the airport, the Airport Authority acted with an anti-competitive purpose when deciding to permit only two in-flight caterers to operate at the airport, and a "substantial prevention or lessening of competition" has resulted, causing "higher prices, dampened innovation and lower service quality."

[9] The Airport Authority denies the Commissioner's allegations and defends against the relief sought. It asserts that it has been acting throughout to discharge its public interest mandate as a non-profit entity, including enhancing the airport's ability to attract and retain flights, thereby generating economic development for Vancouver and, more broadly, for British Columbia and the rest of Canada. The Airport Authority adds that it determined, legitimately, that allowing additional caterers to operate at the airport would imperil the viability of the two already operating at the airport. It also alleges that it does not substantially or completely control the market for galley handling at the airport, it did not have an anti-competitive purpose, and its decision to restrict the number of caterers at the airport did not lessen competition or cause deleterious effects.

[10] In his investigation, the Commissioner of Competition obtained a number of orders under section 11 of the Act. These required four in-flight catering firms, two operating at the airport and two who want to operate at the airport, to produce to the Commissioner a broad array of documents.

[11] The Commissioner of Competition delivered an affidavit of documents in the proceeding. That affidavit disclosed that the Commissioner had roughly 11,500 relevant documents in his possession, power or control. But he was willing to produce fewer than 2,000. Most of these were the Airport Authority's own documents.

[12] Almost all of the remaining documents, roughly 9,500, were withheld in whole or in part on the basis of an alleged public interest class privilege. These documents comprise much of the case the Commissioner has against the Airport Authority.

[13] The Airport Authority brought a motion for disclosure of the 9,500 documents. On the day the motion was to be heard, the Commissioner delivered an amended affidavit of documents. In that affidavit, he waived privilege over roughly 8,300 documents. This is 86% of the documents originally said to be covered by a class privilege. Roughly 1,200 documents—12% of the documents originally withheld—remained withheld exclusively on the basis of a public interest class privilege.

[14] The motion for disclosure went forward and concerned these 1,200 documents. The Commissioner continued to assert that these remaining documents were covered by a class

privilege and could not be disclosed. The Commissioner argued that this class privilege covered all "records created or obtained by the Commissioner, [his] employees, servants, agents or solicitors or obtained from third parties during the Commissioner's investigations."

[15] The Airport Authority urged the Competition Tribunal to reject the Commissioner's assertion of a class privilege. In its view, the Competition Tribunal should instead determine on a case-by-case or document-by-document basis whether a public interest privilege exists concerning any of the 1,200 documents.

[16] In its decision, the Competition Tribunal disagreed with the Airport Authority and dismissed its motion for disclosure. It upheld the existence of the alleged class privilege and, thus, none of the 1,200 documents needed to be disclosed. Given this, it did not need to examine whether any of the individual documents were subject to public interest privilege on a case-by-case or a document-by-document basis.

[17] The Airport Authority appeals from the dismissal of its motion for disclosure to this Court. The appeal is under subsection 13(1) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.).

B. Standard of review

[18] In appeals to this Court from the Competition Tribunal, legal questions are to be reviewed for correctness: *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3,

[2015] 1 S.C.R. 161 at paras. 34 and 39; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 F.C.R. 185.

[19] In this appeal, the central question before us is what is legally required for a court to recognize a class privilege. This is a legal question to be reviewed for correctness. In my view, for the reasons that follow, the Competition Tribunal erred in answering this question. Alternatively, in recognizing a class privilege in the circumstances of this case and based on this evidentiary record, the Competition Tribunal proceeded on the basis of an error in law or in legal principle. Its decision cannot stand.

C. Preliminary considerations

[20] The submissions to us, truly excellent as they were, touched on many different concepts, some aspects of which were complex. These included the admissibility of evidence, pre-hearing disclosure obligations, and, more generally, procedural fairness obligations. The complexity was magnified by the fact that these concepts potentially have different content in court proceedings and administrative proceedings. At the outset, it is worth describing these concepts, how they operate and interrelate, and where they fit in the whole scheme of things.

(1) The admissibility of evidence

[21] In court proceedings, the "fundamental 'first principle'" is that "all relevant evidence" going to the truth of the matter before the court "is admissible until proven otherwise": *R. v.*

Gruenke, [1991] 3 S.C.R. 263 at p. 288, [1991] 6 W.W.R. 673 at p. 688 and see, *e.g.*, *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723 at paras. 79-82.

[22] There are exceptions to this first principle: sometimes relevant evidence is inadmissible. For example, hearsay is ordinarily inadmissible. Another exception is public interest privilege: evidence covered by a legally recognized public interest privilege is inadmissible.

[23] As in court proceedings, administrative proceedings are often directed at getting at the truth of the matter. What happened? Who did what? How was it done? Why? With what effects? As a general rule, within the limits of materiality and proportionality, administrative decision-makers want to receive all possible evidence bearing on these questions. They too are on a quest for the truth of the matters before them and they often formulate their evidentiary rules with that in mind. This is certainly true for the administrative decision-maker here, the Competition Tribunal.

[24] And just like courts, many administrative decision-makers recognize exceptions to general rules of admissibility.

[25] The law of evidence before administrative decision-makers is not necessarily the same as that in court proceedings. An administrative decision-maker's power to admit or exclude evidence is governed exclusively by its empowering legislation and any policies consistent with that legislation: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 at para. 16; on how to interpret legislation that empowers administrators,

see *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609, *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 and *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601. The empowering legislation, properly interpreted, might allow an administrative decision-maker to admit material that courts would ordinarily reject as inadmissible.

[26] This being said, privileges designed to protect fundamental confidentiality interests such as legal professional privilege have the same force in administrative proceedings as in court proceedings. Any administrative decisions or legislation governing administrative decision-makers that weakens or undercuts the privileges may be, respectively, unreasonable or infringe the protection of privacy interests in section 8 of the Charter: *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61, [2002] 3 S.C.R. 209.

