

# COMMENTS / COMMENTAIRES

## SECTION 36 REQUESTS FOR ACCESS TO INFORMATION AND THE COMPETITION BUREAU: HAST THOU FORSAKEN ME?

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*The Competition Bureau has adopted an approach consisting of general opposition to requests for access to information for the purpose of private lawsuits under section 36. The Bureau has in the past resisted information requests on account of a class privilege over all information in its possession amongst other reasons. This article argues that the Bureau's general position is contrary to the governing legislation. The Bureau's reasons for its general position are not compelling because the Bureau fails to factor into the analysis the role of private enforcement within the Canadian competition regulatory scheme. The legislative history of the private right of action, Parliament's intention in creating an integrated regulatory scheme, and the realities of competition enforcement do not support the Bureau's blanket refusal to disclose. Similarly, the text of the legislation, the caselaw, and the state of the law in foreign jurisdictions do not lend credence to the Bureau's approach to private enforcement. This article proposes that cooperation with private enforcers, rather than opposition to them, is the correct approach. In the exceptional cases where the Bureau properly needs to oppose disclosure, a case-by-case study and justification of the denial of access requests for section 36 enforcement would comply with the law and would better protect the many interests involved.*

*Le Bureau de la concurrence a adopté une position d'opposition systématique aux demandes d'accès à l'information faites aux fins de poursuites privées intentées en vertu de l'article 36. Il s'est ingénié à les contrer en invoquant, entre autres motifs, un privilège générique qui met à couvert tous les renseignements en sa possession. Le présent article fait valoir que ce procédé est contraire aux dispositions législatives applicables. Les arguments que le Bureau invoque pour justifier sa position ne sont pas convaincants, son analyse ne tenant pas compte du rôle des agents d'application du droit privé dans le système canadien de réglementation de la concurrence. En effet, ce refus de divulgation systématique ne cadre pas avec l'histoire législative du droit privé d'action, ni avec l'intention dans laquelle le Parlement a créé un système de réglementation intégré, ni avec les réalités de l'application de la loi en matière de concurrence. Le libellé de la loi, la jurisprudence et l'état*

*du droit étranger indiquent eux aussi que la position du Bureau quant à l'application du droit privé ne tient pas la route. Dans cet article, j'explique pourquoi la bonne solution est de coopérer avec les agents d'application du droit privé, et non de leur résister. Dans les cas exceptionnels où le Bureau doit réellement s'opposer à la divulgation, une analyse au cas par cas et une justification du refus de la demande d'accès visant l'application de l'article 36 satisferaient aux exigences légales, et les nombreux intérêts en jeu seraient ainsi mieux protégés.*

## I. Introduction

The Commissioner of Competition has generally resisted requests for information from private parties in proceedings under section 36 of the *Competition Act*.<sup>2</sup> The Bureau's approach to these requests culminated in its 2017 bulletin titled "Requests for information from private parties in proceedings under section 36 of the *Competition Act*".<sup>3</sup> The Bureau revised and updated the 2017 Bulletin on June 11, 2018.<sup>4</sup> The general position in the two Bulletins is that the Commissioner will oppose requests for information and will take all measures necessary to withhold any information in its possession.

This paper argues that (a) the Bureau's approach is based on flawed analysis in that it wholly excludes section 36 of the Act as a factor;<sup>5</sup> and (b) given the importance of the interests involved and the scheme of the Act, a collaborative case-by-case review, not blanket opposition to disclosure, would comply with the Act and be responsive to Parliament's goals in creating a private right of action.

The Act in its broader context reveals that Parliament created a legislative/regulatory scheme for the purpose of maintaining and encouraging competition in Canada "in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices".<sup>6</sup> Parliament gave the primary responsibility for the administration and enforcement of the Act to the Commissioner.<sup>7</sup> However, Parliament also saw fit to create a statutory private right of action as an enforcement mechanism to compensate victims and deter the most egregious anti-competitive conduct contrary to the Act. While Parliament created a cloak of confidentiality on the information obtained by the Competition Bureau, it also created an exception where the information is needed for the purposes of the administration or enforcement of the Act.

Section 36 proceedings are a vital element of the enforcement of the Act. Parliament considered private enforcement under section 36 to be in the public interest. Nothing in the legislation suggests that Parliament intended section 36 enforcement to be subsidiary to the broader scheme of the Act in protecting competition and Canadian consumers. In reality, civil litigation in many instances has proven far more effective in compensating victims and deterring and punishing anti-competitive behaviour than the enforcement alternatives available to the Commissioner.

