Competition Tribunal | Tribunal de la Concurrence

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6
File No.: CT-2016-015
Registry Document No.: 62

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34 as amended;

AND IN THE MATTER OF a motion by Vancouver Airport Authority challenging claims of privilege.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)

Date of hearing: March 22, 2017
Before Judicial Member: D. Gascon J. (Chairperson)
Date of Reasons for Order and Order: April 24, 2017

REASONS FOR ORDER AND ORDER DISMISSING A MOTION CHALLENGING THE COMMISSIONER'S CLAIMS OF PUBLIC INTEREST PRIVILEGE

I. OVERVIEW

[1] Over the last 28 years, the Competition Tribunal, the Federal Court of Appeal and the superior courts of two provinces have recognized that the Commissioner of Competition (the "**Commissioner**") can assert claims of public interest privilege, on a class basis, in the context of the *Competition Act*, RSC 1985, c C-34 as amended (the "**Act**"). This public interest privilege protects against the compulsory disclosure of communications and documents obtained or prepared by the Commissioner in the course of his investigations. On February 28, 2017, in the context of an application made by the Commissioner under the abuse of dominance provisions of the Act (the "**Application**"), the Vancouver Airport Authority ("**VAA**") filed a motion before the Tribunal challenging the class-categorization of the public interest privilege claims asserted by the Commissioner with respect to certain documents included in the Commissioner's affidavit of documents served in this proceeding (the "**Affidavit**").

[2] VAA submits that the Commissioner's claims of public interest privilege in this case are procedurally unfair and prejudice VAA's ability to make a full answer and defence against the Commissioner's underlying Application. But VAA's motion also raises a much larger issue. VAA asks the Tribunal to reconsider and reverse its established practice of recognizing the Commissioner's claims of public interest privilege in the context of the Act as a class privilege and to replace it by a case-by-case evaluation of the Commissioner's claims.

[3] The Commissioner responds that a public interest privilege in the context of the Act has been repeatedly and unanimously recognized as a class privilege by the Tribunal, by the Federal Court of Appeal and by the superior courts of two provinces. He claims that no factual or legal grounds arise in this case to justify reversing this well-established point of law. The Commissioner also submits that, in order to limit the adverse impact that the Commissioner's claims of public interest privilege may have on the respondents, the Tribunal has developed various mechanisms over the years that safeguard the respondents' procedural rights to a fair hearing. He therefore pleads that the Commissioner's class-based public interest privilege in the context of the Act does not, in and of itself, interfere with VAA's right to a fair hearing and that, in any event, any claim of breach of procedural fairness is premature at this point.

[4] VAA's motion raises two issues: (1) whether the Commissioner's public interest privilege in the context of the Act properly qualifies as a class-based privilege or should instead be classified as a case-by-case privilege; and (2) whether the Commissioner's claims of public interest privilege on a class basis in this case amount to a fundamental breach of procedural fairness and a denial of VAA's right to a fair hearing.

[5] For the reasons that follow, VAA's motion will be dismissed. Upon reviewing the materials filed by VAA and the Commissioner (including the supplementary submissions requested by the Tribunal regarding the recent decision of the Supreme Court of Canada in *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 ("***Lizotte***")), and after hearing counsel for both parties, I am not persuaded that there are grounds to overturn the long-standing and unanimous case law on the class-based nature of the Commissioner's public interest privilege in the context of the Act. In fact, even if I were in agreement with VAA's submissions in that regard, I find that the Tribunal would not be entitled to do so in light of the doctrine of *stare decisis*. I also conclude that, at this stage and in the circumstances of this case, the

Commissioner's claims of public interest privilege do not amount to a fundamental breach of procedural fairness nor encroach VAA's right to a fair hearing.

II. BACKGROUND

A. The underlying Application

[6] The Commissioner filed his Notice of Application on September 29, 2016, seeking relief against VAA under section 79 of the Act.

[7] VAA is a not-for profit corporation responsible for the operation of the Vancouver International Airport (the "**Airport**"). The Commissioner claims that VAA abused its dominant position by only permitting two providers of in-flight catering services to operate on-site at the Airport, and in excluding and denying the benefits of competition to the in-flight catering marketplace. The Commissioner's Application is based upon, among other things, allegations that VAA controls the market for "Galley Handling" at the Airport, that it acted with an anti-competitive purpose, and that the effect of its decision to limit the number of in-flight catering services providers was a substantial prevention or lessening of competition, resulting in higher prices, dampened innovation and lower service quality.

[8] In his Application, the Commissioner seeks an order from the Tribunal:

(a) prohibiting VAA from directly or indirectly engaging in the practice of anti-competitive acts set out in the Application;

(b) requiring VAA to issue authorization, on non-discriminatory terms, to any firm that meets customary health, safety, security and performance requirements, so as to entitle that firm to access the airside at the Airport, from one or more facilities used by the firm whether located on or off Airport property, for the purposes of supplying Galley Handling; and

(c) otherwise requiring VAA to take any action, or to refrain from taking any action, as may be required to give effect to the foregoing prohibitions and requirements.

[9] In its response, VAA requests the Tribunal to dismiss the Commissioner's Application, with costs, and asserts that the Application suffers from numerous fundamental flaws, including:

(a) the Application fails to take into account that VAA has been acting in accordance with its statutory mandate to operate the Airport in furtherance of the public interest and, as such, section 79 does not apply in light of the regulated conduct exemption;

(b) VAA does not substantially or completely control the alleged market for access to the Airport airside for the purpose of providing Galley Handling, contrary to the Commissioner's allegations;

(c) with respect to the market for Galley Handling, VAA does not itself provide this service nor have a commercial interest in any entity that provides this service at the Airport and, thus, does not substantially or completely control that market;

(d) VAA does not represent entities involved in the provision of Galley Handling services at the Airport, nor does it have any plausible competitive interest in that market;

(e) VAA was at all times motivated by a desire to preserve and foster competition and had a valid business justification that was both pro-competitive and efficiency-enhancing; and

(f) VAA's conduct will not, and is not likely to, lessen or prevent competition substantially.

B. The Commissioner's Affidavit

[10] Pursuant to a scheduling order issued by the Tribunal on December 20, 2016, as amended on consent by further orders dated February 13 and 16 and March 7, 2017, the Commissioner served VAA with the Commissioner's Affidavit on February 15, 2017.

[11] The Affidavit lists all records relevant to matters in issue in this Application which were in the Commissioner's possession, power or control as at December 31, 2016. It is divided into three schedules:

(a) Schedule A lists and describes records that do not contain confidential information. At the time of service of the Affidavit, Schedule A included 146 documents;

(b) Schedule B lists and describes records that, according to the Commissioner, contain confidential information and for which no privilege is claimed or the Commissioner has waived privilege for the purpose of the Application. At the time of service, Schedule B included 1,619 documents; and

(c) Schedule C lists and describes records that the Commissioner asserts contain confidential information and for which at least one privilege (i.e., solicitor-client, litigation or public interest) is being claimed. At the time of service, Schedule C included 9,906 documents.

[12] The Commissioner's Affidavit also contained the following statement: "[a]t such time as the Competition Tribunal has put in place a confidentiality or protective order in respect of this Application, the Commissioner may provide a supplemental Affidavit of Documents that may de-list certain records from Schedule C and list those records in Schedule B."

[13] On March 20, 2017, two days prior to the hearing of VAA's motion, the Tribunal issued a confidentiality order for this Application based on a proposed order consented to by both parties (the "**Confidentiality Order**"). At the hearing of the motion, counsel for the Commissioner confirmed that, further to the issuance of the Confidentiality Order, privilege had been waived with respect to an additional amount of 8,513 documents initially listed in Schedule C of the Affidavit, and that the Commissioner had already couriered those documents to VAA.

[14] Consequently, there is currently a total of 1,393 documents remaining in Schedule C and on which the Commissioner asserts a claim of privilege. These documents are all listed in

Schedule C and include internal Competition Bureau documents as well as documents obtained from third parties. At the hearing of VAA's motion, counsel for the Commissioner indicated that most of the remaining documents in Schedule C (i.e., 1,185 documents) are exclusively protected by public interest privilege, the balance being documents where litigation or solicitor-client privilege is claimed. Furthermore, counsel for the Commissioner also specified that, out of the 1,393 documents remaining in Schedule C to the Affidavit, 411 documents are internal to the Competition Bureau, 336 documents have been voluntarily provided by third parties, and 646 documents have been provided pursuant to compulsory orders issued under section 11 of the Act ("**Section 11 orders**"). The evidence provided in support of VAA's motion offers no further details on the documents subject to the Commissioner's claims of public interest privilege.

[15] According to the Affidavit, the public interest privilege claimed by the Commissioner attaches to "records created or obtained by the Commissioner, its employees, servants, agents or solicitors or obtained from third parties during the Commissioner's investigations". Again, apart from the statement that the ground for the privilege is "public interest", the evidence on the record contains no other information on the reasons for the claim of privilege.

III. ANALYSIS

A. Should the Tribunal's class-based approach to the Commissioner's claims of public interest privilege in the context of the Act be modified?

[16] VAA first submits that the Tribunal should depart from its established practice of recognizing the Commissioner's public interest privilege in the context of the Act as a class privilege and argues that a case-by-case evaluation for these privilege claims should instead prevail. VAA contends that granting a status of class privilege to the Commissioner's claims of public interest privilege in the context of the Act can no longer be justified and that a review of the Tribunal's approach to public interest privilege first established over 25 years ago is warranted in light of the following factors:

(a) the early decisions of the Tribunal and of the Federal Court of Appeal having first acknowledged the existence of a class-based privilege for the Commissioner's claims of public interest privilege were issued when the Act was newly enacted, did not rest on a solid legal and evidentiary foundation, and have since been applied without any detailed analysis by the Tribunal and the Canadian courts;

(b) since common law class privileges derogate from the search for the truth in relation to the relevant facts, recent decisions of the Supreme Court on such privileges have considerably narrowed their scope;

(c) certain provisions of the Act, including the 2009/2010 amendments, now have both a criminal and a civil component and make it possible for a respondent to be precluded from obtaining full disclosure of the very same documents, in proceedings based on the very same facts, depending on whether the Commissioner decides to use the criminal or civil provisions of the Act;

(d) no other regulatory body or administrative tribunal involved in economic regulatory proceedings analogous to the Application (such as proceedings to enforce securities laws before provincial securities commissions) recognize a similar blanket public interest privilege as being necessary for the enforcement of their laws (in Canada generally, and in the United States with respect to parallel antitrust authorities).

[17] Furthermore, VAA submits that the Commissioner's policy considerations underpinning his claims of public interest privilege (e.g., the expectation of confidentiality, the so-called "candour" rationale, and the fear of reprisal) are ill-founded and, in any event, are not applicable to documents compelled to be produced pursuant to Section 11 orders. VAA advances that the candour rationale that appears to have been a foundation of the current class treatment is unjustified in an environment where, as in this case, the class privilege is applied to large amounts of information and documents obtained through the use of Section 11 orders.

[18] All of these elements, says VAA, militate strongly in favour of a case-by-case approach to the Commissioner's claims of public interest privilege in the context of the Act, in lieu of a class-based approach.

[19] I do not agree.

[20] I instead find that the Commissioner's public interest privilege in the context of the Act has long been recognized as a class privilege by the Federal Court of Appeal, the Tribunal and the courts. A review of the case law allows one to identify sound policy rationales and the necessary attributes supporting a class-based privilege for the Commissioner. In addition, I am not persuaded that the recent decisions of the Supreme Court on privileges assist VAA or that the evolution of the jurisprudence is such that the Commissioner's public interest privilege in the context of the Act now falls outside the scope of class privileges, however exceptional these may be. Furthermore, I conclude that the particular factual circumstances surrounding VAA's motion are not sufficient to change the current treatment of the Commissioner's public interest privilege in the context of the Act and to reverse 28 years of unanimous case law. I also consider that the absence of similar class-based public interest privileges for analogous economic regulators and tribunals is of no moment, and that the common law privilege recognized to the Commissioner is not inconsistent with more limited statutory privileges otherwise created under the *Canada Evidence Act*, RSC 1985, c C-5 (the "**Canada Evidence Act**").

[21] Finally, I underline that, even though more than 20 years have now elapsed since the Federal Court of Appeal issued its seminal decision in this area in *Director of Investigation and Research v D&B Companies of Canada Ltd*, [1994] FCJ No 1643 (FCA), leave to appeal to the SCC refused ("***Nielsen FCA***"), the Tribunal remains bound by this decision. Even if some intervening developments might have warranted a reconsideration of the current legal framework, the specific conditions established by the Supreme Court to set aside the *stare decisis* rule are just not met in this case.

[22] Each of these points will be dealt with in turn below.

1. The case law clearly recognizes the Commissioner's public interest privilege as a class privilege

[23] It is not disputed that the Federal Court of Appeal, the Tribunal and the superior courts of Ontario and British Columbia have repeatedly, and unanimously, recognized the existence of a class of documents and communications, created or obtained by the Commissioner during the course of a Competition Bureau investigation, as being protected by public interest privilege, such that they need not be disclosed during the discovery phase. In fact, neither the Tribunal nor any Canadian court has ever expressly or implicitly rejected the notion that the Commissioner's public interest privilege in the context of the Act is a class privilege. VAA acknowledges that.

