CT-2017-008

THE COMPETITION TRIBUNAL

IN THE MATTER of the *Competition Act,* R.S.C. 1985, c. C-34, as amended; and

AND IN THE MATTER OF an application for orders pursuant to section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the *Competition Act.*

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

HUDSON'S BAY COMPANY

Respondent

BOOK OF AUTHORITIES
OF THE RESPONDENT (MOVING PARTY)
(Refusals Motion returnable November 20, 2018)

November 9, 2018

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7	*Pearson v Inco Ltd*, [2008] OJ No 3589, 169 ACWS (3d) 524 (Sup Ct).
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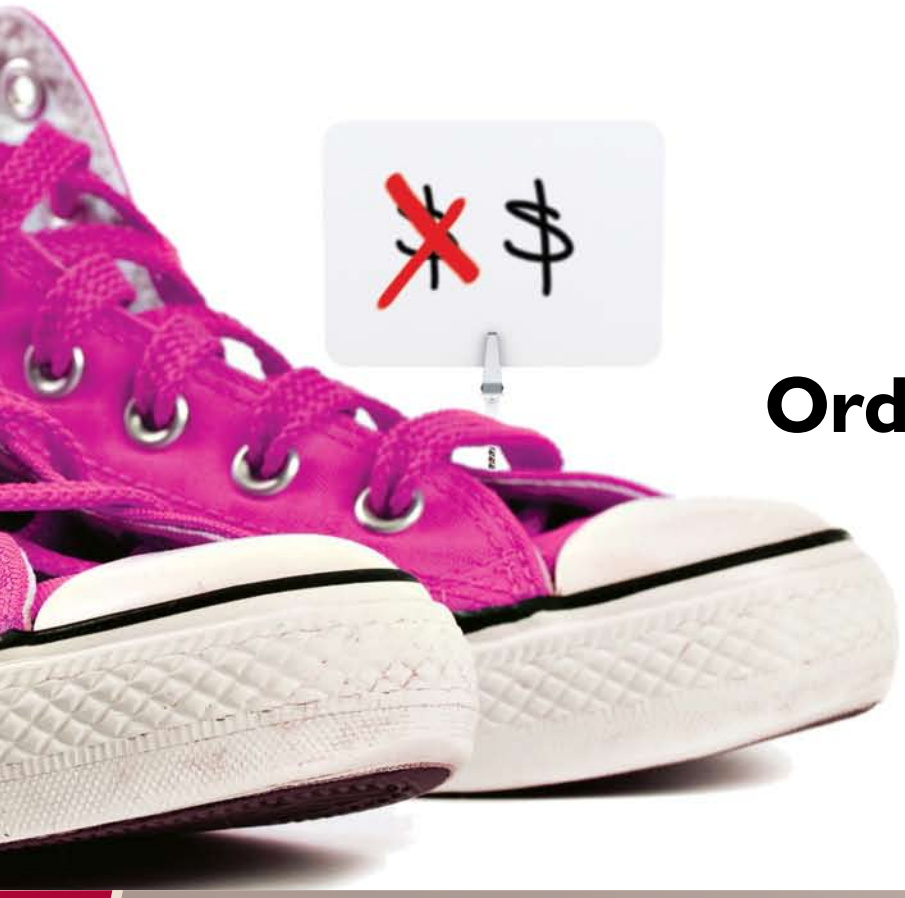
9	*Canada (Director of Investigation & Research) v Washington*, 70 CPR (3d) 317 (CT).
10	*Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24.

TAB 1

Competition Bureau Canada
Bureau de la concurrence Canada

Enforcement Guidelines



Ordinary Price Claims

Subsections 74.01(2) and 74.01(3) of the *Competition Act*

Canada

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

This publication replaces the following Competition Bureau publication:
Information Bulletin – *Ordinary Price Claims – Subsections 74.01(2) and 74.01(3) of the* Competition Act, September 20, 1999

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1. INTRODUCTION

The Competition Bureau is an independent law enforcement agency that contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choice. Headed by the Commissioner of Competition, the Bureau is responsible for the administration and enforcement of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The purpose of the *Competition Act* is to maintain and encourage competition in the Canadian marketplace. Subsections 74.01(2) and 74.01(3) are part of the false or misleading representations and deceptive marketing practices provisions of the Act. These provisions aim to improve the quality and accuracy of marketplace information and discourage deceptive marketing practices. The Act applies to most businesses in Canada, regardless of size.