[27] In the case before us, the Competition Tribunal recognizes, and all before us accept, that evidence covered by a legally recognized public interest privilege is inadmissible.

(2) Pre-hearing disclosure obligations: an aspect of procedural fairness

[28] Administrative proceedings must be procedurally fair. The level of procedural fairness that must be given varies according to a number of factors: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at paras. 23-28.

[29] Before us are administrative proceedings that are adjudicative in nature. Usually in such proceedings, the requirements of procedural fairness are high: *Baker* at para. 23; *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 S.C.R. 884. This is particularly so where the proceedings have the potential to significantly affect a party's interests: *Baker* at para. 25; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105 at p. 1113, 110 D.L.R. (3d) 311 at p. 322; *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.) at p. 667. The Competition Tribunal correctly found that "a high degree of procedural protection is needed in Tribunal proceedings because of its court-like process" and "[t]he Tribunal resides very close to, if not at, the 'judicial end of the spectrum', where the functions and processes more closely resemble courts and attract the highest level of procedural fairness" (at para. 169).

[30] The procedural fairness obligations require the Commissioner of Competition to disclose to the Airport Authority evidence that is relevant to issues in the proceedings. This is necessary for the Airport Authority to know the case it has to meet and to fairly defend itself against the allegations. Often—as the Commissioner has recognized in this case by releasing roughly 8,300 documents from his investigatory file—this includes exculpatory material or other material

resting in the investigatory file that could assist the party whose conduct is impugned in testing the evidence called by the Commissioner or in building its own case: see, *e.g.*, in other contexts, *Shooters Sports Bar Inc. v. Ontario (Alcohol & Gaming Commission)* (2008), 238 O.A.C. 9, 168 A.C.W.S. 580 (Div. Ct.); *Markandey v. Ontario (Board of Ophthalmic Dispensers)*, [1994] O.J. No. 484 at para. 43 (Gen. Div.); *Thompson v. Chiropractors' Assn. (Saskatchewan)*, [1996] 3 W.W.R. 675, 36 Admin. L.R. (2d) 273 at paras. 3-6 (Q.B.); *Shambleau v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1629, [2003] O.J. No. 4089 at para. 6; *Re Fauth*, 2017 ABASC 3; *Law Society of Upper Canada v. Savone*, 2015 ONLSTA 26 at para. 23, aff'd 2016 ONSC 3378, [2016] O.J. No. 2988. In some cases, there may be limits on the obligation to disclose based on materiality, proportionality, applicable legislative standards and the nature of the proceedings: *Ciba-Geigy Canada Ltd. v. Canada (Patented Medicine Prices Review Board)*, [1994] 3 F.C. 425, 55 C.P.R. (3d) 482 (T.D.), affirmed (1994), 56 C.P.R. (3d) 377, 170 N.R. 360 (F.C.A.); *Sheriff v. Canada (Attorney General)*, 2006 FCA 139, [2007] 1 F.C.R. 3.

(3) The relationship between issues of admissibility and issues of pre-hearing disclosure

[31] The obligation to disclose is not necessarily limited by the law of admissibility. Material that is inadmissible can be subject to a disclosure obligation.

[32] To illustrate this, suppose that an authority such as the Commissioner of Competition possesses a document written by one person recounting a discussion with a particular individual. Although that document may be hearsay and arguably inadmissible to prove the contents of what the particular person said, nevertheless the requirements of procedural fairness may require that

it be disclosed. The document may be extremely useful, indeed necessary, to the party whose conduct is impugned in the proceedings.

[33] For example, during a party's pre-hearing preparation, it may decide that it should interview the particular individual whose words are recounted in the document. Perhaps it may decide to call that person as a witness so that the truth of what was said is in evidence. Maybe the fact that the discussion took place at a particular time is an important fact in the scheme of things. And perhaps the document will be necessary to put to an adverse witness during cross-examination.

[34] However, sometimes inadmissible evidence cannot be disclosed. One instance is where privileges that protect fundamentally important interests in confidentiality apply, the privileges have not been waived, and no other exception recognized by law applies. For example, unless legal professional privilege has been waived, material covered by it is normally confidential for all purposes, in just about all circumstances; only the rarest of circumstances will displace the privilege, such as criminal cases where innocence is at stake as a result of the non-disclosure: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 at para. 43.

[35] The central issue before us is whether the 1,200 remaining documents that the Commissioner refuses to disclose are covered by a public interest class privilege. Assuming the privilege exists, the Commissioner holds the privilege and has not waived it. At least no one has argued waiver either by explicit act or implied conduct: see, *e.g.*, *Slansky v. Canada (Attorney*

General), 2013 FCA 199, [2015] 1 F.C.R. 81 at paras. 253-262 (dissenting, but the majority not disagreeing with the legal principle). Accordingly, in the circumstances of this case, if the class privilege exists, *prima facie* the Commissioner need not disclose any documents covered by it. If the class privilege does not exist and the Commissioner wants to maintain confidentiality over individual documents that were said to be in that class, the Commissioner will have to claim a public interest privilege on a document-by-document or case-by-case basis.

D. The public interest privilege claimable on a document-by-document or case-by-case basis compared with a class privilege: how do they differ?

[36] What is the nature of public interest privilege, claimable on a document-by-document or case-by-case basis? When does it exist?

[37] Certain basic principles are at stake in a claim for public interest privilege. In *Carey v. Ontario*, [1986] 2 S.C.R. 637 at p. 647, 35 D.L.R. (4th) 161 at p. 169, the Supreme Court identified a basic tension resting at the heart of a claim for public interest privilege:

> It is obviously necessary for the proper administration of justice that litigants have access to all evidence that may be of assistance to the fair disposition of the issues arising in litigation. It is equally clear, however, that certain information regarding governmental activities should not be disclosed in the public interest.

[38] Another formulation of this is found in a classic British authority:

> It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

(*Conway v. Rimmer*, [1968] 1 All E.R. 874 at p. 880.)

[39] A leading Canadian text puts the matter this way:

> The court, therefore, 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.