[24] The recognition of the Commissioner's class-based public interest privilege in the context of the Act dates back to the very early days of the Tribunal, in 1989, shortly after the Tribunal was created pursuant to the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) (the "**CTA**"). Between 1989 and 2016, two decisions of the Federal Court of Appeal and more than 15 decisions issued by the Tribunal and the superior courts have confirmed the existence of the Commissioner's public interest privilege (*Nielsen FCA*; *Director of Investigation and Research v Hillsdown Holdings (Canada) Ltd*, [1991] FCJ No 1021 (FCA) ("***Hillsdown FCA***"); *The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp Trib 17 ("***Direct Energy***"); *The Commissioner of Competition v Air Canada*, 2012 Comp Trib 21 ("***Air Canada***"); *The Commissioner of Competition v The Toronto Real Estate Board*, 2012 Comp Trib 8 ("***TREB***"); *Commissioner of Competition v Sears Canada Inc*, 2003 Comp Trib 19 ("***Sears***"); *Commissioner of Competition v United Grain Growers Limited*, 2002 Comp Trib 39 ("***UGG 2***"); *Commissioner of Competition v United Grain Growers Limited*, 2002 Comp Trib 35 ("***UGG 1***"); *Director of Investigation and Research v Superior Propane Inc*, [1998] CCTD No 17 ("***Superior Propane***"); *Director of Investigation and Research v Canadian Pacific Ltd*, [1997] CCTD No 42 ("***Canadian Pacific 2***"); *Director of Investigation and Research v Canadian Pacific Ltd*, [1997] CCTD No 28 ("***Canadian Pacific 1***"); *Director of Investigation and Research v Washington*, [1996] CCTD No 24 ("***Washington***"); *Director of Investigation and Research v AC Nielsen Co of Canada*, [1994] CCTD No 15 ("***Nielsen CT***"); *Director of Investigation and Research v Hillsdown Holdings (Canada) Ltd*, [1991] CCTD No 20 ("***Hillsdown CT***"); *Director of Investigation and Research v Southam Inc*, [1991] CCTD No 16 ("***Southam***"); *Director of Investigation and Research v The NutraSweet Company*, [1989] CCTD No 54 ("***NutraSweet***"); *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2013 ONSC 5386 ("***Chatr***"); *Commissioner of Competition v Toshiba of Canada Ltd*, 2010 ONSC 659 ("***Toshiba***"); *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2016 BCSC 97 ("***Pro-Sys***"))[1].

[25] In its initial decisions, the Tribunal accepted the Commissioner's claims of public interest privilege with respect to information collected from complainants and market participants on a voluntary basis during the Commissioner's investigations (e.g., *NutraSweet*; *Southam*; *Hillsdown*

[1] For completeness, and as mentioned in my opening remarks to VAA's motion hearing, the latest pronouncement of the Tribunal on this issue comes from a Direction that I issued on March 7, 2016 in *Rakuten Kobo Inc v The Commissioner of Competition*, CT-2014-002. The purpose of that Direction was to address issues raised with respect to the contents and description of documents in the affidavit of documents produced by the Commissioner. At the outset of the Direction, I stated: "I agree with the Commissioner that public interest privilege is a class privilege protecting not only the information provided but also the identity of the third party providing such information".

CT; *Nielsen CT*). In subsequent cases, the Tribunal looked at the notion of public interest privilege in the context of information obtained on a compulsory basis further to the use of Section 11 orders and found that the protection from disclosure under the public interest privilege extended to those documents as well (e.g., *Washington*; *Canadian Pacific 1*). In more recent cases, the Tribunal also held that information collected from government bodies was similarly protected from disclosure during discoveries (e.g., *UGG 1*; *Air Canada*).

[26] Against that background, VAA claims that the Tribunal's class-based approach to the Commissioner's public interest privilege emerged at a time when the Tribunal was newly created, that it did not rest on reliable foundations, and that the Tribunal's ill-founded approach has since been blindly repeated without proper analysis by the Federal Court of Appeal, the Tribunal and other courts.

[27] I do not share VAA's reading and analysis of the jurisprudence. On the contrary, my review leads me to conclude that solid policy rationales justify conferring the status of a class-based privilege to the Commissioner's public interest privilege in the context of the Act. Since VAA's motion is asking the Tribunal to reverse what has become settled law in its decisions and in the decisions of other Canadian courts, it is useful to review in detail the history and teachings of the jurisprudence on the Commissioner's public interest privilege in the context of the Act.

i. The early cases

[28] Between 1989 and 1994, the Tribunal issued four decisions which would establish the basic foundations of the Commissioner's public interest privilege in the context of the Act: *NutraSweet, Southam, Hillsdown CT* and *Nielsen CT*.

[29] The Commissioner's claim of public interest privilege was first discussed by the Tribunal in *NutraSweet.* In that case, the Director of Investigation and Research (the "**Director**") (as the Commissioner was then known) argued that the complaint which led to the Director's investigation should not be produced because it fell under a public interest privilege. In her decision, Madam Justice Reed did not specifically mention or discuss the class nature of the privilege, as rightly pointed out by counsel for VAA. Madam Justice Reed instead applied the "Wigmore test" to find that the Director indeed had a public interest privilege over documents created at the investigative stage, stating that the "public interest test is sometimes referred to as the 'Wigmore test'" (*NutraSweet* at para 11).

[30] The analytical framework now known as the Wigmore test relies on four criteria to determine whether or not a communication can be considered as privileged in a particular case and was adopted by the Supreme Court in *Slavutych v Baker*, [1976] 1 SCR 254 at 260. The Wigmore test establishes that, for a communication to be subject to privilege and shielded from disclosure, (1) the communication must originate in a confidence that the identity of the informant and the content will not be disclosed; (2) this element of confidentiality must be essential to the maintenance of the relationship in which the communication arises between the parties; (3) the relationship must be one which should be sedulously fostered in the public good; and (4) the injury that would inure to the relationship by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation (i.e., a balancing of the interests at stake) (*Lizotte* at para 32).

[31] In explaining why she had found the existence of a public interest privilege belonging to the Director, Madam Justice Reed observed that "[t]he public interest in protecting their confidentiality, in order to allow complainants to come forward in an uninhibited fashion, outweighs the respondent's right to have all relevant documents produced" (*NutraSweet* at para 16). In that case, the Tribunal thus found that the policy rationale "to allow complainants to come forward in an uninhibited fashion" was sufficient to overcome and outweigh the right of that particular respondent to full disclosure of the documents (*NutraSweet* at para 16). Madam Justice Reed explained that requiring documentation and information collected by the Director at the inquiry stage to be protected from disclosure was justified to further "the public interest of encouraging individuals to come forward and complain about perceived anti-competitive behaviour, in confidence and without fear of reprisals from the dominant player in the market" (*NutraSweet* at para 13).

[32] This argument is commonly referred to as the "candour argument": that is, without public interest privilege, there would be a chilling effect on the provision of certain types of information to government agencies such as the Competition Bureau. VAA alleges that this argument was retained by the Tribunal in *NutraSweet* despite the fact that there does not appear to have been any evidence before the Tribunal that the individuals in question actually came forward "in confidence", nor that the individuals had any "fear of reprisals", whether from the respondent in the proceeding or otherwise.

[33] In *Southam*, issued two years later in 1991, the Tribunal discussed in more detail its understanding of the policy rationale underlying the public interest privilege of the Director. In an often-quoted passage, Madam Justice Reed explained the Tribunal's reasoning as follows, at paragraph 26 of her decision:

> 26. Whether or not litigation privilege applies, however, is somewhat academic since in the Tribunal's view public interest privilege covers much of what the Director seeks to keep from the respondents. […] In the competition law area, at least in merger and abuse of dominant position cases, the individuals who are interviewed may be potential or actual customers of the respondents, they may be potential or actual employees. They may fear reprisals if they provide the Director with information which is unfavourable to the respondents. Many of them are likely to be in a vulnerable position *vis-à-vis* the respondents. It is in the public interest, then, to allow the Director to keep their identities confidential, to keep the details of the interviews confidential, to protect the effectiveness of his investigations. It is in the public interest to keep the interview notes confidential except when the interviewees are called as witnesses in a case or otherwise identified by the party claiming privilege. In addition, the Director is not required to prepare the respondents' case by identifying potential witnesses for them.

[34] The Tribunal thus associated the recognition of the Director's public interest privilege in the context of the Act to the fear of reprisal by the persons providing information and documents to the Director, given their vulnerable position, and the consequent need to keep their identities and information confidential in order to ensure their cooperation. Madam Justice Reed also emphasized that it is in the public interest to preserve such confidentiality in order to "protect the

effectiveness of [the Director's] investigations" (*Southam* at para 26). Madam Justice Reed concluded on this point by stating that "[t]he public interest in keeping the details of the interviews confidential outweighs any benefit that the respondents might obtain from them" (*Southam* at para 27).

[35] VAA claims that, as was the case in *NutraSweet*, the Tribunal in *Southam* had no evidence showing that the complainants had genuine or well-founded fears of reprisals if their identities became known, that they had requested to keep their identities secret or that they had received any form of assurance from the Director about not revealing their identities.

[36] Then, in *Hillsdown CT*, in a short decision written by Mr. Justice Strayer (as he then was), the Tribunal adopted the above-quoted rationales expressed by Madam Justice Reed in *Southam* (*Hillsdown CT* at 3). This ruling of Mr. Justice Strayer was appealed to the Federal Court of Appeal and, in *Hillsdown FCA*, the Court again quoted with approval the principles of public interest privilege stated by Madam Justice Reed in *Southam*. The Federal Court of Appeal indeed reproduced the extract quoted above with respect to the fear of reprisals, the need of confidentiality and the public interest in confidentiality outweighing the benefits of disclosure to the respondents (*Hillsdown FCA* at para 3).

[37] It was in the *Nielsen CT* 1994 decision that, for the first time, the Tribunal referred to the Commissioner's public interest privilege in the context of the Act as a "class" privilege. In his reasons, Mr. Justice McKeown expressly determined that the previous decisions issued by the Tribunal in *NutraSweet*, *Southam* and *Hillsdown* "do establish privilege for a class of documents" (*Nielsen CT* at 7).

[38] In *Nielsen CT*, the Tribunal refused an application for an order requiring the Director to disclose the complaint, notes and materials prepared by the Competition Bureau as well as statements, notes and materials obtained or prepared by the Bureau from meetings with various industry players. The reasons invoked were the following: (1) the Director requires cooperation from the industry concerned in order to perform his functions; and (2) in order to gain this cooperation, members of the industry have to be satisfied that their information will be kept in confidence and their identities not exposed unless they are called as witnesses. In the decision, Mr. Justice McKeown went on to elaborate on the reasons underlying the Director's privilege. He indicated that the Director "must depend on the cooperation of industry participants to gain general background information as well as to evaluate a complaint or complaints" and that there are good reasons to protect the confidentiality of industry participants to ensure such cooperation (*Nielsen CT* at 8). He added that "[e]nforcement of the Competition Act depends on the willingness of complainants to come forward" (*Nielsen CT* at 8). Mr. Justice McKeown however observed that such confidentiality could only prevail until individuals are called as witnesses by the Director.

ii. The *Nielsen FCA* decision

[39] In *Nielsen FCA*, the Federal Court of Appeal upheld the Tribunal's decision in *Nielsen CT* and agreed that the Director did not need to produce records, including statements, notes material and correspondence obtained or prepared by the Director, his staff or his counsel from meetings with industry participants, because they were subject to public interest privilege. In its

decision, relying on the precedents in *NutraSweet*, *Southam* and *Hillsdown FCA*, the Federal Court of Appeal repeatedly confirmed the existence of a "privileged class" for documents received or prepared by the Director, of a "class of documents which should enjoy public interest privilege" (*Nielsen FCA* at paras 3, 4 and 7).

[40] It is worth reproducing the following relevant paragraphs from the Federal Court of Appeal's decision:

> 2. McKeown J., presiding judicial member refused to order production on the grounds that such documents had been held by the Tribunal in previous cases to be protected from disclosure by a public interest privilege. He repeated the policy considerations which support this privilege: namely that the Director has to be able to obtain information from the relevant industry in performing his functions under the Competition Act. To gain the cooperation of people in the industry he must be able to gather information in confidence, his informants not being identified unless of course they are called as witnesses in a proceeding before the Tribunal. He also noted that the appellant had been given ample opportunity to learn of the nature of these documents and of the case which it has to meet, without having the actual documents. The Director had provided the appellant with summaries of all these documents including the information obtained from those in the industry but excluding names of sources. The Tribunal offered to arrange for a judicial member not sitting on this case to review the documents and the summaries to ensure the accuracy of the latter, if the appellant so requested. It has not so requested. Apart from this information, the appellant has had examination for discovery and discovery of documents of both the Director and of the complainant. It also has been given a list of witnesses and summaries of their anticipated evidence three weeks prior to their appearance, all in accordance with Tribunal orders.
>
> 3. I am satisfied that the learned presiding judicial member correctly followed and applied previous Tribunal decisions in finding such documents to be within a privileged class. […] This principle, that certain material generated in the Director's investigation can be protected from disclosure by a public interest privilege, was followed by the Tribunal in dealing with the scope of examination for discovery in *Director v. Hillsdown Holdings (Canada) Limited et al*. On appeal this Court upheld that decision of the Tribunal and quoted with approval the passage from the Tribunal decision in *Southam* (supra) relied upon by the Tribunal in *Hillsdown*, in which Reed J. had expressed the rationale for a class privilege applying to interview notes.
>
> 4. It therefore appears that not only is McKeown J.'s decision in this case consistent with earlier decisions of the Tribunal, but also that this Court has already endorsed that approach by the Tribunal. In recognizing a class of documents which should enjoy public interest privilege it appears to me that the Tribunal has acted well within established principles of the law of evidence. It has decided to bring such documents within the class of documents which, as communications to government agencies by outside sources, should

be protected in order to enable that agency to obtain necessary information. While evidence might be helpful to the Tribunal to decide that such a privilege is necessary, courts have reached such conclusions on the basis of their own analysis of the purpose of legislation and its functioning. The Tribunal did in fact have evidence before it here, the affidavit quoted above, to the effect that these documents were obtained in confidence. While that information in the affidavit is sparse, it has not as far as I am aware been successfully challenged.

