SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No.: 500-06-000888-178

DATE: December 18, 2023

BY THE HONOURABLE MARTIN F. SHEEHAN, J.S.C.

JAMES GOVAN
Plaintiff
v.
LOBLAW COMPANIES LIMITED
and
LOBLAWS INC.
and
GEORGE WESTON LIMITED
and
WESTON FOOD DISTRIBUTION INC.
and
WESTON FOOD (CANADA) INC.
and
METRO INC.
and
SOBEYS QUÉBEC INC.
and
SOBEYS CAPITAL INCORPORATED
and
SOBEYS INC.
and
WAL-MART CANADA CORP.
and
CANADA BREAD COMPANY
and
GIANT TIGER STORES LIMITED
and
Defendants

JS 1699

and
COMMISSIONER OF COMPETITION
Mis en Cause

JUDGMENT

OVERVIEW

[1] Defendants, Loblaw Companies Limited, Loblaws Inc. (together "**Loblaw**"), George Weston Limited, Weston Food Distribution Inc. and Weston Foods (Canada) Inc. (together "**Weston**") (collectively the "**Loblaw and Weston Defendants**") present an Application to enforce and safeguard informer privilege (the "**Motion**").

[2] They ask that measures be put in place during the pre-trial examination of their representative, Mr. Galen G. Weston, to avoid the disclosure of any information that might tend to identify confidential informers that could be entitled to the privilege.

CONTEXT

1. The Competition Bureau's Investigation into Bread Price Fixing

[3] In March 2015, Loblaw and Weston began a process whereby they informed the Competition Bureau (the "**Bureau**") that, since November 2001, they had participated in a conspiracy with retailers and a supplier to fix the wholesale and retail prices of fresh commercial bread in Canada. They applied for immunity under the Bureau's immunity program (the "**Immunity Program**").

[4] The Bureau's Immunity Program was described in detail by Justice Ratushny in her judgment granting informer privilege status to two witnesses representing the Loblaw and Weston Defendants[1] as well as in the affidavit of Ms. Erin Penney dated November 24, 2023 (the "**Penney Affidavit**")[2] filed in support of the Motion. The following is a summary of this process.

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1 *Re Application by Immunity Applicant Witnesses at First Stage Hearing*, 2018 ONSC 6301, paras. 33 and following.

2 A first affidavit dated January 6, 2023, was filed confidentially in support of the motion. This first affidavit was the subject of a judgment on November 9, 2023, which struck certain portions. A new affidavit was filed on November 24, 2023, which was the subject of a further decision on December 18, 2023. When the present judgment refers to the Penney Affidavit, it refers to the affidavit of November 24, 2023, as modified by this court's judgment of December 18, 2023.

[5] Under the Immunity Program, a party involved in anti-competitive activity in violation of the *Competition Act*[3] or the *Criminal Code*[4] may offer to cooperate with the Bureau in exchange for immunity. The purpose of the Immunity Program is to uncover and stop anti-competitive criminal activity and to deter others from engaging in similar behaviour.

[6] The Bureau describes its Immunity Program as the "single most powerful means of detecting criminal activity". It adds that the program's "continued appeal to those who would otherwise remain undercover is pivotal to [its] enforcement efforts".[5]

[7] The Immunity Program process is comprised of five steps:

7.1. Marker;

7.2. Proffer;

7.3. Recommendation;

7.4. Agreement; and

7.5. Full disclosure and cooperation.

[8] At the marker stage, an individual or corporation (the "**Immunity Applicant**") contacts the Bureau, typically through its legal representative, and provides a limited hypothetical disclosure of information that identifies the nature of the criminal offences it has committed in respect of a specified product. The Immunity Applicant receives a "marker" which holds its place in line to seek immunity from prosecution as typically, immunity is only granted to the first accepted Immunity Applicant. The Loblaw and Weston Defendants were granted a marker on March 3, 2015.[6] An Immunity Applicant is prohibited from disclosing its application, as well as any subsequent immunity or any related information to a third party without the prior consent of the Bureau or the Director of Public Prosecution ("**DPP**").[7]

[9] At the proffer stage, the Immunity Applicant voluntarily provides a more detailed (yet often still hypothetical) verbal description of the illegal activity on a without prejudice basis. The proffer is aimed at perfecting the marker. During this stage, the Immunity Applicant generally conducts an internal investigation through counsel and the Immunity Applicant's counsel then shares the information with the Bureau. The evidence proffered becomes part of the Bureau's investigation and, under the Immunity Program, it must be kept private. Current and former employees, officers and directors of the Loblaw and

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3 *Competition Act,* R.S.C., 1985, c. C-34.
4 *Criminal Code*, R.S.C., 1985, c. C-46.
5 *Bulletin - Immunity Programs under the Competition Act*, June 7, 2010 (the "**2010 Bulletin**"), Exhibit CI-1 to in the Penney Affidavit.
6 Penney Affidavit, paras. 5 and 12.
7 Penney Affidavit, para. 10.

Weston Defendants were interviewed by counsel during this stage. Some received assurances by counsel and by the Bureau that the confidentiality of their identity would be protected.[8]

[10] The recommendation step is achieved if and when the Bureau is satisfied that an Immunity Applicant fulfills the requirements of the Immunity Program and is prepared to cooperate fully in order to allow the Bureau to recommend the applicant for immunity to the DPP. The DPP is the only authority able to grant immunity.

