

Competition Tribunal



Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Canada Pipe Company*, 2004 Comp. Trib. 2
File no.: CT2002006
Registry document no.: 0045

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

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to sections 79 and 77 of the *Competition Act*;

AND IN THE MATTER OF certain practices by Canada Pipe Company Ltd. through its Bibby Ste-Croix Division.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Canada Pipe Company Ltd.
(respondent)

Date of hearing by conference call: 20031209
Member: Blanchard J. (presiding)
Date of Reasons and Order: 20040123
Reasons and Order signed by: Blanchard J.



REASONS AND ORDER REGARDING RESPONDENT'S MOTION FOR EXAMINATION OF PERSONS AND DOCUMENTS PURSUANT TO PARAGRAPH 21(2)(d.1) OF THE *COMPETITION TRIBUNAL RULES* AND REGARDING SCHEDULING ISSUES

TABLE OF CONTENTS

Paragraph

I.	INTRODUCTION	[1]
II.	BACKGROUND	[4]
III.	ISSUE	[9]
IV.	REGULATORY FRAMEWORK	[10]
	PARAGRAPH 21(2)(d.1) OF THE COMPETITION TRIBUNAL RULES	[10]
	SECTIONS 4.1 AND 5.1 OF THE COMPETITION TRIBUNAL RULES.....	[11]
V.	EVIDENCE IN SUPPORT OF THE MOTION	[12]
	A. CANADA PIPE'S EVIDENCE ON THE MOTION	[12]
	B. COMMISSIONER'S EVIDENCE ON THE MOTION	[21]
VI.	THE UNDERLYING APPLICATION	[29]
VII.	SUBMISSIONS OF THE PARTIES	[31]
	A. CANADA PIPE'S POSITION ON THE MOTION	[31]
	B. COMMISSIONER'S POSITION ON THE MOTION	[36]
VIII.	ANALYSIS	[40]
	A. DISCOVERY OF DOCUMENTS	[40]
	B. DISCOVERY OF PERSONS	[57]
	C. PUBLIC INTEREST PRIVILEGE	[59]
	D. DUTY OF FAIRNESS OF THE COMMISSIONER	[60]
	E. DISCLOSURE OF NAMES AND ADDRESSES OF WITNESSES	[65]
IX.	CONCLUSION	[67]

I. INTRODUCTION

[1] Canada Pipe Company Ltd. (“Canada Pipe”) brings a motion seeking relief pursuant to paragraph 21(2)(d.1) of the Competition Tribunal Rules, SOR/94-290, as amended (the “Rules”):

(a) requiring the Commissioner to immediately produce to Canada Pipe all documents in [her] possession, custody or control that relate to the matters at issue in this proceeding, including those documents that undermine, call into question or are detrimental to the various positions the Commissioner has taken in the Application;

(b) in the alternative to subparagraph (a) above, an Order requiring the Commissioner to immediately produce to Canada Pipe all documents or records described in Schedule “A” [attached to Canada Pipe’s Notice of Motion] that are in [her] possession, custody or control;

(c) permitting Canada Pipe to conduct an examination for discovery of a representative of Vandem Industries Inc. and requiring the Vandem representative to produce relevant documents and to answer questions pertaining to the matters at issue in this proceeding unless they can establish, on a question-by-question basis, a proper claim of solicitor-client privilege;

(d) requiring the Commissioner to divulge immediately the names and addresses of all witnesses in respect of whom “will-say” statements have been provided in the Commissioner’s most recent Disclosure Statement;

(e) requiring that the hearing of the Application occur in Toronto, Ontario; and

(f) setting a reasonable timetable for the exchange of expert reports, and the commencement of the hearing.

[2] In the alternative to obtaining full disclosure of all the documents in the possession of the Commissioner, the respondent seeks to obtain the documents referred to in Schedule “A” to their notice of motion. These documents can be essentially categorized as follows:

(a) All Parties

Canada Pipe seeks all documents or records produced or obtained by the Commissioner from any third party pertaining to or in connection with her investigation of Canada Pipe, the Stocking Distributor Program and the drain, waste and vent industry in general.

(b) Section 11 Order Respondents

Canada Pipe seeks disclosure of all documents or records obtained by the Commissioner in accordance with Section 11 of the Competition Act and pursuant to the Order of the Superior Court of Quebec dated December 8, 2000. [Complete list of documents attached to Canada Pipe’s Notice of Motion]

(c) Parties Other Than Section 11 Order Recipients

Canada Pipe seeks disclosure of all documents obtained by the Commissioner voluntarily from parties other than respondents to the Section 11 Order including, but not limited to, Vandem Industries Inc., Gates Canada Inc., and BMI Canada Inc. [Complete list of documents attached to Canada Pipe's Notice of Motion]

(d) Updated Information and Documents

Canada Pipe seeks disclosure of all documents, records or information produced to or obtained by the Commissioner from the respondents to the Section 11 Order subsequent to their responses to the Section 11 Order issued in December 2000.

(e) Exculpatory Documents

Canada Pipe seeks disclosure of all documents in the Commissioner's possession, power or control that are exculpatory, or that undermine, call into question or are detrimental to the positions taken by the Commissioner in the Application.

(f) Documents from the Commissioner's Witnesses

Canada Pipe seeks disclosure of all documents in the Commissioner's possession, power or control provided to the Commissioner by any witness (or his or her employer) that the Commissioner intends to call at the hearing.

(g) Documents Obtained During Witness Interviews

Canada Pipe seeks disclosure of all documents or records produced to or obtained by the Commissioner while interviewing potential witnesses during the course of her investigation.