(Lederman, Bryant and Fuerst, *The Law of Evidence in Canada*, 4th ed. (Markham, Ont.: LexisNexis, 2014) at p. 1074.)

[40] We engage with these competing interests by rigorously assessing a claim for public interest privilege using four criteria:

> First, the [evidence] must originate in a confidence…. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be 'sedulously fostered' in the public good ('Sedulous[ly]' being defined in the New Shorter Oxford English Dictionary on Historical Principles (6th ed. 2007), vol. 2, at p. 2755, as 'diligent[ly]… deliberately and consciously'). Finally…the court must consider whether in the instant case the public interest served by [confidentiality over the evidence] outweighs the public interest in getting at the truth.

(*R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477 at para. 53, citing *Wigmore on Evidence* (McNaughton Rev. 1961), vol. 8, at § 2285.)

[41] The four criteria from *Wigmore* are not "carved in stone" but rather provide a "general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court": *Gruenke* at p. 290 S.C.R., p. 689 W.W.R, cited with approval in *National Post* at para. 53; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592 at para. 54.

[42] No one disputes that the Commissioner could try to claim public interest privilege over the 1,200 remaining documents on a document-by-document or case-by-case basis. But in this case, as his primary position, the Commissioner does not assert that documents are covered by a case-by-case privilege.

[43] Instead, the Commissioner says that the 1,200 documents are part of a group of 9,500 documents, all of which are covered by a class privilege. In this case, the class is said to cover all "records created or obtained by the Commissioner, [his] employees, servants, agents or solicitors or obtained from third parties during the Commissioner's investigations."

[44] The Commissioner says that this class privilege is necessary. Without it, those complaining about anti-competitive conduct, fearing reprisal, would be reluctant to complain to the Commissioner and offer candid evidence in support of their complaints.

[45] A class privilege applies if the documents and information fall within a class that legally qualifies for blanket protection from disclosure. Documents and information are protected from disclosure only because of their membership in a protected class; their contents and the circumstances surrounding them do not otherwise matter. In the words of the Supreme Court, a class privilege applies "without regard to the particulars of the situation" and "is insensitive to the facts of the particular case": *National Post* at para. 42.

[46] Class privileges are granted because of the need to protect a particular relationship of importance. "Once the relevant relationship is established between the confiding party and the party in whom the confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation": *National Post* at para. 42. The class protection is granted because "anything less than blanket confidentiality" would "fail to provide the necessary assurance[s]" to parties in the relationship to perform as they must within the relationship: *National Post* at para. 42; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 52 at paras. 39-40.

[47] In contrast, a case-by-case or document-by-document public interest privilege looks at the nature of a particular document or information and the circumstances surrounding it, not its membership in a class. A party claiming the privilege over certain documents must make an affirmative case, document-by-document, to successfully shield them from disclosure. Unlike a class privilege, this sort of privilege offers no presumptive or default protection from disclosure.

[48] So, for example, take the relationship of legal professional and client, established for the purpose of the giving and obtaining of legal advice. Loosely put, the law recognizes that the entire class of all communications within that relationship, including all documents relating to the giving or seeking of legal advice, must be protected on a default, blanket basis from disclosure. The blanket nature of the privilege provides certainty. If only case-by-case or document-by-document privilege could be claimed, uncertainty would be created about whether some information or documents within the relationship might have to be disclosed. The uncertainty might lead clients not to seek legal advice or the legal advice would have to be couched or be less than frank, or both. The effect? The democratic right of people to ascertain their full legal rights and make well-informed decisions would suffer, with resulting damage to the administration of justice. The paramount importance of the relationship between legal professionals and their clients and the vital objectives served by it justify the blanket, presumptive, default protection of confidentiality that class privilege provides.

[49] Due to the breadth and generality of a class privilege, it can be blunt, sweeping and indiscriminate in operation and, thus, can work against the truth-seeking purpose of a court or administrative proceeding. A case-by-case or document-by-document privilege—tailored and case-specific as it is—can be more consistent with the truth-seeking purpose.

[50] The Supreme Court put this point as follows:

> …[W]hile the result of any privilege is to impede the search for truth, and thereby to run the risk of an injustice to the persons opposed in interest to the claimant, a class privilege is more rigid than a privilege constituted on a case-by-case basis. It does not lend itself to the same extent to be tailored to fit the circumstances.

(*National Post* at para. 46.)

[51] In *Carey*, the Supreme Court expressed concern about the "absolute character of [a class] protection…without regard to subject matter, to whether [the documents] are contemporary or no longer of public interest, or to the importance of their revelation for the purpose of litigation" (at p. 659 S.C.R., p. 178 D.L.R.).

[52] Because of these concerns, traditionally courts have been reluctant to find class privileges. Only "very few" class privileges have been found: *National Post* at para. 42. The Supreme Court has gone as far as to say that public interest claims on a class basis will have "little chance of success": *Carey* at p. 655 S.C.R., p. 175 D.L.R. Class privileges can be found only where there is "clear and compelling evidence [they are] necessary" or "really necessary": *R. v. Chief Constable of the West Midlands Police, ex parte Wiley*, [1994] 3 All E.R. 420 at p. 446; *Conway*, above at p. 888.

[53] Recently, the Supreme Court has set the threshold for finding new class privileges as high as can be. New class privileges can be recognized only if they are supported by policy rationales as compelling as the class privilege over solicitor-client communications: *National Post* at para.

42; *Guenke* at p. 288 S.C.R., p. 688 W.W.R. How compelling is that? The policy rationale behind solicitor-client privilege is an interest protected by our highest law, the Constitution, specifically the privacy interest under section 8 of the Charter: *Lavallee, Rackel & Heintz*, above.

[54] Commenting on this, Lederman *et al.*, above observe that new class privileges demand "that the external social policy in question is of such unequivocal importance that it cannot be sacrificed before the altar of the courts" (at p. 919).