Therefore, while there is no doubt concerning the special statutory position of the Commissioner or the potential significance in some circumstances of some of the factors that the Bureau typically relies upon to oppose disclosure, the Bureau's general approach fails to take into consideration the broader context of the Act and its objectives. This paper proposes that the regulatory scheme created by the Act requires cooperation from the Commissioner with private enforcers, rather than opposition. In the same vein, instead of a blanket refusal to disclose, a case-by-case analysis of information requests that balances the myriad interests and statutory considerations at issue would better comply with the Act and jurisprudence.

## **II. The Bureau's General Approach to Access Requests**

In reported cases where section 36 private enforcers have sought access to information in the Commissioner's possession, the Commissioner's general response has been unreserved, blanket opposition. For example, in *Pro-Sys Consultants Ltd v Microsoft Corporation*,<sup>8</sup> the plaintiffs brought a class action against Microsoft alleging various anti-competitive wrongs that enabled it to charge higher prices for its products. The Bureau had earlier investigated Microsoft but ultimately decided not to take enforcement action. The plaintiffs sought disclosure from the Bureau of certain correspondence, notes, research and other documents relating to the Microsoft investigation. The Bureau joined forces with Microsoft to resist the request in its entirety. In *Imperial Oil v Jacques*,<sup>9</sup> section 36 class action plaintiffs sought the disclosure of certain recordings of communications intercepted by the Bureau in the course of its criminal investigation into a gasoline price-fixing conspiracy in Quebec. The Bureau opposed the request and litigated the matter all the way up to the Supreme Court of Canada. Most recently in *Canada (Attorney General) v Thouin*,<sup>10</sup> section 36 plaintiffs sought discovery of the Bureau's price-fixing investigator on

the subject matter of the section 36 proceeding. The Bureau countered by raising the common law immunity from discovery on the ground that neither the Crown nor the Bureau was a party in the class action. While none of these cases disposed of the problematique raised in this article, they show the Commissioner's typical response has been to oppose the requests rather than cooperate with section 36 private enforcers in combating anti-competitive conduct.

The Commissioner's approach toward requests for access to information in his or her possession or control from persons contemplating, or who are parties to, proceedings under section 36 of the Act crystallized in the 2017 Bulletin and its subsequent 2018 version. The Commissioner announced his general opposition to the production of any information in the Bureau's possession regarding anti-competitive conduct. The 2017 and 2018 Bulletins describe the general position in identical terms:

[I]f served with a subpoena, the Bureau will inform the information provider so it has knowledge of, and an opportunity to intervene. The Bureau will, if appropriate, oppose a subpoena for production of information if compliance would potentially interfere with an ongoing examination, inquiry or enforcement proceeding or otherwise adversely affect the administration or enforcement of the Act. If the Bureau's opposition is unsuccessful, it will seek protective court orders to maintain the confidentiality of the information in question.<sup>11</sup>

The Bulletins failed to specify any "appropriate" circumstance where the Commissioner would not oppose an access request.<sup>12</sup> The Bulletins only dealt with reasons why information in the possession of the Commissioner must be withheld from private enforcers under section 36. As such, the Bulletins voiced a blanket statement of opposition to disclosure; a statement of opposition that was reinforced by the Bureau's pledge to seek protective court orders in the face of a subpoena.

The Bulletins provide four arguments in support of the general position. First, requests for information interfere with the Bureau's ongoing examinations, inquiries or enforcement proceedings. Second, confidentiality fundamentally contributes to the Bureau's administration and enforcement of the Act, be it in an ongoing or even closed examination, inquiry or enforcement proceedings. In this respect, the Bureau highlights its reliance on voluntarily provided information—the provision of which, the Bulletins argue, might experience a chilling effect if there is a likelihood that the information would be released to parties outside

the Bureau—and the proprietary and/or commercially sensitive nature of some of the information at issue. Third, responding to requests may become a financial burden and tie up Bureau staff in production efforts instead of other duties under the Act. Fourth, in the 2017 Bulletin the Bureau argued that a public interest class privilege attached to the information in the Commissioner's possession. In the 2018 Bulletin, in light of subsequent jurisprudence from the Federal Court of Appeal discussed below, the Bureau argued that it would assert public interest privilege on a case-by-case or document-by-document basis.

### **III. The Bureau's General Approach Is Inconsistent with the Law**

There may be cases where some of the reasons given by the Bureau could validly justify non-disclosure of certain documents or less draconian restrictions such as redactions. That possibility, however, does not end the debate. The Bulletins are more than a mere summary of reasons why in a given scenario the Commissioner may properly refuse to produce information requested for section 36 enforcement purposes. The Bulletins are a statement of policy and general position by the Commissioner who is a statutory authority. They are consistent with the Bureau's previous responses to access to information requests by section 36 enforcers.

Given the broad policy-based nature of the Bureau's approach, as summarized in the Bulletins, the Bulletins and the general policy that they advance must be based on a proper analysis consistent with the empowering legislation. In that respect, it is helpful to review the scheme of the Act and the relevant provisions.

