CT-2016-015

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF certain conduct of Vancouver Airport Authority relating to the supply of in-flight catering at Vancouver International Airport;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

—and—

VANCOUVER AIRPORT AUTHORITY

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT (MOVING PARTY), VANCOUVER AIRPORT AUTHORITY
(Motion Challenging Claim of Privilege)

TABLE OF CONTENTS

PART I-- STATEMENT OF FACTS

A. Overview

1. Vancouver Airport Authority ("**VAA**") brings this motion in order to address a fundamental unfairness in the Commissioner's approach to the within proceeding. The Commissioner has taken the position that he can withhold from VAA virtually every relevant document on the basis of public interest privilege. Of the 12,000 relevant documents in his possession or control, the Commissioner has claimed public interest privilege over almost 10,000 of them (with almost all of the remaining 2000 being VAA's own documents that it previously delivered to the Commissioner pursuant to a section 11 order issued July 29, 2015) (the "**Relevant Documents**").

2. The very assertion of such a broad claim of privilege in this case shows the exceptional degree of unfairness and prejudice inherent in the Commissioner's position based on the scope of the privilege claimed.

3. The disclosure of the Commissioner's entire investigative file – all of the "fruits of the investigation" – is crucial to ensuring a fair hearing. The "class privilege" approach to public interest privilege taken by the Commissioner in this case is a fundamental breach of procedural fairness. It disregards the adverse effect that this claim of privilege will have on VAA's right to make full answer and defence to the serious allegations of abuse of dominant position being levelled against it. It also disregards the detrimental effect on the Tribunal's decision-making of withholding the Relevant Documents. Under the class privilege, these documents will be kept from the view of VAA, its counsel and indeed the Tribunal without any weighing of any

alleged need for continued secrecy against the right to a fair hearing and the need for full disclosure of all relevant facts.

4. This motion asks the question whether the class privilege claimed by the Commissioner in this case achieves the correct balance between VAA's right to a fair hearing and the Tribunal's search for the truth, on the one hand, and any public interest in not disclosing the Relevant Documents, on the other. Having regard to:

(a) developments in the case law regarding public interest privilege;

(b) the fact that no other similar administrative tribunal recognizes a similar blanket public interest privilege as being necessary for enforcement of the law;

(c) the fact that the class privilege was first recognized when the Act was newly enacted and the privilege has since been applied without any detailed analysis by the Federal Court of Appeal; and

(d) the provisions of the Act, including the 2009/2010 amendments, that make it possible for a respondent either to be prevented from gaining access to relevant documents or to obtain full disclosure of the very same documents, in proceedings based on the very same facts, solely based on whether the Commissioner decides to proceed by way of the criminal or civil provisions of the Act,

it should be asked whether the Commissioner's exceptional reliance on a class-based privilege can be justified, or rather, whether any legitimate, demonstrated public interest considerations

can be balanced against procedural fairness considerations in a manner that is fair and gives effect to both objectives.

5. The Tribunal should reject the Commissioner's claim to a class privilege for the Relevant Documents in this case. Rather, the Commissioner's claim to public interest privilege over the Relevant Documents should be evaluated on a case-by-case basis, consistent with the approach to public interest privilege taken under the *Canada Evidence Act*, R.S.C. 1985, c. C-5, and at common law and in other fora. Such a case-by-case evaluation is specific to the contents of the particular documents in question, rather than simply considering the manner in which the documents were created or gathered. The analysis has three main steps:

(a) Are the documents in question relevant?

(b) Would disclosure of the documents cause harm to a specified public interest?

(c) Does the harm caused by continued secrecy outweigh the harm that would be caused by disclosure?

When evaluated on this basis, the Commissioner's claim to public interest privilege over the Relevant Documents should be denied.

B. The Within Proceedings

6. The Commissioner commenced this proceeding (the "**Application**") by Notice of Application, dated September 29, 2016, seeking relief against VAA pursuant to section 79 of the Act.

7. Broadly speaking, the proceeding relates to VAA's decision to permit only two in-flight caterers to operate on-site at the Vancouver International Airport (the "**Airport**"). The Application is based upon, among other things, allegations that as a result of its control over access to the Airport airside, VAA controls the market for "Galley Handling" at the Airport, that it acted with an anti-competitive purpose, and that the effect of its policy decision was a "substantial prevention or lessening of competition", resulting in "higher prices, dampened innovation and lower service quality" for Galley Handling.

Notice of Application, paras. 1 and 3, Motion Record, Tab 2, p. 12.

8. Importantly, there is no allegation that VAA is actually conducting Galley Handling or carrying on any catering services at the Airport. VAA does not participate in the industry that is the subject of the Application. In fact, as set out in its Response delivered on or about November 14, 2016, VAA is an entity statutorily mandated to operate the Airport in a safe and efficient manner, to generate economic development for Vancouver and, more broadly, for British Columbia and the rest of Canada. Among others, VAA's board of directors includes nominees of various levels of government and local professional organizations, including the Government of Canada, the City of Vancouver, the City of Richmond, Metro Vancouver and the Law Society of British Columbia.

Response of Vancouver Airport Authority, paras. 1, 18 and 19, Motion Record, Tab 3, pp. 32 and 37.

9. In its Response, VAA asserts that, given the market for in-flight catering of fresh meals at the Airport, the entry of additional catering firms would imperil the continued viability of the

operations of the two existing catering firms at the Airport, thereby adversely affecting its ability to attract and retain flights in furtherance of its public interest mandate.

> Response of Vancouver Airport Authority, e.g., para. 2-4, Motion Record, Tab 3, pp.33-34.

10. During the inquiry preceding the Application, the Commissioner applied for and was granted orders pursuant to Section 11 of the *Competition Act* (the "**Act**") directed not only to VAA, but also to four in-flight catering firms: The two firms currently operating at the Airport, CLS Catering Services Ltd. and Gate Gourmet Canada Inc.; and the two firms which requested, but which, up to now, have not been given, licenses by VAA, Strategic Aviation Holdings Ltd. and Newrest Servair Holding Canada Inc.

> Section 11 Orders of the Federal Court, Exhibits "E", "F", "G" and "H" to the Affidavit of Kelly-Ann Webster, Motion Record, Tab 7, pp. 380, 399, 419 and 438.

11. By order made December 20, 2016, the Tribunal set out a schedule for the pre-hearing steps in this matter. That schedule provided, *inter alia*, for "service of Affidavits of Documents and delivery of documents by all parties" to be completed by February 17, 2017. It further provided that examinations for discovery were to be completed between April 10 and May 19, 2017.

> Scheduling Order dated December 20, 2016, Motion Record, Tab 5, p. 66.

12. That scheduling order was subsequently amended in response to a request made by Vancouver Airport Authority to allow VAA an additional two weeks to make its productions, with the new deadline for delivery of VAA's Affidavit of Documents and productions being set as March 3, 2017.

Scheduling Order dated February 16, 2017, Motion Record, Tab 6, p. 70.

C. The Commissioner's Affidavit of Documents

13. On or about February 15, 2017, the Commissioner delivered his Affidavit of Documents, which lists all of the documents relevant to matters in issue in this Application that were in the possession, power or control of the Commissioner as at December 31, 2016.

Affidavit of Documents of the Commissioner of Competition, Exhibit "A" to the Affidavit of Kelly-Ann Webster, Motion Record, Tab 7, p. 80.