[11] The agreement step is reached after an independent review is conducted by the DPP. If it accepts the Bureau's recommendation, the DPP will execute an immunity agreement with the immunity applicant. An immunity agreement template is attached to the Penney Affidavit as Exhibit CI-2.

[12] The Loblaw and Weston Defendants entered into an immunity agreement on October 26, 2017 (the "**Immunity Agreement**").[9] Subsequent to the signing of the Immunity Agreement, the Bureau interviewed people who provided information regarding the price-fixing conspiracy (the alleged "**Confidential Informers**").[10]

[13] The full disclosure and cooperation step require the Immunity Applicant to provide the Bureau with continuing full disclosure of non-privileged information, evidence, and records relating to the illegal conduct. The Bureau agrees not use the information against an Immunity Applicant unless they fail to comply with the Immunity Agreement.

[14] The 2010 Bulletin[11] and the Immunity Agreement[12] contain obligations and promises of confidentiality which apply to both the Bureau and to the Immunity Applicant. The Immunity Agreement also contains a promise of immunity from prosecution for the Immunity Applicant and its current or former directors, officers and employees as long as they respect their obligations under the Immunity Agreement.

[15] The *Competition Act* also contains its own confidentiality provision,[13] prohibiting members of the Bureau from disclosing the identity of any person from whom information was obtained pursuant to the act.

[16] In August 2017, the Bureau commenced an official inquiry pursuant to the *Competition Act* to investigate allegations that the Defendants participated in a conspiracy to fix the price of bread in Canada.[14]

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8 Penney Affidavit, paras. 18, 20.1 to 20.3 and 32.
9 Exhibit A-1, filed under seal.
10 Penney Affidavit, paras. 20.3 and 32.
11 2010 Bulletin, para. 31.
12 Immunity Agreement, para. 7.
13 *Competition Act*, *supra*, note 3, s. 29.
14 Affidavit of Simon Bessette dated October 26, 2017, in support of a sealing order, p. 4 of Exhibit P-13.

2. The Class Action Proceeding

[17] In November 2017, Plaintiff, Mr. James Govan, filed an application to bring a class action against the defendants.

[18] On December 19, 2017, the Loblaw and Weston Defendants issued a press release announcing actions they had taken to address their role in an industry-wide price-fixing arrangement.[15]

[19] On December 19, 2019 (judgment rectified on April 22, 2020),[16] Justice Pierre-C. Gagnon authorized Mr. Govan to commence a class action against the defendants.

[20] Mr. Govan's originating application was filed on March 25, 2020.

3. The Court Rulings Regarding the Examination Out of Court of a Loblaw and Weston Representative

[21] The class action relies heavily on the Bureau's investigation which was fuelled by Loblaw's and Weston's self-reporting and admission that they participated in a price-fixing conspiracy with the other defendants.

[22] As such, Plaintiffs are eager to examine a representative of the Loblaw and Weston Defendants.

[23] The other defendants are also impatient to proceed with this examination. The defendants, excluding Loblaw and Weston, (the "**Other Defendants**") have always denied the existence of or their participation in a conspiracy. They feel they were dragged into a class action as a result of Loblaw's and Weston's disclosure to the Bureau. They wish to examine a representative of the Loblaw and Weston Defendants in order to establish that they never participated in a conspiracy.

[24] In December 2021, the Québec Court of Appeal ruled that, in the absence of abuse, a party should not be deprived of its right to examine the other parties before trial. The Court of Appeal ordered that one representative per group of Defendants should be examined out of court.[17] It referred the matter back to the Superior Court for it to determine the terms under which these depositions should be held. Everyone agreed that a Loblaw and Weston representative should be examined first.

[25] In April 2022, counsel for the Loblaw and Weston Defendants wrote to Justice Stéphane Lacoste, who had been appointed to case manage the class action. Counsel pleaded that conditions to protect informer privilege should be discussed prior to the deposition of a Loblaw or Weston witness. He suggested that a "case management

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15 Exhibit P-16.
16 *Govan* c. *Loblaw Companies Limited*, 2019 QCCS 5469.
17 Exhibit A-9; *Govan* c. *Loblaw Companies Limited*, 2021 QCCA 1914, paras. 18 and 19.

hearing be scheduled before advancing any further on any draft protocol, in order to comply with the Québec Court of Appeal decision on December 20, 2021, and to determine the conditions for any examinations to be contemplated".[18]

[26] On June 30, 2022, Justice Lacoste proceeded with a case management hearing. At the time, the Loblaw and Weston Defendants refused to identify a representative to be deposed. Their counsel argued that the mere identification of a representative could provide information that would identify an informant whose anonymity is protected by informer privilege.[19] He asked that the examination of its representative be stayed.[20]

[27] Justice Lacoste refused to stay the proceedings. Instead, he designated Mr. Galen G. Weston, Chief Executive Officer of George Weston Limited and President of Loblaw Companies Limited, as representative of the Loblaw and Weston Defendants unless the parties agreed otherwise. He decided that the examination would take place before him so that he could deal with the objections and difficulties that might arise with respect to informer's privilege in real time (the "**Lacoste Judgment**").[21]

[28] The Loblaw and Weston Defendants sought permission to appeal. In their appeal notice, they mention that they intend to file a motion to stay "until such time as the Crown has made a decision to call the informers as witnesses in the criminal proceeding". In the alternative, they ask that they be allowed to file a motion which would be heard *in camera* and *ex parte* "in order to hold a proper debate on informer privilege before the *Judge a Quo*" as recommended by the Supreme Court of Canada.[22] Justice Robert M. Mainville refused to grant leave or the relief sought.[23]