#### **A. The Act's Relevant Provisions**

As the Bulletins indicate, at least two provisions of the Act directly apply to the policy position at issue: sections 29 and 36. Section 29 governs confidentiality under the Act. Subsection 29(1) states:

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 except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act ...

As such, section 29 creates a confidentiality obligation with two

exceptions. One exception concerns information that is to be used “for the purposes of the administration or enforcement of this Act”. Section 36 enforcement falls within this exception. Thus, production to plaintiffs prosecuting under that provision is not barred by the Act’s cloak of confidentiality—although some caselaw has held that this exception does not translate into an automatic right to access information by section 36 enforcers.<sup>13</sup>

Given that the Act has expressly carved out an exception to the section 29 confidentiality obligation in the case of section 36 proceedings, section 36 itself needs to be taken into account in the formulation of the Commissioner’s general position regarding production requests under section 36. Basic principles of statutory interpretation assist the analysis. Canada’s modern approach to statutory interpretation is that:

the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.<sup>14</sup>

Therefore, it is necessary to consider the wording of section 36 together with the Act’s object and Parliament’s intention to be able to properly assess the Commissioner’s general position on information requests for section 36 enforcement.

### **B. Section 36 is an Indispensable Part of the Canadian Competition Scheme**

Subsection 36(1) creates a statutory right of action for any person who has suffered loss or damage as a result of some of the most egregious anti-competitive conduct, including criminal offences under Part VI of the Act.

The provision’s legislative history helps clarify what Parliament intended.<sup>15</sup> The private right of action was created by 1975 amendments as section 31.1 of the then *Combines Investigation Act*.<sup>16</sup> In enacting section 31.1, Parliament implemented the recommendations of the Economic Council of Canada in its 1969 *Interim Report on Competition Policy*.<sup>17</sup> The Economic Council recommended a shift from the solely criminal law based enforcement of competition to civil remedies. The rationales behind this proposed shift included, among others, the flexibility of the civil process and civil remedies as well as the lower standard of proof.<sup>18</sup> The Economic Council advised that primacy should be given to deterrence and prevention, as opposed to solely criminal prosecution.<sup>19</sup> One

example of such civil remedies was the availability of treble damages for antitrust offences contrary to the *Sherman Act*<sup>20</sup> in the United States.<sup>21</sup> In that respect, the Economic Council recommended:

It would seem to be worth exploring whether the deterrent effect of the criminal law portions of the Canadian competition policy could be enhanced by opening up an avenue for single-damage suits by private parties.<sup>22</sup>

Subsequently, the parliamentary discussions on section 31.1 in 1974 and 1975 strongly pointed to the regulatory and consumer protection purposes of the private right of action. In discussing the various proposed amendments to the *Combines Investigation Act*, André Ouellet, the Federal Minister of Consumer and Corporate Affairs, said consumer protection was the “constant concern of the government and especially my department”.<sup>23</sup> Parliamentarians also debated civil enforcement as a mechanism to enhance compliance and protect Canadian consumers. Some expressed concern that the Act’s criminal enforcement provisions alone were insufficient. For example, David Orlikow stated during the parliamentary deliberations:

Over the years we have seen a large number of investigations into such illegal [anti-competitive] acts by Canadian corporations. Over the years there have been a substantial number of prosecutions. Some of them were unsuccessful; [...] In other cases the prosecutions succeeded, at which time we witnessed the spectacle of the courts assessing monetary fines of \$5,000, \$10,000 or \$20,000 on some of the largest corporations in the country.

In a recent case, as one of my hon. friends mentioned earlier in debate, a group of companies was assessed a total of \$450,000 in fines. Those fines, Mr. Speaker, were completely unsuccessful in their objective, which was to prevent corporations from combining illegally to mulct the public.<sup>24</sup>

These concerns were consistent with some of the considerations regarding flexibility, effectiveness, and deterrence effects voiced earlier by the Economic Council in 1969 and later echoed by the Supreme Court of Canada in *General Motors of Canada Ltd v City National Leasing*<sup>25</sup> discussed below.

Various parties challenged the constitutionality of the private right of action in section 31.1 of the *Combines Investigation Act*. The issue reached the Supreme Court of Canada in *General Motors*. In that case, City National Leasing (“CNL”) leased vehicles that it purchased

from General Motors dealers in competition with other national fleet leasing companies. CNL alleged that a General Motors affiliate had paid preferential interest rates to CNL's competitors contrary to the price discrimination provisions of the Act. It sued for damages under section 31.1. General Motors brought an application to declare section 31.1 *ultra vires* Parliament and therefore unconstitutional, alleging that the provision was in pith and substance legislation on matters within the exclusive legislative competence of the provinces.<sup>26</sup>