This publication outlines the approach that the Commissioner of Competition is taking in enforcing the ordinary price claims provisions of the Act. The guidelines contained in this publication are not law. However, they may be relied upon as reflecting the Commissioner's interpretation of how the law is applied on a consistent basis by Competition Bureau staff.

2. WHEN IS A BARGAIN REALLY A BARGAIN?

Whether they are after a lawnmower, or a refrigerator, or just a new pair of shoes, everyone likes a bargain. Consumers will often shop around, or wait for products to go on sale rather than buy at the "regular price". Where comparisons are made between two prices, consumers respond to the implied savings. Therefore, regular price representations and related savings claims can be powerful marketing tools.

When is a bargain really a bargain? If someone puts a phoney regular price on a product, merely to cross it out and claim that the item is marked down, the consumer might not be getting any saving at all. And, if the consumer is deceived, the market is not operating fairly. Even if buyers never learn the truth, a deception has taken place, and competitors may have been adversely affected as well.

3. THE ORDINARY PRICE CLAIMS PROVISIONS OF THE *COMPETITION ACT*

Subsections 74.01(2) and 74.01(3) of the Competition Act are civil provisions. They prohibit the making, or the permitting of the making, of any materially false or misleading representation, to the public, as to the ordinary selling price of a product, in any form whatever. The ordinary selling price is determined by using one of two tests: either a substantial volume of the product was sold at that price or a higher price, within a reasonable period of time (*volume test*); or the product was offered for sale, in good faith, for a substantial period of time at that price or a higher price (*time test*).

- In the event that the ***represented ordinary price refers to the ordinary price of suppliers in the market***, unless these suppliers have sold a substantial volume of the product at the represented ordinary price, or alternatively, these suppliers have offered the product for sale in good faith at the represented ordinary price, this price can not be referenced as the ordinary price, and an issue is raised under subsection 74.01(2).

- In the event that the ***represented ordinary price refers to the supplier's ordinary price***, unless the supplier has sold a substantial volume of the products at the represented ordinary price, or alternatively, the supplier has offered the product for sale in good faith at the represented ordinary price, this price can not be referenced as the ordinary price, and an issue is raised under subsection 74.01(3).

Under these provisions, it is not necessary to demonstrate that any person was deceived or misled; that any member of the public to whom the representation was made was within Canada; or that the representation was made in a place to which the public had access. Subsection 74.03(5) directs that the general impression conveyed by a representation, as well as its literal meaning, be taken into account when determining whether or not the representation is false or misleading in a material respect.

If a court determines that a person has engaged in conduct contrary to subsection 74.01(2) or 74.01(3), it may order the person not to engage in such conduct, to publish a corrective notice and/or to pay an administrative monetary penalty of up to $750,000 in the case of a first time occurrence by an individual and $10,000,000 in the case of a first time occurrence by a corporation. For subsequent orders, the penalties increase to a maximum of $1,000,000 in the case of an individual and $15,000,000 in the case of a corporation.

Subsections 74.01(2), 74.01(3) and 74.1(1) of the Act read as follows:

Ordinary price: suppliers generally

74.01 (2) Subject to subsection (3), a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product,

(*a*) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(*b*) have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

Ordinary price: supplier's own

74.01 (3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

(*a*) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(*b*) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

Determination of reviewable conduct and judicial order

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(*a*) not to engage in the conduct or substantially similar reviewable conduct;

(*b*) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

(*c*) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding

(i) in the case of an individual, $750,000 and, for each subsequent order, $1,000,000, or

(ii) in the case of a corporation, $10,000,000 and, for each subsequent order, $15,000,000; and

(*d*) in the case of conduct that is reviewable under paragraph 74.01(1)(*a*), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold – except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products – in any manner that the court considers appropriate.