[29] He noted that a stay had already been refused by Justice Gagnon[24] and that his decision had not been appealed. He added that the effect of a stay would be to effectively nullify the Québec Court of Appeal's December 2021 judgment, which allowed the discovery of a Loblaw and Weston representative.[25]

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18 Exhibit A-10.
19 Exhibit A-11, transcript of hearing, p. 14.
20 See footnote 6 of the decision of the Québec Court of Appeal in *Loblaw Companies Limited* c. *Govan*, 2022 QCCA 1155, para. 6 (Motion to Suspend the Execution of a Judgment of the Court of Appeal rejected, 2022 QCCA 1603).
21 Exhibit A-11.
22 *Loblaw Companies Limited* c. *Govan*, *supra*, note 20, paras. 10 and 12.
23 Exhibit A-12; *Loblaw Companies Limited* c. *Govan*, *supra*, note 20.
24 *Govan* c. *Loblaw Companies Limited*, 2021 QCCS 63, paras. 37 to 56 and 66.
25 *Loblaw Companies Limited* c. *Govan*, *supra*, note 20, paras. 10 and 11.

[30] With regard to the Loblaw and Weston Defendants' proposed motion, Justice Mainville observed that the Supreme Court of Canada's decisions in *Named Person*[26] c. *Basi*[27] require a hearing as a first step to establish the existence of the privilege. Such a hearing was not needed here as the existence of the informer's privilege was not in question.[28]

[31] As an aside, Justice Mainville adds:

> *[19] Peut-être que certaines questions mériteraient d'être traitées à huis clos par la* [sic] *juge Lacoste; il lui appartiendra d'en décider au moment opportun. Cela étant, je ne perçois pas en quoi l'appel sollicité pourrait ajouter quoi que ce soit à ce stade-ci des procédures.*

[32] On October 25, 2022, a first case management conference was held by the undersigned. Counsel for the Loblaw and Weston Defendants confirmed that he had received instructions: i) to seek leave to appeal Justice Mainville's decision to the Supreme Court of Canada;[29] and ii) to file a motion before the Québec Court of Appeal to stay the Lacoste Judgment pending the Supreme Court's decision. A hearing was scheduled for November 30, 2022, to hear the parties on objections made to document requests.

[33] On November 3, 2022, Plaintiff's counsel asked the Court to postpone the hearing on objections but to keep the November 30, 2023, date to allow the Loblaw and Weston Defendants to provide an update on their request to stay. The hearing on objections was postponed to March 30, 2023.

[34] On November 25, 2022, Justice Geneviève Marcotte dismissed Loblaw's motion to stay the Lacoste Judgment.[30]

[35] In summary, she observed that:

35.1. While the class action was authorized in December 2019, the parties have made little progress since (paragraph 4);

35.2. Justice Mainville concluded that, in light of the framework for the examination proposed by Justice Lacoste and the recognition by the parties that informer privilege should be protected, the proposed appeal of his order appeared of little use at this stage (paragraph 8);

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26 *Named Person* v. *Vancouver Sun,* 2007 SCC 43, para. 49.
27 *R.* c. *Basi*, 2009 SCC 52, para. 38.
28 *Loblaw Companies Limited* c. *Govan*, *supra*, note 20, paras. 10 and 12.
29 The Application for leave, which is still pending, was filed as Exhibit A-13.
30 Exhibit A-14; *Loblaw Campanies Limited* c. *Govan*, *supra*, note 20.

> 35.3. Nothing supported appellants' premise that the trial judge, who undertook to supervise the conduct of the examination and committed to overseeing it in a way that would protect informer's privilege, would not be able to fulfill this role (paragraph 13).

[36] This being said, like Justice Mainville had done before her, Justice Marcotte left open the possibility of a preliminary hearing prior to the deposition:

> *[14] J'ajouterai que les arguments des appelantes pour soutenir leur appel en Cour suprême occultent également la possibilité de tenir un débat à huis clos, si nécessaire le temps venu, comme l'envisageait mon collègue Mainville. Or, rien ne permet d'affirmer qu'un débat à huis clos ne pourrait au besoin précéder la tenue de l'interrogatoire projeté.*

[37] On November 30, 2022, the Loblaw and Weston Defendants informed the Court of the decision and asked that they be allowed to file a Motion in line with these comments. The Court allowed the Loblaw and Weston Defendants to file a Motion to enforce and safeguard informer privilege.

[38] The Court ruled that the Motion should be served before December 14, 2022, to all Defendants and that the Loblaw and Weston Defendants explain concretely in their conclusions the safeguards they suggest be put in place. The Court ordered that the Bureau be impleaded and be allowed to make representations. Representations would also be allowed from counsel for the Confidential Informers, Plaintiffs, and the Other Defendants.

[39] In order to make sure that these submissions would be meaningful and respectful of the open court principle, the Court reiterated that "all information necessary […] which can be disclosed without breaching the privilege, ought to be disclosed".[31]

[40] On January 6, 2023, the Confidential Informers unilaterally filed the Penney Affidavit "under seal". It was not circulated to the other parties.

[41] The Motion was heard on January 13, 2023. The Bureau did not appear and left the matter to the discretion of the Court. The Court heard from the Loblaw and Weston Defendants, counsel for the Confidential Informers and Metro Incorporated ("**Metro**"). A short *in camera* and *ex parte* hearing took place in the afternoon during which examples were given of information that could tend to identify a Confidential Informer.