[3] This motion is brought in the context of an application by the Commissioner of Competition (the "Commissioner") under subsections 77(2), 79(1) and 79(2) of the Competition Act, R.S.C. 1985, c. C-34 (the "Act"), concerning alleged exclusive dealing and abuse of dominant position by Canada Pipe.

II. BACKGROUND

[4] On October 31, 2002, the Commissioner filed a notice of application (the "Application") alleging that Canada Pipe had abused its dominant position and engaged in a practice of exclusive dealing in the market for cast iron pipe, fittings and mechanical joint couplings for use in drain, waste and vent ("DWV") applications.

[5] The Commissioner served a disclosure statement on Canada Pipe on November 14, 2002, pursuant to subsection 4.1(1) of the Rules. The disclosure statement included: (i) a list of records to be relied on at the hearing: 526 documents obtained from Canada Pipe and 92 documents or categories of documents in respect of which public interest privilege was claimed; (ii) five statements summarizing the will-say statements of 42 non-expert witnesses from the industry, identified by category of witness, and (iii) a statement of economic theory in support of the Application.

[6] In my reasons dated August 8, 2003 (*Commissioner of Competition v. Canada Pipe Company*, [2003] C.C.T.D. No. 24, 2003 Comp. Trib. 15 (the “August 8, 2003 Decision”)), with respect to a motion challenging the applicability of the Rules under the Canadian Bill of Rights, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III, I concluded that the Commissioner’s disclosure statement failed to comply with the Rules. I ordered that the Commissioner deliver a fresh disclosure statement. Canada Pipe’s request for production of all relevant documents in the Commissioner’s possession, power or control and oral discovery was dismissed. I concluded in my reasons that the provisions concerning documentary discovery did not violate Canada Pipe’s right to a fair hearing and stated that Canada Pipe could make specific requests regarding a motion pursuant to paragraph 21(2)(d.1).

[7] In compliance with the August 8, 2003 Decision, the Commissioner served on Canada Pipe, a further disclosure statement. Canada Pipe delivered its responding disclosure statement on October 20, 2003.

[8] Canada Pipe now seeks an order, pursuant paragraph 21(2)(d.1) of the Rules, to discover additional information not provided by the Commissioner and to conduct an examination for discovery of a representative of Vandem Industries Inc. (“Vandem”), the complainant that led to the initial investigation by the Commissioner. Canada Pipe also requires the Vandem representative to produce relevant documents and to answer questions pertaining to the matters at issue.

III. ISSUE

[9] Is Canada Pipe entitled to further discovery of documents and discovery of particular persons under the Rules?

IV. REGULATORY FRAMEWORK

[10] Paragraph 21(2)(d.1) of the *Rules* provides:

(2) The Tribunal may consider the following matters at a pre-hearing conference:
plan for the completion of such discovery;
(d.1) in the case of applications referred to in subsection 2.1(2) and if warranted by the circumstances, the matters referred to in paragraph (d);
[emphasis added]

(2) Le Tribunal peut considérer les questions suivantes lors de la conférence préparatoire :
d.1) dans le cas d’une demande visée au paragraphe 2.2(2) et lorsque les circonstances le justifient, les questions visées à l’alinéa d);
[je souligne]

[11] Section 4.1 and 5.1 of the Rules provide:

4.1 (1) The Commissioner shall, within 14 days after the notice of application other than an application for an interim order is filed, serve on each person against whom an order is sought the disclosure statement referred to in subsection (2).

(2) The disclosure statement shall set out

- (a) a list of the records on which the Commissioner intends to rely;
- (b) the will-say statements of non-expert witnesses; and
- (c) a concise statement of the economic theory in support of the application, except with respect to applications made under Part VII.1 of the Act.

(3) If new information that is relevant to the issues raised in the application arises before the hearing, the Commissioner may by motion request authorization from the Tribunal to amend the disclosure statement referred to in subsection (2).

(4) The Commissioner shall allow a person who wishes to oppose the application to inspect and make copies of the records listed in the disclosure statement referred to in subsection (2) and the transcript of information for which the authorization referred to in section 22.1 has been obtained. SOR/2002-62, s. 3.

5.1(1) A person served with a notice of application, other than an application for an interim order, who wishes to oppose the application shall, within 14 days after the service of the response, serve a disclosure statement referred to in subsection (2) on the Commissioner and on each other person against whom an order is sought.

(2) The disclosure statement shall set out

- (a) a list of the records on which the person served with a notice of application intends to rely,
- (b) the will-say statements of non-expert witnesses; and
- (c) a concise statement of the economic theory in support of the response, except with respect to applications made under Part VII.1 of the Act.

(3) If new information that is relevant to the issues raised in the response arises before the hearing, the person who serves the disclosure statement referred to in subsection (2) may by motion request authorization from the Tribunal to amend the disclosure statement.

(4) The person who wishes to oppose the application shall allow the Commissioner to inspect and make

4.1 (1) Dans les quatorze jours suivant le dépôt de l'avis de demande autre qu'une demande d'ordonnance provisoire, le commissaire signifie la déclaration visée au paragraphe (2) à chacune des personnes contre lesquelles l'ordonnance est demandée.

(2) La déclaration relative à la communication de renseignements comporte:

- a) la liste des documents sur lesquels le commissaire entend se fonder;
- b) un sommaire de la déposition des témoins non experts;
- c) un exposé concis de la théorie économique à l'appui de la demande, sauf dans le cas d'une demande présentée aux termes de la partie VII.1 de la Loi.

(3) Le commissaire peut, par voie de requête, demander au Tribunal l'autorisation de modifier la déclaration visée au paragraphe (2) en cas de découverte, avant l'audition, de nouveaux renseignements se rapportant aux questions soulevées dans la demande.