14. Attached to the Affidavit of Documents are three Schedules. The relevant documents listed in those three schedules total approximately 11,600.

15. Schedule A to the Commissioner's Affidavit lists those relevant documents in the Commissioner's possession or control that do not contain confidential information and over which the Commissioner does not claim privilege. Schedule A lists 146 documents.

16. Schedule B to the Commissioner's Affidavit lists those relevant documents in the Commissioner's possession or control that the Commissioner is willing to produce (as the Commissioner is not claiming privilege in respect thereof) but that the Commissioner asserts contain confidential information. Schedule B lists 1619 documents.

17. All of the documents listed in Schedule B are VAA's own documents (produced to the Commissioner pursuant to the Commissioner's investigative authority and, more specifically, pursuant to the section 11 order referenced above), or are communications between the Bureau and VAA, or are communications on which VAA was copied.

Schedule B to the Affidavit of Documents of the Commissioner of Competition, Exhibit "A" to the Affidavit of Kelly-Ann Webster, Motion Record, Tab 7, p. 94.

18. Schedule C to the Commissioner's Affidavit lists those relevant documents in the Commissioner's possession or control in respect of which the Commissioner claims privilege and, therefore, is refusing to produce. Schedule C lists 9906 documents.

19. Some of the documents listed in Schedule C are subject to a claim of litigation privilege. Others are subject to a claim of solicitor-client privilege. And some are subject to multiple privilege claims. However, of the 9906 documents in respect of which the Commissioner is claiming privilege, approximately 9500 are being withheld from production solely on the basis of a claim of public interest privilege. These are the Relevant Documents.

20. The Commissioner has indicated an intention to waive privilege over somewhere between 80% and 90% of those 9500 documents.[1] However, no waiver has yet been made and, in any event, no explanation has been given as to the need to maintain privilege over the documents that will continue to be withheld, which according to the Commissioner will still number in excess of 1000 relevant documents.

PART II -- POINTS IN ISSUE

21. The issue for the Tribunal to determine is whether the Commissioner should be required to produce the Relevant Documents.

[1]The Commissioner's indications in that regard have varied slightly. By email sent February 24, 2017, counsel for the Commissioner indicated an intention to waive "approximately 80%" of the records over which the Commissioner has claimed public interest privilege. By letter dated February 28, 2017, counsel for the Commissioner indicated an intention to waive privilege over 8513 records, which would amount to just under 90% of the 9500 records which the Commissioner is withholding solely on the basis of public interest privilege. See Affidavit of Kelly-Ann Webster, Exhibits "C" and "D", Motion Record, Tab 7, pp. 372 and 376.

PART III -- SUBMISSIONS

A. Introduction

22. The approach taken by the Commissioner in this case demonstrates the unfairness and danger of applying public interest privilege as a class privilege. If upheld, this blanket, "one-size fits all" approach would place anywhere from 1000 to 9500 relevant documents that are in the possession of the Commissioner beyond the reach of VAA, its counsel and the Tribunal. Although those documents could be the subject of summaries, no summaries have yet been received.

23. Moreover, even assuming summaries are provided, such summaries are no substitute for disclosure of these records in the Commissioner's possession. Thus, to the extent that the Commissioner argues that this motion is "premature", because such summaries have not yet been delivered, that argument is simply incorrect

24. Summaries are no replacement for providing counsel with access to and use of the documents themselves. Summaries are by their very nature selective. They do not provide counsel with the important contextual background in which communications may take place between third parties and the Commissioner's staff. Summaries cannot afford the same degree of preparation for examinations and use on examination as the original documents themselves. Summaries ultimately shield documents from being produced before the Tribunal and therefore prevent the Tribunal from gaining a complete picture of the Commissioner's investigation and all relevant facts in the Tribunal's search for the truth of the facts asserted. This therefore precludes the Tribunal from making a fully and properly informed decision.

25. The Commissioner has taken this approach in this case, notwithstanding that many of the documents over which he is claiming this blanket privilege appear to have been obtained in response to orders issued pursuant to Section 11 of the Act, from which both the identity of the third party entities providing that information, as well as the subject matter of the documents sought by the Commissioner, are publicly known. This claim is also being made notwithstanding the lack of any evidence as to whether any of the third parties who provided the documents or information in question have any fear of reprisal from VAA, an entity with a public interest mandate and a non-participant in the Galley Handling or in-flight catering industries. VAA would not have any incentive in the factual circumstances of this case to misuse the documents for anti-competitive purposes. In fact, VAA recently did grant a license for ground handling to Strategic Aviation Holdings Ltd.

Response of Vancouver Airport Authority, para. 60, Motion Record, Tab 3, p. 46.

26. To the extent the Commissioner's approach is consistent with the Tribunal's jurisprudence, it is respectfully submitted that it is time for a review of the Tribunal's approach to public interest privilege first established over 25 years ago. This review is warranted in light of a number of factors.

27. First, the jurisprudence recognizes few class-based privileges due to the fact that such privileges derogate from the search for the truth in relation to the relevant facts, particularly in proceedings – like those before the Tribunal – which attract and necessitate significant procedural fairness.

28. Second, the general rule that all relevant information should be disclosed, subject only to case-by-case exceptions, applies to economic regulatory proceedings analogous to the Application, such as proceedings to enforce securities laws before provincial securities commissions.

29. Third, since the Tribunal first developed its relevant jurisprudence over 25 years ago, there have been important procedural and legislative developments in relation to competition law specifically that militate strongly in favour of a case-by-case approach to public interest privilege, rather than a class-based approach:

(a) The first such development is the wide use by the Commissioner of his investigatory powers under the Act to gather information from third parties. As commentators have pointed out, the "candour" rationale that appears to have been a foundation of the current class treatment is unjustified in an environment where, as here, the class privilege may be applied to large amounts of information compelled through the use of Section 11 orders. Indeed, Section 29 of the Act expressly creates an exception for the confidential treatment of such information where it is "communicated … for the purposes of the enforcement or administration of this Act."

Competition Act, Section 29(1), Brief of Authorities ("BOA"), Tab ●

Kent Thomson, Charles Tingley and Anita Banicevic, "Truncated Disclosure in Competition Tribunal Proceedings in the Aftermath of Canada Pipe: An Experiment Gone Wrong", [2006] *The Advocates' Quarterly* 67 at 107 *("Truncated Disclosure")*, BOA, Tab 46.

(b) In addition, in certain cases (e.g. in respect of agreements between competitors under Section 90.1 of the Act and misleading representations under Section 74 of the Act), the Commissioner can elect to proceed by way of either a criminal track or civil track under the Act "on the basis of the same facts". This magnifies the lack of justification for a class privilege being applied in circumstances where a respondent faces a civil proceeding but not where it faces a charge under the criminal provisions of the Act in relation to the same facts. The Commissioner's discretion to elect to proceed under either a criminal or civil provision on the basis of the same facts, also belies the argument that class privilege is necessary to protect the expectation of the person providing the information that such information would be maintained in confidence.

See for example, *Competition Act*, s. 90 and 90.1, BOA, Tab 44.

30. The Tribunal's jurisprudence regarding public interest privilege has been criticized by commentators who have described it as "fundamentally flawed", "singularly unfortunate" and "unfair, unwarranted and unwise". A 2006 article in the *Advocates Quarterly* stated:

> The Tribunal's lack of detailed and critical analysis concerning the applicability and rationale for the public interest privilege is inconsistent with the approach taken by courts and tribunals in other cases, where it has been held consistently that claims for privilege must be scrutinized carefully because, by definition, they interfere with the search for truth.