[55] The Supreme Court also suggests that class privileges—privileges that are "more rigid than a privilege constituted on a case-by-case basis" and cannot "be tailored to fit the circumstances"—are inapt where the relationship said to give rise to the need for blanket confidentiality varies in practice and depends upon the circumstances: *National Post* at paras. 44-46; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at pp. 97-98, 2 D.L.R. (4th) 193 at p. 223. Further, the existence of a comparable class privilege in "other common law jurisdictions with whom we have strong affinities" can assist in the determination: *National Post* at paras. 43, 47-48.

[56] The extremely high threshold for the recognition of class privileges means that to date only four have been recognized—legal professional privilege, litigation privilege, informer privilege and settlement privilege: *Lizotte*, above at paras. 33-36.

[57] As well, this extremely high threshold has led the Supreme Court to opine that "in future such 'class' privileges will be created, if at all, only by legislative action": *National Post* at para.

42. For good measure, the Supreme Court repeated this in *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33 at para. 87.

[58] *Harkat* shows how high the threshold for establishing a class privilege now is. In *Harkat* the provisions of the *Immigration and Refugee Protection Act* concerning security certificates fell before the Supreme Court for consideration.

[59] Broadly speaking, security certificates are issued against those who are reasonably believed to have come to Canada, among other things, for the purpose of engaging in terrorism. Once the certificates are issued, the Federal Court must assess their reasonableness. If the security certificate is found to be reasonable, the certificate becomes the equivalent of an order requiring the person named in the certificate to be removed from Canada.

[60] Often in the Federal Court proceedings to assess reasonableness much sensitive evidence is adduced. This can include evidence from human intelligence sources—evidence of the highest level of sensitivity. Improper disclosure of that sort of evidence can have the highest of consequences: the lives of sources whose identities are revealed can be put at grave risk. It is notorious in international intelligence circles that improper disclosure has sometimes killed human intelligence sources.

[61] A stronger policy rationale for a class privilege imposing blanket confidentiality over a class of evidence can scarcely be imagined. But in *Harkat*, the Supreme Court—citing its reluctance to recognize new class privileges in *National Post*—declined to recognize a class

privilege covering evidence from human intelligence sources. As in *National Post*, it held that if a class privilege is warranted, Parliament, not the courts, should enact one (at para. 87):

> Nor, in my view, should this Court create a new privilege for [Canadian Security Intelligence Service] human sources. This Court has stated that "[t]he law recognizes very few 'class privileges'" and that "[i]t is likely that in future such 'class' privileges will be created, if at all, only by legislative action": *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 42. The wisdom of this applies to the proposal that privilege be extended to [Canadian Security Intelligence Service] human sources: *Canada (Attorney General) v. Almalki*, 2011 FCA 199, [2012] 2 F.C.R. 594, at paras. 29-30, *per* Létourneau J.A. If Parliament deems it desirable that [Canadian Security Intelligence Service] human sources' identities and related information be privileged, whether to facilitate coordination between police forces and [Canadian Security Intelligence Service] or to encourage sources to come forward to [Canadian Security Intelligence Service] (see [dissenting] reasons of Abella and Cromwell JJ. [in *Harkat*]), it can enact the appropriate protections.

[62] In light of these authorities, it is perhaps not far from the truth to say that it is now practically impossible for a court, acting on its own, to recognize a new class privilege.

E. Analysis

[63] Based on the foregoing principles, the Commissioner's claim to a public interest privilege over the roughly 1,200 documents he has refused to disclose must be rejected. I offer several reasons in support of this conclusion.

– I –

[64] The Commissioner stresses that he is not asking this Court to recognize a new class privilege. He says that this Court has already recognized a class privilege covering all documents and information supplied to the Commissioner from third party sources during the Commissioner's investigation: *D&B Companies of Canada Ltd. v. Canada (Director of Investigation & Research)* (1994), 58 C.P.R. (3d) 353, 176 N.R. 62 (C.A.); *Hillsdown Holdings (Canada) Ltd. v. Canada (Director of Investigation and Research)*, [1991] F.C.J. No. 1021.

[65] The Commissioner adds that in cases like *National Post*, the Supreme Court has not cast doubt on already recognized class public interest privileges, such as the one recognized in *D&B Companies* and *Hillsdown*.

[66] Thus, to the Commissioner, this case is a simple one: we need only apply the class privilege recognized in *D&B Companies* and *Hillsdown*.

[67] The Competition Tribunal stated, properly, that it is bound by decisions of our Court. Accordingly, it considered itself bound by this Court's recognition of the class privilege in *D&B Companies* and *Hillsdown*. It applied the class privilege to the 1,200 documents and refused to order that they be disclosed.

[68] The Airport Authority disagrees with both the Commissioner and the Competition Tribunal. It submits that this Court's decisions in *D&B Companies* and *Hillsdown* do not

recognize the class privilege the Commissioner seeks to assert in this case. In those cases, this Court applied a deferential standard of review and decided only that the Competition Tribunal had made, in today's terms, a reasonable decision. Whether the Competition Tribunal was *correct* in recognizing the class privilege was not before this Court. After *D&B Companies* and *Hillsdown*, the standard of review changed to correctness as a result of *Superior Propane* and *Tervita*, both above. Thus, according to the Airport Authority, the case at bar is the first time this Court has been called upon to assess on the standard of correctness whether the Commissioner has the class privilege it asserts.

[69] In the alternative, the Airport Authority says that if those cases do recognize the class privilege, *D&B Companies* and *Hillsdown* can no longer be seen as good authority because they have been overborne by later Supreme Court jurisprudence: *Miller v. Canada (Attorney General)*, 2002 FCA 370; 220 D.L.R. (4th) 149 (circumstances where this Court may depart from earlier authorities); *National Post*.

[70] I agree with the Airport Authority. First, I shall examine *D&B Companies*.