(4) Le commissaire doit permettre à la personne qui entend contester la demande d'examiner et de reproduire les documents mentionnés dans la déclaration visée au paragraphe (2) ainsi que la transcription des renseignements pour lesquels l'autorisation visée à l'article 22.1 a été obtenue. DORS/2002-62, art. 3.

5.1(1) Dans les quatorze jours suivant la signification de la réponse, la personne qui a reçu signification de l'avis de demande autre qu'une demande d'ordonnance provisoire et qui entend contester la demande signifie la déclaration visée au paragraphe (2) au commissaire et à chacune des autres personnes contre lesquelles l'ordonnance est demandée.

(2) La déclaration relative à la communication de renseignements comporte:

- a) la liste des documents sur lesquels la personne ayant reçu signification de l'avis de demande entend se fonder;
- b) un sommaire de la déposition des témoins non experts;
- c) un exposé concis de la théorie économique à l'appui de la réponse, sauf dans le cas d'une demande présentée aux termes de la partie VII.1 de la Loi.

(3) La personne qui signifie la déclaration visée au paragraphe (2) peut, par voie de requête, demander au

Copies of the records listed in the disclosure statement referred to in subsection (2).

Tribunal l'autorisation de la modifier en cas de découverte, avant l'audition, de nouveaux renseignements se rapportant aux questions soulevées dans la réponse.

(4) La personne qui entend contester la demande permet au commissaire d'examiner et de reproduire les documents mentionnés dans la déclaration visée au paragraphe (2).

V. EVIDENCE IN SUPPORT OF THE MOTION

A. CANADA PIPE'S EVIDENCE ON THE MOTION

(1) Affidavit of Andy Baziliauskas, PhD

[12] In support of the motion, the respondent filed the affidavit of Andy Baziliauskas sworn on November 26, 2003. Mr. Baziliauskas is a managing economist with LECG LLC ("LECG"), an economic consulting firm retained on behalf of Canada Pipe to provide an expert report and testimony concerning the economic impact and effect of Canada Pipe's Stocking Distributor Program ("SDP"). Mr. Baziliauskas worked for the Competition Bureau (the "Bureau") as an economist between 1993 and 1997 and was the Co-ordinator of the Enforcement Economics Division from 1997 to 1999. He was involved in a number of proceedings involving the Bureau and the Competition Tribunal (the "Tribunal") in connection with abuse of dominant position, merger reviews, distribution and pricing practices and other enforcement issues.

[13] Mr. Baziliauskas states that based on his review of the revised disclosure statement from the Commissioner, it is evident to him that the Commissioner has collected documents and information from various third parties regarding Canada Pipe, the SDP and the DWV industry in general, as a result of section 11 orders, and voluntary cooperation from participants in the DWV industry.

[14] Based on his experience and review of the documents produced by both parties, Mr. Baziliauskas attests, at paragraph 6 of his affidavit, that the documents that have not been disclosed by the Commissioner ". . . are likely to be highly relevant to a number of issues in the Application. . ." such as the relevant market definition, Canada Pipe's position in a properly defined market, the impact of the SDP on participants in the DWV industry and whether the SDP has anti-competitive effects.

[15] The affiant asserts that disclosure of the information listed below is relevant and “. . . would materially assist. . .” LECG in the completion of its economic analysis and preparation of its expert report and testimony.

(a) Information Obtained from Section 11 Order Recipients

[16] With respect to all documents or records obtained by the Commissioner pursuant to a section 11 order issued by Superior Court of Quebec dated December 8, 2000 (the “Section 11 Order”), Mr. Baziliauskas asserts at paragraph 17 of his affidavit, that these documents are “. . . likely relevant to this Application. . .” as that is “. . . why the Commissioner sought these documents and information in the first place. . .” The affiant states that such documents “. . . would likely be of material assistance. . .” to LECG in conducting and completing its economic analysis, expert report and testimony. The documents would include the information provided by the 12 respondents to the Section 11 Order for which no documents have been produced, the remaining portions of the responses received from the seven respondents for which partial disclosure has been made, and the gaps and omissions in the Commissioner’s documents that have been disclosed. As well, if the Commissioner has received updated information and documents from these Section 11 Order recipients, the production of these documents to Canada Pipe “. . . would be highly relevant. . .” to LECG’s economic analysis of the SDP and the preparation of its expert report and testimony.

(b) Information Obtained from Parties Other Than Section 11 Order Recipients

[17] The affiant reiterates that Canada Pipe seeks disclosure of all documents obtained by the Commissioner voluntarily from parties other than respondents to the Section 11 Order including, but not limited to, Vandem, Gates Canada Inc., and BMI Canada Inc. He asserts at paragraph 20 of his affidavit, that such information “. . . may be directly relevant. . .” to the matters at issue in this proceeding, and could be used by LECG in completing its economic analysis in respect of this matter, or by Canada Pipe in answering or rebutting a number of the allegations made by the Commissioner in seeking relief against Canada Pipe.

[18] In particular, he states at paragraph 21 of his affidavit, that Vandem’s documents are “. . . likely to be highly relevant. . .” to an economic analysis and the issue of the alleged exclusionary effect of the SDP, as well as barriers to entry in the DWV industry. At paragraph 23, he asserts that any information from Gates Canada Inc. “. . . would also be desirable and highly relevant. . .” to an economic analysis, as well as the issue of the alleged exclusionary effect of the SDP, and barriers to entry in the DWV industry. As well, he states at paragraph 25 of his affidavit, that documents from BMI “. . . may contain. . .” relevant information regarding allegations made by the Commissioner that Canada Pipe’s acquisition of inventory from BMI is an example of its anti-competitive conduct with a view to eliminate competitors from the DWV industry. The production of these documents would be “. . . desirable and particularly relevant . . .” to the economic analysis of the impact of the acquisition.