5. I would also observe that in the light of recent Supreme Court jurisprudence 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. The establishment and definition of a class of documents privileged from disclosure in discovery proceedings involves in these cases a balancing of two public interests: that of full disclosure for the best administration of justice, and that of protection of sources which are necessary for administration of the law. This balancing must be done by the Tribunal within the particular context of a proceeding under the *Competition Act*, and its assessment of the relative public interests at stake must depend in part on its special expertise in the problems of protecting competition in the market place. A court should not lightly substitute its own views of the proper balance in these circumstances.

[…]

7. Nor do I think the *Gruenke* decision in any way affects the validity of earlier jurisprudence of the Tribunal or of this Court on the existence of a class privilege. *Gruenke* confirms that there may be a class privilege for documents or they may be found privileged on a case by case basis. That is not *per se* inconsistent with the decision of the Tribunal in the present case which found that the documents in question belong to a privileged class. The Supreme Court confirmed in *Gruenke* that classes are created as a matter of policy. There has long been a recognized class of privileged communications in the common law involving information provided to police and to other public officials, in circumstances where it is desirable to protect sources in order not to discourage the continuing provision of such information necessary to the administration of laws. The Tribunal in this and other cases has simply found as a matter of policy that complaint and investigation materials acquired by the Director in certain proceedings under the *Competition Act* belong to a privileged class. That, in my view, was within the competence of the Tribunal to decide as an adjudicator of fact and law. *Gruenke* contemplates that such decisions can be made. The case by case method, it was said there, does not "preclude the identification of a new class on a privileged basis". While one should not become snared by semantics, what the Tribunal has done probably does not

> even go that far it has simply ascribed certain documents to an already recognized public interest class, by way of analogy to other documents already recognized as being within that class.
>
> [emphasis added]

[41] The decision is short but it is comprehensive. In its reasons, the Federal Court of Appeal encapsulated numerous key elements of the Commissioner's public interest privilege in the context of the Act. These are:

(a) as a policy rationale for the privilege, it stated that "as communications to government agencies by outside sources, [documents within that class] should be protected in order to enable that agency to obtain necessary information";

(b) the Director has to be able to obtain information from the relevant industry "in performing his functions under the [Act]";

(c) the necessity of the class privilege recognized to the Commissioner was based on the Tribunal's "own analysis of the purpose of legislation and its functioning";

(d) establishing a class privilege involves a balancing of two public interests, "that of full disclosure for the best administration of justice, and that of protection of sources which are necessary for administration of the law";

(e) there is a recognized class of privileged communications "involving information provided to police and to other public officials, in circumstances where it is desirable to protect sources in order not to discourage the continuing provision of such information necessary to the administration of laws"; and

(f) mechanisms put in place by the Tribunal to give respondents an opportunity to know about the nature of the otherwise privileged documents include the provision of summaries by the Director; the offer to arrange for a judicial member not sitting on the case to review the documents and the summaries; examination for discovery and discovery of documents; and the provision of a list of witnesses and summaries of their anticipated evidence prior to the hearing.

[42] As discussed in more detail below, it is my view that this seminal decision of the Federal Court of Appeal on the issue of the Commissioner's public interest privilege contains all the ingredients and features that characterize and establish the uniqueness of the Commissioner's class-based public interest privilege in the context of the Act.

iii. The more recent cases

[43] Since the Federal Court of Appeal's decision in *Nielsen FCA*, I have counted at least 10 decisions from the Tribunal and three superior court cases that have confirmed the analysis of the Court and the status of the Commissioner's public interest privilege in the context of the Act as a class-based privilege.

[44] In *Washington*, Mr. Justice McKeown confirmed the existence of the privilege "given the various Tribunal decisions affirmed by the Court of Appeal dealing with this very issue", though he did not specifically discuss whether a class privilege existed as such (*Washington* at 2). He however stated that it "would be difficult to argue against the existence of the privilege" (*Washington* at 2). Also worth noting is the fact that the Tribunal determined that the privilege extended to information and documents provided during section 11 investigations (*Washington* at 10-11). Mr. Justice McKeown indicated that section 11 of the Act is an investigative tool available to the Director and that "[p]rotecting the Director's ability to effectively use all the tools available to her in investigating potential competitive problems is in the public interest" (*Washington* at 10). He added that the presence of section 29 of the Act on confidentiality, with its particular reference to section 11, also underlines the public interest in keeping confidential the information acquired by the Director in this manner.

[45] In *Canadian Pacific 1*, the Tribunal again found no basis to support a claim that the privilege does not extend to information provided under compulsion of law, and instead concluded that it does (*Canadian Pacific 1* at para 8). In that decision, Mr. Justice Noël (as he then was) further offered a slightly different policy rationale for the Director's privilege, namely providing the ability to maintain control over the information entrusted to him as part of his duty to enforce the Act: "[i]n claiming the privilege, the Director must ultimately be guided by his duty to apply the Act with the result that, whether obtained voluntarily or under compulsion of law, there is always a possibility that information will be disclosed beyond what the source of the information would like. What the privilege accomplishes, however, is that it gives the Director the ability to maintain control over information entrusted to him, thereby minimizing the risk of disclosure and preserving the effectiveness of the investigative process" (*Canadian Pacific 1* at para 7). In that decision, the Tribunal thus referred explicitly to the Commissioner's duty under the Act and to the preservation of the effectiveness of the investigation process contemplated in the Act, as grounds to base his claims of public interest privilege.

[46] In *Canadian Pacific 2*, the Tribunal did not discuss the class privilege status as such but Mr. Justice McKeown expressly stated that "[t]he Tribunal has long recognized that there is a public interest in protecting the sources of information provided to the Director in the course of his inquiries" (*Canadian Pacific 2* at para 9). Similarly, in *Superior Propane*, Mr. Justice Rothstein (as he then was) stated that "[i]t is well established that there is a public interest in protecting the sources of information provided to the Director in the course of his inquiries" (*Superior Propane* at para 5).

[47] The *UGG 1* decision provided a most comprehensive review of the genesis and history of the Commissioner's public interest privilege. In that decision, Mr. Justice Lemieux commenced his analysis by providing an overview of the historical policy considerations relied on in previous Tribunal and Federal Court of Appeal decisions, including *Nielsen FCA, Hillsdown FCA* and *Washington*. I can do no better than reproduce the following extracts from Mr. Justice Lemieux's reasons:

> [38] Counsel for the Commissioner replies that the existence of the public interest privilege attaching to the Commissioner's investigation is a recognized class privilege which he need not justify on a case-by-case basis in each proceeding before the Tribunal. The public interest privilege was initially

> determined by Justice Reed in *Nutrasweet*, cited above at paragraph 36, on the basis of meeting the Wigmore test and reiterated by her in the Southam case, cited above at paragraph 22, without alluding to the Wigmore test. Specific advertence and consideration of the Wigmore test is only necessary, she argued, when a new class of privilege is sought to be established relying on several Supreme Court of Canada's decisions.
>
> […]
>
> [39] In my view, counsel for the Commissioner expresses the correct view on this issue — the existence of a recognized class privilege generally attaching to the Bureau's investigation conducted under the Act for the purpose of enforcing that statute obviates the necessity of establishing at the discovery stage in each proceeding before the Tribunal on a case-by-case basis the existence of this privilege.
>
> [emphasis added]

[48] The Tribunal thus refers to a "recognized class privilege generally attaching to the Bureau's investigation conducted under the Act for the purpose of enforcing that statute", directly linking the privilege to the Commissioner's mandate in the enforcement of the Act and to the investigation process under the Act. Mr. Justice Lemieux also explained that the rationale for the privilege is not only to protect informants from fear of reprisals. It also "includes protecting from information disclosure, subject to the constraints of use at trial, so as to encourage information providers to be forthcoming and candid about what they say to the Bureau" (*UGG 1* at para 60), thus reaffirming the candour argument relied on in the earlier cases.

[49] In a second decision issued in the same matter, Madam Justice Dawson (as she then was) confirmed the status of the Commissioner's public interest privilege as a class privilege (*UGG 2* at paras 4-5).

[50] In *Sears*, the Tribunal further discussed the rationale underlying the public interest privilege and the policy reasons at stake, echoing the analysis retained in previous decisions. Madam Justice Dawson stated that the public interest privilege "is supported by the policy considerations that the Commissioner must be able to obtain information from the relevant industry in performing his function under the Act" (*Sears* at para 35). And to gain that cooperation from people in the industry, the Commissioner must be able to gather information in confidence.

[51] In *TREB*, Madam Justice Simpson referred to the policy consideration underlying the Commissioner's public interest privilege in the following terms, reinforcing confidentiality and fear of reprisals as the salient grounds for the privilege: "public interest privilege exists so that complainants and other members of an industry will cooperate with the Commissioner because they can be confident that what they tell her will be kept in confidence unless they are called to testify. This confidentiality means that those who cooperate with the Commissioner need not fear reprisals and that the Commissioner's inquiry will be comprehensive and effective" (*TREB* at para 6).

[52] In *Air Canada*, Mr. Justice Rennie (as he then was) once again recognized the public interest privilege as a privilege over a "class of documents, created or obtained during the course of [an investigation]", and extended it to information gathered by the Competition Bureau from Canadian or foreign government agencies and to information gathered from an intervenor (*Air Canada* at para 3). The Tribunal thus tied the existence of the privilege to documents created or obtained during the course of investigations conducted by the Commissioner and added that the rationale for the privilege could not be limited to the sole fear of reprisals. The rationale also included "protecting from information disclosure, subject to the constraints of use at the hearing, so as to encourage information providers to be forthcoming and candid in their discussions with the Bureau" (*Air Canada* at para 5).

[53] In *Direct Energy*, Mr. Justice Rennie found that the Commissioner's summaries of privileged documents were sufficient. While there was no specific discussion of establishment of a class in that decision, the Tribunal looked at the issue of procedural fairness, stating that the "right of a respondent to a fair hearing means that the respondent has the right to know the case against it and the right to have a meaningful opportunity to present evidence supporting its own case" (*Direct Energy* at para 16).

[54] The decisions of the Canadian superior courts dealing with the Commissioner's public interest privilege are to the same effect.

[55] In *Chatr*, Mr. Justice Marrocco from the Ontario Superior Court observed that the public interest privilege in the context of the Act developed "in its own unique way" and that the Federal Court of Appeal has recognized "a class-based public interest privilege attaching to documents collected by the Competition Bureau during the course of an investigation" (*Chatr* at para 15). In essence, the Court noted, public interest privilege is needed to allow the Commissioner to perform his functions under the Act, and the exercise of these functions requires obtaining information through investigations, which in turn relies on the cooperation of people in the industry who count on the fact that the information is provided in confidence (*Chatr* at para 18). On that basis, Mr. Justice Marrocco confirmed that all documents created or obtained by the Commissioner in the course of an inquiry were presumptively protected by a class privilege.

[56] This was also affirmed by the Ontario Superior Court in *Toshiba* in the following terms: "documents created or obtained during the course of an investigation by the Commissioner are subject to a well-established public interest privilege which is not easily displaced" (*Toshiba* at para 27).

[57] Finally, in the most recent decision issued in January 2016, the Supreme Court of British Columbia remarked that "public interest privilege in the context of the Act has developed in its own unique way" and is a "well-established principle" which has been in place for many years (*Pro-Sys* at para 25).

iv. The foundations and attributes of the Commissioner's public interest privilege

[58] What are the lessons to be drawn from this unanimous line of cases?

[59] I retain two. First, even though it is now almost 23 years old, the decision of the Federal Court of Appeal in *Nielsen FCA* embodies all the particular elements and features that have contributed to establish the Commissioner's class-based public interest privilege in the context of the Act, and that have been retained in total or in part in the subsequent cases. This is evidently of fundamental importance in light of the *stare decisis* principle, discussed below, that I am required to follow. Second, as the Commissioner correctly pointed out in his submissions, the case law makes it clear that what underlie the class-based nature of the Commissioner's public interest privilege and the need for confidentiality are the candour consideration and the fear of retribution or reprisal. But it is not just those two factors looked at in a vacuum. A class privilege is said to be necessary to allow the Commissioner to exercise his functions under the Act. It is intimately tied to the Commissioner's mandate and to the very purpose of the Act that the Commissioner is tasked to administer and enforce. In other words, policy considerations stemming from the Commissioner's mandate under the Act support the existence of a class privilege.

[60] In brief, the reasoning behind the Commissioner's class-based public interest privilege can be summarized as follows.

[61] The purpose of the Act, set out in section 1.1, is to "maintain and encourage competition in Canada", in all sectors of the economy, so as to provide for, among other things, an efficient and adaptive economy, competitive prices and product choice for consumers. In order to fulfill his mandate, the Commissioner has to conduct investigations in the marketplace. The Act provides him with various tools to obtain information in the context of these investigations, voluntarily or through compulsory methods set out in various sections of the Act, including section 11.

[62] 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 to 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.

[63] The Act indeed recognizes the need for confidentiality, as section 10 of the Act requires that the Commissioner conduct inquiries in private. Section 29 of the Act further states that, subject to two exceptions (i.e., communications to a Canadian law enforcement agency or for the purpose and administration of the Act), information provided voluntarily or under compulsion and the identity of the person providing such information shall be maintained in confidence by the Commissioner. The Commissioner publicly recognizes that maintaining confidentiality is fundamental to his ability to pursue his responsibilities and essential to upholding the integrity of the Competition Bureau as a law enforcement agency (see Competition Bureau, *Information Bulletin on the Communication of Confidential Information under the Competition Act*, September 30, 2013 (the "**Bulletin**") at sections 3.1-3.6).

[64] Having a class-based public interest privilege ensuring confidentiality of the documents and communications provided to or prepared by the Commissioner is about protecting and facilitating the Commissioner's particular investigation process and his ability to administer and enforce the Act. It is also about protecting the Commissioner's particular relationship with third parties from whom the Commissioner needs to obtain information in order to conduct his investigations and to carry out his responsibilities under the Act.