The Court upheld the constitutional validity of the provision as "an integral, well-conceived component of the economic regulation strategy found in the *Combines Investigation Act*" and "one of the arsenal of remedies created by the Act to discourage anti-competitive practices".<sup>27</sup> Regarding the interrelationship between the private right of action and the legislation as a whole, Dickson C.J. stated:

It seems to me that s. 31.1 is fully integrated into the Act, indeed, it is a core provision of the very pith and substance of the Act. As the Attorney General of Canada submits, the civil action for damages provided by s. 31.1 for an occurrence of the anti-competitive practices set out in s. 34(1)(a) is clearly as much a part of the legislative scheme regulating competition throughout Canada as is the criminal action for fines and imprisonment or the administrative action involving an inquiry or the reduction of customs duties. Together or apart, the civil, administrative, and criminal actions provide a deterrent against the breach of the competitive policies set out in the Act. In this respect s. 31.1 is part of a legislative scheme intended to create "a more complete and more effective system of enforcement in which public and private initiative can both operate to motivate and effectuate compliance".<sup>28</sup>

In describing the utility of the private right of action, Dickson C.J. relied on the American experience with private antitrust litigation "premiered on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behaviour in violation of the antitrust laws".<sup>29</sup> Creating a private right of action also increased the flexibility needed to combat anti-competitive practices.<sup>30</sup>

### **C. Section 36 Enforcement Cannot be Divorced from Class Actions**

The 2017 Bulletin particularly addressed parties in class proceedings under section 36 of the Act, arguing that "[r]esponding to their requests

is time-consuming and requires the Bureau to incur considerable costs”.<sup>31</sup> In this respect, both Bulletins argue that “[e]ven if salary and overhead costs are repaid, the Bureau employees and counsel will not be available to carry out the Bureau’s public interest mandate. This would be contrary to the public interest”.<sup>32</sup>

The Bulletins fail to take note of the equally compelling public interest in section 36 enforcement and how class actions make section 36 enforcement viable.

From its inception, the private right of action was intertwined with class proceedings. When Parliament was deliberating on the private right of action in 1974 and 1975, some lawmakers pressed for the provision to be taken one step further and include a class action regime in order to give teeth to the right of action and better protect Canadian consumers.<sup>33</sup> Lawmakers went as far as including a class action regime as an amendment to the bill that included the proposed private right of action.

However, that proposed amendment was not enacted. This led to a period of time between the enactment of the private right of action in 1975 until the creation of class proceeding regimes in the various common law provinces during which private enforcement actions were rare.<sup>34</sup> Individual actions based on violations of the Act were and are prohibitively expensive to litigate.<sup>35</sup> Practically speaking, the average consumer could never sue for damages under section 36 as the costs of prosecuting the claim would far outweigh the potential recovery.

The advent of class proceeding regimes breathed life into section 36 enforcement. Class actions’ economies of scale<sup>36</sup> made the enforcement of the Act under section 36 viable. The advantages of behaviour modification and access to justice underlying class actions as a procedural vehicle<sup>37</sup> aligned perfectly with the substantive objectives of consumer protection and deterrence underlying section 36. The Supreme Court of Canada dealt with this issue in *Pro-Sys Consultants Ltd v Microsoft Corporation*.<sup>38</sup> In that case the plaintiffs sought to bring a class action under section 36 and some other rights of action alleging that the defendant Microsoft engaged in unlawful anti-competitive conduct by overcharging for its operating systems and software. Writing for a unanimous Court, Rothstein J. allowed the section 36 claim to proceed, stating:

[W]hile under the *Competition Act* the Competition Commissioner is the primary organ responsible for deterrence and behaviour modification,

the Competition Bureau in this case has said that it will not be pursuing any action against Microsoft. Accordingly, if the class action does not proceed, the objectives of deterrence and behaviour modification will not be addressed at all. On this issue, the class action is not only the preferable procedure but the only procedure available to serve these objectives.<sup>39</sup>

As the *Pro-Sys* case illustrates, in some instances a class action under section 36 may be the only means through which the Act can be enforced. In *Pro-Sys*, the Commissioner did not intend to take enforcement action. Even in cases where the Commissioner does take enforcement action under the Act, a section 36 proceeding may prove to be the only way to obtain results in furtherance of the Act. For example, the Commissioner investigated a chocolate price fixing conspiracy by major firms including Cadbury, Hershey, and Nestlé between 2002 and 2008. The Commissioner's investigation led to criminal charges under the Act against various companies and individuals. Ultimately, some defendants were acquitted and the Crown stayed the charges against the others.<sup>40</sup> The Commissioner's attempts at enforcing the Act fell apart. Private litigants also commenced class proceedings under section 36 against the co-conspirators. Unlike the prosecutions that led nowhere, the class proceedings resulted in settlements in excess of \$23-million in favour of the consumers of chocolate in Canada.<sup>41</sup>

