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Compelling disclosure from the Competition Bureau for use in class actions: where are we now?

A recurring source of challenging legal problems in the price-fixing class actions, and in class actions more generally, is the issue of what information and evidence the Courts can compel government investigators to provide to private litigants for use in those class actions.

On September 28, 2017, the Supreme Court of Canada once again waded into this issue in its decision in *Canada (Attorney General) v Thouin*, holding that an investigator at the Competition Bureau could not be compelled to be examined for discovery in a price-fixing class action to which the government was not a party.

In *Thouin*, the plaintiffs started a class action against a number of oil companies and retailers, alleging a conspiracy to fix the retail price of gasoline in certain regions of Quebec, contrary to the *Competition Act*. The alleged conspiracy had already been investigated by the Competition Bureau, which had gathered a substantial volume of documentation in the course of its investigation.

The plaintiffs brought a motion before the Quebec Superior Court for production of various documents in the possession of the Competition Bureau, and also for an order allowing them to examine for discovery the Competition Bureau's lead investigator on the file. Both the Superior Court and the Quebec Court of Appeal sided with the plaintiffs, and made an order requiring the lead investigator to attend to be examined for discovery.

The Supreme Court unanimously allowed the appeal.

The Court held that, at common law, the Crown would be immune from virtually all types of legal process. That Crown immunity can and has been overridden in many cases, but it can only be done with clear and unequivocal legislative language. The Court held that there had been no such clear and unequivocal lifting of Crown immunity so as to require a representative of the Crown to be examined for discovery in a case where the Crown is the third party.

While the Supreme Court acknowledged that s. 27 in the *Crown Liability and Proceedings Act* provides that the Crown is subject to the "rules of practices and procedures of the Court" where the proceedings are taken, the Court held that s. 27 only applied to cases where the Crown was a party to the litigation. In cases where the Crown is not a party to the litigation, the common law immunity continues to apply, subject to that immunity being overridden. Consequently, the Court confirmed that the Competition Bureau's lead investigator, and by implication other Crown officials in similar proceedings, could not be compelled to be examined for discovery in a price-fixing class action to which neither the Competition Bureau nor the investigator was a party.

There are two take-aways from the Court's decision.

First, while the Court's statements regarding Crown immunity are sweeping, the practical impact of the decision is more limited.

As the Court explicitly noted, its decision did not modify the ordinary rules regarding production of documents by the Crown, nor does it preclude the Crown from being summonsed as a witness at trial, even where the Crown is not a party to the proceeding. Consequently, while this decision shields Crown employees and agents from being examined for discovery, it does not immunize the Crown from an obligation to comply with rules of the Court that would compel the production of documents from them.

Second, the *Thouin* decision introduces yet another layer of complexity into parties' attempts to obtain production of files from Competition Bureau investigations.

The law on when the Competition Bureau can be compelled to disclose information for private litigations is subject to a number of doctrines. Many of the leading cases do not specifically address all of the doctrines or provide an integrated framework.

For example, in its 2014 decision in *Imperial Oil v Jacques*, the Supreme Court of Canada confirmed decisions of Quebec courts requiring the disclosure of wiretap evidence that had been obtained by the government in the course of a criminal investigation under the *Competition Act*.

More recently, in the 2016 decision in *Pro-Sys Consultants Ltd v Microsoft Corporation*, the British Columbia Supreme Court declined to order the Competition Bureau to produce most of its investigative files on Microsoft, primarily relying on the doctrine of public interest privilege. The doctrine of public interest privilege, which has developed uniquely in the competition law context, allows the Bureau to maintain privacy over the fruits of its investigation into third-parties' records and private

communications until such time as the government chooses to rely on such evidence in proceedings. Neither *Jacques* nor *Thouin* touch on the issue of public interest privilege in any meaningful way.

What all of this means is that, going forward, private litigants seeking access to the Competition Bureau's files will have to navigate the hurdles of both Crown immunity and public interest privilege, as well as the particular rules of Court where the proceeding had been started to satisfy the Court that the information sought is relevant and proportional. As a result, we are still a long way off from any standard as to what parties should expect the Competition Bureau to produce in any particular class action.