(c) Further Information from Other Third Parties

[19] The affiant states on information and belief, at paragraph 26 of his affidavit, that the Commissioner may have obtained section 11 orders, as well as requested and received other voluntary production of documents, after the filing of this Application without disclosing the existence of such orders to Canada Pipe. He asserts that any such documents could be relevant to the economic analysis, the assessment of the impact of the SDP on third parties and its alleged anti-competitive effects, as well as in preparing expert report and testimony.

[20] The affiant asserts at paragraph 28 of his affidavit that there is a “. . .serious risk that the Commissioner has engaged in selective disclosure in this case, by producing only documents that assist his case. . .” In order to ensure that analysis and evidence are accurate and complete, and that it can offer meaningful assistance to the Tribunal, he states that proper and timely disclosure of such documents referred to above would assist LECG in completing its analysis.

B. COMMISSIONER’S EVIDENCE ON THE MOTION

(1) Affidavit of Catherine A. Lawrence

[21] The Commissioner filed the affidavit of Catherine A. Lawrence, Counsel with the Civil Litigation Section of the Department of Justice, sworn on December 3, 2003. She has been a part of the litigation team representing the Commissioner in this matter since the commencement of the Application on October 31, 2002. She was also involved in the preparation of the Commissioner’s disclosure statement and therefore claims to be knowledgeable of the matters to which this affidavit relates.

[22] Ms. Lawrence claims that contrary to the respondent’s suggestion that documents are missing or have not been produced, the Commissioner has produced all of the documents upon which she intends to rely. Further, she states that to the extent that the written responses to the Section 11 Order produced refer to other documents, the Commissioner does not intend to rely on those other documents at the hearing of this Application.

[23] Ms. Lawrence asserts at paragraph 5 of her affidavit that the documents in the Commissioner’s possession that have not been disclosed to the respondent consist of the following:

- A. Documents upon which the Commissioner does not intend to rely at the hearing of the application obtained from third parties whom the Commissioner does not intend to call as witnesses at the hearing;
- B. Documents upon which the Commissioner has no intention to rely at the hearing of the application, obtained from third parties whom the Commissioner intends to call as witnesses at the hearing; and,
- C. Documents upon which the Commissioner does not intend to rely at the hearing of the application available in the public domain and obtained from various sources.

[24] Ms. Lawrence claims that the Commissioner obtained the records in the above-noted Categories A and B in the course of this investigation into alleged anti-competitive acts by the respondent, from third parties through a combination of informal information requests, formal information requests and orders pursuant to section 11 of the Act. The Commissioner asserts public interest privilege with respect to all of the documents in these categories. Finally, Ms. Lawrence asserts that “numerous” documents the Commissioner obtained from third parties are irrelevant to the matters at issue in the proceeding.

(2) Affidavit of Madeleine Dussault

[25] The Commissioner also filed the affidavit of Madeleine Dussault, sworn on December 4, 2003. Ms. Dussault is the Assistant Deputy Commissioner, Division A of the Civil Matters Branch of the Bureau, and has held this position since September 1999. She joined the Bureau in 1986 and has experience in investigation, analysis and preparation of cases or inquiries under the Act. Consequently, Ms. Dussault states that she is familiar with the Bureau’s statutory responsibilities and the operational and policy framework in place to discharge that mandate.

[26] In her affidavit, Ms. Dussault attests that confidentiality is required to protect both the integrity of the Bureau’s investigative process and the commercially sensitive information provided to the Bureau by others. This is reflected as one of the five key operating principles of the Bureau. In the course of the Bureau’s investigative process, competitors, suppliers and customers are asked to provide commercially sensitive or proprietary information. Such information provides a picture of the state of competition in specific industries such as the relevant product and geographic markets, barriers to entry, market shares, alleged anti-competitive acts and the competitive impact of alleged anti-competitive acts.

[27] Ms. Dussault attests that section 29 of the Act is relied upon to foster frank and full disclosure of information to the Bureau. In Ms. Dussault’s experience, suppliers and competitors would not willingly provide information without the assurance of confidentiality, and the Bureau’s ability to collect vital information would be severely compromised without such an assurance. Consequently, without the cooperation of third party market participants, the Bureau could not effectively carry out its mandate under the Act.

[28] Ms. Dussault attests that it is the Bureau’s practice to explain its confidentiality policy when gathering information, and as such, will take all necessary steps to protect information gathered during the course of its examinations and inquiries that it does not intend to rely on in the proceeding.

VI. THE UNDERLYING APPLICATION

[29] In the Application, the Commissioner states that Canada Pipe substantially controls the supply of the three products in six geographic markets, and in addition controls the national market. The Commissioner alleges that Canada Pipe has engaged in a practice of exclusive dealing through its SDP, which provides discounts to distributors and contractors who deal exclusively with Canada Pipe's line of products. The Commissioner further alleges at paragraph 2 of the Statement of Grounds and Material Facts attached to the Application, that this practice has had, is having or is likely to have the effect of substantially lessening or preventing competition among manufacturers and importers of cast iron pipe, fittings and mechanical joint couplings, for use in certain DWV applications, in six Canadian regions.

[30] Upon reviewing the Application, it is apparent that the following factors are relevant to the issues: the relevant market definition; Canada Pipe's position in that defined market; the impact of the SDP on participants in the DWV industry and whether the SDP has anti-competitive effects. Indeed, information material to these factors was sought by the Commissioner during the investigation of the alleged anti-competitive conduct of Canada Pipe. The affidavit of Jean-Marc Boileau filed in support of an application by the Commissioner for a section 11 order to the Superior Court of Quebec dated December 8, 2000, states:

14. The information sought by the Commissioner is related to the marketing practices, monitoring and enforcement practices of Bibby Ste-Croix in relation to the sale of cast iron soil pipes, fittings and couplings in Canada.