The Bureau itself has touted the effectiveness of competition enforcement through class actions. The Bureau participated in proposed Canadian class action settlements regarding anti-competitive conduct by Volkswagen, Audi, and Porsche relating to the diesel emissions scandal dubbed as "Dieselgate".<sup>42</sup> The Bureau stated that its investigation had found that the automakers misled consumers by promoting vehicles sold or leased in Canada as having clean diesel engines with reduced emissions that were cleaner than an equivalent gasoline engine.<sup>43</sup> Private enforcement in these cases led to settlements in favour of Canadian consumers of approximately \$2.4 billion.<sup>44</sup> In comparison, as part of the same process, the Bureau was able to negotiate monetary penalties of a total of \$17.5 million. In other words, the Bureau's monetary penalties were less than one per cent of the result obtained through private enforcement. The then Commissioner, John Pecman, stated at the time: "We are pleased that Canadians will now begin to receive compensation and that Volkswagen Canada and Audi Canada will address the impact this matter has had on the marketplace. The Bureau works to ensure that Canadians can trust advertising claims made by businesses and can be

confident in their purchasing decisions.”<sup>45</sup> It goes without saying that the compensation to Canadian consumers flowed from private enforcement not the Bureau’s statutory mandate or function.

In these circumstances, the Commissioner’s statement that responding to requests for information for class proceedings under section 36 would detract from the Bureau’s competition mandate is entirely inconsistent with not only the wording and objects of the Act, but also with the realities of enforcement under the Act. It is indeed an odd proposition that the Commissioner, a statutory authority created under the Act, should take the unqualified position that it “would be contrary to the public interest” to respond to requests for information made in furtherance of one of the core provisions of the same Act.<sup>46</sup>

Likewise, the Commissioner’s position that requests for information for section 36 enforcement could hinder another enforcement mechanism<sup>47</sup> under the Act cuts both ways because the same rationale applies to section 36 enforcement. The Commissioner’s blanket refusal to provide information for section 36 proceedings would hinder enforcement under that section of the Act. Parliament has not granted the Commissioner a monopoly on the enforcement of the Act. The Commissioner shares the enforcement role with private litigants and the private bar. The two enforcement arms must complement, not exclude, each other.

It may be true that private enforcers are not in the same statutory position as the Commissioner.<sup>48</sup> However, that proposition cannot provide grounds for blanket opposition to requests for information for section 36 enforcement. The attempt to posit the different status of the Commissioner as a ground on which disclosure ought to be refused skews the issue. The legal and policy question on requests for information is not whether the Commissioner has a different status than private enforcers. The question is whether the Act and the applicable court rules require the disclosure of information on the facts of each particular case and document. Furthermore, the individualized decision-making on disclosure must be undertaken in light of the need for both methods of enforcement under the Act to cooperate and complement each other. An approach contrary to this proposition would frustrate the regulatory scheme created by Parliament and the statutory objects of the Act.

#### **IV. Law in Foreign Jurisdictions Does Not Support the Bureau's General Approach**

Competition authorities in foreign jurisdictions do not possess the broad powers to restrict access to information that the Bulletins propose.<sup>49</sup> Their approach to information in the possession of competition authorities confirms that general opposition or a blanket cloak of confidentiality is not the only way to protect the interests at issue.

For example, in the United Kingdom, the Competition and Markets Authority promises strict confidentiality on the information provided by third parties who submit complaints of anti-competitive conduct.<sup>50</sup> However, the *Enterprise Act 2002*<sup>51</sup> specifically carves out certain exceptions to that confidentiality, including an express exception for instances where any person requests confidential information for the purposes of civil proceedings in the UK or elsewhere.

Similarly, Australia's *Competition and Consumer Act 2010*,<sup>52</sup> which creates and governs The Australian Competition and Consumer Commission,<sup>53</sup> adopts a case-by-case approach to the confidentiality of information in the possession of the Commission<sup>54</sup> rather than a blanket cloak of confidentiality or a class privilege. New Zealand follows suit. The *Commerce Act 1986*<sup>55</sup> establishes that country's Commerce Commission<sup>56</sup> responsible for business competition. The legislation gives the Commission certain powers to prohibit the disclosure of information, documents, and evidence through orders that are subject to expiry dates specified in the legislation.<sup>57</sup>

#### **V. There is No Class Privilege**

The 2017 Bulletin claimed a class-based public interest privilege attaching categorically to all the information in the Commissioner's possession.<sup>58</sup> After the release of the 2017 Bulletin, the Federal Court of Appeal held in *Vancouver Airport Authority* that the Commissioner's claim to a public interest class privilege must be rejected.<sup>59</sup> That case did not concern a request for information for section 36 enforcement. Rather, a party responding to an abuse of dominance claim sought disclosure from the Commissioner.<sup>60</sup> The Commissioner advanced some of the same arguments that are included in the Bulletin, in support of an alleged class privilege. Particularly, the Commissioner argued that the absence of blanket confidentiality would have a chilling effect on third party sources and thus hinder the Commissioner's investigations.<sup>61</sup>

The Court overruled those arguments and concluded that the blanket confidentiality coverage of a class privilege was unnecessary for maintaining the relationship between the Commissioner and third party sources and that a case-by-case public interest privilege—whose existence nobody disputed—was more appropriate.<sup>62</sup> It was after the *Vancouver Airport Authority* decision that the Bureau published the 2018 Bulletin offering a case-by-case analysis.