[65] As illustrated by the various decisions mentioned above, the policy considerations and rationales identified to support the Commissioner's public interest privilege have included: "to protect the effectiveness of [the Commissioner's] investigations" (*Southam*); the protection of "communications to government agencies by outside sources" in order to "enable that agency to obtain necessary information" (*Nielsen FCA*); allowing the Commissioner "in performing his functions under the [Act]" (*Nielsen FCA*; *Sears*); "preserving the effectiveness of the investigative process" (*Canadian Pacific 1*); attaching a privilege "to the Bureau's investigation conducted under the Act for the purpose of enforcing that statute" (*UGG 1*); and ensuring that "the Commissioner's inquiry will be comprehensive and effective" (*TREB*).

[66] I would add this.

[67] Under the Act, the Commissioner's mandate is a *public interest mandate*. It is well established that the Commissioner has the general responsibility to enforce the provisions of the Act and to protect the public interest in respect of competition in Canada, in the manner conferred upon him by the Act (*Air Canada v Canada (Commissioner of Competition)*, 2002 FCA 121 at para 25; *Kobo Inc v The Commissioner of Competition*, 2015 Comp Trib 14 ("***Kobo***") at para 65; *The Commissioner of Competition v Parkland Industries Ltd*, 2015 Comp Trib 4 ("***Parkland***") at para 59; *The Commissioner of Competition v The Canadian Real Estate Association*, 2015 Comp Trib 3 at para 25; *The Commissioner of Competition v Direct Energy Marketing Limited*, 2015 Comp Trib 2 at para 43; *Sears* at para 18).

[68] The Commissioner has the statutory obligation to conduct inquiries into allegedly anti-competitive conduct, the discretion to initiate civil legal proceedings before the Tribunal and other courts when he considers it necessary in order to carry out his responsibilities, and the powers to enforce the Act. In his investigative functions and in taking actions to maintain and

encourage competition in Canada, he acts in the public interest. In other words, the Commissioner is the guardian of the public interest in competition matters, and this role is at the very heart of his mandate. In exercising his statutory mandate, the Commissioner benefits from a presumption that actions taken in the administration of the Act are *bona fide* and in the public interest, and the Tribunal has frequently noted that significant weight should be given to these public interest considerations and to the statutory duties carried out by the Commissioner (*Kobo* at para 65; *Parkland* at para 59; *Kobo Inc v The Commissioner of Competition*, 2014 Comp Trib 14 at para 32; *The Commissioner of Competition v Pearson Canada Inc*, 2014 FC 376 at para 43; *Rona Inc v Commissioner of Competition*, 2005 Comp Trib 26 at para 17; *Commissioner of Competition v Superior Propane Inc*, 2002 Comp Trib 16 at para 28; *Canada (Director of Investigation and Research) v Superior Propane Inc*, [1998] CCTD No 20 at para 19).

[69] Contrary to what counsel for VAA suggests, I do not view this as a "shaky foundation" for the Commissioner's class-based public interest privilege. Quite the opposite. I instead find, as the Tribunal, the Federal Court of Appeal and Canadian superior courts have found before me, that the policy considerations and policy rationales summarized above offer a strong foundation to justify the existence of a class-based public interest privilege for the Commissioner in the context of the Act.

[70] This also illustrates well why the Commissioner's public interest privilege in the context of the Act has indeed developed in a "unique way". It reflects the particular context of the Commissioner's mandate. What has been recognized by the case law as a class-based privilege is not just any form of public interest privilege, it is the *specific* public interest privilege of the Commissioner in the context of the Act.

[71] VAA takes particular exception with the considerations of candour and the need for confidence that have been advanced to justify the Commissioner's public interest privilege. It says that this argument makes no sense because section 29 of the Act allows the Commissioner to disclose information whenever he initiates proceedings in the enforcement of the Act. VAA thus argues that a person providing information to the Commissioner as part of an investigation can have no reasonable expectation of confidentiality, and that there is no basis to assert that third parties expect their communications to be held in confidence if a proceeding is commenced before the Tribunal. VAA adds that the Tribunal itself has recognized that, in light of section 29, third parties coming forward and providing documents and information to the Commissioner have no common understanding or legitimate expectation of confidentiality (*Director of Investigation and Research v Air Canada*, [1993] CCTD No 4 ("***Air Canada 1993***") at para 7). VAA also invokes section 3.4 of the Bulletin in support of its position that section 29 of the Act provides no assurance of confidentiality.

[72] I do not agree with VAA's submissions on this point.

[73] The fact that section 29 of the Act imposes limits on the expectation of confidentiality does not mean that the relationship between the Commissioner and the third parties does not originate in confidence nor does it imply that the confidentiality expectation is not at the core of the relationship and of the Commissioner's investigation process. Expectations of confidentiality do not become non-existent because they are not absolute. Even if the assurance that the information provided by third parties to the Commissioner will remain confidential exists only

up until proceedings are brought before the Tribunal, it does not mean that there is no expectation of confidentiality at the time the information is provided to the Competition Bureau. It also does not mean that the confidentiality that is generally granted, within the understood limits described above, does not assist in encouraging parties to cooperate with the Commissioner. While section 29 creates a limit to the expectation of confidentiality, it does not negate its existence or its utility. In fact, first and foremost, section 29 sets out prohibitions on disclosure of information obtained or provided to the Commissioner, rather than weakening the protection that is expected by parties who may provide information to the Commissioner.

[74] Indeed, in *Air Canada 1993* cited by VAA and in the decisions where the Tribunal referred to the candour argument and the need to provide information in confidence, the Tribunal was mindful of the limits imposed by section 29. The Tribunal was not ignorant of that reality and consistently mentioned the fact that third parties cooperate because they are confident that their information will be kept in confidence *unless they are called to testify.*

[75] In the same vein, I do not accept VAA's proposition that third parties providing information under compulsory orders can have no reasonable expectation of confidentiality, and that the candour argument does not hold under those circumstances. Section 29 applies equally to the situation of such third parties and the confidentiality provisions of the Act make it clear that their information is protected (subject to the limits set out above) even if they provide it further to a Court order.

[76] VAA also asserts that, in the early cases where the candour argument and the fear of reprisal rationale were raised to support the Commissioner's public interest privilege (e.g., *NutraSweet* and *Southam*), there did not appear to be evidence that the complainants had genuine or well-founded fears that their identities would become known, or that they had requested to keep their identities secret or received any form of assurance from the Director that their identities and information would not be revealed. I am not persuaded by these arguments. No details or evidence have been provided to support that position, and I am not ready to second-guess the factual findings made years ago by the Tribunal in those early decisions, or to draw from the wording used in the Tribunal's reasons that the evidence then relied on by the Tribunal may have been lacking or insufficient. I would add that the assurance of confidence is expressly provided for in the Act itself, at section 29, subject to the limits mentioned above. I further observe that, in *Nielsen FCA*, the Federal Court of Appeal specifically mentioned the presence of such evidence, even though it was described as sparse.

[77] With respect to the subsequent cases, as was stated by Mr. Justice Lemieux in *UGG 1*, once it has been determined that the Commissioner's public interest privilege is a class-based privilege, there is no need of establishing, at the discovery stage of each case brought before the Tribunal, the existence of this privilege or the evidentiary basis justifying its rationale or its purpose of protecting the confidentiality of information. Once it has been determined that a document or communication falls within the class of documents covered by the privilege, the privilege applies unless an exception (e.g., a "compelling circumstance") arises.

[78] For all those reasons, I am not convinced that the foundations for the Commissioner's class-based public interest privilege in the context of the Act are wrong or unconvincing, or that the conclusions reached by the Tribunal, the Federal Court of Appeal and the Canadian superior

courts on this issue need to be revisited.

[79] I acknowledge that some Tribunal cases may have created some confusion since they appear to import or mix the Wigmore criteria into their analysis even though those are typically associated with the assessment of case-by-case privileges (e.g., *NutraSweet*; *Canadian Pacific 1*; *Air Canada*). However, when these decisions are reviewed as a whole and put into context, I am satisfied that the apparent dissonance they contain does not allow one to infer that the Tribunal was in fact contemplating the existence of a form of case-by-case privilege in these cases. It may have been an unfortunate choice of terms, blurring the distinction between, on one hand, the balancing of interests which is to be conducted for case-by-case privileges and, on the other hand, the weighing of policy considerations that courts are invited to undertake for determining the existence of a class privilege. What ultimately transpires, though, is the fact that the Commissioner's public interest privilege rests on public interest policy considerations that are typical of class privileges.

v. Safeguard mechanisms and compelling circumstances

[80] Another important observation needs to be made. The specificity of the Commissioner's class-based public interest privilege in the context of the Act does not stop at the policy considerations stemming from the Commissioner's mandate.

[81] In addition to articulating the rationale and policy considerations underlying the Commissioner's public interest privilege in the context of the Act, the decisions issued by the Tribunal, the Federal Court of Appeal and the courts since 1989 have also identified two other important features characterizing the Commissioner's privilege. In my view, these are material elements illustrating the "unique way" in which the Commissioner's privilege has developed. In this regard, I refer to the safeguard mechanisms put in place by the Tribunal to temper the adverse impact of the limited disclosure and the high threshold (e.g., compelling circumstances or compelling competing interest) required to authorize lifting the privilege. These two elements cannot be divorced from the policy considerations on which the privilege is anchored.

[82] First, starting with its early decisions on the Commissioner's claims of public interest privilege, the Tribunal has repeatedly discussed the special mechanisms put in place to address the legitimate concerns for the search for the truth and for the right to a fair hearing raised by this limit imposed on the full disclosure of relevant documents and communications. Over the years, the Tribunal has thus consistently discussed and referred to the particular safety valves and safeguards endorsed by the Tribunal to compensate for the limited disclosure of information resulting from the Commissioner's claims of public interest privilege. There is no doubt, in my view, that these safeguard mechanisms have been a key element of the Tribunal's treatment of the Commissioner's public interest privilege and indeed form an integral part, in the Tribunal's reasons, of the class recognition awarded to the Commissioner's privilege (e.g., *Washington* at 5).

[83] These safeguard mechanisms have taken three main incarnations.

[84] The Tribunal decisions have first established that the Commissioner should provide, prior to the start of examinations for discovery, complete summaries of the privileged information,

including not merely information which supports his case but also information which favours the respondent (*Southam* at paras 28-31; *Nielsen CT* at pp 7-8; *Washington* at 5; *Canadian Pacific 1* at paras 2, 15; *Canadian Pacific 2* at paras 9-11; *Superior Propane* at para 5; *UGG 1* at para 19; *Sears* at para 22; *TREB* at para 7; *Air Canada* at para 6; *Direct Energy* at paras 11, 15). In *Superior Propane*, Mr. Justice Rothstein, when referring to the practice of providing summaries of the information obtained, underlined its purpose of disclosing facts to assist respondents in the preparation of their case (*Superior Propane* at para 5).

[85] The Tribunal has also mentioned, as a second safeguard mechanism, the fact that if, after receipt of the summaries and the discoveries, the respondent is of the view that the information provided is otherwise incomplete or that the summaries are inadequate or insufficient, the Tribunal would arrange for a judicial member of the Tribunal not sitting on the panel that eventually hears the application to review the documents and summaries in order to determine whether the suspicion is well founded and to ensure the adequacy and accuracy of the summaries (*Southam* at paras 28-31; *Nielsen CT* at 7-8; *Canadian Pacific 1* at paras 2, 15; *Air Canada* at para 8; *Direct Energy* at para 11).

[86] A third safeguard mechanism is the fact that, if a third party is to testify at the hearing and if the Commissioner is to rely on his or her evidence, a full witness statement and all relevant documents relating to the testimony are to be provided by the Commissioner to the respondent before the hearing (*Superior Propane* at para 8; *TREB* at para 7; *Direct Energy* at para 15). In other words, no claims of public interest privilege will be maintained on documents relied on by the Commissioner to support his case.

[87] Quite significantly, the seminal decision of the Federal Court of Appeal in *Nielsen FCA* indeed mentioned each of those safeguards mechanisms in place to support and frame the Commissioner's public interest privilege in the context of the Act (*Nielsen FCA* at para 2).

[88] The second point worth mentioning are the frequent references to the "compelling" circumstances allowing one to circumscribe the reach of the Commissioner's public interest privilege in the context of the Act. Throughout the various decisions, the Tribunal and the courts have repeatedly signalled that the public interest privilege of the Commissioner is not absolute and can be overridden by "compelling circumstances" or by a "compelling competing interest". The presence of such exceptions may require a lifting of the privilege.

[89] Very early, in *Southam*, Madam Justice Reed established that there may be certain circumstances where the Commissioner's public interest privilege could be pierced. However, she stated that "it is difficult to conceive of a situation where this would be so", thus setting a high threshold for such situations (*Southam* at para 27). References to the requirements of "fairly compelling circumstances to outweigh the public interest element", to the public interest privilege prevailing "unless overridden by a more compelling competing interest" and to the adoption of the high standard for overriding the privilege further to *Southam* were made by the Tribunal in numerous decisions (e.g., *Washington* at 5; *Canadian Pacific 1* at paras 5-6; *UGG 1* at paras 51-53; *Sears* at para 40; *Air Canada* at para 7; *Direct Energy* at para 14).