Truncated Disclosure, at 101, 104 and 106, BOA, Tab 46.

31. The requirement to scrutinize claims for public interest privilege carefully is well-founded. In contrast, a class-based approach interferes with both procedural fairness and the

search for truth. As pointed out by the authors of *Truncated Disclosure*, the class-based approach taken by the Tribunal is inconsistent with the approach taken by courts and tribunals in other cases. There is no justification for the Tribunal to continue with an approach that is out of step with this other jurisprudence. Indeed, as demonstrated in this case, this approach can be abused in circumstances where there is no reason to believe that the very justification or rationale for the approach can be upheld. The class privilege claimed by the Commissioner over the Relevant Documents in this case should therefore be rejected in favour of a case-by-case approach.

32. The Tribunal can then decide what confidentiality orders are needed in relation to limiting the public availability of the documents, including possibly *in camera* hearings when a witness testifies. The use of such orders are analogous to protective orders used in civil antitrust proceedings in the United States.

B. Proceedings Before the Tribunal Attract and Necessitate a High Degree of Procedural Fairness

33. The Application – a proceeding under Part VIII of the Act - attracts the highest level of procedural fairness. As the Supreme Court has explained, the requirements of procedural fairness vary for different tribunals, depending upon the nature and function of the particular tribunal. Those tribunals that are "closer to the judicial end of the spectrum" – i.e., those whose function and processes more closely resemble courts – will attract the highest level of procedural fairness.

> *Bell Canada v. Canadian Telephone Employees Assn.*, 2003 SCC 36 at para. 21, BOA, Tab 3.

34. As explained by the Ontario Divisional Court:

> The closer a tribunal is to exercising court-like functions, the greater will be the procedural protections required to accord fairness to the parties.
>
> *Shooters Sports Bar Inc. v. Ontario(Alcohol and Gaming Commission)*, [2008] O.J. No. 2112 at para. 40 (Div. Ct.), BOA, Tab 37.

35. The Competition Tribunal, of course, resides very close to, if not at, the "judicial end of the spectrum". The Rules provide for the exchange of detailed pleadings and for full rights of discovery, with each party being required to serve an affidavit listing all documents that are "relevant to any matter in issue" and with oral examinations for discovery occurring "as of right". These examinations are an important aspect of case preparation and cannot be effectively conducted without access to all of the relevant documents. Full rights of cross-examination cannot be properly considered and conducted without access to all relevant documents relating to witnesses, including third parties who communicated with the Bureau. Moreover, the Rules mandate the exchange of witness statements and expert reports 60 days prior to the hearing, with full rights of cross-examination and re-examination at the hearing itself.

36. In short, proceedings before the Tribunal are virtually indistinguishable from civil trials in the courts. As such, these proceedings attract and necessitate the very highest level of procedural fairness.

C. The Law Recognizes Very Few Class Privileges Because They Are Insensitive to the Facts of the Case and Operate in Derogation of the Search for Truth

37. One of the fundamental goals of our justice system is the search for truth. The law of privilege – and, particularly, any class privilege – operates in derogation of that search for truth, as it prevents the Court from hearing (and the opposing party from accessing) relevant and probative evidence:

> Class privilege necessarily operates in derogation of the judicial search for truth and is insensitive to the facts of the particular case
>
> *R. v. National Post*, 2010 SCC 16 at para. 42, BOA, Tab 35.

38. Class privileges typically focus on the particular relationship between the parties to a given communication. Once it is proved that the communication was made within the context of the specified type of relationship, that communication is *prima facie* excluded from evidence (and from any disclosure obligations). As Lamer C.J. explained in *R. v. Gruenke*:

> ["Blanket" or "class" privilege] refer to a privilege which was recognized at common law and for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged. . .
>
> *R. v. Gruenke*, [1991] 3 S.C.R. 263 at para. 26, BOA, Tab 33.

39. Similarly, in *R. v. National Post*, Binnie J. explained that, in the case of a class privilege, the focus is less on the contents of the documents in question and more on the need to protect the particular relationship within which the communication occurred:

> In a class privilege what is important is not so much the content of the particular communication as it is the protection of the type of relationship.
>
> *R. v. National Post*, 2010 SCC 16 at para. 42, BOA, Tab 35.

40. The determination of whether or not a given relationship should attract such a "blanket" or class privilege is a question of policy, requiring the court to consider whether the relationship and the privacy of communications within that relationship are so important to the effective operation of the justice system (or to society as a whole) as to warrant a derogation from the fundamental first principle, which is that all relevant evidence is admissible. Thus, Lamer C.J. explained the policy reasons that underlay the class privilege for solicitor-client communications:

> The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication.
>
> *R. v. Gruenke*,[1991] 3 S.C.R. 263 at para. 32, BOA, Tab 33.

41. The Supreme Court has further explained that a class privilege should only be recognized where it is truly needed – i.e., it should only be recognized where any lesser degree of protection (such as a case-by-case privilege) would be insufficient to fulfill the policy objective in question. Thus, in *R. v. National Post*, Binnie J. explained why a class privilege is warranted for solicitor-client communications and for police informants:

> Anything less than this blanket confidentiality, the cases hold, would fail to provide the necessary assurance to the solicitor's client or the police informant to do the job required by the administration of justice.

R. v. National Post, 2010 SCC 16 at para. 42, BOA, Tab 35.

42. So high is this threshold of necessity and so serious the potential adverse effect on the search for truth that the Supreme Court has suggested that no new class privileges should be recognized by the courts. Rather, any such expansion of class privilege should be left to the legislature:

> It is likely that in future such "class" privileges will be created, if at all, only by legislative action.

R. v. National Post, 2010 SCC 16 at para. 42, BOA, Tab ●.

D. Outside of the Competition Tribunal Context, Public Interest Privilege Is Not a Class Privilege

43. The common law has long recognized that there are instances where disclosure of certain information would be unacceptably damaging to a public interest. The type of public interest that is typically implicated include national security, national defence or criminal investigations. As Nordheimer J. explained in *Toronto Star Newspapers Ltd. v. Canada*:

> [T]he common law recognizes that there are matters that may need to be withheld from public disclosure because the failure to do so would damage other legitimate public interests such as national security, government relations and criminal investigations.

Toronto Star Newspapers Ltd. v. Canada, [2005] O.J. No. 5533 at para. 14 (Sup. Ct. J.), BOA, Tab 41.

44. However, the courts have made clear that public interest privilege is not a "class" privilege. It does not shield from production all documents that fall within a given group. Rather, public interest privilege is a "qualified" privilege. It requires the court, in each case, to

balance the importance of guarding the secrecy of the particular documents in question against the importance of disclosing those particular documents to the party seeking access, in the context of the particular proceedings. As Hugessen J. stated:

> The privilege is . . . a qualified one and requires that the Court balance the relevance of the documents against any possible harm to the public interest that might flow from the document's revealing investigative techniques.
>
> *Novacor Chemicals (Canada) Ltd. v. R.*, [1999] 2 C.T.C. 145 at para. 14 (F.C.T.D.), BOA, Tab 31.