[71] *D&B Companies* must be seen in light of the standard of review this Court applied in that case. In *D&B Companies*, this Court applied a deferential standard of review. It stated that "a certain curial deference is due to tribunals even on statutory appeals when the issue in question, whether factual or legal, is within the particular expertise of the tribunal" (at p. 357 C.P.R., para. 5 N.R.). In this Court's view, the necessary balancing of the interests between disclosure and confidentiality drew upon "special expertise in the problems of protecting competition in the

market place" and, thus, was within the preserve of the Competition Tribunal (*ibid.*). Accordingly, the Court "should not lightly substitute its own views of the proper balance in these circumstances" (*ibid.*).

[72] This Court also observed that class privileges "are created as a matter of policy" and the assessment of policy was "within the competence" of the Competition Tribunal, not the Court (at p. 358 C.P.R., para. 7 N.R.). In its view, the Supreme Court decision in *Gruenke*, above, on the recognition of class privileges generally, was not inconsistent with what the Tribunal had done (*ibid.*).

[73] In my view, this Court decided in *D&B Companies* that the Tribunal's recognition of a public interest privilege was owed deference and could not be interfered with. This Court did not affirm for itself, nor did it need to affirm for itself given the deferential standard of review, that a class privilege exists.

[74] *Hillsdown* is similar to *D&B Companies*. There, the Competition Tribunal did not allow disclosure of certain interview notes. It relied on an earlier Tribunal decision that acknowledged the need to keep certain notes confidential in the public interest so that those making a complaint would not suffer reprisal. This Court applied a deferential standard in its review of the Tribunal's decision, finding "no reviewable error" because the conclusion was "reasonably open" to the Tribunal (at paras. 1-2). In *Hillsdown*, this Court did not affirm for itself that a class privilege exists.

[75] I would add that had this Court in *D&B Companies* or *Hillsdown* affirmed that the public interest class privilege actually exists, these holdings can no longer stand in light of later Supreme Court cases such as *National Post* and *Harkat*. To some extent this point has been made during the discussion of these cases earlier in these reasons at paras. 46-62. And this point will be developed further below when I measure the Commissioner's claim for a class privilege against these cases.

[76] The Commissioner cites other cases that support the existence of the public interest class privilege it asserts: *Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2013 ONSC 5386, 23 A.C.W.S. (3d) 922 at para. 15; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2016 BCSC 97, 262 A.C.W.S. (3d) 883 at paras. 11 and 25; *Commissioner of Competition v. Toshiba of Canada Ltd.*, 2010 ONSC 659, 10 O.R. (3d) 535 at para. 27; *Canada (Commissioner of Competition) v. Air Canada*, 2012 Comp. Trib. 21 at paras. 3-6; *Canada (Commissioner of Competition) v. United Grain Growers Ltd.*, 2002 Comp. Trib. 35 at para. 59. None of these bind this Court. All of these rely directly or indirectly upon *D&B Companies*, *Hillsdown*, or both.

[77] In dismissing the Airport Authority's motion for disclosure, the Competition Tribunal described *D&B Companies*, *Hillsdown* and its own case law as "long standing and unanimous" on the existence of the class privilege, considered it binding, and relied upon it in dismissing the Airport Authority's motion (at para 5.). This was an error in law.

– II –

[78] It is not possible on the jurisprudence for this Court or the Competition Tribunal to recognize a new class privilege in these circumstances. See the discussion at paras. 46-62, above. The blunt, sweeping nature of a class privilege, even over the public interest in the truth-finding function of the Competition Tribunal, is not supportable in these circumstances. Further, as both *National Post* and *Harkat* suggest, these days the sort of class privilege the Commissioner seeks should only be granted by Parliament.

[79] Parliament has already spoken to confidentiality and privilege concerns in the Act. Its failure to enact the class privilege the Commissioner seeks is noteworthy. This provides another reason why this Court should not construct one itself.

[80] The *Competition Act* and *Competition Tribunal Rules*, SOR/2008-141 provide a scheme to address the Commissioner's concerns about confidentiality and privilege. For example, the Act requires inquiries to be private (subsection 10(3)), allows third parties to claim solicitor-client privilege (section 19), demands that the Bureau keep a wide range of information obtained confidential (subsection 29(1)) and provides protection for whistleblowing employees against employer reprisals (sections 66.1-66.2). The Rules explain that the public is entitled to access all documents filed or received in evidence subject only to a confidentiality order (sections 22, 66).

[81] These avenues to protect confidentiality under the Act and Rules also show that lesser measures are available, short of the extreme step of recognizing a public interest class privilege

over all materials gathered by the Commissioner from third parties during his investigation: see also the discussion in *Canada (Commissioner of Competition) v. Canada Pipe Company* (2003), 28 C.P.R. (4th) 335 at para. 69 (Comp. Trib.).

– III –

[82] Even if the threshold for judicial recognition of a class privilege were not as high as the Supreme Court has set it, a class privilege could not be recognized on the basis of the evidentiary record in this case.

[83] In order to establish a class privilege covering all documents and information received from third parties during his investigations, the Commissioner must prove that the relationship between him and third party sources warrants blanket confidentiality protection. In practical terms, like the example of the legal professional and client discussed at para. 48 above, the Commissioner must prove that anything less than blanket confidentiality protection would substantially impair the relationship, thereby frustrating the Commissioner's ability to discharge his legislative responsibilities.

[84] The Commissioner says just that. He says that if anything less than blanket confidentiality protection were afforded to documents and information supplied by third party sources, there might be reprisals or the threat of reprisals against them. Thus, third party sources might be less inclined to act. And the Commissioner would be less able to discharge the

important responsibilities Parliament has assigned to him in the *Competition Act*. The public interest would suffer.

[85] The Commissioner did not file any evidence before the Competition Tribunal establishing these matters. Thus, in this case, there is no evidentiary basis to support the existence of a class privilege. On this evidentiary record, a class privilege cannot be recognized. Given the consequences of recognizing a class privilege and the high threshold that must be met, the unsworn say-so of the Commissioner in submissions cannot suffice.

[86] In upholding the existence of the class privilege, the Competition Tribunal appeared to assume that the prerequisites for it were met (at para. 62). Is this permissible?