[90] In *Sears*, Madam Justice Dawson notably expressed the test as follows: "public interest privilege will prevail unless over-ridden by a more compelling competing interest, and fairly

compelling circumstances are required to outweigh the public interest element" (*Sears* at para 40). In that decision, fairly compelling circumstances sufficient to outweigh the public interest element were found to exist with respect to the two remaining documents still being subject to the Commissioner's claim of public interest privilege. The compelling reasons resulted from evidence showing that (1) the investigation was completed; (2) little information remained confidential; (3) each deponent was to testify at the hearing; and (4) the lack of fairness in refusing to disclose a "relevant" document on the basis that the Commissioner was not going to rely on it (*Sears* at paras 40-41). Conversely, in *UGG 1*, Mr. Justice Lemieux observed that the various factors listed by counsel for UGG were insufficient for the proper exercise of the Tribunal's discretion to set aside a privilege whose foundation has been recognized to be in the public interest (*UGG 1* at paras 42-65).

[91] The *Toshiba* decision also stated that the public interest privilege will prevail unless overridden by a more compelling competing interest (*Toshiba* at para 27). In *Chatr*, Mr. Justice Marrocco referred to the "more compelling competing interest" mentioned in *Sears*, making a parallel with the Supreme Court decision in *A (LL) v B (A)*, [1995] 4 SCR 536 ("***LL***") where the Court, in its discussion of the notion of class privilege in a context other than the public interest privilege (i.e., therapy counselling), stated that there is a heavy onus on a party attempting to override a class privilege (*Chatr* at para 20). I note that this assessment of the existence of compelling circumstances or competing interest is done after the provision of the Commissioner's summaries, as the Tribunal needs to factor in these summaries in its review and analysis (*Southam*; *Hillsdown CT*). When the privilege is overridden, it will typically be on the condition that the documents remain protected by a confidentiality order.

vi. Conclusion

[92] In *Nielsen FCA*, the Federal Court of Appeal stated that the establishment of a class privilege involves the weighing of two public interests, namely the full disclosure for the best administration of justice balanced against the protection of sources necessary for the administration of the law. It is clear to me that the Tribunal's systematic consideration of safeguard mechanisms and compelling circumstances has been instrumental to its determination of the class-based nature of the Commissioner's public interest privilege in the context of the Act. It reflects the fact that the Tribunal and the Canadian courts carefully scrutinized the relevant considerations before recognizing a class privilege, and that they conducted the appropriate weighing exercise before finding the existence of a class privilege.

[93] When considering the policy considerations at the source of the privilege, the safeguard mechanisms to alleviate the limited disclosure and the compelling circumstances needed to lift the privilege, I am satisfied that the case law establishes sound foundations and the necessary attributes supporting the class-based nature of the Commissioner's public interest privilege in the context of the Act. Despite the able arguments made by counsel for VAA, I am not persuaded that they provide sufficient grounds to reverse the unanimous line of decisions on the Commissioner's privilege.

2. The Tribunal's approach fits with the Supreme Court's teachings on class privileges

[94] I also disagree with VAA's suggestion that the recent decisions of the Supreme Court on privileges, and in particular *R v National Post*, 2010 SCC 16 ("***National Post***"), have changed the law and considerably narrowed the scope of common law class privileges, to the point where the Commissioner's public interest privilege in the context of the Act would now fall outside the scope of class privileges recognized in our law. I do not dispute that the law and legal thinking continue to evolve and that courts should remain alert and sensitive to such evolution. However, my review of the laws of privilege and of the Supreme Court's jurisprudence on class privileges does not lead me to conclude that the *National Post* case is the game changer portrayed by VAA. On the contrary, I am instead satisfied that the Commissioner's public interest privilege continue to have the necessary attributes to be qualified as a class privilege, alongside the other class privileges recognized by the courts.

[95] I observe that, whereas numerous Supreme Court decisions have addressed the question of class privileges in various contexts (e.g., *Lizotte*; *National Post*; *R v Basi* 2009 SCC 52 ("***Basi***"); *Blank v Canada (Minister of Justice)*, 2006 SCC 39 ("***Blank***"); *R v Leipert*, [1997] 1 SCR 281 ("***Leipert***"); *LL*; *R v Gruenke*, [1991] 3 SCR 263 ("***Gruenke***")), the Supreme Court has not yet directly considered the issue of whether or not a common law public interest privilege can be qualified as a class privilege. Therefore, the precedents on class privileges can only be used here by analogy. I concede that analogies are never perfect, but they can nonetheless be informative.

i. Class and case-by-case privileges

[96] It is helpful to look at the Commissioner's public interest privilege in the larger perspective of privileges in general.

[97] Privilege is a rule of law of evidence allowing one to prevent the disclosure, in legal proceedings, of otherwise probative and trustworthy evidence that is relevant to the issues at stake but that must be excluded "to serve other overriding social interests" (*LL* at para 33). Privileges are exceptions to the general rule stating that the public has the right to every person's evidence (*National Post* at para 1). Since privileges preclude the obtaining and tendering of evidence and obstructs the truth-finding process of trial procedure, they are thus limited (*LL* at para 33).

[98] There are two types of privilege: class privileges and case-by-case privileges (*Lizotte* at para 32; *LL* at para 39; *Gruenke* at 286 and 297). The attributes of the common law class and case-by-case privileges have been developed by the Supreme Court in several cases, notably in *Gruenke*, *LL*, *National Post* and most recently *Lizotte*.

[99] Class privilege designates a privilege recognized at common law and for which there is a *prima facie* presumption of inadmissibility once it has been established that a particular relationship fits within the class. The documents and communications covered by class privileges are excluded "not because the evidence is not relevant, but rather because there are overriding policy reasons to exclude this relevant evidence" (*Gruenke* at 286). In *LL* and in *M (A) v Ryan*,

[1997] 1 SCR 157(“***Ryan***”), Madam Justice L’Heureux-Dubé noted that establishing a class privilege involves a weighing exercise of policy considerations. In essence, determining whether a class privilege exists requires “a careful weighing of the policy arguments for a class privilege in this context against the detrimental effects of such a privilege on the administration of our justice system” (*Ryan* at para 51). In order for a class privilege to attach, “compelling policy reasons must exist, similar to those underlying the privilege for solicitor-client communications, and the relationship must be inextricably linked with the justice system” (*LL* at para 39). In the same spirit, the Supreme Court has also indicated that “the policy reasons to support a class privilege for religious communications [had to be] as compelling as the policy reasons which underlay the class privilege for solicitor-client communications”, failing which “there is no basis for departing from the fundamental ‘first principle’ that all relevant evidence is admissible until proven otherwise” (*Gruenke* at 288; *National Post* at para 42).

[100] In a class privilege, what is important is not so much the content of the particular communication but the protection of the relationship. However, a class privilege can also exist where the purpose is not solely to protect a relationship but to facilitate a process. In *Lizotte*, the latest pronouncement of the Supreme Court on the issue of privileges, the Court indeed confirmed the status of litigation privilege as a class privilege, even though litigation privilege has for its purpose to facilitate a process (i.e., the adversary process) rather than to protect a relationship (*Lizotte* at para 36).

[101] Once a class privilege is recognized, there is no need to balance competing interests as contemplated by the Wigmore test as this “exercise of balancing competing interests is associated with case-by-case privileges (*National Post* at para. 58), not class privileges” (*Lizotte* at para 39). A class privilege is therefore more rigid and “does not lend itself to the same extent to be tailored to fit the circumstances” (*Lizotte* at para 32, citing *National Post* at para 46).

[102] Conversely, privileges established on a case-by-case basis refer to communications and documents for which there is a *prima facie* presumption that they are <u>not</u> privileged and are instead admissible, but which can be excluded in a particular case if they meet the four requirements of the Wigmore test. The analysis to be conducted to establish a case-by-case privilege requires that the reasons for excluding otherwise relevant evidence be weighed in each particular case (*Gruenke* at 286). The fact that, for class privileges, there is no need to balance competing interests using the Wigmore criteria is an important difference between class privilege and case-by-case privilege.

[103] I pause to note that, while they bear some resemblance, the balancing of interests forming part of the Wigmore test (i.e., the fourth criteria) is not to be confused with the weighing exercise contemplated for the establishment of class privileges. In determining whether a class privilege exists, the weighing exercise looks at two public interests: (1) the policy considerations underlying the claim of privilege for the class and the public interest they raise are compared against (2) the public interest in the search for the truth and the general right to full disclosure. This is indeed what the Federal Court of Appeal expressly referred to in *Nielsen FCA* (at paragraph 5). However, in conducting the “balancing of interests”, under the Wigmore approach, to assess whether a case-by-case privilege arises regarding a specific communication or document, what is being compared has a narrower, case-specific focus. Public interest still is a factor but the “balancing of interests” involves (1) potential injury to the particular relationship

caused by the disclosure of the communication or document and (2) the benefit of that disclosure with respect to the particular litigation at stake. The two exercises both require some form of weighing and they overlap to a degree, but they remain different.

[104] That being said, as counsel for VAA correctly pointed out, so high is the threshold of class privilege and so serious is the potential adverse effect on the search for the truth that the Supreme Court has suggested that no new class privileges will likely be recognized by the courts. Rather, any such expansion of class privilege should be left to the legislators (*National Post* at para 42).

[105] The courts have indeed limited the recognition of class privileges in order to favour the search for the truth in the judicial system. As such, few class privileges have been identified by the Canadian courts over the years (*Lizotte* at para 42; *LL* at para 37). The Supreme Court has expressly recognized the following class privileges: litigation privilege, solicitor-client privilege, settlement privilege and informer privilege. In *Lizotte*, the Supreme Court indeed referred to those four class privileges and notably confirmed the class status of litigation privilege.

[106] In each case, well-identified underlying policy reasons justify the class privileges. These policy reasons are generally so paramount to the judicial process that they have been considered as being more important than the detrimental effect of not knowing the redacted information. For example, solicitor-client privilege is based on the fact that "the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it" and protection of solicitor-client privilege is therefore "a necessary and essential condition of the effective administration of justice" (*Blank* at para 26). Litigation privilege ensures the efficacy of the adversarial process by maintaining a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate, and promotes the access to justice and the quality of justice (*Lizotte* at paras 22, 63). Settlement privilege protects the overriding public interest in permitting the "parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation" (*Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 ("***Sable***") at para 11). This has been found to reflect sound judicial policy and to contribute to the effective administration of justice (*Kelvin Energy Ltd v Lee*, [1992] 3 SCR 235 at 259). Turning to informer privilege, it serves to protect informants who assist in law enforcement and to encourage people to divulge information and report crime to the police, thus helping to maintain "an efficient police force and an effective implementation of the criminal law" (*Bisaillon v Keable*, [1983] 2 SCR 60 at 97; *Leipert* at para 9).

[107] Conversely, it is the lack of sufficient policy reasons that led the Supreme Court to conclude that religious communications (i.e., communications between a priest and a penitent) did not qualify as a class privilege (*Gruenke* at 288). When discussing why religious communications would not qualify as a class privilege, the Supreme Court stated that "the policy reasons which underlay the treatment of solicitor-client communications as a separate class from most other confidential communications, are not equally applicable to religious communications" (*Gruenke* at 288). Similarly, in *National Post*, journalistic sources were found not to have the attributes of class privileges, as it was not established that "the public interest in the protection of [journalistic] secret source(s) outweighs the public interest in the production of the physical evidence of the alleged crimes" (*National Post* at para 91). In *Canada (Citizenship*

and Immigration) v Harkat, 2014 SCC 37 ("***Harkat***"), the Supreme Court also ruled that individuals who provided information to the Canadian Security Intelligence Service ("**CSIS**"), referred to as human sources, were not protected by a class privilege and that the rationale for the police informer privilege did not extend to CSIS human sources (*Harkat* at para 80).

[108] Another feature of class privileges needs to be mentioned. When a class privilege has been established, the protection afforded to a document or a communication can only be lifted if it meets certain limited exceptions. A class privilege is not absolute but it is as close to absolute as possible, and it will only accept a limited number of well-defined exceptions (*Lizotte* at paras 41-42). Once a privilege is recognized as a class-based privilege, there is therefore a heavy onus on a party attempting to override it. In discussing these exceptions in *LL*, the Supreme Court stated that a party seeking disclosure of documents falling within a class-based privilege must show "that an overriding interest commands disclosure" (*LL* at para 39).

[109] For example, exceptions to litigation and solicitor-client privileges include harm to public safety and security, innocence of the accused, criminal communications and evidence of the claimant party's abuse of process or similar blameworthy conduct (*Lizotte* at para 41; *Blank* at para 44). In the case of settlement privilege, exceptions have been limited to situations where "on balance, 'a competing public interest outweighs the public interest in encouraging settlement'" and have included "allegations of misrepresentation, fraud or undue influence (…) and preventing a plaintiff from being overcompensated" (*Sable* at para 19). Turning to informer privilege, the only recognized exception is the "innocence at stake" exception (*Basi* at paras 22-23; *Leipert* at paras 20-21). This means that, once informer privilege is found to exist, no exception or balancing of interests is made except "if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence" (*R v Barros*, 2011 SCC 51 at para 28).

[110] In light of the above jurisprudence on privileges, it can be said that a privilege can be qualified as a class privilege if it has the following attributes: (1) the privilege exists to protect a particular relationship or a particular process; (2) there are sufficiently compelling, overarching policy considerations and the protection of these policy considerations must trump the inherent obstruction caused by the privilege to the usual truth-finding process; (3) the protection has a link with the justice system and an effective implementation of the law; and (4) only limited exceptions (e.g., compelling circumstances) reflecting illegal or abusive conduct or impairing the ability of the accused or respondent to answer the case against it can authorize overriding the privilege.