Other recent appellate jurisprudence also suggests that a class-based approach to information within the Commissioner's possession is not appropriate. In *Imperial Oil v Jacques*,<sup>63</sup> the Quebec Superior Court ordered the disclosure of documents that private parties requested for the purpose of a class proceeding under section 36. The documents were private communications that had been intercepted in the course of a cartel investigation and were in the possession of the Bureau and the Crown. The Bureau was involved in the cartel investigation and the Crown was prosecuting dozens of persons.<sup>64</sup> Yet, the motion judge relied on section 29 of the Act expressly providing that evidence obtained may be disclosed "for the purposes of the administration or enforcement" of the Act, which she found what was at issue in that case.<sup>65</sup> She ordered disclosure under the applicable provision of the *Code of Civil Procedure* regarding productions in the course of litigation.<sup>66</sup> The Supreme Court of Canada upheld that decision. While a public interest class privilege was not before the Court in that case, the judicial decision-making framework that the Supreme Court sanctioned long before *Vancouver Airport Authority* was one of case-by-case analysis based on the applicable rules of production, not a categorical ban on disclosure of all information in the possession of the Bureau.

## VI. Conclusion

In some limited cases, the Commissioner may be justified in refusing to disclose information to section 36 enforcers. However, the Bureau's general approach consisting of blanket opposition is untenable. The Bureau's failure to factor private enforcement of the Act into its justification analysis is fatal.

The Commissioner has no jurisdiction separate and apart from the authority and responsibilities conferred on him or her by legislation. It is a fundamental principle of the rule of law that state power must be exercised in accordance with the law,<sup>67</sup> in this instance the Act. Parliament created a private right of action and exempted it from the Act's

confidentiality obligation. Parliament did not include in the Act the blanket exemption from disclosure or the class privilege that the Commissioner has advocated.

Instead, Parliament envisioned an integrated regulatory scheme that includes both the Commissioner and private enforcement under section 36. The proper administration of this regulatory scheme requires cooperation between the Commissioner and private enforcers. The Commissioner cannot entirely neglect “a core provision of the very pith and substance of the Act”<sup>68</sup> in his or her general position regarding that core provision or in comparison with his or her other responsibilities under the Act.

Opposition to disclosure should not be the norm. In the exceptional cases where the Commissioner has valid reason to oppose disclosure, a case-by-case inquiry that also considers the role and objectives of section 36 would comply with the Act as a whole, and advance its objects to protect Canadian consumers and deter wrongdoers.

## Endnotes

<sup>1</sup> Lawyer, Sotos LLP, Toronto. The author would like to thank Alexander Dos Reis, articling student, for his helpful research assistance, and David Sterns and Jean-Marc Leclerc for their insightful comments on earlier drafts of this article.

<sup>2</sup> *Competition Act*, RSC 1985, c C-34.

<sup>3</sup> Canada, Competition Bureau, “Requests for information from private parties in proceedings under section 36 of the *Competition Act*”, (Ottawa: Competition Bureau, 2017) [2017 Bulletin].

<sup>4</sup> Canada, Competition Bureau, “Requests for information from private parties in proceedings under section 36 of the *Competition Act*”, online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04314.html>> [2018 Bulletin].

<sup>5</sup> The 2017 Bulletin recognized section 36 enforcement and its compensatory and deterrence effects. The 2018 Bulletin goes further and recognizes the compensation and deterrence effects of section 36 proceedings. Neither Bulletin, however, weighs section 36 enforcement as a factor in the analysis that leads to the Commissioner’s general position.

<sup>6</sup> *Competition Act*, *supra* note 2 at s 1.1.

<sup>7</sup> *Ibid*, s 7(1)(a).

<sup>8</sup> *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2016 BCSC 97, 262 ACWS (3d) 883 [*Microsoft*].

<sup>9</sup> *Imperial Oil v Jacques*, 2014 SCC 66, [2014] 3 SCR 287 [*Imperial*].

<sup>10</sup> *Canada (Attorney General) v Thouin*, 2017 SCC 46, [2017] 2 SCR 184 [*Thouin*].

<sup>11</sup> 2017 Bulletin, *supra* note 3 at para 2; 2018 Bulletin, *supra* note 4 at para 2.