[42] During the hearing, the Court asked counsel for the Confidential Informers to provide other counsel with a copy of the Penney Affidavit redacting only those portions susceptible to identify the Confidential Informers. A redacted version of the Penney Affidavit was notified to the other parties on February 1, 2023.

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[31] *Named Person* v. *Vancouver Sun*, *supra*, note 26, para. 51.

[43] Upon receipt, the Retailer Defendants advised the Court that they objected to the filing of the Penney Affidavit.

[44] On February 16, 2023, while the motion to safeguard informer privilege was still under advisement, Class counsel informed the Court by email that they (along with class counsel for parallel cases in the rest of Canada) and the Loblaw and Weston Defendants had scheduled a mediation before Chief Justice Geoffrey B. Morawetz of the Ontario Superior Court of Justice. The mediation was scheduled for the end of July 2023.

[45] They asked that the deposition of Mr. Weston be postponed until after the mediation. They considered that other procedural steps could still move forward.

[46] The Other Defendants did not agree to have the case move forward as they considered that the examination of Mr. Weston should occur prior to any other significant step in the litigation. However, they agreed to suspend the litigation until the end of July 2023 to allow the mediation to take place.

[47] A joint motion to stay was filed and the Court granted it. The Court advised the parties that it was suspending the issuance of its judgment on the motion to safeguard informer privilege.

[48] On July 27, 2023, Class counsel advised the Court that the mediation had not been successful. They asked that the stay be lifted and that a case management conference be held. Counsel for the Loblaw and Weston Defendants added that the mediation had been suspended specifically to allow class counsel to proceed with the examination of Mr. Weston. He also mentioned that the parties were discussing modalities of the examination to avoid a judgment on the motion to safeguard informer privilege.

[49] A case management conference was held on September 6, 2023. The other Defendants reiterated their objection to the filing of the Penney Affidavit. A timetable was agreed for the filing of written representations on the subject. The parties agreed that the Court could decide on the basis of these representations.

[50] On October 3, 2023, the Court and the parties set aside the dates of January 17 and 18, 2024 to proceed with Mr. Weston's deposition.

[51] On November 9, 2023, the Court struck parts of the Penney Affidavit[32]. A new Penney Affidavit was filed which was the subject of new objections. These were decided during a case management conference call on December 18, 2023.

[52] During the call, Plaintiffs and the Other Defendants advised the Court that they did not intend to examine Ms. Penney and that the Court could proceed to render judgment on the Motion to safeguard informer privilege.

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[32] *Govan c. Loblaw Companies Limited*, 2023 QCCS 4278.

ANALYSIS

[53] This case raises issues regarding two fundamental yet conflicting principles:

53.1. The right of a party to pre-trial discovery to allow timely and complete access to information necessary to evaluate the strength of its case; and

53.2. The right of a confidential informer to protect the secrecy of his or her identity.

[54] These principles must be considered in light of a party's right to be heard and the open court principle guaranteed by the *Canadian Charter of Rights and Freedoms*[33] and the *Québec Charter of Human Rights and freedoms*.[34]

1. APPLICABLE LAW

1.1 The Importance of Timely and Complete Discovery of Evidence

[55] Examinations for discovery and pre-trial document requests are essential elements of the exploratory phase in civil matters. Their goal is to facilitate the disclosure of evidence that enables the parties to evaluate the strength of their respective cases and thus encourages out of court settlements.[35]

[56] The pre-trial exploratory stage also facilitates the task of the parties to establish the truth which remains the "ultimate aim" of any civil or criminal trial.[36]

[57] The court should encourage the fullest and earliest possible disclosure of evidence. Such disclosure is in line with the duty of transparency and cooperation required for the sound management of proceedings and a fair judicial debate, as opposed to a trial by ambush (articles 19 and 20 C.C.P.).[37]

[58] A party may object to disclosure on the grounds of privilege. When it does, it has the burden of proving that a privilege applies.[38]

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33 *Canadian Charter of Rights and Freedoms*, Constitution Act 1982, Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982.

34 *Québec Charter of human rights and freedoms*, L.R.Q., c. C-12.

35 *Imperial Oil v. Jacques*, 2014 SCC 66, para. 26.

36 *Id.*, paras 24 to 26.

37 Denis FERLAND and Benoît EMERY, *Précis de procédure civile du Québec*, 6e éd., Montréal, Éditions Yvon Blais, 2020, volume 1, para. 1-1336; *Grid Solutions Canada* c. *Murphy*, 2019 QCCA 1141, para. 6; *Sotramont Gatineau Inc.* c. *Original Baked Quality Pita Dips Inc.*, 2020 QCCS 143; *Envac Systèmes Canada inc* c. *Montréal (Ville de)*, 2016 QCCS 1931, para. 27.

38 *Compagnie d'assurances AIG du Canada* c. *Solmax International inc.*, 2016 QCCA 258, para. 5; *Médiasud inc.* c. *Prud'Homme*, 2012 QCCA 798, para. 10; *9255-3502 Québec inc. (Fumoir Rubs)* c. *Aviva Insurance Company of Canada*, 2017 QCCS 27, para. 5.

1.2 Informer Privilege

[59] Confidential informers play a significant role and serve a valuable investigative function in law enforcement. Informants can allow officers to access information about clandestine criminal activity or help them uncover evidence in unresolved cases. In some cases, informants have access to information, groups, and activities that traditional law enforcement and undercover agents cannot access through other means. In other cases, information can be obtained more quickly, at a lower cost and with less risk than would be possible using traditional techniques. Thus, the use of confidential informers is crucial to the effectiveness of the criminal justice system.