[111] As illustrated by the discussion in the previous section, I am satisfied that the Commissioner's public interest privilege in the context of the Act meets these attributes generally associated with class privileges in the jurisprudence: the privilege exists to protect the investigation process of the Commissioner under the Act as well as his particular relationship with third parties involved in the market affected by the alleged anti-competitive conduct; there are overarching policy reasons linked to the Commissioner's mandate that are sufficiently compelling to justify that the protection of these policy considerations prevail over the limits imposed on the usual truth-finding process; the protection is linked to the effective administration and implementation of the Act; safeguard mechanisms ensure that the limits to full disclosure are kept to a minimum; and the compelling circumstances and competing interests

allowing one to override the privilege are limited exceptions reflecting situations where the divulgation of the document or communication is absolutely necessary to the defence of the respondent or where no rationale for the privilege any longer exists.

ii. No change in the case law of the Supreme Court

[112] In their submissions, both in writing and at the hearing before the Tribunal, counsel for VAA insisted on the fact that the recent decisions of the Supreme Court on class privileges, and more specifically the *National Post* decision, have changed the treatment of class privileges and are sufficient to push the long-recognized class-based privilege of the Commissioner outside the boundaries of class privileges. While VAA recognizes that the Federal Court of Appeal has issued clear statements supporting the Commissioner's class privilege in *Hillsdown FCA* and *Nielsen FCA*, it claims that these decisions were issued before the express thinking of the Supreme Court in *National Post*. VAA submits that, in *National Post*, the Supreme Court has made it clear that class privileges can only exist in the most exceptional circumstances and that it has effectively narrowed the scope of class privileges.

[113] I disagree with VAA's reading of the evolution of the Supreme Court's teachings.

[114] True, class privileges are highly exceptional, rare and unlikely to grow, and the scope of class privileges has been narrowly interpreted by the courts. But, the Supreme Court has been consistently saying so ever since its decision in *Gruenke.* In my view, both *National Post* and *Lizotte* have simply reemphasized the exceptional nature of class-based privileges. They have not modified the test. I acknowledge that the Supreme Court warns that class privileges must be viewed with great caution, as they derogate from the search for the truth. However, I do not accept that *National Post,* or for that matter any subsequent decision of the Supreme Court, has established new principles or narrowed the approach, or signaled a change in the law in place since the *Gruenke* decision.

[115] More specifically, I am not convinced that, following the *National Post* decision, the Commissioner's public interest privilege in the context of the Act no longer fits with the definition of class privileges as developed or stated by the Supreme Court. In other words, I do not agree that, since the seminal decision of the Federal Court of Appeal in *Nielsen FCA*, the case law on class privilege has evolved to the point that the Commissioner's public interest privilege now falls outside the range of what is accepted as a class privilege. I observe in passing that *National Post* does not deal with public interest privilege, just as *Lizotte* does not either.

[116] I further point out that the Commissioner's class-based public interest privilege existed at the time the Supreme Court talked about future class privileges likely being created solely by the legislative process (*National Post* at para 42). I admit that this privilege is not as ancient as solicitor-client privilege or informer privilege. However, at the time the *National Post* decision was issued in 2010, it had nonetheless been recognized by the Tribunal and the Federal Court of Appeal for two decades.

[117] As rightly noted by counsel for the Commissioner at the hearing, the observations made by the Supreme Court in *National Post* and in other decisions are not about narrowing class-based privileges They are instead about how such privileges are exceptional. No new legal

principles or analysis of the class-based privileges have been established in *National Post*, or even in the most recent *Lizotte* case. These decisions simply represent the continuation of the approach set out in *Gruenke*, to which the Federal Court of Appeal expressly referred to in *Nielsen FCA*. When discussing the impact of *Gruenke* in its reasons, the Federal Court of Appeal concluded that this decision did not imply, at the time, that the recognition of the Commissioner's public interest privilege as a class-based privilege should be revisited (*Nielsen FCA* at para 7). I detect nothing in the subsequent *National Post* decision that could persuade me to reach a different conclusion today. In fact, I cannot help but observe that, when stating the exceptional nature of class privileges and their limited number, the Supreme Court in *National Post* quoted the *Gruenke* decision with approval (*National Post* at para 42).

[118] As exceptional as they may be, class privileges have not been declared moribund by the Supreme Court.

[119] In my view, not only is there no support for the argument that *National Post* changed the basic tenets of the law on class privileges but in *Lizotte*, issued six years after *National Post*, the Supreme Court has instead clarified the scope of class privileges in a way that lends even additional support to the analysis developed by the Federal Court of Appeal and by the Tribunal to justify the Commissioner's class-based public interest privilege in the context of the Act. In *Lizotte*, the Supreme Court specified that the creation of a class privilege can arise not only from the protection of a relationship but also from the preservation or the facilitation of a process (*Lizotte* at para 36). In that case, it was the adversary process associated with litigation privilege. In my view, the Supreme Court's statement about protecting a process confirms that a class status can be justified for the Commissioner's public interest privilege on the basis that the privilege exists to protect the process of obtaining information as part of the Competition Bureau's investigation. Just as the litigation privilege serves to maintain the secure and effective administration of justice according to law, the Commissioner's public interest privilege serves to protect a process that facilitates the factual investigation and preparation of a case by the Commissioner under the Act, and the effective administration and enforcement of justice in the competition law field. It protects the integrity and effectiveness of the investigation process which is part of the Commissioner's mandate.

[120] I acknowledge that the Commissioner's public interest privilege is of more recent origin than the other class privileges discussed above. However, the fact remains that it has now been unanimously recognized by the Tribunal and the Canadian courts for some 25 years. I also accept that it may not be necessary to "ensure the efficacy of the adversarial process" and that it may not be qualified as "fundamental to the proper functioning of our legal system" in general, as is the case with litigation or solicitor-client privileges. However, the Commissioner's public interest privilege in the context of the Act remains closely tied to the Commissioner's mandate, to the effectiveness of the investigation process under the Act, and to the public interest in preserving and protecting competition in the Canadian marketplace. It relates to the administration of justice, albeit to a narrower and more specific dimension of it. I would also add that, similarly to what informer privilege accomplishes for the efficiency of police work and the effective implementation of criminal law, the Commissioner's public interest privilege contributes to the efficient enforcement of competition laws by the Commissioner and the effective implementation of the Act, all of which is in the general public interest. I note that, in

NutraSweet and in *Nielsen FCA*, both Madam Justice Reed and the Federal Court of Appeal had analogized the Commissioner's public interest privilege to the informer privilege.

[121] This is not to say that the Commissioner's public interest privilege should be seen as being on the same footing as solicitor-client privilege, litigation privilege or informer privilege. In that regard, I concede to counsel for VAA that one cannot place the Commissioner's public interest privilege in the same bucket as the solicitor-client or litigation privileges; those two are linked with the justice system as a whole whereas the Commissioner's privilege is limited to a very specific area of the law.

[122] But I do not understand class privilege to be a one-size-fits-all category. Class privileges can exist on different footings and they are not all created equal. The case law shows that the various class privileges recognized at common law or by statute result from different rationales and that they do not all enjoy the same sanctity. Indeed, solicitor-client privilege is the bench-mark of class privileges, situated at the top of the list (*Lizotte* at para 64; *National Post* at para 39; *Gruenke* at 288). Even litigation privilege and solicitor-client privilege do not sit at the exact same point on the spectrum of class privileges, as there may be more situations where litigation privilege may have to yield to full and timely disclosure. In addition, litigation privilege is temporary (as opposed to permanent) and does not necessarily involve confidential documents. In fact, in *Blank*, the Supreme Court acknowledged that "litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege" (*Blank* at para 60). But both have solid, overriding policy considerations supporting their class-based nature.

[123] In my view, a similar observation can be made about the Commissioner's public interest privilege in the context of the Act. There may be more situations where the privilege may have to yield to disclosure or waiver, and it is certainly not as absolute as solicitor-client privilege or informer privilege. But that is not enough, in my view, to strip its class-based qualification from it. As discussed above, it bears sufficient characteristics of class privileges to have its place within the range of such privileges.

[124] For all those reasons, I am not persuaded that the jurisprudence on class privileges that has developed since the decision of the Federal Court of Appeal in *Nielsen FCA* has changed the state of the law to the point where the unanimous findings on the class-based nature of the Commissioner's public interest privilege in the context of the Act should now be revisited and replaced by a case-by-case privilege.

3. No particular circumstances arise in this case

[125] VAA also argues that, in addition, there are some distinguishing factual circumstances in this case justifying the Tribunal to depart from its long-standing approach and to reverse its position about the class-based nature of the Commissioner's public interest privilege in the context of the Act.

[126] I do not see any.

[127] In terms of particular factors, VAA points to four: the high number of documents (i.e.,

1,185) over which the Commissioner claims a public interest privilege in this matter; the fact that VAA is not itself competing in the in-flight catering business; the alleged more extensive use of Section 11 orders by the Commissioner; and the new provisions of the Act giving the Commissioner the option to choose the criminal or the civil route to deal with certain conduct. I am not persuaded that any of these factual circumstances constitutes solid grounds to modify the treatment of the Commissioner's public interest privilege and to move from a class-based approach to a case-by-case privilege.

[128] No clear and convincing evidence has been provided by VAA to the effect that claiming public interest privilege over more than 1,000 records is exceptional or out of the ordinary course. I admit that the number of 1,185 documents does look impressive at first sight. But that is not enough, in and of itself, to single out a particular situation. I observe that, in the *TREB* case, claims of privilege were made on a comparable number of documents. In oral argument, counsel for the Commissioner also referred to the *Direct Energy* matter as another case where the privilege claims related to a comparable large number of documents. No persuasive evidence has been provided by VAA showing grounds upon which I could conclude that the sheer number of documents involved in this case, or the particular nature of these documents, justifies a reconsideration of the class-based approach.

[129] I also do not accept that, simply because VAA is not directly in the in-flight catering business and is itself a publicly-mandated authority, the treatment of the Commissioner's claims of public interest privilege should be any different. The policy considerations relating to the Commissioner's mandate and the investigation process under the Act, as well as the rationales supporting the need to receive the third party information in confidence, do not disappear because of these particular characteristics of VAA.

[130] I further note that there is no clear and convincing evidence on the record on the alleged increased prevalence of the use of Section 11 orders by the Commissioner or how this case differs from the other instances where the Commissioner's class-based public interest privilege was maintained by the Tribunal in that context. I, of course, take note of the fact that 646 documents over which a public interest privilege is claimed in this case were obtained by the Commissioner pursuant to Section 11 orders. But, in the absence of any evidence on this front, the argument that this is a new and different circumstance is only speculative. Even if I were to assume that the Commissioner has now adopted a practice of increasingly and more frequently employing the formal investigatory tools at his disposal under the Act, I observe that according to the Commissioner's *Draft Bulletin on Information Requests from Private Parties in Proceedings for Recovery of Loss or Damages* (March 8, 2017), obtaining information from third parties on a voluntary basis remains an important source for his investigations and is heavily relied on by the Competition Bureau (at 3-4). In addition and in any event, for the reasons detailed earlier in these reasons, I do not consider that the use of Section 11 orders to obtain information modifies the foundation of the policy considerations and rationale to support the Commissioner's class-based public interest privilege in the context of the Act.

[131] Finally, I fail to see how the new provisions of the Act, which offer the Commissioner a possibility to choose between a criminal or civil route for the enforcement of the Act in respect of certain conduct, could lead to a review of the class-based nature of the Commissioner's public interest privilege. VAA has not presented any persuasive argument in that respect.

4. The comparison with analogous situations is not meaningful

[132] In its submissions, VAA also contends that no other regulatory body or administrative tribunal involved in economic regulatory proceedings analogous to the Application (such as proceedings to enforce securities laws before provincial securities commissions) recognizes a class-based public interest privilege similar to the Commissioner's as being necessary for the enforcement of their laws. In addition, VAA underlines that public interest privileges under sections 37 or 38 of the Canada Evidence Act are classified as case-by-case privileges requiring the demonstration of factors similar to the Wigmore test.

[133] Neither of these arguments suffices to convince me to revisit the Tribunal's approach to the Commissioner's public interest privilege.

[134] As illustrated by the case law discussed above, the Tribunal and the Canadian courts have recognized that the Commissioner's class-based public interest privilege applies in the context of the Commissioner's particular mandate. The underlying policy considerations and rationales arose in the specific context of the Act. The fact that public interest privilege as a class privilege was not recognized in other contexts is of no moment and does not render the Federal Court of Appeal, the Tribunal or the other court decisions on this issue incorrect, flawed or suspect.

[135] Whether other investigative or enforcement agencies with an analogous investigative/enforcement role, if any, enjoy a similar class privilege is therefore of little relevance. The same is true of the fact that a different result may have been reached in other contexts. The question is not whether there is any reason to single out the Commissioner among other investigative/enforcement authorities for a class-based public interest privilege. The question is whether, looking at the particular situation of the Commissioner, there are grounds to grant to the information collected by the Competition Bureau as part of its investigations under the Act the higher form of class privilege affirmed by the case law. In the absence of any turbulence whatsoever in the jurisprudence recognizing the Commissioner's class-based public interest privilege, I am not convinced that the fact that other types of public interest privileges may not have received a similar treatment is a material element.

[136] I further observe that the cases referred to by VAA in its submissions are often criminal matters and/or are generally decisions rendered by administrative agencies or tribunals, such as securities commissions, looking at their own processes, as opposed to decisions issued by the courts on the nature and scope of the public interest privilege invoked by regulating bodies. VAA cites no civil cases where a Canadian court has expressly stated that a common law public interest privilege cannot be recognized as a class privilege. One decision refusing to recognize a public interest privilege as a class privilege is *R v Anderson*, 2011 SKQB 427 at para 30, but it can be distinguished on the basis that it relates to a claim of police investigative privilege made in the context of a criminal case. Another one relied on by VAA is *Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 493 ("***Wang***"). However, that is a case where the Federal Court ruled that the investigative privilege is not a class privilege in the particular context of section 37 of the Canada Evidence Act (*Wang* at para 75).