45. This point that public interest privilege is <u>not</u> a class privilege was also made in *R. v. Anderson*, where the court discussed the privilege as it applies specifically to police investigative techniques:

> Police investigative technique privilege is a part of public interest privilege. Public interest privilege is not a class privilege like informer privilege. Also, it is not an absolute privilege; rather, it is referred to as a "qualified privilege" and requires a balancing between the public and private interests involved and whether to disclose the purportedly privileged information.
>
> *R. v. Anderson*, 2011 SKQB 427 at para. 30, BOA, Tab 32.

46. Similarly Mactavish J. stated recently:

> Investigative privilege is not a class privilege. . . . The Ontario Court of Appeal has, moreover, determined that while there is "an obvious reason for caution in disclosing the contents of any document in the possession of the police . . . <u>this has never been accepted as a reason for excluding such documents as a class</u>". [emphasis added]
>
> *Wang v. Canada(Minister of Public Safety and Emergency Preparedness)*, 2016 FC 493 at para. 75, BOA, Tab 43.

47. Similarly:

> Investigative privilege has, moreover, been described as a "fairly narrow" basis for secrecy – and "one that of necessity needs to be determined on a case by case basis".
>
> *Wang v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 493 at para. 76, BOA, Tab 43.

48. Accordingly, when public interest privilege is asserted, the Court must undertake an analysis on a case-by-case basis – i.e., an analysis that is specific to the contents of the particular documents in question, rather than simply considering the manner in which the documents were created or gathered. The analysis has three main steps:

(a) Are the documents in question relevant?

(b) Would disclosure of the documents cause harm to a specified public interest?

(c) Does the harm caused by continued secrecy outweigh the harm that would be caused by disclosure?

> *Khadr v. Canada(Attorney General)*, 2008 FC 807 at para. 48, BOA, Tab 27.
>
> *Wang v. Canada(Minister of Public Safety and Emergency Preparedness)*, 2016 FC 493 at paras. 34-47, BOA, Tab 43.

49. This three-step analysis was summarized by Noel J. in the *Maher Arar* case, wherein the asserted public interest related to national defence/national security/international relations:

> The first step of the scheme demands that the party seeking disclosure establish that the information, for which disclosure is sought, is relevant. The second step demands that the Attorney General establish that disclosure of the information at issue would be injurious to international relations, national defence, or

> national security. If injury is found to exist, the last step asks the Court to determine whether the public interest in disclosure outweighs the public interest in non-disclosure. . .
>
> *Canada(Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*, 2007 FC 766 at para. 37, BOA, Tab 5.

50. Thus, once it is determined that the documents are relevant, the onus shifts to the Crown (or, in the present case, the Commissioner) to identify the public interest allegedly at risk and to prove that disclosure of the information in question would have an adverse effect on that public interest. Discharging that onus requires specific, concrete evidence demonstrating how disclosure of the particular documents at issue would harm the asserted public interest; generalized assertions will not suffice:

> [T]he Court must guard against reliance on "generalized assertions of possible disadvantage to an ongoing investigation". . . . Rather, the onus is on the Minister to establish that the disclosure of the information in question would have a concrete deleterious effect on the ongoing investigation. [emphasis added]
>
> *Wang v. Canada(Minister of Public Safety and Emergency Preparedness)*, 2016 FC 493 at para. 35, BOA, Tab 43.

51. If, under the second step, the Crown cannot discharge that onus, then the privilege is not established and the documents must be produced. If the Crown does discharge its onus under the second step, then the Court must engage in the third step, which is a balancing exercise, weighing the harm that would be caused by disclosure against the harm that would be caused by maintaining the secrecy, based on a number of factors. Or, to put it differently, the Court must weigh the interest in continued secrecy against the interest in disclosing the document(s) to the party seeking access. As Mactavish J. explained:

> If the Court is satisfied that disclosure of the evidence in question would indeed encroach on a specified public interest, it must then consider whether the public interest in protecting an ongoing investigation is outweighed by the public interest in disclosure.
>
> *Wang v. Canada(Minister of Public Safety and Emergency Preparedness)*, 2016 FC 493 at para. 36, BOA, Tab 43.

52. In carrying out this balancing exercise under the third step, the Federal Court has held that it should consider the following factors, which include factors identified by Justice Rothstein in *Khan v. R*:

(a) the nature of the public interest(s) asserted;

(b) the degree of connection between the documents in question and the matters in issue in the proceeding – i.e., the probative value of the disputed documents;

(c) the nature of the underlying proceeding, including the public interest in that proceeding;

(d) the effect that non-disclosure would have on the public's perception of the justice system;

(e) the timing, source and sensitivity of the information contained in the disputed documents; and

(f) other evidence available to the party seeking disclosure.

Canada(Attorney General) v. Tepper, 2016 FC 307 at para. 5 and 15, BOA, Tab 6 citing *Khan v. R.*, [1996] 2 F.C. 316 (Fed. T.D.) at para. 26.

53. Finally, the Supreme Court has held that the exercise of public interest privilege is subject to constraints of good faith and that it must not be asserted in order to gain a tactical advantage in litigation:

> [The purpose of public interest privilege] is not to thwart public inquiry nor is it to gain tactical advantage in litigation.
>
> *Babcock v. Canada(Attorney General)*, 2002 SCC 57 at para. 25, BOA, Tab 1.

54. Similarly:

> Public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish.
>
> *Babcock v. Canada(Attorney General)*, 2002 SCC 57 at para. 32, BOA, Tab 1, quoting with approval from *Makanjuola v. Commissioner of Police of the Metropolis*, [1992] 3 All E.R. 617 at 623 (C.A.)

55. When viewed against the foregoing considerations and principles, it becomes readily apparent that the public interest privilege as it has been recognized and applied by the Tribunal is, respectfully, wholly out-of-step with these principles established in analogous cases, which address the issues.

E. No Other Investigative/Enforcement Agency Enjoys a Blanket Privilege

56. There is no reason to single out the Commissioner among other investigative/enforcement authorities for a class-based public interest privilege. Yet, in the field of administrative law, the public interest privilege the Tribunal has attached to the Commissioner's investigative file stands alone. No other administrative agency – and certainly no other agency with an analogous investigative/enforcement role – enjoys such a privilege.

On the contrary, the case law consistently emphasizes that disclosure of the entire investigative file – all of the "fruits of the investigation" – is crucial to ensuring a fair hearing.

57. Thus, outlining the importance of disclosure to a fair hearing, the Ontario Securities Commission has stated:

> Full fair and timely disclosure is key to ensuring procedural fairness to respondents in regulatory enforcement proceedings.
>
> *Market Regulation Services Inc., Re* (2008), 31 OSCB 5441 at para. 65, BOA, Tab 30.

58. To similar effect is the following statement by the Alberta Securities Commission:

> Disclosure enables the respondents to know the case they have to meet, prepare to rebut Staff's evidence, and make tactical decisions about how to present their case. It is a matter of fundamental justice.
>
> *Fauth*, *Re,* 2017 ABASC 3 at para. 23, BOA, Tab 23.

59. Similarly, the British Columbia Securities Commission stated as follows:

> Disclosure is an issue that goes to the heart of fairness in proceedings before the Commission.
>
> *Timothy Fernback, Brent Wolverton, Wolverton Securities Ltd. and William Massey, Re,* 2004 BSCECCOM 378 at para. 18, BOA, Tab 40.

60. And, in the context of a hearing before the Alcohol and Gaming Commission of Ontario, the Divisional Court stated:

> The purpose of requiring disclosure from administrative tribunals is to ensure that the person brought before the tribunal has the ability to make full answer and defence.

