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Toll the death knell for class-based public interest privilege in competition proceedings?

The Competition Bureau relies heavily on voluntary cooperation from corporate Canada in order to enforce the *Competition Act*. Companies typically want assurances of confidentiality in order to cooperate with the Bureau. In recognition of the fact that companies are less likely to cooperate with the Competition Bureau if commercially sensitive information might be disclosed to third parties, the *Competition Act* provides a number of confidentiality protections for information acquired by the Bureau from third parties.

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A long-standing question has been whether such confidentiality protections apply if the Commissioner of Competition decides to bring the proceedings against a market participant. For many years, the answer to this question was a qualified “yes”. The Competition Bureau was typically able to rely on a broad, class-based public interest privilege to shield disclosure of information provided by third parties to the Competition Bureau.

What this meant in practice was that information did not have to be disclosed by the Commissioner to the respondent in any proceedings, until such time as the Commissioner chose to rely on such documents. Only if the Commissioner intended to rely on a document at the proceeding would the Commissioner have to waive privilege and produce the documents. However, in the Federal Court of Appeal’s recent decision of *Commissioner of Competition v Vancouver Airport Authority*, the landscape has been dramatically altered.

By way of background, the matter of *Commissioner of Competition v Vancouver Airport Authority* is an application brought by the Commissioner before the Competition Tribunal

against the Vancouver Airport Authority. The Commissioner alleges that the Vancouver Airport Authority abused of dominance in relation to galley handling at the Vancouver airport, by restricting the market to only two in-flight caters.

In the course of its investigation, the Bureau had obtained a large amount of information from market participants, most of that information through so-called section 11 orders. Section 11 orders are court orders requiring an individual who may have relevant information or documents to disclose such documents to the Bureau.

As a result of the information gathered by the Bureau, the Commissioner had amassed approximately 11,500 relevant documents in its possession. It claimed public interest privilege over approximately 9,500 of these documents, and refused to disclose them to the Vancouver Airport Authority. The Vancouver Airport Authority brought a motion to compel production of those documents. On the eve of the motion, the Commissioner waived privilege over approximately 8,300 of those documents, and agreed to disclose them to the Greater Vancouver Airport Authority. However, it maintained privilege over the remaining 1,200.

The Tribunal declined to order the Commissioner to disclose the documents sought, holding that the documents were protected by a class-based public interest privilege.

The Vancouver Airport Authority appealed to the Federal Court of Appeal. The Federal Court of Appeal allowed the appeal, holding that the Commissioner of Competition could not rely on a class-based public interest privilege to preclude disclosure of the documents. The Federal Court of Appeal identified several reasons for rejecting the existence of a class-based public interest privilege, including that:

- Earlier cases finding a class-based public interest privilege in the circumstances were no longer supportable in light of later Supreme Court case law;
- If a class-based public interest privilege were to be recognized in these circumstances, it should be created by Parliament, rather than the courts;
- There was no evidentiary record led by the Commissioner to support the existence of a class-based public interest privilege; and
- The Commissioner had not established sound policy reasons that a blanket confidentiality protection was necessary to protect the Bureau's ability to gather information.

Rather, the Federal Court of Appeal held that if the Commissioner wished to withhold relevant documents on the basis of public interest privilege, it would have to justify such public interest privilege on a document-by-document basis.

The implications of the Federal Court of Appeal's decision are significant for all market participants.

From the perspective of those targeted in proceedings by the Competition Bureau, this decision will be a welcome one, as it provides respondents access to the usual types of information that they will enjoy other forms of civil litigation—namely, all relevant documents in the Bureau's possession.

For other market participants who provide information to the Competition Bureau, either voluntarily or under compulsion pursuant to a section 11 order, the situation is less rosy. While such entities could not guarantee that there confidential documents would not be disclosed to a third party, this decision makes it virtually guaranteed that relevant documents provided to the Competition Bureau will have to be disclosed to a target in any subsequent litigation. This may make companies think twice before voluntarily providing information to the Competition Bureau, and also as to whether to challenge or comply with a section 11 order made against the company.