[60] As such, the law recognizes the need to conceal the identity of confidential informers to protect them from the possibility of retribution and to encourage others to cooperate with the criminal justice system.[39]

[61] Informer privilege arises where a law enforcement official, "in the course of an investigation, guarantees protection and confidentiality to a prospective informer in exchange for useful information that would otherwise be difficult or impossible to obtain".[40] This promise can be express or implied by the circumstances.[41]

[62] When informer privilege is claimed, its existence must be determined by the court at a "first stage" hearing, often held *in camera* and *ex parte*. "Ordinarily, only the putative informant and the Crown may appear before the judge".[42] Nonetheless, the protection of the open court principle and of the right of a party to be heard demand that all information necessary to ensure meaningful submissions be disclosed, as long as these can be shared without breaching the privilege.[43]

[63] To determine whether the privilege exists, the judge must be satisfied, on a balance of probabilities, that the individual concerned is indeed a confidential informant who has received a promise of anonymity.[44]

[64] Informer privilege is a class privilege.[45] When a claim is established, the privilege is "nearly absolute" and must be given "full effect". Law enforcement, the Crown, the attorneys, and judges are all bound to protect it. Trial judges have "no discretion to do

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39 *R.* v. *Durham Regional Crime Stoppers Inc.*, 2017 SCC 45, paras. 1 and 12; *R.* v. *Barros*, 2011 SCC 51, para. 30; *Named Person* v. *Vancouver Sun*, *supra*, note 26, paras. 16 to 18; *R.* v. *Leipert*, [1997] 1 S.C.R. 281, para. 9; *Re Personne désignée* c. *R.*, 2022 QCCA 984, para. 61; *R.* v. *Hunter* (1987), 57 C.R. (3d) 1, pp. 5 and 6.

40 *R.* v. *Durham Regional Crime Stoppers Inc.*, *supra*, note 39, para. 11; *R.* v. *Basi*, *supra*, note 27, para. 36; *M. A* c. *Drapeau et la Commission des valeurs mobilières du Nouveau-Brunswick*, 2012 NBCA 73, para. 20.

41 *R.* v. *Named Person B.*, 2013 SCC 9, para. 18; *R.* v. *Barros*, *supra*, note 39, para. 31.

42 *R.* v. *Basi*, *supra*, note 27, para. 38; *Named Person* v. *Vancouver Sun*, *supra*, note 26, paras. 46 to 49.

43 *Ibid*, para. 51.

44 *R.* v. *Basi*, *supra*, note 27, para. 39.

45 *R.* v. *National Post*, 2010 SCC 16, para. 42; *Named Person* v. *Vancouver Sun*, *supra*, note 26, para. 22.

otherwise".[46] "No one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies".[47]

[65] Informer privilege not only prevents disclosing the name of the informer, but it also creates "an all but absolute bar against revealing any information which might tend to identify a confidential informer".[48] However, informer privilege does not prevent the obtention of evidence that may involve an informer, nor does it prohibit the examination of an informer. Only the status of a person as a confidential informer or information that may lead to identify a person as a confidential informer is protected by the privilege.

[66] Courts have warned that the distinction is not always easy to make:

> Since the informer whom the privilege is designed to protect and his or her circumstances are unknown, it is often difficult to predict with certainty what information might allow the accused to identify the informer. A detail as innocuous as the time of the telephone call may be sufficient to permit identification. In such circumstances, courts must exercise great care not to unwittingly deprive informers of the privilege which the law accords to them.[49]

[67] The Québec Court of Appeal notes that the Supreme Court of Canada has not established a finite list of the type of information that may tend to identify an informer. Such a list would be futile as such information depends on the particular facts of each case.[50]

[68] While the privilege originates from confidences and promises made in the context of a criminal investigation, when privilege applies, it protects information from disclosure both in criminal and in civil trials.[51] The only exception to informer privilege is when disclosure is "necessary to establish innocence in a criminal trial". There are "no exceptions to the rule in civil proceedings".[52]

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46 *R.* v. *Durham Regional Crime Stoppers Inc.*, *supra*, note 39, para. 15; *R.* v. *Barros*, *supra*, note 39, para. 1; *R.* v. *Basi*, *supra*, note 27, paras. 37 and 39; *Named Person* v. *Vancouver Sun*, *supra*, note 26, paras. 19 to 23, 26, 30 and 47; *R.* v. *Leipert*, *supra*, note 39, paras. 12 and 14; *Bisaillon* v. *Keable*, [1983] 2 S.C.R. 60, p. 93; *Re Personne désignée* c. *R.*, *supra*, note 39, paras. 50 to 52.

47 *R.* v. *Basi*, *supra*, note 27, para. 44.

48 *Named Person* v. *Vancouver Sun*, *supra*, note 26, paras. 15, 16, 26 and 30; *R*. v. *Leipert*, *supra*, note 39, para. 18; *Re Personne désignée* c. *R.*, *supra*, note 39, paras. 49 and 59 to 63; *R* v. *Omar*, 2007 ONCA 117, para. 39.

49 *R.* v. *Leipert*, *supra*, note 39, para. 16.

50 *Re Personne désignée* c. *R.*, *supra*, note 39, para. 60.

51 *Named Person* v. *Vancouver Sun*, *supra*, note 26, para. 26; *R.* v. *Leipert supra*, note 39, para. 17.