Shooters Sports Bar Inc. v. Ontario(Alcohol and Gaming Commission), [2008] O.J. No. 2112 at para. 54 (Div. Ct.), BOA, Tab 37.

61. The importance of full disclosure was underlined in *Law Society of Upper Canada v. Savone*:

> Full disclosure helps to ensure that all possible admissible evidence, that is relevant to the issues in dispute, is placed before the hearing panel and contributes to the fair and transparent adjudication of conduct matters in the public interest.

Law Society of Upper Canada v. Savone, 2015 ONLSTA 26 at para. 20, aff'd 2016 ONSC 3378, BOA, Tab 28.

62. Thus, both the courts and administrative tribunals have repeatedly held that, in proceedings that attract a high degree of procedural fairness, disclosure of the investigative file is required in order to achieve a fair hearing. Thus, the Ontario Divisional Court stated that disclosure of the fruits of the investigation "is paramount to achieving fairness in such proceedings as it permits the opportunity to make full answer and defence".

Shambleau v. Ontario(Securities Commission), [2003] O.J. No. 4089 at para. 4 (Div. Ct.), BOA, Tab 36.

63. To that end, courts and tribunals have repeatedly held that agencies such as the Ontario Securities Commission, the Alberta Securities Commission, the British Columbia Securities Commission, the Law Society of Upper Canada, the Ontario Human Rights Commission, the Canadian Human Rights Commission, the Ontario Board of Ophthalmic Dispensers, the Chiropractors' Association of Saskatchewan, the Alberta Teachers' Association, the Ontario Alcohol and Gaming Commission, must disclose the contents of their investigative files in proceedings against respondents.

Shambleau v. Ontario(Securities Commission), [2003] O.J. No. 4089 at para. 4 (Div. Ct.) , BOA, Tab 36.

Fauth, *Re,* 2017 ABASC 3 at para. 48 and 51, BOA, Tab 23.

Timothy Fernback, Brent Wolverton, Wolverton Securities Ltd. and William Massey, *Re,* 2004 BSCECCOM 378 at para. 26, BOA, Tab 40.

Law Society of Upper Canada v. Savone, 2015 ONLSTA 26 at para. 23; aff'd 2016 ONSC 3378, BOA, Tab 28.

Christian v. Northwestern General Hospital, [1993] O.J. No. 3380 at para. 19 (Div. Ct.) , BOA, Tab 17.

Singh v. Canada(Statistics Canada), [1998] C.H.R.D. No. 7 at para. 318, BOA, Tab 38.

Markandey v. Ontario(Board of Ophthalmic Dispensers), [1994] O.J. No. 484 at para. 43 (Gen. Div.), BOA, Tab 29.

Thompson v. Chiropractors' Assn.(Saskatchewan), [1996] S.J. No. 11 at para. 3 and 6 (Q.B.), BOA, Tab 39.

Barnes v. Alberta Teachers' Assn., [1994] A.J. No. 1109 at para. 47 (Q.B.), BOA, Tab 2.

Shooters Sports Bar Inc. v. Ontario(Alcohol and Gaming Commission), [2008] O.J. No. 2112 at para. 56 (Div. Ct.), BOA, Tab 37.

64. Of course, it cannot be claimed that these administrative agencies, which are required to disclose the fruits of their respective investigations to respondents, are thereby rendered unable to discharge their enforcement mandates due to an inability to gather information from third parties and thereby effectively investigate allegations. Similarly, it cannot be claimed that merely by requiring that public interest privilege be applied on a case-by-case, rather than on a class basis, the Commissioner would thereby be prevented from discharging his mandate to enforce the Act's civil provisions such as Section 79.

F. No Equivalent Privilege Based on the Candour Rationale in the United States

65. Indeed in quite parallel cases and circumstances in the United States, the antitrust authorities cannot avail themselves of any similar class public interest privilege based on the

candour rationale. Instead, a work product privilege is available to both public and private parties under which disclosure is addressed and resolved by the courts on a case-by-case basis, by distinguishing between facts learned from third parties (which are discoverable) and attorneys' legal strategies and mental impressions (which are not). This doctrine would not prevent the disclosure of documents obtained from third parties, although such might be subject to a protective order, if the requirements for such an order were met. The antitrust authorities in the Unites States nevertheless continue to function quite effectively.

> See, for example, *United States v. Dentsply International,* 187 F.R.D. 152 (D. Del. 1999), BOA, Tab 42.
>
> U.S. jurisprudence also recognizes a separate "deliberative process privilege" although this is again different from the class privilege at issue here. See, for example, *EPA v. Mink*, 410 U.S. 73 (U.S.S.C 1973), BOA, Tab 22.

G. The Class Privilege for the Fruits of the Commissioner's Investigation as Recognized thus far by the Tribunal

66. The recognition of a class privilege applicable to documents and information gathered by the Commissioner in the course of an investigation, relied upon by the Commissioner in this case, dates back to late 1989. These were the early years of the Act, and it was, perhaps, understandable that there might have been some trepidation and concern about making sure that the Commissioner could properly carry out his investigative role. In this environment, the Tribunal was perhaps willing to weigh the potential impact on the Commissioner's investigations more heavily as against procedural fairness. Today, however, the Commissioner's authority and effectiveness are well-established and, as discussed, the general law regarding class privilege has moved on. A closer review of the Tribunal's approach to public interest privilege is therefore warranted.

67. The class privilege was first recognized in the decision by Reed J. in *Canada(Director of Investigation and Research, Competition Act) v. NutraSweet Co.* Reed J. began her analysis by referring to the "*Wigmore* test". The *Wigmore* test, however, governs the determination of whether a particular communication that does not fall within an established class privilege should nonetheless be protected as privileged, in light of the particular circumstances in which that communication was made. As the Supreme Court explained in *R. v. Gruenke*:

> The case-by-case analysis has generally involved an application of the "*Wigmore* test", which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case.
>
> *R. v. Gruenke*,[1991] 3 S.C.R. 263 at para. 26, BOA, Tab 33.
>
> *Canada(Director of Investigation and Research) v. NutraSweet Co.*, [1989] C.C.T.D. No. 54 at para. 11, BOA, Tab 14.

68. The *Wigmore* test requires the court to consider whether the party asserting the privilege has met his onus to establish the following (failing which disclosure will be ordered):

(a) whether the communications in question originated in a confidence that they would not be disclosed;

(b) whether this element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties;

(c) whether the relation is one which in the opinion of the community ought to be sedulously fostered; and

(d) whether the injury that would inure to the relation by the disclosure of the communications is greater than the benefit thereby gained for the correct disposal of litigation.

R. v. Gruenke,[1991] 3 S.C.R. 263 at para. 22, BOA, Tab 33.

69. In *NutraSweet*, although the Tribunal stated that the *Wigmore* test was applicable, it appears not to have applied that test. Instead, the Tribunal simply accepted that the documents should be protected by privilege so as 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".

Canada(Director of Investigation and Research) v. NutraSweet Co., [1989] C.C.T.D. No. 54 at para. 13, BOA, Tab 14.

70. It should be emphasized that the Tribunal accepted this argument – commonly referred to as the "candour argument" – 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 was there any evidence that the individuals had any "fear of reprisals", whether from the respondent in the proceeding or otherwise.