4. GUIDELINES REGARDING ORDINARY PRICE CLAIMS

Under subsections 74.01(2) and 74.01(3) of the Act, materially false or misleading ordinary price claims are reviewable civil matters. However, where there is evidence of the requisite criminal intent, false or misleading ordinary price claims may also be subject to the general criminal prohibition against materially false or misleading representations under subsection 52(1) of the Act.

4.1 General Principles

4.1.1 A person can make a price comparison about a product if the reference price reflects the price at which suppliers generally in the relevant market area have either:

> (a) sold a **substantial volume** of the product within a **reasonable period of time** before or after making the representation (*volume test*); or
>
> (b) offered the product for sale **in good faith** for a **substantial period of time** recently before or immediately after making the representation (*time test*).

(See Hypothetical Examples – section 4.3.1).

4.1.2 Where the comparison is made to the supplier's own prices, the tests described in paragraph 4.1.1 apply to those own prices (see Hypothetical Examples – section 4.3.2).

4.1.3 Price comparisons can be made to past prices ("was"), current prices ("regular") and future prices ("after sale price"). All three types of claims are judged by the volume test or the time test (see Hypothetical Examples – section 4.3.3).

4.1.4 The nature of the product (e.g. national vs. private brand; seasonal vs. non-seasonal; novelty vs. commonplace; new vs. established; frequently vs. infrequently purchased) will be considered in determining whether a violation under the Act has likely occurred. For example, a seasonal product may be sold or offered for sale for a shorter period of time than other products. In this instance, the volume or time test will apply in relation to this shorter period.

4.1.5 Depending upon the specific circumstances of each case, the relevant geographic market will be determined based on a number of factors. These could include, in no particular order, the market reach of the representation, the number and location of competitors, the likelihood of travel to purchase the product in question, the location of consumers reached by the representation and ease of price comparison. In the case of small to medium size suppliers, the relevant geographic market will typically be the municipality or metropolitan area where a business is located. In the case of larger suppliers, the relevant geographic market may be the combined geographic areas of individual outlets. The relevant geographic market is usually captured by the area covered by the medium of communication that is employed.

4.1.6 Where price comparisons are made to like products, the tests described in paragraph 4.1.1 apply with reference to the prices of those like products.

4.1.7 Price comparison representations that fail the tests described in paragraph 4.1.1 may not raise an issue under the Act if the supplier can establish that they were not otherwise false or misleading in a material respect. For example, a "clearance sale" may fail both the time and volume tests. However, a supplier promoting this type of sale will likely be able to show that the price comparison representations were not otherwise misleading if the supplier can demonstrate that the sale was clearly marked as a clearance sale, the representations refer to the original price and any subsequent interim prices and the original price was offered in good faith (see Important Terms – section 4.2.2.1). Such a sale may occur where a supplier offers for sale products not intended to be sold again at the original price, the products did not sell or were no longer selling at the original price or at a lower price, or the supplier wants to take a firm mark down on the products and sell them to make room for new merchandise. Generally, a clearance sale should only be used on product which the supplier already has in stock (see Hypothetical Examples – section 4.3.4 for another example of this principle).

4.2 Important Terms

4.2.1 Ordinary price claims relating to actual sales (*volume test*)

4.2.1.1 Substantial volume

(a) The substantial volume of product requirement will be met if more than 50% of sales are at or above the reference price.

(b) Where no single price accounts for a substantial volume of sales, reference may be made to the lowest of two or more of the prices which make up a substantial volume of sales. In selecting the lowest price, one will take into account the volume of sales at the different prices (see Hypothetical Examples – section 4.3.5).

4.2.1.2 Reasonable period of time

The time period to be considered will be the twelve months prior to (or following) the making of the representation. However, this period may be shorter having regard to the nature of the product.