[137] Similarly, I am not persuaded that the common law class privilege recognized to the Commissioner is inconsistent with statutory privileges otherwise created under sections 37 or 38

the Canada Evidence Act. Section 37 of the Canada Evidence Act permits a federal minister of the Crown or other official to object to disclosure of information on the grounds of a "specified public interest" that is not defined in the legislation. The process under section 37 exists in parallel with the common law regarding public interest privilege claims. It is a separate and distinct means by which public interest privilege may be asserted. Section 37 does not eliminate the common law public interest privilege; rather, the two co-exist with their respective jurisprudence. This statutory process has no bearing on the common law privilege asserted by the Commissioner.

[138] As to section 38 of the Canada Evidence Act, I agree with the Commissioner that it is simply irrelevant to the question raised by VAA's motion. The provision relates to matters of international relations, national defence and national security, which have no relevance in the current proceeding. Moreover, just as with respect to section 37, section 38 also exists in parallel with the common law.

[139] Consequently, the numerous references made by VAA to the decisions of the Federal Court in *Wang* and *Canada (Attorney General) v Tepper*, 2016 FC 307 ("***Tepper***"), while informative, only apply in the context of a privilege claimed under section 37. Put another way, both *Wang* and *Tepper* stand for the proposition that, if the disclosure of evidence encroaches on a specified public interest, the court must then consider whether the public interest in protecting an ongoing investigation is outweighed by the public interest in disclosure using criteria inspired from the Wigmore test, but this is only in the context of a privilege claimed under section 37 of the Canada Evidence Act. True, the test developed in these cases echoes the test for case-by-case privileges. But it applies to public interest privilege claimed under the specific statutory context of the Canada Evidence Act. This is not sufficient, in my view, to overturn the unanimous case law developed by the Tribunal and the courts regarding the Commissioner's public interest privilege in the context of the Act.

[140] In essence, using these alleged analogous situations, VAA submits that a class privilege approach is not warranted for the Commissioner but that a case-by-case approach should rather be preferred, in order to better balance all interests at stake, to ensure that there is procedural fairness for VAA and to give the Tribunal the benefit of having all the evidence to make a fully-informed decision.

[141] I commend the valiant efforts of VAA to try to circumscribe what would be the test to apply in a case-by-case analysis and its attempt to reformulate and modernize the Wigmore criteria in terms of a three-part test articulated as follows: (1) are the documents in question relevant?; (2) would disclosure of the documents cause harm to a specified public interest?; and (3) does the harm caused by continued secrecy outweigh the harm that would be caused by disclosure? VAA supports the use of this three-part test by referring to the Federal Court decisions in *Wang* issued in the context of section 37 of the Canada Evidence Act and in *Khadr v Canada (Attorney General)*, 2008 FC 807 in relation to section 38. VAA also proposes six factors to consider in the balancing exercise required by a claim of case-by-case privilege, citing the *Tepper* decision. These approaches would certainly constitute helpful guidance if a case-by-case assessment was required to be made of the Commissioner's claims of public interest privilege.

[142] However, the question raised by VAA's motion is not whether there is another way in which the Commissioner's mandate could be effectively executed using claims of public interest privilege on a case-by-case basis, as opposed as to a class basis. The question is whether the long-standing recognition of the Commissioner's public interest privilege in the context of the Act as a class privilege should be modified, set aside or recalibrated. Whether or not the Commissioner's claims of public interest privilege would meet the criteria for a case-by-case approach is beyond the scope of this motion.

5. There is no reason to ignore the *stare decisis* rule

[143] One last important point needs to be addressed as it is also dispositive of the first main issue raised by VAA's motion.

[144] VAA is asking for a reversal of the Tribunal's approach to the Commissioner's public interest privilege. As illustrated above, this approach was crystallized in the seminal decision of the Federal Court of Appeal in *Nielsen FCA*. VAA is therefore asking the Tribunal to reverse a binding decision of a higher court and to depart from the well-established rule of *stare decisis*. Even if I were in agreement with VAA's submissions on the need to overturn the current case law, I do not find that the Tribunal would be entitled to do that in this case.

i. The principle of *stare decisis*

[145] The doctrine of *stare decisis* provides that "a lower court is bound by particular findings of law made by a higher court to which decisions of that lower court could be appealed, directly or indirectly" (*Tuccaro v Canada*, 2014 FCA 184 at para 18). It is a fundamental tenet of our legal system. Following the existing case law and the clearly established legal rules supports the virtues of consistency and predictability, two key principles underlying the rule of law and the doctrine of *stare decisis*. This doctrine stands for the principle that lower courts are bound by the decisions of higher courts in the same jurisdiction, and of the Supreme Court of Canada, no matter how wrong the lower court believes the decision to be. Of course, lower courts have the right to distinguish otherwise binding cases based on the factual context before them. However, it is not open to a lower court to refuse to follow a higher court's decision on the basis that the lower court believes the higher court's decision to have been wrongly decided.

[146] The Supreme Court has frequently stated that courts and tribunals can only depart from the *stare decisis* principle in exceptional circumstances. In *Carter v Canada (Attorney General)*, 2015 SCC 5 ("***Carter***"), the Supreme Court summarized those particular circumstances as follows: "[t]rial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate'" (*Carter* at para 44, citing (*Canada (Attorney General) v Bedford*, 2013 SCC 73 ("***Bedford***") at para. 42).

[147] For example, the *Carter* decision was applied recently by the Federal Court of Appeal in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 ("***Hospira***"), when the Court moved away from the existing standard governing the review of the discretionary decisions made by prothonotaries of the Federal Court. In that case, the Federal Court of Appeal concluded that, although the issue of the standard of review applicable to

discretionary decisions of prothonotaries was not a new legal issue, there had been "a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate'" and that "the standard of review set out in *Aqua-Gem* has been overtaken by a significant evolution and rationalization of standards of review in Canadian jurisprudence" (*Hospira* at para 63).

[148] I pause to underline that lower courts, including the Tribunal, do not have the same latitude as the Supreme Court in modifying existing precedents. In *Canada v Craig*, 2012 SCC 43 ("***Craig***"), the Supreme Court clearly stated that the vertical convention of precedent was different when it related to whether the Supreme Court should overrule one of its own precedents. In making such a decision, "the Supreme Court engages in a balancing exercise between the two important values of correctness and certainty" (*Craig* at para 27; see also *R v Nur*, 2015 SCC 15 at para 59 and *Bedford* at para 47). The test is therefore less stringent when the Supreme Court wants to distinguish its own decisions than when a lower court wants to depart from a higher court's decision.

[149] I acknowledge that common law is always evolving, that courts may make incremental changes to the law to further the requirements of justice and fairness, and that "stare decisis is not a straitjacket that condemns the law to stasis" (*Carter* at para 44). However, the threshold for revisiting a matter is not an easy one to reach. In other words, the *Carter* decision cannot be taken as a declaration of open season on the *stare decisis* rule. This rule remains fundamental to our legal system and it remains the presumptive starting point of any analysis to determine the status of the law on a given point.

[150] In the context of VAA's motion, the Tribunal is therefore not entitled to ignore the binding precedent from the Federal Court of Appeal in *Nielsen FCA*, repeatedly confirmed and applied by the Tribunal and other courts since then, unless the circumstances squarely fit the exceptions set out in *Carter*. I should add that, in this case, it is not as if the Federal Court of Appeal only dealt obliquely with the issue at stake. It is instead a situation where that Court, in *Nielsen FCA*, clearly identified and adopted all the ingredients and features establishing a class-based status for the Commissioner's public interest privilege.

ii. The *Carter* factors are not met

[151] I do not find that this is a situation where the *Carter* factors are met. No new legal issue is raised by VAA's motion and the circumstances or evidence of this case do not "fundamentally shift the parameters of the debate" regarding the public interest privilege of the Commissioner.

[152] The issue of the qualification of the Commissioner's public interest privilege, and of its status as a class-based or case-by-case privilege, is not a new legal issue. It was raised and debated in the long list of cases referred to earlier in these reasons. In fact, VAA is making legal arguments which are quite similar to what had been unsuccessfully advanced in previous cases such as *UGG 1* or *Pro-Sys*. VAA argues that developments in the law, including *National Post* on the issue of class privileges and the *Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36 ("***Bell***") case on procedural fairness, meet the *Carter* requirement regarding a new legal issue being raised. I do not agree. As stated above with respect to *National Post*, and as will be discussed below for *Bell*, these decisions have not established new legal principles. Stated differently, I do not believe that the approach unanimously followed by the

Tribunal and the courts on the Commissioner's public interest privilege in the context of the Act is no longer consonant with the latest pronouncements of the Supreme Court on class privileges or on procedural fairness. The case law as we know it today is not materially different from the legal parameters in place when the Federal Court of Appeal confirmed the existence of the Commissioner's class privilege in 1994 in *Nielsen FCA*.

[153] I also disagree with counsel for VAA that a change in the circumstances or evidence has fundamentally shifted the parameters of the debate. None has emerged in terms of legal principles governing the treatment of class privileges. None has either emerged in terms of the factual dynamics against which the Commissioner's public interest privilege has to be considered for the purpose of this Application. This case does not bring a fundamental shift in the parameters of the debate: the concerns about the use of Section 11 orders, the allegedly high number of documents affected by the Commissioner's claims of public interest privilege (i.e., 1,185 documents), the alleged lack of evidence on the expectation of confidentiality or on the fear of reprisal, or the ability to handle any concerns through a confidentiality order do not amount to a change in the circumstances or evidence that fundamentally shifts the parameters of the debate. All of these issues were present in a vast majority of the cases already considered by the Tribunal and the Canadian courts in the past, and by the Federal Court of Appeal in *Nielsen FCA*. Similarly, I do not find that VAA's own public interest mandate, the fact that it is not itself in the in-flight catering business or the recent changes in certain provisions of the Act amount to material changes supporting a departure from the *stare decisis* rule.

[154] This is therefore not a situation where, in my opinion, the Tribunal can consider itself not bound, by reason of the *Carter* exceptions to the *stare decisis* rule, in respect of the decision of the Federal Court of Appeal in *Nielsen FCA*. On the record before me, I do not find the elements that could allow me to conclude that the *Carter* test is clearly met by VAA.

[155] In *Paradis Honey Ltd v Canada*, 2015 FCA 89 ("***Paradis Honey***"), the Federal Court of Appeal noted that, while "the common law is in a continual state of responsible, incremental evolution", changes to the law should be approached with caution and extensions of legal doctrine or principles should be achieved "through accepted pathways of legal reasoning" (*Paradis Honey* at paras 116-117). Replacing the long-recognized, class-based public interest privilege in the context of the Act by a case-by-case approach based on the Wigmore criteria, as advocated by VAA, would not, in my view, constitute a "responsible, incremental change to the common law founded upon legal doctrine and achieved through accepted pathways of legal reasoning" (*Paradis Honey* at para 118). In this case, ignoring the established jurisprudence would instead "completely throw into doubt the outcomes of previous cases", something that Mr. Justice Stratas warned against in *Paradis Honey* (*Gligbe v Canada*, 2016 FC 467 at para 16).

[156] For completeness, I make one final comment. Counsel for VAA suggests that I could more easily depart from the Federal Court of Appeal precedent in *Nielsen FCA*, because the Court in that case essentially deferred to the Tribunal's findings in that decision, and that any reviewing court would show similar deference to a new finding of the Tribunal overturning the state of the law on the Commissioner's class-based public interest privilege. I am not ready to follow VAA's invitation for two reasons. First, a reading of the Federal Court of Appeal reveals that, while it alluded to some deference towards the Tribunal's findings, the Court nonetheless developed a legal analysis of its own on the merits of the class privilege of the Commissioner.

This issue was thus directly addressed and determined by the Court. The Court did not simply defer and yield to the Tribunal's conclusions. Second, I do not agree that deference would necessarily be shown towards a Tribunal's decision on the class-based status of the Commissioner's privilege. In *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 [*Tervita*] at para 39, the Supreme Court opined that, given the language of the CTA directing that Tribunal's decisions be considered "as if [they] were a judgment of the Federal Court" (sub-section 13(1)) and not as originating from an administrative source, the decisions of the Tribunal on questions of law are to be reviewed on the less deferential standard of correctness. The Supreme Court expressly stated that the presumption that questions of law arising under the Tribunal's home statute should be reviewed on a reasonableness standard was rebutted in the case of the Tribunal, given that express statutory language in the CTA. Therefore, I do not agree that the Tribunal should necessarily expect deferential treatment by a higher court on the issues raised by VAA in its motion.

B. Do the Commissioner's claims of public interest privilege interfere with VAA's right to a fair hearing and raise issues of procedural fairness?

[157] As a second main argument, VAA submits that resorting to a class-based privilege in this case constitutes a fundamental breach of procedural fairness, and that it is also detrimental to the Tribunal's ability to make a fully and properly informed decision in this particular case. In fact, this appears to be the main complaint expressed by VAA, driving its request for a reversal of the existing case law. VAA argues that the Commissioner's claims of public interest privilege on a class basis are procedurally unfair and prejudice VAA's ability to make a full answer and defence against the Commissioner's underlying Application and the serious allegations of abuse of dominant position being levelled against it.

[158] Here again, VAA maintains that the legal thinking on the principles of procedural fairness has moved considerably from where it was 25 to 30 years ago when the Tribunal and the Federal Court of Appeal first considered the question of the Commissioner's public interest privilege. VAA notably relies on the *Bell* decision in this regard and claims that the time is ripe for a reconsideration of the Tribunal's approach in light of this evolution.

[159] It is well-known that considerations of fairness are fundamental to the Tribunal's approach and proceedings. While sub-section 9(2) of the CTA directs the Tribunal to conduct its proceedings as informally and expeditiously as the circumstances allow, it also specifies that the Tribunal can only do so as "considerations of fairness permit". Ensuring adequate protection of procedural fairness is thus central to the Tribunal's functions and the Tribunal never takes lightly concerns raised with respect to the procedural fairness of its proceedings. I indeed agree with VAA that, since proceedings before the Tribunal are highly "judicialized" and virtually indistinguishable from civil trials in the courts, they attract a high level of procedural fairness.