71. Moreover, the Tribunal recognized the privilege not only as applicable to the particular documents at issue, but also as applying to <u>all</u> documents gathered by the Commissioner through his investigative process:

> [D]ocuments created at the investigation stage . . . fall within what has been described as the public interest privilege. The 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.
>
> *Canada(Director of Investigation and Research) v. NutraSweet Co.*, [1989] C.C.T.D. No. 54 at para. 16, BOA, Tab 14.

72. Thus, respectfully, this foundational case rests upon quite questionable footings. In her subsequent decision in *Canada(Director of Investigation and Research) v. Southam*, Reed J. again applied the privilege on a class basis, and again based her decision on the purported (but, once again, unproven) need to protect complainants from potential reprisals in order to ensure their full cooperation with the Commissioner's investigations:

> [T]he 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. . . . 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.
>
> *Canada(Director of Investigation and Research) v. Southam*, [1991] C.C.T.D. No. 16 at para. 26, BOA, Tab 15.

73. And, as was the case in *NutraSweet*, the Tribunal in *Southam* had no evidence that the complainants had genuine or well-founded fears of reprisals if their identities became known, that the complainants had requested that their identities be kept secret or that the complainants had received any form of assurance from the Commissioner that their identities would not be revealed. Moreover, the Tribunal compounded its error by dismissing, virtually out of hand, the possibility that the fairness of the proceeding could be adversely affected by the Commissioner's refusal to produce relevant documents, saying that it was "difficult to conceive of [such] a situation".

> *Canada(Director of Investigation and Research) v. Southam*, [1991] C.C.T.D. No. 16 at para. 27, BOA, Tab 15.

74. Despite these flaws in the reasoning in both *NutraSweet* and *Southam*, the Tribunal continued in other cases to apply the class privilege. It did so, despite the fact that in none of the subsequent cases did the Commissioner ever lead evidence to establish either that the complainants had a well-founded fear of reprisal, or that the Commissioner had promised to keep the complainants' identities secret in the event that proceedings were commenced.

75. Certain of these decisions following *NutraSweet and Southam* were appealed to and upheld by the Federal Court of Appeal, but, respectfully, with virtually no analysis. Thus, in *Hillsdown Holdings (Canada) Ltd. v. Canada(Director of Investigation & Research)*, the Federal Court of Appeal merely stated:

> We agree with Strayer J. that the above statements of principle by Reed J. apply with equal force to the circumstances at bar.

> *Hillsdown Holdings (Canada) Ltd. v. Canada(Director of Investigation & Research)*, [1991] F.C.J. No. 1021 at para. 3 (C.A.), BOA, Tab 25.

> *Canada(Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd.*, [1991] C.C.T.D. No. 20 at p. 3QL, BOA, Tab 13.

76. Likewise, in *D&B Companies of Canada Ltd. v. Canada(Director of Investigation and Research)* the Tribunal appears to have based its decision, at least in part, upon its view that, in order to carry out his investigation, the Commissioner must "depend on the co-operation of industry participants", ignoring the Commissioner's extensive powers to gather information by compulsion, pursuant to section 11 of the *Act*.

> *Canada(Competition Act, Director of Investigation and Research) v. A.C. Nielsen Company of Canada Limited,* [1994] C.C.T.D. No. 15 at 8QL, BOA, Tab 9.

77. A subsequent appeal was dismissed, once again with very little in the way of analysis. Instead, the Court of Appeal simply pointed to Reed J.'s decisions in *NutraSweet* and *Southam* and to its own decision in *Hillsdown Holdings*. The Court then rejected arguments that the correctness of the foregoing jurisprudence was called into question by the Supreme Court's decisions in *R. v. Gruenke* and *R. v. Stinchcombe*, and refused to consider whether there was any defensible policy justification for the privilege.

> *D&B Companies of Canada Ltd. v. Canada(Director of Investigation and Research)*, [1994] F.C.J. No. 1643 at paras. 3, 6-7 (C.A.), BOA, Tab 21.

78. Thereafter, decisions by the Tribunal simply continued to apply the class privilege that had been recognized by Reed J., repeatedly relying upon the "candour argument" as the purported policy justification for the privilege:

> [P]ublic 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.
>
> *Commissioner of Competition v. Toronto Real Estate Board*, 2012 Comp .Trib. 8 at para. 6, BOA, Tab 20.
>
> 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. To gain co-operation from people in the industry the Commissioner must be able to gather information in confidence.
>
> *Canada(Commissioner of Competition) v. Sears Canada Inc.*, [2003] C.C.T.D. No. 16 at para. 35, BOA, Tab 7.

79. The Tribunal made only minor adjustments over the course of the years, which related mainly to the consequences of the privilege. For example, some cases held that the

Commissioner was required to deliver summaries of the documents over which privilege was claimed, although other cases held that such summaries were not necessary.

> See, e.g., *Canada(Competition Act, Director of Investigation and Research) v. Washington*, [1996] C.C.T.D. No. 24 at para. 20, BOA, Tab 11, holding that summaries are not necessary.
>
> And see *Commissioner of Competition v. Air Canada*, 2012 Comp. Trib. 21 at para. 6, BOA, Tab 18, holding that summaries must be produced before examinations for discovery.

80. In addition, some cases have held that, once witness statements are exchanged, the Commissioner is required to produce all documents containing information provided by the witnesses to be called, while other cases have held that the Commissioner need only disclose the information in respect of which the witness will testify.

> See, e.g., *Commissioner of Competition v. Direct Energy Marketing Limited*, 2014 Comp. Trib. 17 at para. 16, BOA, Tab 19, holding that the Commissioner is required to produce all relevant documents provided by witnesses to be called by the Commissioner.
>
> And see *Canada(Commissioner of Competition) v. United Grain Growers Ltd.*, 2002 Comp. Trib. 35 at para. 104, BOA, Tab 8, holding that the Commissioner is not obliged to disclose all information provided to the Commissioner by the witnesses to be called.

81. As discussed above, the provision of summaries is insufficient to meet the requirements for procedural fairness. Nor does the production, a mere 60 days before the hearing, of documents from witnesses who will testify, satisfy procedural fairness, as by then the respondent will have lost the opportunity to examine on the broader range of documents held back by the Commissioner, which one can expect will include documents unhelpful to his case. Full and proper examinations for discovery, preparation for the Tribunal hearing and conduct of the hearing, will all be prejudiced.

H. The Tribunal Should no longer Recognize a Class Based Privilege

82. As discussed above:

(a) the class-based public interest privilege that the Tribunal has recognized is wholly inconsistent with every other facet of public interest privilege at Canadian law; and

(b) no other analogous investigative/enforcement agency enjoys such a blanket privilege – and yet such other agencies are able to carry out their respective investigative duties nonetheless.

83. In addition, when the following factors are considered, it becomes abundantly clear that the Tribunal should no longer recognize any class privilege for documents and information gathered by the Commissioner in the course of his investigation:

(a) the "candour argument" originally relied upon simply cannot justify the class privilege – among other things, it wholly fails to account for the Commissioner's power to compel production of documents and testimony pursuant to section 11;

(b) there is no analogy between the class based privilege accorded the fruits of the Commissioner's investigation and the informer privilege; and

(c) the privilege is out-of-step with Canada's competition law and enforcement practices.

84. Although consistency in its decisions is a valid objective, the Tribunal is not bound by *stare decisis*. The Tribunal should reconsider the class privilege in light of the unreasonableness of applying the Tribunal's previous decisions in this case, light of the factors and developments discussed herein.