15. The information sought by the Commissioner is related to the competitive impact of the marketing practices, monitoring and enforcement practices of Bibby Ste-Croix in relation to the sale of cast iron soil pipes, fittings and couplings in Canada.

16. In order to assess the competitive impact of the alleged marketing practices, monitoring and enforcement practices of Bibby Ste-Croix, the information required dates back to 1996, one year prior to the introduction by Bibby Ste-Croix of the alleged practices which are the subject of this application in relation to the sale of cast iron soil pipes, fittings and couplings in Canada. This will provide the Commissioner the information required to conduct a comparative analysis of the competitive impact of such practices in the market.

VII. SUBMISSIONS OF THE PARTIES

A. CANADA PIPE'S POSITION ON THE MOTION

[31] Canada Pipe submits that the Commissioner should be required to produce further relevant documents. Prior to the amendments to the Rules in 2002, the Tribunal repeatedly emphasized the importance of proper disclosure for respondents. Canada Pipe relies on *Canada (Commissioner of Competition) v. United Grain Growers Ltd.* (2002), 21 C.P.R. (4th) 140 at 151. Canada Pipe also relies on the recent decision of *Canada (Commissioner of Competition) v. Sears Canada Inc.*, [2003] C.C.T.D. No. 16, 2003 Comp. Trib. 19 [Sears] rendered under the current Rules. There, Madam Justice Dawson wrote at paragraph 33:

. . . I am satisfied that the right to make full answer and defence carries with it the right to know all of the information provided to the Commissioner in the affidavits upon which the Commissioner has chosen to rely, particularly where the withheld information is relevant to issues such as the definition of the geographic market.

[32] Canada Pipe restates the test for further disclosure adopted by Madam Justice Dawson in *Sears*, in the following fashion. Canada Pipe submits it was held that further discovery should be granted where: (1) the respondent identifies or specifies relevant information that is helpful to allow it to fully know the case it has to meet; (2) the respondent demonstrates that it is unable to obtain the documents sought; (3) no prejudice will be caused by any delay which cannot be compensated for with costs; and (4) there is a risk that the respondent's right to a fair hearing will be jeopardized if further disclosure is not granted.

[33] Canada Pipe submits that it satisfies the above-stated test enunciated by Madam Justice Dawson in *Sears*, supra, with respect to the documents requested in this motion. The documents listed by Canada Pipe are clearly relevant to matters at issue in the case to know and the case it has to meet, especially those documents relevant to the economic analysis to be carried out by Canada Pipe's experts. Furthermore, Canada Pipe argues that it has been unable to obtain the documents from the third parties, and that there is no evidence of prejudice to the Commissioner if disclosure is ordered. Finally, Canada Pipe submits that its rights to a fair hearing will be jeopardized if further disclosure is not ordered.

[34] Canada Pipe further submits that, as the case against it appears to be wholly based on complaints and evidence from third parties, it is critically important to Canada Pipe's defence that documents in the Commissioner's power, possession or control which explore the credibility of these witnesses be disclosed in order to properly defend itself unimpaired. As well, Canada Pipe requires access to relevant documentation and information produced to the Bureau by third parties in order to properly inform its economic experts and be in a position to respond to the Commissioner's expert witnesses on issues such as comparative analysis.

[35] Finally, Canada Pipe submits that the Tribunal should grant its request to conduct an examination for discovery of a representative of Vandem and to require the representative to produce relevant documents and to answer questions pertaining to the matters at issue. Vandem is a competitor of Canada Pipe who manufactures and sells cast iron pipe, fittings and couplings which are used in the DWV Industry. Canada Pipe submits that the Commissioner's Application was initiated as a result of the complaint made by Vandem and that Vandem is the source of some "...relevant and cogent evidence on the issues in dispute of the Application. . ." More specifically, Canada Pipe argues that the principal allegations made against Canada Pipe in the Application are that the SDP has acted as a barrier to entry and has had a series of anti-competitive effects. Canada Pipe submits that the evidence of Vandem regarding its ability to enter the DWV market and compete while the SDP was in effect lies at the heart of the Commissioner's case.

B. COMMISSIONER'S POSITION ON THE MOTION

[36] The Commissioner submits that the motion is founded on the incorrect legal premise that the standard governing pre-trial disclosure is one of relevance. This is clearly incorrect as the Rules establish a standard of reliance. Furthermore, the respondent, Canada Pipe, has failed to demonstrate any legitimate basis, evidentiary or legal, to support the exercise of the Tribunal's discretion. Such discretion should only be exercised in limited and exceptional circumstances, which Canada Pipe has not demonstrated.

[37] The Commissioner submits that a contextual and purposive approach must be taken in determining how discretion under paragraph 21(2)(d.1) of the Rules must be exercised. The Rules provide a complete code to the disclosure obligations of the Commissioner, and demonstrate a clear intention to move from broad-ranging discovery based on an assertion of relevance. Compelling reasons, unique to the particular circumstances of the case must exist in order to depart from the general principle, and there must at least be a demonstrable nexus between a known document and a key point which is deemed essential. The evidence in support of Canada Pipe's motion consists of mere assertions by an expert that documents are likely to be highly relevant to a number of issues. Canada Pipe also seeks broad-ranging disclosure from third parties as full disclosure could be relevant to its position.

[38] The Commissioner submits that Canada Pipe has not placed before the Tribunal any credible argument or compelling evidence to justify the reversion to a wholesale discovery process. It cannot identify a specific type of document that would impact its case. The Commissioner further submits that Canada Pipe cannot demonstrate that the case is compromised and in fact, it has put forth a theory of its case in the absence of these allegedly relevant documents.