[160] However, I do not agree that the class-based status of the Commissioner's public interest privilege in the context of the Act results, in and of itself, in a breach of procedural fairness. Likewise, I do not agree that, at this stage, VAA's right to a fair hearing has been compromised. Instead, I find that no breach of the principles of procedural fairness has yet occurred. VAA has provided no persuasive evidence showing that the limited disclosure provided by the Commissioner further to his claims of public interest privilege makes it particularly difficult for

VAA to respond to the allegations made against it in the Application. Nor am I convinced that the limited disclosure, at this juncture, interfere with VAA's right to a fair hearing.

[161] Of course, like any other privilege, the Commissioner's public interest privilege does impact the information that a respondent in an application before the Tribunal receives at the discovery stage. And I am sympathetic to VAA's concerns that this could be detrimental to its ability to defend against the Commissioner's allegations. However, over the past quarter century, the Tribunal has developed a process that protects procedural fairness in the context of the Commissioner's important mandate, in the form of safeguard mechanisms which are closely attached to the recognition of the Commissioner's public interest privilege as a class privilege. As mentioned above, these mechanisms put in place to safeguard the respondent's right to a fair hearing include : (1) the provision of detailed summaries, prior to the examination for discoveries, containing both favourable and unfavourable facts to the Commissioner's application; (2) the option for the respondent to have a judicial member of the Tribunal, who would not be adjudicating the matter on the merits, to review the underlying documents to ensure they have been adequately summarized and are accurate; and (3) the fact that the Commissioner will have to waive privilege on relevant documents and communications and provide will-say statements ahead of the hearing, if he wants to rely upon that information in proceedings before the Tribunal.

[162] I also observe that, in none of the cases decided by the Tribunal or the Canadian courts in the past 28 years where Commissioner's public interest privilege has been claimed as a class privilege has procedural fairness and the ability of a respondent to make a full answer and defence ever found to be an issue that could not be resolved through those mechanisms.

[163] Given the safeguards developed by the Tribunal in the treatment of the Commissioner's public interest privilege, and considering the evidence indicating that steps are being taken to follow this process in this case, I agree with the Commissioner that VAA's claims of violations of procedural fairness are premature at this stage. Similarly, no evidence of compelling circumstances or compelling competing interests sufficient to exclude the Commissioner's public interest privilege over the documents and communications subject to privilege has been adduced or provided by VAA at this point. I am not ruling out the possibility that VAA might raise such arguments at a later stage of these proceedings, with respect to some of the documents or information covered by the privilege. However, on the record before me, no persuasive evidence has yet been offered by VAA to attack the rationale of the Commissioner's claims of public interest privilege or to allow one to conclude, as the Tribunal did in the *Sears* case, that factual elements exist to lift the privilege with respect to certain documents.

1. Procedural fairness and the right to a fair hearing

[164] The duty to act fairly has two components: the right to be heard and the right to an impartial hearing.

[165] It is well-established that the nature and extent of the duty will vary with the specific context and the different factual situations dealt with by the administrative body, as well as the nature of the disputes it must resolve (*Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 ("***Baker***") at paras 25-26). In any situation, the exact nature and

scope of the duty of procedural fairness are flexible and will fluctuate depending on the attributes of the administrative tribunal and its enabling statute (*Canada (Attorney General) v Mavi*, 2011 SCC 30 at paras 39-42). The level and the content of the duty of procedural fairness are determined according to the context of each case (*Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 113). Its purpose is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and to the statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and to have them considered by the decision-maker (*Baker* at paras 21-22; *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 18).

[166] In *Baker*, the Supreme Court set out five non-exhaustive factors to be considered in determining the duty of procedural fairness owed in a particular situation. They are: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) respect for the agency's choice of procedure (*Baker* at paras 23-28; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115). In every case, the requirements refer to the process followed and not to the substantive rights determined by the decision-maker. Indeed, the Tribunal expressly adopted those *Baker* factors when dealing with the extent of the duty of fairness in the context of proceedings before the Tribunal (*Commissioner of Competition v Canada Pipe Company Ltd*, 2003 Comp Trib 15 at para 53).

[167] Despite the suggestions repeatedly made by counsel for VAA, the reference in the *Bell* decision to "stringent requirements" of procedural fairness does not change the state of the law or set a new standard in this respect. It simply reaffirms, and in fact cites with approval, the principles set out in *Baker* and its progeny (*Bell* at para 21). I will add that, given the emphasis put by VAA on the words "stringent requirements" used by the Supreme Court in the *Bell* passage quoted by VAA, it is important to note what the Court effectively said in that decision. The Supreme Court stated that, when a tribunal possesses court-like powers and procedures, "[t]hese powers <u>may</u> bring with them stringent requirements of procedural fairness, including a higher requirement of independence" [emphasis added] (*Bell* at para 21). The Court used the word "may", in fact echoing the fundamental principle established in *Baker* to the effect that requirements of procedural fairness vary with the circumstances. It is thus incorrect to suggest that the *Bell* decision has established a somewhat higher, more stringent requirement of procedural fairness for the Tribunal or, for that matter, for any other tribunal sitting closer to the judicial end of the spectrum.

[168] The assessment of the appropriate duty of procedural fairness to be followed by the Tribunal remains dictated by the *Baker* factors. Nothing in the *Bell* case supports the proposition made by VAA that, following that decision, the considerations of fairness imposed by sub-section 9(2) of the CTA should suddenly be looked at under a different light. I would further mention that the remarks made by the Supreme Court in *Bell* were not in relation to the "right to a fair hearing" dimension of procedural fairness, but rather dealt with the requirements of "independence and impartiality" of procedural fairness. For those reasons, I conclude that VAA's extensive reliance on the *Bell* decision to support its claim of more "stringent" procedural fairness requirements is misguided.

[169] That said, I of course agree with VAA that a high degree of procedural protection is needed in Tribunal proceedings because of its court-like process. This is not disputed by the Commissioner. The 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. The Tribunal has indeed recognized, in one of its decisions dealing with the Commissioner's public interest privilege, that an important dimension of procedural fairness is the right to a fair hearing, which means the right to know the case against it and the right to a meaningful opportunity to present evidence supporting its own case (*Direct Energy* at para 16).

[170] But the question has to be considered in the particular context of the Tribunal's process, using the *Baker* criteria. This means, in this case: (1) the nature of the Tribunal's decision on the Application and the process followed in making it; (2) the nature of the statutory scheme and the terms of the Act; (3) the importance of the decision to VAA; (4) the legitimate expectations of VAA; and (5) respect for the Tribunal's choice of procedure. I am not persuaded that, taking into account these *Baker* factors, any breach of procedural fairness has occurred or may occur for VAA when one considers the safeguard mechanisms put in place and expected to be used in this Application. New evidence may be brought by VAA at a later stage of this proceeding but I find no persuasive evidence of a breach of procedural fairness at this point.

[171] I also add the following important observation. Considerations of procedural fairness are not to be analyzed in silos or in isolation at various stages of a judicial process. Courts need to look at the whole process involved, not strictly at a preliminary stage like the discovery process, in order to determine whether issues of fairness arise or not. As long as there is no final decision, and as long as there might still be changes or further steps in the judicial process, it would be hard to claim a breach of procedural fairness or for a court to conclude that such a breach occurred (*Tsleil-Waututh Nation v Canada (National Energy Board)*, 2016 FCA 219 at para 88).

[172] In a similar way, if a breach of procedural fairness is afterwards cured, for example by way of a *de novo* hearing or by subsequent disclosure prior to a decision, no breach of procedural fairness can be found (*Walsh v Canada (Attorney General)*, 2016 FCA 157 at paras 22-23 and 28; *McBride v Canada (National Defence)*, 2012 FCA 181 ("***McBride***") at paras 43-45). The question of procedural fairness is therefore not an analysis of whether, at any given point in the evolution of a proceeding, there was a breach, but "whether, given the circumstances as a whole, the procedure was fair" (*McBride* at para 44; *Patanguli v Canada (Citizenship and Immigration)*, 2015 FCA 291 at para 42).

[173] In light of the foregoing, I therefore agree with the Commissioner that VAA's claim of a breach of procedural fairness is premature in the circumstances, as the judicial process for the Application is far from over. In its consideration of the Commissioner's claims of public interest privilege in the context of by the Act and its assessment of whether they are justified, the Tribunal will be called upon to use the various safeguard mechanisms to protect the procedural rights of VAA. The evidence indicates that this is indeed the process being followed in these proceedings.

2. Mechanisms in place to limit the procedural fairness concerns

[174] As detailed above in the review of the decisions issued in the context of claims of public interest privilege by the Commissioner, the Tribunal has put in place various mechanisms to ensure the right to a fair hearing and a proper level of disclosure for documents and communications over which a public interest privilege is claimed by the Commissioner. In other words, the limited disclosure resulting from privilege claims has been tempered through the safeguard mechanisms developed to alleviate its adverse impact on the search for the truth and the right of the respondents to know the case against them and present a full defence.

[175] The practice has been and still is to follow those mechanisms in order to balance the public interest in a respondent's right to a fair hearing with the Commissioner's obligation to fulfill his mandate to enforce the Act. It reflects the fact that the Tribunal's appetite for the highest level of disclosure has not been dampened.

[176] So far, this is precisely the process that the Commissioner has indicated will be followed in the Application, and the evidence reveals that the Commissioner is at the stage of preparing the summaries required by the jurisprudence. The Commissioner will provide VAA with summaries of the privileged documents presenting relevant information both favourable and detrimental to the Commissioner's case. Before oral discovery, VAA will therefore have a complete listing of documents and communications over which public interest privilege is asserted by the Commissioner, as well as summaries of their contents. If, after reviewing the summaries and obtaining discovery from the Commissioner, VAA believes that the summaries are deficient or improperly shield relevant information, VAA will have the option of applying to the Tribunal to request a review of the summaries by a judicial member not sitting on the merits of the case, to determine the adequacy and sufficiency of the summaries. The *Competition Tribunal Rules*, SOR/2008-141 also require the Commissioner to disclose, before the Application is heard, his case in chief, including witness statements, expert reports, and a list of the documents to be relied upon. If the Commissioner intends to rely upon information before the Tribunal that is protected by public interest privilege and to have the Tribunal consider it, the privilege will need to be waived on such relevant information, and full witness statements will need to be provided for the witnesses testifying at the hearing. Before the hearing of the Commissioner's Application, VAA will have copies of all documents on which the Commissioner intends to rely.

[177] In addition, VAA will be able to bring a motion to override the public interest privilege if it can demonstrate the presence of compelling circumstances or compelling competing interests. That was the case in *Sears* where the Tribunal concluded that an underlying rationale for the privilege on certain documents was absent since the Commissioner's investigation had been completed and the identity of the informants had been already provided. As the Tribunal has indicated in previous cases, the assessment of the existence of such compelling circumstances cannot be done until the summaries of the privileged evidence have been provided and reviewed.

[178] I agree with the Commissioner that this process is fair, and that it is therefore premature to determine whether a breach of procedural fairness has occurred in the circumstances. It does not mean that a breach could not be found by the Tribunal at a later stage. But, at this juncture, VAA has provided no persuasive evidence to support its allegations that the process being

followed is somehow unfair. There is also no sufficient factual basis, at this stage, to determine if there are exceptions (e.g., compelling circumstances or competing interests) allowing VAA to override the Commissioner's class privilege and to challenge the class of documents over which the Commissioner's claim of public interest privilege is made, in total or in part. Only after the Commissioner has provided the summaries of third party documents and information will the Tribunal be in a position to assess whether the privilege should be overridden in this case. It will then be up to VAA to raise this and bring forward the required clear and convincing evidence in that respect, as was done in *Sears*. There could well be such instances in this case, but the Tribunal cannot determine this without a proper evidentiary basis.

[179] The safeguard mechanisms developed by the Tribunal limit encroachments to full disclosure so that no issues of lack of procedural fairness arise. They are part of the "unique way" in which the Commissioner's class-based public interest privilege has developed. This reflects the somewhat unique nature of the Commissioner's privilege, which addresses the potential adverse impact on the respondent's right to a fair hearing.

[180] For those reasons, I find that no issue of procedural fairness has come into play at the stage of determining whether, in this case, the Commissioner's public interest privilege is a class privilege or a case-by-case privilege. This is not to say that considerations of fairness do not play a role in the assessment of a claim of public interest privilege. But the issue arises at a later, second stage of the process, when the Tribunal can be asked to assess whether the safeguard mechanisms work properly and whether compelling circumstances exist to exclude documents from the class privilege.

IV. CONCLUSION

[181] For the reasons detailed above, I conclude that VAA's motion ought to be dismissed. Upon reviewing the materials filed by VAA and the Commissioner, I am not persuaded that there are grounds to overturn the long-standing and unanimous case law on the class-based nature of the Commissioner's public interest privilege in the context of the Act. I am satisfied that sound policy rationales exist to support it and that it has the necessary attributes of a class privilege. Furthermore, nothing in the recent decisions of the Supreme Court on privileges or in the factual circumstances of this case changes the situation or warrants a modification of the current treatment of the Commissioner's public interest privilege in the context of the Act.

[182] Even though more than 20 years have now elapsed since the Federal Court of Appeal issued its seminal decision in *Nielsen FCA*, it remains good law and the Tribunal remains bound by it.

[183] I also find that, at this stage and in the circumstances of this case, the Commissioner's claims of public interest privilege on a class basis do not, in and of themselves, give rise to a fundamental breach of procedural fairness or encroach VAA's right to a fair hearing.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[184] VAA's motion is dismissed.

[185] The Commissioner is awarded costs against VAA, at the mid-point of Column III of the table to Tariff B of the *Federal Courts Rules*, SOR/98-106.

DATED at Ottawa, this 24th day of April 2017.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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