52 *R.* v. *Basi*, *supra*, note 27, para. 37; *Named Person* v. *Vancouver Sun*, *supra*, note 26, paras. 27 to 29.

[69] The privilege belongs to both the Crown and the informant. “Neither can waive it without the consent of the other”.[53] “[W]hile informers typically waive privilege when they agree to testify, nothing prevents them from keeping their privilege until there is a firm decision to testify by both the informer and the prosecution”.[54]

[70] However, “it is important not to extend [the privilege’s] scope beyond what is necessary to achieve its purpose of protecting informers and encouraging individuals with knowledge of criminal activities to come forward to speak to the authorities”. “[I]nformer privilege cannot be interpreted to apply where it would compromise the very objectives that justify its existence”.[55]

[71] Furthermore, when privilege exists, courts must insist that “the informer privilege cover only that information which would in fact tend to reveal an informer’s identity”. Entire *in camera* hearings should be used only “as a last resort”. “A judge ought to make every effort to ensure that as much information as possible is made public, and that disclosure and publication are restricted only for that information which might tend to reveal the informer’s identity”. The objective is to “protect informer privilege absolutely while minimally impairing the open court principle”.[56]

[72] The same should be said with regard to other rights like the right of a party to be heard as well as its right to have timely access to the information required to evaluate one’s case and prepare a complete defense. While informer privilege takes precedence over these rights, the impairment should be limited to what is necessary to protect the privilege.

[73] The ways in which privileged information can be protected may also vary depending on the circumstances. *In camera* proceedings (in whole or in part) and sealing of the court file (in whole or in part) may be required in some cases. Protection limited to a few documents or simply withholding the informer’s name from a hearing may be sufficient in other cases, with the full range of possibilities in between. The nature of an informer’s involvement in the proceedings is also a consideration.[57]

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53 *R.* v. *Basi*, *supra*, note 27, para. 40; *Named Person* v. *Vancouver Sun*, *supra*, note 26, para. 25; *R.* v. *Leipert*, *supra*, note 39, para. 15.

54 *R.* v. *Named Person B.*, *supra*, note 41, para. 43.

55 *R.* v. *Durham Regional Crime Stoppers Inc.*, *supra*, note 39, para. 17; *R.* v. *Barros*, *supra*, note 39, para. 28.

56 *Named Person* v. *Vancouver Sun*, *supra*, note 26, paras. 40, 41, 50 and 55; *Re Personne désignée* c. *R.*, *supra*, note 39, paras. 71 and 72.

57 *Re Personne désignée* c. *R.*, *supra*, note 39, para. 65.

2. DISCUSSION

2.1 Informers Entitled to Informer Privilege

[74] Before discussing measures that should be put in place to protect informer privilege, a few comments are required to identify the beneficiaries of the privilege.

[75] This necessitates a review of judgments rendered by the Ontario Superior Court.

[76] In October and November 2017, the Bureau obtained the issuance of search warrants allowing them to search the premises of certain defendants. These warrants were issued on reliance of several "information to obtain" declarations (the "**ITOs**") sworn by Mr. Simon Bessette, Senior Competition Law Officer with the Cartels and Deceptive Marketing Practices Branch of the Bureau.[58] The ITOs, which were prepared using information provided by the Confidential Informers, were disclosed to defendants in a redacted form.

[77] On January 29, 2018, two of the defendants, Metro and Sobeys Incorporated ("**Sobeys**") filed applications before the Ontario Superior Court to force the disclosure of unredacted ITOs so that they could identify two witnesses referred to in the ITOs ("**Witness 1**" and "**Witness 2**").[59]

[78] Witness 1 and Witness 2 countered with a confidential motion requesting a court declaration that they are Confidential Informers entitled to the protection of informer privilege.

[79] Justice Ratushny held a "first stage" *ex parte* and *in camera* hearing to determine whether Witnesses 1 and 2 were confidential informers entitled to the protection of the privilege. Metro's and Sobeys' motions were adjourned *sine die* without explanation. Only the Commissioner and Witnesses 1 and 2 were parties to the first stage hearing. Measures were taken to ensure that Witness 1 and Witness 2 would continue to ignore each other's identity. The first stage hearing (evidence and arguments) lasted eight days.

[80] On September 26, 2018 (reasons given August 24, 2018), Justice Ratushny ruled that Witness 1 and Witness 2 were entitled to informer privilege protection. However, she decided that the protection would cease if they were called upon to testify at trial.[60] Accordingly, she dismissed Metro's and Sobeys' motions.[61]

[81] She did so on the basis of the following findings:

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58 Information of Simon Bessette sworn October 26, 2017; Information of Simon Bessette sworn October 30, 2017; Information of Simon Bessette sworn October 31, 2017; Information of Simon Bessette sworn November 1, 2017, filed together as Exhibit P-15.

59 Exhibit P-15.

60 Exhibit A-5; *Re Application by Immunity Applicant Witnesses at First Stage Hearing*, *supra*, note 1.

61 Exhibit A-6; *Sobeys Incorporated* v. *The Commissioner of Competition*, 2019 ONSC 84.

81.1. Beginning with their initial involvement at the proffer stage of the Immunity Program, Witness 1 and witness 2 were given express and broad assurances of confidentiality of identity by the Loblaw and Weston Defendants' counsel;

81.2. These assurances were reiterated by the Bureau during its inquiry in accordance with the Immunity Program as described in the 2010 Bulletin and in accordance with the Bureau's obligations under the *Competition Act*;

81.3. Witnesses 1 and 2 understood that their identity would remain confidential except if they were called upon to testify at a trial in which case their identity would be revealed at that time;

81.4. Both testified that the protection of their identity was always very important to them, particularly given their admission of a criminal offence.