<sup>12</sup> The words “if appropriate” did not exist in the Draft for Public Consultation that the Bureau published on March 8, 2017. They were added later to the final draft of the 2017 Bulletin. See Canada, Competition Bureau, “Draft for Public Consultation”, online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04204.html#Conclusion>>.

<sup>13</sup> *Microsoft*, *supra* note 8 at para 23. The Bulletins concede this point.

<sup>14</sup> *Thouin*, *supra* note 10 at para 26, citing *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193.

<sup>15</sup> *Ibid* at para 34.

<sup>16</sup> *Combines Investigation Act*, RSC 1970, c C-23, s 31.1.

<sup>17</sup> Canada, Economic Council of Canada, *Interim Report on Competition Policy*, (Ottawa: Queen’s Printer, 1969) [Report].

<sup>18</sup> *Ibid* at 107-109.

<sup>19</sup> *Ibid* at 189.

<sup>20</sup> 15 USC § 1 (2012). Section 4 of the *Clayton Act*, 15 USC § 15 (2012), provides for the recovery of threefold the damages sustained as a result of antitrust offences.

<sup>21</sup> *Ibid* at 191. See also Carl H Fulda, “Proposed Changes in Canadian Combines Legislation: Some Comparative Comments on the ‘Interim Report on Competition Policy’” (1970) 8:3 *Osgoode Hall LJ* 415 at 416-17.

<sup>22</sup> Report, *supra* note 17 at 191.

<sup>23</sup> *House of Commons Debates*, 30th Parl, 1st Sess, No 3 (16 October 1975) at 8270 (Hon André Ouellet).

<sup>24</sup> *House of Commons Debates*, 30th Parl, 1st Sess, No 7 (10 June 1975) at 6625 (David Orlikow).

<sup>25</sup> *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641, [1989] SCJ No 28 [*General Motors*].

<sup>26</sup> Prior to this decision, the jurisprudence was marginally divided on the constitutional validity of section 31.1. See e.g.: *Rocois Construction Inc v Quebec Ready Mix Inc*, [1980] 1 FC 184 (FCTD), 105 DLR (3d) 15 rev’d [1985] 2 FC 40, 25 DLR (4th) 373 (FCA); *Seiko Time Canada Ltd v Consumers Distributing Co Ltd* (1980), 29 OR (2d) 221, 112 DLR (3d) 500 (H Ct J), aff’d (1981), 34 OR (2d) 481, 128 DLR (3d) 767 (CA); *Henuset Bros Ltd v Syncrude Canada Ltd* (1980), 33 AR 199, 114 DLR (3d) 300 (AB QB).

<sup>27</sup> *General Motors*, *supra* note 25 at para 70.

<sup>28</sup> *Ibid* at para 72.

<sup>29</sup> *Ibid* at para 74.

<sup>30</sup> *Ibid* at para 75.

<sup>31</sup> 2017 Bulletin, *supra* note 3 at paras I, VI.

<sup>32</sup> 2018 Bulletin, *supra* note 4 at para 6. See also 2017 Bulletin, *supra* note 3 at para VI.

<sup>33</sup> *House of Commons Debates*, 30th Parl, 1st Sess, No 1 (22 October 1974) at 625 (John Rodriguez); *House of Commons Debates*, 30th Parl, 1st Sess, No 7 (10 June 1975) at 6611-18 (John Rodriguez); *House of Commons Debates*, 30th Parl, 1st Sess, No 8 (15 October 1975) at 8246 (John Rodriguez); *House of*

*Commons Debates*, 30th Parl, 1st Sess, 8 (16 October 1975) at 8289-90 (John Rodriguez).

<sup>34</sup> James Musgrove, ed, *Fundamentals of Canadian Competition Law*, 3rd ed (Toronto: Carswell, 2015) at 467.

<sup>35</sup> *Ibid.*

<sup>36</sup> George L Priest, “Economics of Class Actions” (2000) 9 *Kansas J of L & Public Policy* 481 at 481. Economies of scale and access to justice were also concerns that drove the parliamentary initiative to include a class action regime in the 1975 amendments, see e.g., *House of Commons Debates*, 30th Parl, 1st Sess, No 8 (15 October 1975) at 8246 (John Rodriguez).

<sup>37</sup> *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paras 28-29, 46, [2001] 2 SCR 534.

<sup>38</sup> *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, [2013] 3 SCR 477 [Pro-Sys].

<sup>39</sup> *Ibid* at para 141.

<sup>40</sup> See Shannon Kari, “Immunity in the spotlight”, *Canadian Lawyer* (5 March 2018), online: <<http://www.canadianlawyermag.com/author/shannon-kari/immunity-in-the-spotlight-15410/>>.