[39] Finally, the Commissioner argues that the fact that Vandem's identity as the informer is known does not translate into a waiver of the entire privilege that might otherwise be associated with communications between that witness and the Bureau. The fact that Vandem is the complainant does not provide it with any special status. The Commissioner submits that Vandem is nothing more than a simple witness.

VIII. ANALYSIS

A. DISCOVERY OF DOCUMENTS

[40] On February 13, 2002, the Rules were amended. In particular, sections 4.1 and 5.1 of the Rules clearly narrow the previously applied standard of "relevance" for general disclosure and replaced it with one of "reliance." Not surprisingly, prior to the February 13, 2002, amendment, there was a greater degree of document disclosure, as the standard of relevance was quite broad. Further, examination for discovery was available by order of the Tribunal if the respondent could demonstrate "the desirability of examination for discovery of particular persons or documents . . ." (paragraph 21(2)(d)). The Rules now add the phrase ". . . and if warranted by the circumstances . . ." (paragraph 21(2)(d.1)).

[41] The current Rules do not obligate the Commissioner to disclose all relevant documents and information. Instead, only information and documents intended to be relied on in the application must be disclosed. The purpose of the amended Rules was set out by Madam Justice Simpson in “Objectives of the Amendments to the Competition Tribunal’s Rules Relating to Reviewable Matters Other than Mergers” and restated at paragraph 13 of the August 8, 2003 Decision:

The amendments to the Rules were designed to streamline the proceedings of the Tribunal. The regulatory objectives included: (i) ensuring that the Commissioner’s investigation is completed and that the case is in final form at the time an application is filed with the Tribunal; (ii) ensuring that the issues are clearly defined at the outset of the case by having them set out in disclosure statements; (iii) streamlining the Tribunal’s pre-hearing procedure by eliminating examinations for discovery as of right; and (iv) providing a more effective presentation of expert witness evidence. . .

[42] The expeditious resolution of proceedings is further emphasized by subsection 9(2) of the Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.) which states expressly:

All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

[43] In the August 8, 2003 Decision, I was required to consider whether the amended Rules regarding disclosure violated a respondent’s right to a fair hearing. After analysing the content of the duty of fairness in light of the five factors set out by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, I concluded at paragraph 53 that:

. . . Canada Pipe’s right to a fair hearing would be fulfilled by a process that provides a respondent the right to know the case against it and the right to have a meaningful opportunity to present evidence supporting its own case. . .

[44] I further stated that the change to a standard of reliance in the Rules is not inherently unfair in the context of procedures before an administrative tribunal. I also found that the new standard does not violate the respondent’s right to know the case it must meet, as the applicant’s case must be based on documents included in the disclosure statement which is available to the respondent prior to the hearing. In the August 8, 2003 Decision, I wrote at paragraph 58:

I am of the view that the framers of the Rules clearly intended to amend the standard of “relevance” and replace it with one that requires only the disclosure of documents to be relied on. Canada Pipe argues that the Commissioner’s failure to disclose any or all “bad documents”, even if he does not intend to rely on such documents, has the effect of impairing its ability to know the case to meet. I disagree. The case that Canada Pipe must meet is set out in the Application and is supported by the documents listed in the disclosure statement. Canada Pipe is asking for additional documents that may serve to bolster its own case, which has little to do with the case it must meet. The Commissioner’s case must be based on documents included in the disclosure statement, and no others.

[45] In bringing this motion, Canada Pipe requests that I exercise my discretion pursuant to paragraph 21(2)(d.1) of the Rules and order further discovery of persons and documents. In essence, Canada Pipe seeks disclosure of all documents and information obtained by the Commissioner in the course of the investigation that relate to this proceeding.

[46] In *Sears*, supra, Madam Justice Dawson restated the grounds upon which, in an earlier Order in that matter, she refused discovery of documents ([2003] C.C.T.D. No. 1, 2003 Comp. Trib. 2.) She stated at paragraph 31:

In my view, this is consistent with the previous order in this case which refused the discovery sought at that time on the ground that *Sears* failed to show that the disclosure provided fell short of disclosing the case to be met by *Sears* and failed to show that specific information or documents were “necessary for the defence of the application” or that there would be “any actual unfairness if *Sears* has to proceed to hearing without specific evidence”.

[47] The test advanced by Madam Justice Dawson turns on whether the documents sought are necessary for the defence of the application or, put differently, whether there would be any actual unfairness if the hearing proceeded without disclosure of the specific evidence sought. Canada Pipe submits that it satisfies the test enunciated by Madam Justice Dawson in *Sears*, supra, with respect to the documents requested in this motion.

[48] I am satisfied that Canada Pipe has established that the Commissioner is likely in possession of additional documents and that these documents are likely relevant to matters at issue in the proceeding.

[49] The Commissioner has stated, through her affiant on this motion, that she is indeed in possession of documents obtained from third parties on which she does not intend to rely at the hearing and which consequently have not been disclosed. I am therefore satisfied that these undisclosed documents cannot be obtained by Canada Pipe.

[50] I also recognize that since Canada Pipe is not aware of the documents it seeks, it is difficult, if not impossible, for it to advance further cogent argument on the necessity of the unknown and undisclosed documents. Canada Pipe argues that the documents may be of assistance in making full answer and defence and alleges unfairness if it has to proceed without this information. This submission, however, can only be based on speculation since Canada Pipe has not seen the documents.