[87] In the abstract, I accept that, provided procedural fairness obligations are respected, some administrative decision-makers in some circumstances can make assessments without evidence, relying on facts gleaned from their own experience and expertise in their field. As discussed earlier, the rigorous evidentiary requirements in court proceedings do not necessarily apply in certain administrative proceedings: it depends on the text, context and purpose of the legislation that governs the administrative decision-maker.

[88] In another case, I put this point as follows:

> The investigator [of the Public Service Commission] did not need specific evidence [that if a vacant public service position were advertised, candidates would apply]. Parliament did not vest decision-making authority over this subject-matter in a body of generalist judges sitting in court who will need evidence of

> every last thing. Rather, Parliament chose to vest decision-making authority in the Public Service Commission, including investigators employed by it—a body acting within a specialized area of employment, armed with expert appreciation of the nature and functioning of this area.
>
> The Commission knows the skills and capabilities of people who apply for various types of public service positions and the operational needs and pressures bearing upon a staffing decision. From this, the Commission can determine whether an advertising process likely would have found qualified candidates for the position in a timely way.
>
> To insist that the Commission have the sort of evidence a court would require on every element of this determination is to ossify and over-judicialize a process that Parliament intended to be fair and more informal, one enriched by knowledge and insights built from years of administrative specialization and expertise. We should not depart from the decades-old principle of administrative law that "[t]he purposes of beneficent legislation must not be stultified by unnecessary judicialization": *Re Downing and Graydon* (1978), 92 D.L.R. (3d) 355 at p. 373, 21 O.R. (2d) 292 at p. 310 (C.A.).

(*Canada (Attorney General) v. Shakov*, 2017 FCA 250 at paras. 94-96 (dissenting, but the majority not disagreeing with the legal principle).)

[89] Even accepting for argument's sake that the Competition Tribunal can sometimes draw on its own experience and expertise to make certain assessments in certain circumstances, I am not persuaded that the Competition Tribunal could do so here on its own or by adopting its earlier decisions on this issue.

[90] I accept that the Competition Tribunal might be in a position to accept in a general way that third party sources *might* have a fear of reprisal if they assist the Commissioner in an investigation. But the Competition Tribunal is in no position to make definitive conclusions without evidence about the Commissioner's relationship with third party sources if the class

privilege is not recognized. In particular, without evidence it cannot conclude that the fear of reprisal *actually* exists, third party sources *will* be less inclined to assist, and the Commissioner *will* be prevented from carrying out his investigation and enforcement mandate under the *Competition Act*.

[91] The knowledge about third parties' possible fear of reprisal if they cooperate lies with the Commissioner that deals with third party sources, not the Competition Tribunal. From its legislative mandate and the cases it hears, the Competition Tribunal is not well placed to know whether third party sources are reluctant to complain to the Commissioner. But the Commissioner is. It was incumbent on the Commissioner to adduce evidence on this point and allow the Airport Authority to test it.

[92] The Competition Tribunal's decision in this case and the Tribunal decisions it relies upon all assume that a public interest class privilege is necessary in order to cause third party sources to come forward and be candid. But in another public interest privilege context, the Supreme Court has cast doubt on the validity of assumptions about the need for candour, particularly where a blanket privilege over a broad class of documents is sought: *Carey*, above at p. 659 S.C.R., p. 178 D.L.R. In *Carey*, Justice La Forest put it this way (at p. 657 S.C.R., p. 176 D.L.R.):

> I am prepared to attach some weight to the candour argument but it is very easy to exaggerate its importance. Basically, we all know that some business is better conducted in private, but generally I doubt if the candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation. Certainly the notion has received heavy battering in the courts.

[93] In these circumstances, I conclude that it was incumbent on the Commissioner to adduce evidence before the Competition Tribunal establishing the prerequisites of the public interest class privilege. It did not.

[94] The Competition Tribunal found that the class privilege asserted by the Commissioner had "sound policy rationales" (at para. 20) based on previously decided jurisprudence. An examination of that jurisprudence, particularly Competition Tribunal jurisprudence, shows only the most general, and often cursory, consideration of the matter, with the possible exception of *Canada (Commissioner of Competition) v. Sears Canada Inc.*, [2003] C.C.T.D. no. 16 (Q.L.), 28 C.P.R. (4th) 385. Rather, in these cases, the Competition Tribunal should have examined in a rigorous way whether the blanket confidentiality protection afforded by a class privilege—one that protects from disclosure all documents gathered from third party sources in the course of the Commissioner's investigation—was needed in order to ensure a sufficiently uninhibited sharing of information by third party sources with the Commissioner: see 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. 104.

[95] And "sound policy rationales" are not enough to recognize the class privilege. It will be recalled that the policy rationales supporting a class privilege must be as compelling as those supporting the class privilege over solicitor-client communications and these are extremely compelling, at the level of constitutionally protected interests: see discussion at paras. 53-54, above.

[96] The gist of the Competition Tribunal's finding on the alleged public interest class privilege appears in para. 62 of its reasons:

> By its very nature, the Commissioner's mandate and statutory functions require the collection of commercially sensitive information from businesses and actors in various sectors of the economy. In undertaking his investigations of alleged anti-competitive conduct, the Commissioner requires the input from the industry and from various players in the marketplace, including customers, suppliers and competitors of persons under investigation. The Commissioner thus relies on the cooperation of these third parties and on information provided by them, either voluntarily or through compulsion. Disputed matters coming before the Tribunal, such as applications challenging an alleged abuse of dominance, mergers alleged to be anti-competitive or civil arrangements between competitors, involve situations where customers, suppliers and competitors in the marketplace may be at a commercial disadvantage *vis-à-vis* the respondents targeted by the Commissioner. Protecting their identities and information through public interest privilege claims reduces the risk of witness intimidation or reluctance to provide information, and thus preserves the effectiveness of the Competition Bureau's investigations. To gain and secure this cooperation, sources of information must not be concerned about fear of reprisal in the marketplace or other potential adverse consequences, and must be satisfied that their information will be kept in confidence and their identities will not be exposed, unless they are called as witnesses. This is true whether the information is provided voluntarily or pursuant to a Section 11 order.