4.2.2 Ordinary price claims relating to offered prices (*time test*)

4.2.2.1 In good faith

In assessing if a product was offered for sale in good faith, some of the factors that the Bureau would likely consider include whether:

(a) the product was openly available in appropriate volumes;

(b) the reference price was based on sound pricing principles and/or was reasonable in light of competition in the relevant market during the time period in question;

(c) the reference price was a price that the supplier fully expected the market to validate, whether or not the market did validate this price; and/or

(d) the reference price was a price at which genuine sales had occurred, or it was a price comparable to that offered by competitors.

4.2.2.2 Substantial period of time

(a) The substantial period of time requirement will be met if the product is offered at or above the reference price for more than 50% of the time period considered.

(b) The time period to be considered will be the six months prior to (or following) the making of the representation. However, this period may be shorter having regard to the nature of the product.

(c) Where the product is offered for sale at different prices for different periods of time, reference may be made to the lowest of two or more of the prices which make up the substantial period of time at which the product was offered for sale (see Hypothetical Examples – section 4.3.6).

4.3 Hypothetical Examples

4.3.1 Regular Price $100 – Sale Price $50

In examining this type of case, the Bureau would assess the prices of suppliers generally in the relevant market area as it is not clearly specified to be the supplier's own advertised prices.

The Commissioner would not likely initiate an inquiry in the following circumstances:

(a) a substantial volume of product had been recently sold at the $100 price or higher (e.g. more than 50% would clearly constitute a substantial volume);

(b) the product was offered for sale in good faith at or above $100 for more than 50% of the time in the last six months and genuine sales were made at the $100 price; or,

(c) no sales were made during the relevant time period at the $100 price, but the supplier was prepared to meet the demand for the product and had made bona fide efforts to ensure that the $100 price was a reasonable price in light of prevailing market conditions.

4.3.2 Our Regular $100 – Now $50

The tests and principles laid out in hypothetical example 4.3.1 apply with respect to a comparison made by a supplier to that supplier's own prices.

4.3.3 After Sale Price $100 – Now Available $50

The Commissioner would not likely initiate an inquiry in the following circumstances:

(a) the product is offered at $100 immediately after the sale period:

(i) for a substantial period of time; or

(ii) for a substantial period of time taking into account several cumulative periods immediately after the sale period ends; or

(b) a substantial volume of sales occurred at or above $100 within the one year immediately after the end of the sale.

This representation would be taken as an undertaking by the supplier that the product would be offered at the higher price after the sale period ends. The Commissioner would likely initiate an inquiry if the product is not so offered for sale for a substantial period of time or if a substantial volume of the product was not sold at or above the after sale price within a reasonable period of time in the post-sale period.

The Commissioner would not likely initiate an inquiry even if the price comparison fails to meet either the time test or the volume test if the supplier establishes that the representation is not otherwise false or misleading in a material respect.

4.3.4 MSRP $15,000 – Manufacturer's Rebate $1000 (Dealers may sell for less)

With respect to the use of the term Manufacturer's Suggested Retail Price (MSRP), the Commissioner would not likely initiate an inquiry even if the price comparison fails to meet either the time test or the volume test if the supplier establishes that the representation is not otherwise false or misleading in a material respect.

The Commissioner would not likely initiate an inquiry where the term MSRP is used where it is not compared to the actual selling price of the product and where it is prominently disclosed that it can be sold for less.

4.3.5 A product is sold at different prices during a 12-month period

The product is sold at different prices in the following proportions: 5% of the total sales were at $100; 20% at $90; 30% at $80; 5% at $70; and 40% at $60. The Commissioner would not likely initiate an inquiry if:

(a) $60 was the quoted reference price as 100% of sales occurred at $60 or higher during the 12 month period;

(b) $70 was the quoted reference price as 60% of sales occurred at $70 or higher during the 12 month period; or

(c) $80 was the quoted reference price as 55% of sales occurred at $80 or higher during the 12 month period.