[51] The essence of Canada Pipe's argument is that information and documents obtained by the Commissioner during the lengthy investigation "are likely to be highly relevant to a number of issues in the Application" and that such documents and information "would likely be of material assistance" in conducting and completing its economic analysis, expert report and testimony. In consequence, Canada Pipe argues that these unidentified documents should be ordered disclosed.

[52] The Commissioner's evidence on this motion is that the undisclosed documents in her possession will not be relied on in the Application. Those documents consist of documents obtained from third parties whom the Commissioner will call as witnesses, and documents obtained from third parties who will not be called. The Commissioner's affiant also attests that other documents on which the Commissioner does not intend to rely at the hearing consist of documents in the public domain and obtained from various sources.

[53] The test enunciated by Madam Justice Dawson in *Sears*, supra, is helpful in determining the proper criteria to be considered in deciding whether further discovery should be ordered. I am in general agreement with her views. The onus is on Canada Pipe, however, to establish the evidentiary basis for the order sought. The evidence must not only focus on specific information or documents said to be necessary for the defence of the Application, but also establish any actual unfairness in having to proceed without the information. Specifically, Canada Pipe argues that the information sought is necessary since it is "likely to be relevant" to an economic analysis and the alleged exclusionary effect of the SDP, as well as barriers to entry in the DWV industry. Canada Pipe submits that the information is sought in order to properly inform its economic experts and be in a position to respond to the Commissioner's expert witnesses on issues such as comparative analysis. Quite apart from the speculative nature of the affidavit evidence adduced in support of the argument, I am not convinced that the information sought is necessary. Nor am I convinced that an unfairness will result if the information is not disclosed. Canada Pipe will have the benefit of the Commissioner's experts' reports in advance of the hearing. An expert's opinion is only as good as the factual basis upon which it is founded. The Commissioner's experts will base their opinions on evidence to be adduced by the Commissioner which, by necessity, will have been disclosed in the will-say statements of their non-expert witnesses. The Commissioner's case is limited to the evidence disclosed in the disclosure statement. Therefore, Canada Pipe will have all of the information necessary to inform its economic experts, namely the information relied on by the Commissioner, and this should include the information upon which the Commissioner's experts found their opinions. Consequently, I am of the view that the documents sought are not necessary to enable Canada Pipe to properly meet and defend the case. No actual unfairness has been established by Canada Pipe.

[54] Canada Pipe further argues that it is important to its defence that the documents it seeks, which explore the credibility of third party witnesses, be disclosed. I fail to be convinced that disclosure of the documents sought is necessary to deal with the credibility issues raised by Canada Pipe with respect to third parties. On the evidence, I see no unfairness in Canada Pipe being required to proceed without this information. Prior to the hearing Canada Pipe will have the will-say statements of third party witnesses to be called by the Commissioner, and will have the opportunity to test their credibility on cross-examination at the hearing. The issue of disclosure of the names and addresses of witnesses is discussed below.

[55] In the instant case, there is no evidence to suggest that documents produced by the Commissioner are only partially disclosed. Nor is there evidence that could lead me to conclude that the Commissioner is not fully disclosing the case on which she intends to rely. Canada Pipe supports its numerous requests for information with mere speculation. Canada Pipe's requests are based on the premise that the unknown documents are "likely to be highly relevant" to a number of issues. The weakness of this argument is self-evident and further disclosure cannot be ordered on the basis of such evidence.

[56] In the circumstances, I find that the exercise of my discretion with respect to further discovery of documents is not warranted.

B. DISCOVERY OF PERSONS

[57] I will now address Canada Pipe's request for an order for discovery of a representative of Vandem. Canada Pipe alleges that the Application was initiated as a result of a complaint made by Vandem and that Vandem would be the source of ". . . relevant and cogent evidence on the issues in dispute of the Application. . ." On this basis, Canada Pipe argues that discovery should be ordered.

[58] As is the case with the discovery of documents, paragraph 21(2)(d.1) provides that the Tribunal may consider the desirability of discovery of particular persons if warranted by the circumstances. Canada Pipe has not demonstrated in what way a representative of Vandem is different from any other non-expert witness that may be called at the hearing. Non-expert witnesses to be called by the Commissioner have provided will-say statements and it can reasonably be assumed that all witnesses will give evidence that is "relevant and cogent" to the Application. It is well established that there is no automatic right to discovery in Tribunal proceedings. Examination of a non-party is exceptional and just because a witness is a complainant with relevant information to the Application is not, in my view, sufficient grounds to warrant the order sought. As stated earlier in these reasons, one of the regulatory objectives sought to be achieved with the amendments to the Rules, is to streamline the Tribunal's pre-hearing procedure by eliminating discovery as of right. To order the discovery of a non-party on the sole basis that that person is a complainant with relevant information would not be in keeping with this objective. Further, Canada Pipe has not identified any specific information sought that has not been produced in the will-say statement or that could not otherwise be obtained. In essence Canada Pipe is again seeking discovery of all relevant information from this witness. This is not the disclosure test provided for in the Rules. In the circumstances, I am of the view that the discovery of a representative of Vandem is not warranted.

C. PUBLIC INTEREST PRIVILEGE

[59] The Commissioner takes the position that the additional information sought by Canada Pipe in this motion is protected from disclosure, in any event, by public interest privilege. In the August 8, 2003 Decision I stated that if the Commissioner elects to claim public interest privilege in relation to a document, she must do so prior to filing her disclosure statement and thereby forgo reliance on the document at the hearing. I ruled that such an interpretation was consistent with another regulatory objective of the Rules, namely having the investigatory process completed by the time the disclosure statement is filed and served. Given my above findings that Canada Pipe has not satisfied me that additional discovery of documents or persons is warranted, it is not necessary to deal with public interest privilege. In keeping with my earlier ruling, the Commissioner is taken to have waived the privilege with respect to those documents and information provided in the disclosure statement. Further, privilege is not claimed on any other document that is to be produced in this proceeding. In consequence, public interest privilege is not at issue in this motion. That is not to say that the issue may not arise should the Commissioner claim privilege on any document subsequently ordered produced.