<sup>41</sup> Elise Amendola, “Canadian chocolate makers to pay \$23.2-million in price-fixing lawsuit”, *The Globe and Mail* (September 16, 2013), online: <<https://www.theglobeandmail.com/report-on-business/canadian-chocolate-makers-to-pay-232-million-in-price-fixing-lawsuit/article14361922/>>. See also: *Osmun v Cadbury Adams Canada Inc*, 2009 CanLII 72092 (Ont Sup Ct J); *Main v Cadbury Schweppes plc*, 2010 BCSC 816 (CanLii); *Osmun v Cadbury Adams Canada Inc*, 2012 ONSC 3837 (CanLii); *Main v Cadbury Schweppes plc*, 2012 BCSC 1062 (CanLii); *Roy c Cadbury Adams Canada inc*, 2012 QCCS 1607 (CanLii).

<sup>42</sup> See summary of the matter, online: US, Environmental Protection Agency, “Learn About Volkswagen Violations”, online: <<https://www.epa.gov/vw/learn-about-volkswagen-violations>>.

<sup>43</sup> Competition Bureau, News Release, “Volkswagen and Audi to pay up to \$2.1 billion to consumers and \$15 million penalty for environmental marketing claims”, (19 December 2016), online: <<https://www.canada.ca/en/competition-bureau/news/2016/12/volkswagen-audi-pay-up-2-1-billion-consumers-15-million-penalty-environmental-marketing-claims.html>> [2016 VW News Release].

<sup>44</sup> *Ibid.* See also Competition Bureau, News Release, “Up to \$290.5 million in compensation for Canadians in Volkswagen, Audi and Porsche emissions case”, (12 January 2018), online: <[https://www.canada.ca/en/competition-bureau/news/2018/01/up\\_to\\_290\\_5\\_millionincompensationforcanadiansinvolkswagenaudiand.html](https://www.canada.ca/en/competition-bureau/news/2018/01/up_to_290_5_millionincompensationforcanadiansinvolkswagenaudiand.html)>.

<sup>45</sup> 2016 VW News Release, *supra* note 43.

<sup>46</sup> 2017 Bulletin, *supra* note 3 at para VI; 2018 Bulletin, *supra* note 4 at para 6.

<sup>47</sup> 2017 Bulletin, *supra* note 3 at paras III, IV; 2018 Bulletin, *supra* note 4 at paras 3, 4.

<sup>48</sup> The 2017 Bulletin stated: “Private plaintiffs in proceedings commenced under section 36 of the Act, despite their private enforcement of the Act, are not in the same position as the Commissioner, and are accordingly not entitled to the same information that the Bureau has in its possession or control.” (The 2018 Bulletin has removed this language.) The Bureau has also made this argument in opposing disclosure at court proceedings. See *e.g.*, *Microsoft*, *supra* note 8 at para 24.

<sup>49</sup> *Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24 at paras 106-108, 420 DLR (4th) 163 [*Vancouver Airport Authority*].

<sup>50</sup> Canada, Competition and Markets Authority, “Competition Act 1998: Guidance on the CMA’s investigation procedures in Competition Act 1998 cases”, ss 3.20-3.21. Online: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/537006/CMA8\\_CA98\\_Guidance\\_on\\_the\\_CMA\\_investigation\\_procedures.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537006/CMA8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf)>.

<sup>51</sup> *Enterprise Act 2002*, c 40, s 241A.

<sup>52</sup> *Competition and Consumer Act 2010* (Cth).

<sup>53</sup> See *ibid* at Part II.

<sup>54</sup> See *e.g.*, *ibid*, ss 44ZL, 95AZA, 95ZN.

<sup>55</sup> *Commerce Act 1986* (NZ), 1986/5.

<sup>56</sup> *Ibid*, s 8.

<sup>57</sup> *Ibid*, s 100.

<sup>58</sup> The 2017 Bulletin stated that “a class-based public interest privilege attaches to information collected or created by the Bureau during the course of an examination, inquiry or enforcement proceeding”. See 2017 Bulletin, *supra* note 3 at para V. The 2018 Bulletin modified this language consistent with *Vancouver Airport Authority*.

<sup>59</sup> *Vancouver Airport Authority*, *supra* note 49 at para 63.

<sup>60</sup> *Ibid* at paras 1-3.

<sup>61</sup> *Ibid* at paras 82-97.

<sup>62</sup> *Ibid* at para 114.

<sup>63</sup> *Imperial*, *supra* note 9, aff’g *Jacques c Pétroles Irving inc*, 2012 QCCS 2954, JE 2012-1485.

<sup>64</sup> *Ibid* at para 3.

<sup>65</sup> *Ibid* at para 7.

<sup>66</sup> *Ibid* at para 27.

<sup>67</sup> *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 10-11, [2012] 1 SCR 5.

<sup>68</sup> *General Motors*, *supra* note 25 at para 72.