> This board is not bound by any strict rule of *stare decisis* to follow a decision of another board in a different bargaining relationship. Yet the demand of predictability, objectivity, and impersonality in arbitration require that rules which are established in earlier cases be followed unless they can be fairly distinguished or unless they appear to be unreasonable. (emphasis added)
>
> *Re United Steelworkers v. Triangle Conduit & Cable Canada(1968) Ltd.* (1970), 21 L.A.C. 332 (Ont. Arb.), cited in *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34 at para. 78, BOA, Tab 26.

a. The Candour Argument Cannot Justify the Class Privilege

85. There is no basis to assert that complainants expect that their communications will be held in confidence if a proceeding is commenced. Section 29 of the Act expressly provides that any documents gathered by the Commissioner as part of his investigation can be used in a proceeding. A person providing information to the Commissioner as part of an investigation can have no reasonable expectation of confidentiality in the event of a contested proceeding before the Tribunal.

86. As pointed out by commentators, in *Carey v. Ontario*, the Supreme Court of Canada held that a mere promise to keep documents confidential is insufficient.

> *Carey v. Ontario*, [1986] 2 S.C.R. 637 , in *Truncated Disclosure*, at 107, BOA, Tab 46.

87. The Tribunal itself has recognized that third parties who come forward and provide documents and information to the Commissioner have no legitimate expectation of confidentiality. In *Canada(Director of Investigation and Research) v. Air Canada*, where the Tribunal held that, given section 29, there was no "common understanding" that the documents provided by third parties would be kept confidential in case of an application being launched.

> *Canada(Director of Investigation and Research) v. Air Canada*, [1993] C.C.T.D. No. 4 at para. 7, BOA, Tab 12.

88. That is consistent with the wording of section 29 of the Act*:*

> No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person <u>except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act</u>
>
> (a) the identity of any person from whom information was obtained pursuant to this Act;
>
> (b) any information obtained pursuant to section 11, 15, 16 or 114;
>
> …
>
> (e) any information provided voluntarily pursuant to this Act. (emphasis added)
>
> *Competition Act*, Section 29(1), BOA, Tab 44.

89. The "candour argument" makes no sense in the context of compelled documents or information, as it cannot be argued that any expectation of confidentiality played a role in gathering the information.

90. While the class privilege was applied to information obtained under compulsion in *Canada(Competition Act, Director of Investigation & Research) v. Canadian Pacific Ltd,* the theory applied was that the privilege "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." Any concern regarding "control" over information, however, can be met through the use of a confidentiality order, as has been applied for in this case. The Tribunal can then decide what confidentiality orders are needed in relation to limiting disclosure of the documents, including possibly *in camera* hearings when a witness testifies.

> *Canada(Competition Act, Director of Investigation & Research) v. Canadian Pacific Ltd.*, [1997] C.C.T.D. No. 28, at para 7, BOA, Tab 10.

91. Accordingly, the candour argument does not provide a basis for a class privilege to be maintained for information obtained by the Commissioner at the investigatory stage.

b. The Privilege Cannot Be Justified by Analogy to the very Narrow Informer Privilege

92. It appears that in *Nutrasweet*, Reed J. also analogized from the public interest privilege to the informer privilege. But if the candour argument provides a shaky foundation for recognizing a class privilege in Tribunal cases, justifying the class privilege by analogy to the informer privilege is untenable.

> *Canada(Director of Investigation and Research) v. NutraSweet Co.*, [1989] C.C.T.D. No. 54 at para. 30, BOA, Tab 14.

93. First, the informer privilege only applies to communications with a peace officer. As the Federal Court of Appeal explained in declining to extend the privilege to communications with CSIS agents:

> The informer privilege as a class privilege protects the relationship between the informer and a peace officer.
>
> *Canada(Attorney General) v. Almalki*, 2011 FCA 199 at para. 18, BOA, Tab 4.
>
> See also, *Harkat*, *Re*, 2014 SCC 37 at para. 80, BOA, Tab 24.

94. In declining to extend informer privilege to communications made to CSIS agents, the Federal Court of Appeal noted that "CSIS' approach was overbroad as it tended to treat everyone who provides information as a confidential source whether there is any real expectation of confidentiality on the part of the source, a risk of harm to the source or likelihood that they would not be forthcoming without such assurances".

> *Canada(Attorney General) v. Almalki*, 2011 FCA 199 at para. 22, BOA, Tab 4.

95. Information provided to the Commissioner and his officials in the Competition Bureau is not information provided to a "peace officer", as is evident from the specific use of the term "peace officer", for example in Section 30.18 of the Act, which specifies the ability of any peace officer to execute an arrest warrant.

> *Competition Act*, Section 30.18, BOA, Tab 44.

96. Second, informer privilege cannot be waived by the Crown alone. It can only be waived if both the Crown and the informer agree. As the Supreme Court stated in *R. v. Leipert*:

> The privilege belongs to the Crown. However, the Crown cannot, without the informer's consent, waive the privilege either expressly or by implication by not raising it. In that sense, it also belongs to the informer.
>
> *R. v. Leipert*, [1997] 1 S.C.R. 281 at para. 15, BOA, Tab 34.

97. Informer privilege is not an apt or tenable analogy for the class privilege being claimed by the Commissioner in this case.

c. The Privilege is Out-of-Step with Canada's Competition Law and Enforcement

98. There have been both statutory developments and developments in enforcement practice that suggest a review of the class privilege is now due, if not overdue.

99. In 2009/2010, Parliament enacted amendments that significantly revamped a number of provisions of the Act. One such set of amendments related to agreements between competitors. Formerly, the Act prohibited such agreements only under section 45 of the Act, that is, under Part VI – Offences in Relation to Competition. In addition to amending this provision to make certain such conspiracies an indictable offence on a *per se* standard, Section 90.1 of the Act, relating to agreements or arrangements that prevent or lessen competition substantially, was added to Part VIII of the Act – Matters Reviewable by the Tribunal. Subsection 90.1(10) specifies that the Commissioner cannot make application to the Tribunal "against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which", among other things, "proceedings have commenced against that person under section 45 …" Section 74.16 of the Act similarly provides, "No application may be made under this Part against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which proceedings have been commenced against that person

under section 52 or 52.01 [the provisions of Part VI of the Act relating to misleading advertising.]

Competition Act, Sections 45, 90.1, 90.1(10), 74.16, 52 and 52.01, BOA, Tab 44.

100. These provisions demonstrate that in certain cases it lies within the Commissioner's discretion whether or not to proceed by way of criminal or civil proceedings in relation to the same or substantially the same facts. If the Commissioner elects to proceed under the criminal provisions of the Act, he is required to comply with *Stinchcombe* disclosure, while if he elects to proceed under the civil provisions of the Act, he benefits from the class privilege approach accepted by the Tribunal. The fact that the Commission might choose either track "on the basis of facts that are the same or substantially the same" belies any expectation on the part of a third party that its information will be protected, thereby undercutting the so-called "candour argument".

Canada v. Pharmaceutical Society(Nova Scotia), [1992] N.S.J. No. 406 at para. 12 (S.C. (T.D.)), BOA, Tab 16.

101. The Commissioner's practise of increasingly and consistently employing the formal investigatory tools at his disposal, which can be judicially recognized by this expert Tribunal, also merits a re-examination of the class public interest privilege.