D. DUTY OF FAIRNESS OF THE COMMISSIONER

[60] While the Commissioner's obligation to disclose information is now dictated by a standard of reliance under the Rules, she is nevertheless required to act fairly in the exercise of her duties.

[61] The Commissioner is a public officer with significant statutory powers to gather information and exercise public interest privilege. The Commissioner's oath of office, provided for in subsection 7(2) of the Act, imposes on her the duty to exercise her powers with impartiality:

I do solemnly swear (or affirm) that I will faithfully, truly and impartially, and to the best of my judgment, skill and ability, execute the powers and trusts reposed in me as Commissioner of Competition. . . [emphasis added]

There is a presumption that the Commissioner is acting in good faith.

[62] In these proceedings, the Commissioner is not a normal adversary, she is a public officer with a statutory obligation to act fairly. Similarly prosecutors must act fairly. Rand J. elaborated on the role and duty of a Crown prosecutor in the frequently quoted case of *Boucher v. The Queen*, [1955] S.C.R. 16 [Boucher] at pages 23-24:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.

[63] L'Heureaux-Dubé J. more recently emphasized that the duty to disclose is inherent in the role of a public officer, such as the Crown prosecutor, in *R. v. O'Connor*, [1995] 4 S.C.R. 411 [O'Connor] at pages 477-478:

Though the obligation on the Crown to disclose has found renewed vigour since the advent of the Charter, in particular in s. 7, this obligation is not contingent upon there first being established any violation of the Charter. Rather full and fair disclosure is a fundamental aspect of the Crown's duty to serve the Court as a faithful public agent, entrusted not with winning or losing trials but rather with seeing that justice is served. . . [emphasis added]

[64] It naturally follows that just as the Crown prosecutor must be motivated by fairness and not the notion of winning or losing, so too the Commissioner must be motivated by goals of fundamental fairness and not by achieving strategic advantage on the proceeding. This is not to say that the duties articulated in such landmark criminal cases as *Boucher*, supra, or *O'Connor*, supra, should be directly imported into an administrative law setting. The Tribunal is an administrative tribunal with an administrative process and procedural fairness must be customized to accommodate the expedited process required by the legislation and rules which govern its proceedings. Though the standard of disclosure may justifiably be different in proceedings before the Tribunal than in criminal proceedings, the underlying notion of fairness must remain constant for both. It is in this context that the reliance standard is to be applied.

E. DISCLOSURE OF NAMES AND ADDRESSES OF WITNESSES

[65] Canada Pipe seeks an order requiring the Commissioner to disclose immediately the names and addresses of the witnesses that she intends to call at the hearing. Section 4.2 of the Rules requires that, unless the Tribunal orders otherwise, the Commissioner shall identify each witness by name and address, at least two days before the date that the witness is called to testify. In the August 8, 2003 Decision I expressed difficulty appreciating the rationale for such a rule. I am of the view that earlier disclosure is appropriate and fair. I fail to see how the Commissioner would be prejudiced by being ordered to disclose the names and addresses of her witnesses earlier. No arguments were advanced by the Commissioner at the hearing submitting otherwise. In the exercise of my discretion I will order that the Commissioner serve on Canada Pipe, at least 30 days before the date scheduled for the beginning of the hearing, the names and addresses of all witnesses to be called at the hearing.

[66] At the hearing of this motion Canada Pipe argued that since certain witnesses and counsel reside in or near Toronto, the hearing of the Application should occur in Toronto. The Commissioner expressed a preference that the hearing occur in Ottawa. I have considered the arguments of the parties on this issue and order that the hearing occur in Ottawa. This is essentially a case which evolved in central Canada. Toronto is relatively close to Ottawa and the Tribunal's staff and premises are in Ottawa. In the interest of fairness and efficiency, I am of the view that there is insufficient evidence to warrant that the hearing occur in a location other than Ottawa.

IX. CONCLUSION

[67] Given the above analysis, I summarize my conclusions on the motion as follows:

- (a) in the circumstances, further discovery of persons or documents is not warranted;
- (b) no public interest privilege claim arises on the motion, since no further discovery is ordered, and the Commissioner is deemed to have waived privilege on information in the disclosure statement;
- (c) there is no resulting prejudice to the Commissioner or unfairness in requiring that she provide to Canada Pipe, at least 30 days before the date scheduled for the beginning of the hearing, the names and addresses of all witnesses to be called at the hearing; and
- (d) the Commissioner is presumed to act fairly and impartially in the exercise of her duties.

FOR THE ABOVE REASONS THE TRIBUNAL ORDERS THAT:

[68] The motion for further discovery of documents and persons is dismissed.

[69] The Commissioner shall serve on Canada Pipe, at least 30 days before the date scheduled for the beginning of the hearing, the names and addresses of all witnesses to be called at the hearing.

[70] The hearing of the application is to be held in Ottawa, Ontario.

[71] A pre-hearing conference will be scheduled at which the parties will be heard on the timeframe for the exchange of expert reports and the date of commencement of the hearing.

[72] Failing agreement on costs, the parties shall submit written submissions on costs of the motion within 30 days of the date of this order.

[73] The motion is otherwise dismissed.

DATED at Ottawa, this 23rd day of January, 2004.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Edmond P. Blanchard

APPEARANCES:

For the applicant:

The Commissioner of Competition

John A. Campion

Donald J. Rennie

For the respondent:

Canada Pipe Company Ltd.

Kent E. Thomson

James Doris