[97] In my view, this is nothing more than an expression that a class privilege would be desirable in increasing the flow of useful information to the Commissioner. Nowhere does the Competition Tribunal find that blanket confidentiality protection is necessary for the preservation of the relationship or the continuance of the information flow. As we shall see in the next section of these reasons, even if the Competition Tribunal could have acted without evidence I doubt that it could have made such a finding.

– IV –

[98] Even putting aside the absence of a satisfactory evidentiary record and taking the Commissioner's submissions at face value, the Commissioner has not established that blanket confidentiality protection is absolutely necessary for the preservation of the relationship. The Commissioner falls short in a number of respects.

[99] The relationship between the Commissioner and third party sources very much depends upon the circumstances, the type of assistance sought and the nature of the particular investigation. For example, sometimes cooperation from a third party source is voluntary; other times it is not. In such circumstances, a rigid class privilege is inapt; a case-by-case or document-by-document privilege may be more appropriate: see *National Post* at paras. 43 and 47-49 and *Bisaillon*, above at pp. 97-98; and see the discussion in these reasons at para. 55, above. Perhaps due to the fact that a determination of public interest privilege often depends on the specific circumstances and particular documents in issue, some opine that while public interest privilege is possible on a case-by-case basis, a public interest class privilege is not: Hubbard, Magotiaux and Duncan, *The Law of Privilege in Canada* (looseleaf) Aurora, Ont.: Canada Law Book, 2006 (loose-leaf updated December 2017) at §3.20; of interest is that these commentators are aware that the Commissioner asserts a public interest class privilege (see *ibid.* at §3.50.50).

[100] The class privilege the Commissioner asserts applies even in the case of evidence it compels from third parties under section 11 of the *Competition Act*. When a witness is compelled to cooperate fully with an investigation, there is far less need to motivate a party to come forward

or be any more forthcoming in providing evidence: the candour rationale for protection is markedly reduced or, in some situations, even eliminated. In the words of one commentator, "if [an] agency can obtain…information by compulsion of statute then the sources cannot be said to 'dry up' if the confidentiality is breached": T.G. Cooper, *Crown Privilege*, (Aurora, Ont: Canada Law Book, 1990) at p. 56.

[101] Similarly, the class privilege is said to apply regardless of whether any promise or undertaking of confidentiality was made to persons with information and documents and whether they relied upon any such promise or undertaking in providing documents and information. This makes no sense:

> Where the information is provided to government agencies by outsiders, there is a greater prospect that the providers of that information may be less frank or will not provide the information at all if there is a prospect of disclosure. *Of course, where no expectation of confidentiality exists, the candour argument is without merit.* [emphasis added]

(Lederman, above at p. 1079; see also *Gruenke* at pp. 291-292 S.C.R., p. 691 W.W.R.)

[102] Indeed, there is material suggesting that those providing information to the Commissioner can never have any assurance or expectation of confidentiality. In proceedings before the Competition Tribunal, the Commissioner has consistently taken the view that "anyone providing information to the [Commissioner] either voluntarily or pursuant to an order under s. 11 [of the Act] must expect that such information may be used by the [Commissioner] in the administration of the Act including the bringing of an application before this Tribunal under the Act": *Canada*

(Director of Investigation and Research) v. Air Canada (1993), 46 C.P.R. (3d) 312 at p. 316 (Comp. Trib.).

[103] Further, as the facts of this case demonstrate, the alleged public interest class privilege, if asserted by the Commissioner, is waivable by the Commissioner and only the Commissioner at any time. Thus, there is no assurance of confidentiality. This differs from the informer class privilege, which the law recognizes. Informer class privilege belongs jointly to the Crown and to the informer and cannot be waived without the informer's consent: *R. v. Leipert*, [1997] 1 S.C.R. 281, 143 D.L.R. (4th) 38 at para. 15.

[104] Further, the purported scope of the privilege—"records created or obtained by the Commissioner, [his] employees, servants, agents or solicitors or obtained from third parties during the Commissioner's investigations"—is unnecessarily broad and detached from the compelling public interest asserted by the Commissioner. At the very least, there must be some nexus between these documents and the identity of a third party source and/or information provided by those third party sources to be captured by any public interest privilege. If a document emanates from outside of the purportedly essential relationship between the Commissioner and third party sources, there is no need for the privilege to attach.

[105] In these circumstances, measures falling short of a blanket class privilege might suffice to protect the confidentiality interests and preserve the relationship between the Commissioner and third party sources who can assist his investigation. For example, it may be possible for

confidentiality to be protected by redactions of documents, undertakings of confidentiality, sealed volumes of documents, or *in camera* sessions.

[106] At the hearing of this appeal, we asked the parties whether any other regulator, competition or otherwise, domestic or foreign, has found it necessary to assert the sort of class privilege the Commissioner seeks here. The parties were unable to identify even one. Nor is this Court aware of any.

[107] In particular, American, European, Australian and New Zealand competition authorities have not found it necessary to recognize a class privilege over information and documents supplied by third parties. Like the Commissioner here, these authorities gather sensitive information from customers, suppliers and competitors of the party under investigation, with every possibility of retaliation against them for supplying the information. The same is true for domestic agencies which regulate fields such as securities, tax, the environment, human rights and occupational health and safety. All these competition authorities and domestic regulators are able to conduct investigations and make orders without the benefit of a class privilege over information and documents supplied by third parties.

[108] In my view, this is a salient legal consideration to be taken into account when assessing whether a class privilege should be recognized. The Supreme Court has suggested that the experience of foreign jurisdictions and whether they have recognized a class privilege in other circumstances should be examined when considering whether to recognize a class privilege: see discussion earlier in these reasons at para. 55 and *National Post* at paras. 43, 47-48. These

considerations go directly to the issue whether blanket confidentiality protection is necessary or warranted for the preservation of the relationship between the Commissioner and third party sources.