102. These developments support a review of the class privilege applied by the Tribunal to the fruits of the Commissioner's investigation in civil proceedings.

I. The Application of a Class-Based Public Interest Privilege in this Case is Fundamentally Unfair to VAA

103. As noted in *Truncated Disclosure*, "[the Tribunal's and Federal Court of Appeal's previous decisions] have shifted the balance in Tribunal proceedings in favour of the Commissioner in a manner that is unfair, unwarranted and unwise. The search for truth, and the fairness and utility of proceedings before the Tribunal, have been sacrificed in the process."

Truncated Disclosure, at 106, BOA, Tab 46.

104. The Commissioner's claim to a class public interest privilege should be rejected. By claiming privilege over an entire class of documents, the Commissioner is shifting the balance in this Application significantly in his favour, by fundamentally altering the onus that would otherwise rest on the Crown if the privilege were to be applied on a case-by-case basis, as provided for by the common law and pursuant to Sections 37 and 38 of the *Canada Evidence Act*.

Canada Evidence Act, R.S.C. 1985, c. C-5, Sections 37 and 38, BOA, Tab 45.

105. The first step in this case-by-case analysis is to establish the relevance of the documents in question. In this case, there is no debate that the Relevant Documents are relevant to the matters in the Application, as they have been designated as such by the Commissioner and VAA has no reason to believe otherwise.

106. The second step in determining whether the Relevant Documents should be protected from disclosure on a case-by-case basis places the onus on the Commissioner of demonstrating

a specific public interest that would be harmed by disclosure of the Relevant Documents. As cautioned by the Federal Court:

> [T]he Court must guard against reliance on "generalized assertions of possible disadvantage to an ongoing investigation". . . . Rather, the onus is on the Minister to establish that the disclosure of the information in question would have a concrete deleterious effect on the ongoing investigation. (emphasis added)
>
> *Wang v. Canada(Minister of Public Safety and Emergency Preparedness)*, 2016 FC 493 at para. 35, BOA, Tab 43.

107. In this case, the Commissioner has failed to provide even a generalized assertion of possible disadvantage. Instead, Schedule C of the Commissioner's Affidavit of Documents describes a class of documents: "Public interest" means public interest privilege; the privilege attaching to records of any kind or description and copies thereof, including records to which the confidentiality provisions of the *Competition Act* apply, created or obtained by the Applicant, its employees, servants, agents or solicitors, or obtained from third parties during the Applicant's investigations".

108. By invoking a class-based privilege, the Commissioner has sought to avoid the onus that would otherwise be on him to demonstrate that disclosure of the Relevant Documents would lead to harm to a specified public interest. Instead, he seeks to rely on the mere presumption of harm that applies once the Relevant Documents are demonstrated to fall within the class. This approach short-circuits any assessment whatsoever of whether there is a basis for the assertion of privilege in this case.

109. On the unique facts of this case, the Respondent has a public interest mandate and is a non-participant in the Galley Handling or in-flight catering industries. VAA would not have any incentive in the factual circumstances of this case to misuse the documents for anti-competitive purposes, and in fact recently granted a license for ground handling to Strategic Aviation Holdings Ltd., one of the entities that applied for an in-flight catering license. Yet the presumption of harm in this case denies procedural fairness to VAA, and with it, the Tribunal's search for the truth.

110. The third step in determining whether the Relevant Documents should be protected from disclosure on a case-by-case basis (which is only reached if the onus has been met under the second step) is the balancing of the harm of disclosure against the harm of not disclosing the documents.

111. By way of contrast, under a class privilege, with the presumption of harm of such disclosure the onus shifts onto the respondent to provide a "compelling reason for disclosure", an unreasonably high standard that has previously proven impossible for other respondents to meet.

112. Under the balancing test required by a case-by-case application of the privilege, <u>if</u>, and only if, the Commissioner was to have met his onus of demonstrating a specific public interest that would be harmed by disclosure of the Relevant Documents, the Tribunal should consider the following:

(a) the nature of the public interest(s) asserted;

(b) the degree of connection between the documents in question and the matters in issue in the proceeding – i.e., the probative value of the disputed documents;

(c) the nature of the underlying proceeding, including the public interest in that proceeding;

(d) the effect that non-disclosure would have on the public's perception of the justice system;

(e) the timing, source and sensitivity of the information contained in the disputed documents; and

(f) other evidence available to the party seeking disclosure.

Canada(Attorney General) v. Tepper, 2016 FC 307 at para. 5 and 15, BOA, Tab 6.

Wang v. Canada(Minister of Public Safety and Emergency Preparedness), 2016 FC 493 at paras. 36-37, BOA, Tab 43.

113. In this case there is no evidence available to VAA or the Tribunal regarding criterion (b) (other than the fact that the Relevant Documents are, by the Commissioner's own admission, relevant to the matters in the Application), or criteria (e) or (f). Under criterion (c), it is clear that the nature of the proceedings raise serious issues and are at the court-like end of the spectrum. As well, under criterion (d) the perception (as evidenced by, among other things, the *Truncated Disclosure* article), that the balance between secrecy and disclosure has previously tilted too far towards secrecy. Accordingly, among other reasons, criteria (c) and (d) weigh heavily in favour of disclosure in this case.

PART IV -- ORDER SOUGHT

114. VAA seeks:

(a) an Order requiring the Applicant to produce to VAA all of those documents listed in Schedule C of the Commissioner's Affidavit of Documents in respect of which the only privilege claimed is public interest privilege;

(b) VAA's costs of this motion; and

(c) such further and other relief as the Tribunal deems just.

DATED at Toronto, Ontario this 17th day of March, 2017

GOODMANS LLP

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Calvin S. Goldman, QC
Tel: (416) 597-5914
Fax: (416) 979-1234

Michael Koch
Tel: (416) 597-5156

Julie Rosenthal
Tel: (416) 597-4259

Ryan Cookson
Tel: (416) 597-6012

Counsel for Vancouver Airport Authority

PART V-- LIST OF AUTHORITIES, STATUTES AND SECONDARY SOURCES REFERRED TO

Jurisprudence	
1	*Babcock v. Canada(Attorney General)*, 2002 SCC 57
2	*Barnes v. Alberta Teachers' Assn.*, [1994] A.J. No. 1109 (Q.B.)
3	*Bell Canada v. Canadian Telephone Employees Assn.*, 2003 SCC 36
4	*Canada(Attorney General) v. Almalki*, 2011 FCA 199
5	*Canada(Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*, 2007 FC 766
6	*Canada(Attorney General) v. Tepper*, 2016 FC 307
7	*Canada(Commissioner of Competition) v. Sears Canada Inc.*, [2003] C.C.T.D. No. 16
8	*Canada(Commissioner of Competition) v. United Grain Growers Ltd.*, 2002 Comp. Trib. 35
9	*Canada(Competition Act, Director of Investigation and Research) v. A.C. Nielsen Company of Canada Limited*, [1994] C.C.T.D. No. 15
10	*Canada(Competition Act, Director of Investigation & Research) v. Canadian Pacific Ltd.*, [1997] C.C.T.D. No. 28
11	*Canada(Competition Act, Director of Investigation and Research) v. Washington*, [1996] C.C.T.D. No. 24
12	*Canada(Director of Investigation and Research) v. Air Canada*, [1993] C.C.T.D. No. 4
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