[82] On September 12, 2019, the Supreme Court of Canada denied leave to appeal Justice Ratushny's judgment.[62]

[83] Justice Ratushny's reasons are elaborate, and her conclusions are in line with the case law discussed above. There is no reason not to apply her findings in the present matter. Thus, Witness 1 and Witness 2 will be afforded informer privilege status in the present matter.

[84] If a debate ensues with regard to the informer privilege status of other alleged Confidential Informers, a "first stage" hearing can be held to determine if these other informers should be considered to be in the same position as Witness 1 and Witness 2.

2.2 No Exceptions to Informer Privilege

[85] There is no disagreement in the present case that the innocence at stake exception is not applicable.

[86] This is a civil case that does not involve criminal liability. Moreover, no charges have been laid, and accordingly, there are no accused persons at this stage of the investigation.

2.3 Measures Needed to Protect Informer Privilege

[87] Counsel for the Loblaw and Weston Defendants have assured that he understands and agrees that Mr. Weston should be examined.

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62 Exhibit A-7; *Sobeys Incorporated* v. *Commissioner of Competition*, 2019 CanLII 84561 (SCC).

[88] The objective of the Loblaw and Weston Defendants is to make certain that the informer privilege is respected. They ask that certain rules to be established in advance before the deposition takes place.

[89] The Court notes that some measures are already in place to protect the confidentiality of information disclosed in the present matter.

[90] For example, the Court issued a general confidentiality order in this matter on January 14, 2021 (the "**Confidentiality Order**").[63] This Confidentiality Order confirms that only counsel, their experts and party representatives who sign a confidentiality undertaking will have access to confidential information. Confidential information includes documents communicated following an application for the communication of documents or a subpoena, documents marked during examinations out-of-court, all transcripts of examinations out of court as well as undertakings arising out of examinations out-of-court.

[91] The Lacoste Judgment provides that the court will oversee Mr. Weston's deposition to adjudicate any objection that may arise, including those regarding informer privilege.

[92] The Loblaw and Weston Defendants propose three additional options:

92.1. Option 1:

Plaintiff's counsel would provide a written list of questions in advance. The Loblaw and Weston Defendants and the Confidential Informers would make submissions to the Court *ex parte* with regard to the possibility of informer privilege being infringed. After hearing the other parties, the Court would decide which questions may be asked. Oral discovery would proceed *in camera* on the questions approved by the Court.

92.2. Option 2:

Oral discovery of the Loblaw and Weston Defendants' representative would take place *in camera*. The Loblaw and Weston Defendants and Confidential Informers would raise any objections they may deem appropriate, and answers would not be given until the Court rules on the objections. The Loblaw and Weston Defendants and the Confidential Informers would make submissions *ex parte* after the examination is completed. After hearing the other parties, the Court would decide which questions must be answered. The Loblaw and Weston Defendants' representative would provide answers to those questions in writing.

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63 Exhibit A-15; *Govan* c. *Loblaw Companies Limited*, *supra*, note 24.

92.3. Option 3:

> This option is similar to Option 2 except that the Loblaw and Weston Defendants' representative would verbally answer the objected questions *ex parte* and *in camera* to the judge alone at the end of the deposition. These answers would be noted in a separate transcript to be kept by the witness and the Court under seal until a final ruling on the objections. The adjudication process would proceed in the same way as option 2. The recorded answers would be provided for those questions for which the objections were dismissed.

[93] The Loblaw and Weston Defendants argue that Option 1 is the only one that can prevent inadvertent disclosure of privileged information.

[94] Counsel for Plaintiff and counsel for the Other Defendants submit that the solutions proposed by the Loblaw and Weston Defendants are too restrictive, that the measures already in place are sufficient and that no further measures should be imposed at this time. They add that what the Loblaw and Weston Defendants propose has already been ruled out by prior judgments of this court and the Québec Court of Appeal. They believe that the Court should oversee the deposition as decided by Justice Lacoste and rule on the objections in real time.

[95] The Court believes that a median position should be adopted at this time.

[96] Proposed Option 1 is not advisable in the present case as it would unjustly curtail the parties' right to ask questions. A written examination only works if the questions are "clear and specific" (article 223 C.C.P.) and elicit "direct, categorical and specific" answers (article 224 C.C.P.). Questions must be closed rather than open-ended, and they cannot be susceptible of resulting in vague or ambiguous answers.[64]

[97] Discovery is an exploratory and evolving process. In some cases, a lawyer may consider that a mix of open-ended and closed questions would be better suited to the objective. Because sub-questions inevitably occur from the answers received, it is difficult to anticipate all questions (or sub-questions) in advance. Furthermore, a lawyer questioning a witness must be able to test not only the witness' knowledge, but also his or her credibility. Sometimes this can only be achieved using an element of surprise. A lawyer must also be able to analyze the witness' body language and hesitations in order to serve the client's interests. This is particularly true in the present case as proof of a conspiracy will likely rest on the credibility of the testimony of those involved. Option 1 also assumes that only the Plaintiff has questions for Mr. Weston. As mentioned above,

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[64] *Corporation d'hébergement du Québec* c. *Decarel inc.*, 2012 QCCS 4444, para. 12; *Norcan Hydraulic Turbine* c. *Sherbrooke (Ville de)*, 2011 QCCS 4292, para. 9; *J.B. Laverdure inc.* c. *Mediterranean Shipping Company*, 2017 QCCQ 4679.

the Other Defendants are very interested in deposing Mr. Weston as it is Loblaw and Weston that identified them as being parties to the conspiracy.