[109] Contrary to this, the Competition Tribunal considered that the experience of foreign competition authorities and domestic regulators was of "no moment" (para. 20). This was a legal error.

– V –

[110] The Commissioner attempts to support the existence of the alleged class privilege by suggesting that he does not cause any procedural unfairness. The Commissioner reviews the documents covered by the class privilege and exercises his discretion to provide the documents necessary to fulfil his procedural fairness obligations. Respondents to competition proceedings brought by the Commissioner receive summaries of the information supplied by third party sources and, later, witness statements if any third party sources are called to testify. Concerns about the adequacy of the summaries can be brought before the Competition Tribunal. Further, if the Commissioner intends to rely on a privileged document at a hearing, it must disclose the document: subsection 68(1) of the *Competition Tribunal Rules*, SOR/2008-141.

[111] As an illustration of fairness, the Commissioner points to what it did in this case. While some 9,500 documents were covered by the public interest privilege, the Commissioner exercised his discretion to waive the privilege over roughly 8,300 of these documents and

disclose them to the respondent. Summaries of undisclosed documents were vetted and provided to the Airport Authority.

[112] As the discussion of case law above shows, the recognition of a class privilege does not depend on whether the beneficiary of the privilege is prepared to act fairly. And the Commissioner cannot defend a class privilege on the basis that it does not create procedural unfairness if there is no sufficient, proven reason for the class privilege to exist in the first place. In any event, fairness is in the eye of the beholder: the Airport Authority believes that the withholding of the 1,200 documents is working unfairness.

[113] There is something to this. If the class privilege urged by the Commissioner is recognized, something incongruous emerges: Competition Tribunal proceedings are subject to procedural fairness obligations at the highest level, akin to court proceedings, yet the Commissioner can unilaterally assert a class privilege and withhold all documents obtained from third parties in his investigation—here, the entire case against the Airport Authority—unless the Commissioner unilaterally decides to waive the privilege over some of the documents. Thus, as far as disclosure of the case against the party whose conduct is impugned is concerned, that party gets only what the Commissioner deigns to give it. And requests for more disclosure may well be dismissed by the Competition Tribunal because, on the authority of a decision by this Court upholding the class privilege, the interests in confidentiality supporting the class privilege will be seen to be very high. Perhaps summaries of withheld documents might be provided. But by definition, summaries leave information out. What may seem innocuous or irrelevant to the preparers of the summaries may be critical to the party whose conduct is impugned. And the

actual documents authored by participants in the matters under investigation are often more useful for cross-examination than summaries prepared by non-participants. This entire scenario is fraught with the potential of interference with procedural fairness rights and the truth-finding function of the proceedings: see discussion earlier in these reasons at paras. 28-33.

[114] The Commissioner's submission that he has acted fairly by disclosing so many documents and by providing summaries is also telling in a related way. After conducting a document-by-document review of the documents covered by the alleged class privilege in this case, the Commissioner found that confidentiality was unnecessary for 86% of them and so it disclosed these documents. As for the others, it says that some information can be disclosed by summaries. This tends to show a number of things:

- the blanket 100% confidentiality coverage of a class privilege is unnecessary for maintaining the relationship between the Commissioner and third party sources;

- a case-by-case public interest privilege—one that the Supreme Court says gives "the necessary flexibility to weigh up and balance competing public interests in a context-specific manner", where established on the evidence, may be more appropriate: National Post at para. 51; in any event, a class privilege that is so significantly whittled down through waiver after a document-by-document review is no more effective in maintaining the relationship between the Commissioner and third party sources than a case-by-case, document-by-document public interest privilege;

- other lesser measures to protect confidentiality and the relationship between the Commissioner and third party sources, even short of asserting a public interest privilege, may be more appropriate for many of the documents, such as redactions, non-disclosure undertakings, sealed volumes or in camera portions of proceedings.

[115] For the foregoing reasons, I conclude that the Commissioner has not established that there is a class privilege preventing disclosure of the 1,200 remaining documents. If, as a policy matter, the Commissioner considers that there ought to be a class privilege over information and documents supplied by third party sources during his investigations, he can ask Parliament for it.

[116] It follows that the Competition Tribunal erred in law in finding a class privilege and, thus, erred in dismissing the Airport Authority's motion on that basis.

F. Where does this leave the parties?

[117] Because the Competition Tribunal found the presence of a public interest class privilege over the 1,200 remaining documents, it did not assess whether any of them are covered by a case-by-case or document-by-document public interest privilege. Under the disposition of this appeal I propose below, the motion will be remitted to the Competition Tribunal for redetermination. The Airport Authority agrees that in the redetermination the Commissioner should have an opportunity to argue for privilege over individual documents.

[118] In considering whether a particular document should be covered by a case-by-case or document-by-document public interest privilege, the Competition Tribunal will wish to follow the legal test discussed earlier in these reasons. In assessing the interests of confidentiality and the extent to which they are sufficiently compelling, the Competition Tribunal should consider whether alternative, lesser means of protecting the relevant confidentiality interests are available, such as redacting portions of individual documents, undertakings of confidentiality, protective orders, sealed volumes of documents, *in camera* sessions, and other effective measures that might be devised: see, *e.g.*, the creative and detailed sealing order made in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2002 BCSC 1509, 8 B.C.L.R. (4th) 281.

G. Proposed disposition

[119] I would allow the appeal, and set aside the order of the Competition Tribunal, including its award of costs. I would award the Airport Authority its costs of the appeal. I would remit the motion to the Competition Tribunal for redetermination in accordance with these reasons.

"David Stratas"
J.A.

"I agree
Richard Boivin J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-149-17
APPEAL FROM A DECISION OF THE COMPETITION TRIBUNAL DATED APRIL 24, 2017, NO. CT-2016-015	
STYLE OF CAUSE:	VANCOUVER AIRPORT AUTHORITY v. COMMISSIONER OF COMPETITION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 17, 2017
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	BOIVIN J.A. LASKIN J.A.
DATED:	JANUARY 24, 2018

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