4.3.6 A product is offered at different prices during a 6-month period.

The product is offered for sale at different prices for different periods of time as follows: for 5% of the time, the product was offered at $100; for 20% of the time, it was offered at $90; for 30% of the time, it was offered at $80; for 5% of the time, it was offered at $70; and for 40% of the time, it was offered at $60. The Commissioner would not likely initiate an inquiry if:

(a) $60 was the quoted reference price as the product was offered at $60 or higher for 100% of the time in the last 6 months;

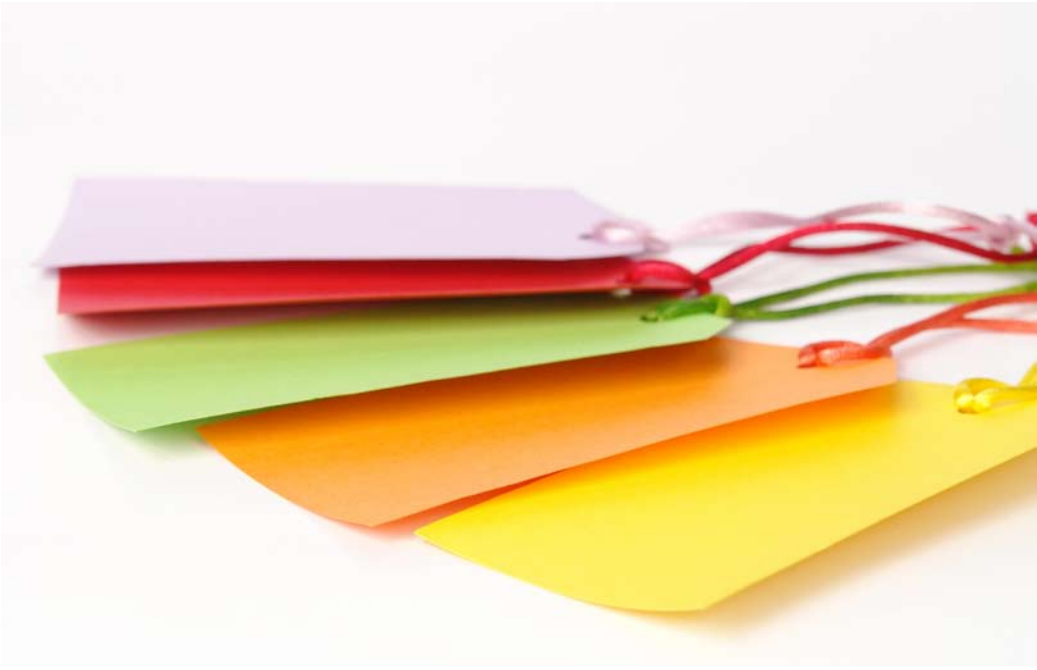
(b) $70 was the quoted reference price as the product was offered at $70 or higher for 60% of the time in the last 6 months; or

(c) $80 was the quoted reference price as the product was offered at $80 or higher for 55% of the time in the last 6 months.

The supplier should be aware however that this time period is a rolling period and has to take into account the prices at which the product is offered in the coming months and make adjustments (if needed) to the reference price.

5. WRITTEN OPINIONS

The Competition Bureau facilitates compliance with the law by providing various types of written opinions subject to fees. Company officials, lawyers and others are encouraged to request an opinion on whether the implementation of a proposed business plan or practice would raise an issue under the *Competition Act*. These written opinions are binding on the Commissioner of Competition when all the material facts have been submitted by or on behalf of an applicant for an opinion and when they are accurate. A specific written opinion will be based on information provided by the requestor and will take into account previous case law, prior opinions and the stated policies of the Bureau.



6. HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act,* the *Textile Labelling Act*, the *Precious Metals Marking Act*, or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

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TAB 2

2003 CAF 438, 2003 FCA 438
Federal Court of Appeal

Merck & Co. v. Apotex Inc.