[98] Option 3 should also be discarded. It would require the Court to note the questions under objection in real time and re-read them to the witness at the end of the deposition. Furthermore, it creates a situation whereby the witness will be forced to give answers that counsel suspects may infringe informer privilege. The risk of inappropriate disclosure is thus increased. Furthermore, forcing counsel for the Confidential Informers to raise and argue objections in real time and imposing on the Court the duty to rule forthwith should also be avoided.

[99] This is so for two reasons:

[100] Firstly, as discussed above, it is often difficult to predict with certainty what information might allow someone to identify the informer. An innocuous detail may be sufficient to permit identification. The following observations by Justice Hennessy in *R.* v. *Talke* are perfectly applicable here:

> In *Leipert*, the Supreme Court cautioned trial judges, who might be persuaded that they could somehow discern which particular detail from the information requested might disclose the identity of the informer, to tread carefully. The defence suggested that all parties could place their confidence in my ability to edit out information that might disclose the identity of the informant. In the clearest of terms, the Supreme Court has said that such confidence is misplaced. Trial judges cannot step into the mind of the accused and recognize on the basis of their knowledge, what detail or omission would be the important piece of the three dimensional jigsaw puzzle that could reveal the informant. This court does not know how small the circle of persons is who may know an innocuous fact that is mentioned in one of the tips or on the criminal record of this informant. What appears innocuous to this court or one of the counsel on this motion may be of singular importance.[65]

[101] This is all the more difficult in the present case given that the evidence is complex and voluminous, extends over 14 years, and is largely verbal in nature. It involves a large number of conversations and meetings between Confidential Informers and representatives of other organizations. Because a conspiracy is most often occult, much of the information may be known by a very limited number of people.

[102] Secondly, arguing each objection as they are raised would take too much time and would not enable the examination to be completed within a reasonable timeframe.

[103] Thus, the Court will impose a process closer to Option 2 but with modifications.

[104] The deposition of Mr. Weston will take place before the undersigned as previously decided on January 17 and 18, 2023.

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[65] *R.* v. *Talke*, 2010 ONSC 2045, para. 21.

[105] In order to comply with the Confidentiality Order, the deposition will be *in camera*. All those entitled to access confidential information under the Confidentiality Order will be allowed to attend as well as counsel for the Confidential Informers and counsel for the Bureau. Counsel for Plaintiff and counsel for the Other Defendants will be permitted to ask questions. Anyone present may raise objections. Counsel for Plaintiff and counsel for the Other Defendants will agree amongst themselves how the two days will be divided.

[106] In order to facilitate the task of the Court and other counsel, Plaintiff has agreed when asking a question that relates to part of an ITO which has been redacted, to identify that paragraph when asking a question. The Court will pray act of this undertaking.

[107] If possible, general objections (other than those invoking informer privilege) will be argued and ruled upon in real time.

[108] A party objecting based on informer privilege may provide reasons on the spot or refrain from doing so if it is felt that the argument risks disclosing information covered by informer privilege. Objections will either be sustained immediately or be taken under advisement and decided at a later date. The witness will be instructed not to answer these questions.

[109] If further problems arise during this examination, the Court is confident that it will be able to rely on the professionalism of each party's counsel to resolve these problems in an efficient and respectful manner.

[110] If a party asks that the objections be adjudicated, the Court may decide that part of the objection hearing should take place *in camera* and *ex parte* to avoid disclosing information covered by informer privilege. However, a decision on this process is not needed at this time.

[111] Nor is it necessary to determine now, whether the answers to dismissed objections will be provided in writing by the witness or whether the witness will have to submit to a supplementary examination. This can be decided if and when objections are adjudicated and may depend on the nature and number of questions remaining to be answered.

[112] The Court does not believe it would be appropriate to identify in advance subjects that are off-limits. The present judgment gives some guidance with regard to information that may potentially be subject to informer privilege. Because the type of information that may lead to identify an informer is context specific, it would be very difficult to establish a list of prohibited topics in advance. A final determination with regard to a specific question should benefit from the context of the question and full arguments from the parties.

FOR THESE REASONS, THE COURT:

[113] **ORDERS** that the deposition of Mr. Galen G. Weston take place on January 17 and 18, 2024, before the undersigned in a courtroom to be determined;

[114] **ORDERS** that:

114.1. the deposition take place *in camera*;

114.2. those entitled to access confidential information under the January 14, 2021, Confidentiality Order as well as counsel for the Confidential Informers and counsel for the Bureau are permitted to attend;

114.3. anyone present will be allowed to object to questions;

[115] **PRAYS ACT** of the undertaking of those parties who will be asking questions that relate to part of an ITO which has been redacted, to identify that paragraph when asking a question;

[116] **PRAYS ACT** of counsel's undertaking to provide the Court with the list of documents it needs to read in order to effectively preside over this examination by 5 p.m. on January 12, 2024.

[117] **ORDERS** that objections relating to informer privilege may - but will not need to – be argued in real time and that such objections will either be sustained or be taken under advisement to be adjudicated at a later date and through a process to be determined if need be;

[118] **THE WHOLE** with costs to follow suit.

Martin Sheehan

Signature numérique de Martin Sheehan
Date : 2023.12.18 12:03:41 -05'00'

MARTIN F. SHEEHAN, J.S.C.

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