2003 CarswellNat 3738, 2003 CarswellNat 4475, 2003 CAF 438, 2003 FCA 438, [2003] F.C.J. No. 1725, 127 A.C.W.S. (3d) 417, 246 F.T.R. 158 (note), 28 C.P.R. (4th) 491, 312 N.R. 273

Apotex Inc., Appellant (Defendant) and Merck & Co. Inc., Merck Frosst Canada & Co., Syngenta Limited, Astrazeneca UK Limited and Astrazeneca Canada Inc., Respondents (Plaintiffs)

Malone J.A., Sharlow J.A., Strayer J.A.

Heard: November 13, 2003
Judgment: November 20, 2003
Docket: A-112-03

Proceedings: reversing *Merck & Co. v. Apotex Inc.* (2003), 230 F.T.R. 242, 2003 FCT 160, 2003 CarswellNat 315, 24 C.P.R. (4th) 251, 2003 CFPI 160, 2003 CarswellNat 2538 (Fed. T.D.)

Counsel: *Mr. Harry Radomski*, *Ms Judith Robinson*, *Ms Frédérique Amrouni*, for Appellant
Mr. Nelson Landry, for Merck Respondents
Ms Nancy Pei, for Astrazeneca Respondents

***Strayer J.A.*:**

Introduction

1 This is an appeal from a decision of a motions judge of the Federal Court of February 13, 2003 which dismissed an appeal from a decision of a prothonotary of August 21, 2002. That decision dismissed the appellant's motion to compel answers on discovery to certain questions to which answers were refused during the examinations for discovery of the respondents. It involves the question of whether ordinary rules of discovery can be overridden in the interests of case-management.

Facts

2 The respondents are plaintiffs in an action commenced in 1996 against the appellant alleging infringement by the appellant of the respondents' patent. The appellant has filed a statement of defence and counter-claim denying infringement and alleging invalidity of the patent on various grounds. Extensive examinations for discovery have been held. At the time the appellant brought its motion requiring further answers, some 800 questions and 133 undertakings were still in dispute. For purposes of the motion the outstanding questions were organized into 26 categories. Subsequently the parties agreed with respect to some of the questions and the prothonotary ordered answers to certain others. Otherwise he dismissed the motion by the appellant for an order compelling further answers.

3 As the prothonotary saw it the issue before him was as follows:

> The principal problem before the Court in this motion is whether the Court should take the approach recommended by Apotex and, essentially, allow any relevant question arising from the allegations not admitted in the proceedings, or specifically here the questions based on paragraph 19 of Apotex's defence and counterclaim ("the defence"), or whether the Court should regard this as an opportunity to limit the scope of the examination which Apotex is

conducting so as to move the case at bar forward as quickly as possible, within the spirit of Rule 3 of the *Federal Court Rules* (*1998*) .... (Reasons for Order paragraph 6).

It appears that the learned prothonotary chose the latter approach. He relied heavily on the written submissions of the respondents, particularly paragraphs 18 and 19 of those submissions. Paragraph 18 listed nine categories of questions which the respondents thought it would be "appropriate" to answer. (There was no explanation on what criteria the respondents deemed it "appropriate" to answer). Paragraph 19 of the respondents's submissions listed ten kinds of questions which it characterized as "improper and irrelevant".

4 Upon reading this list it is not apparent what criteria were used to determine that these were improper or irrelevant. One might guess that certain of them were considered simply irrelevant but some categories by their description were based on criteria for exclusion other than relevance such as answers requiring "expert evidence", those requiring interpretation of the patent (a role for the Court) and one category including questions which were "too broad, would require considerable time, effort and expense to answer...". Apart from this list, not being confined to objections based on pure irrelevancy, the respondents at the hearing maintained that three additional categories could be added to paragraph 19 including one category called "irrelevant questions". It must thus be assumed that the other categories of objections were not based on irrelevancy alone.

5 The prothonotary, without making any determination as to relevancy himself, simply stated:

In the circumstances, I am prepared to approve and accordingly adopt this approach by Merck so as to limit the scope of the examination held by Apotex and move the case forward expeditiously, within the meaning of Rule 3. (Reasons for Order, paragraph 22).

It is not clear from this statement which elements of the "approach" of the respondents were adopted by the learned prothonotary: that is, there are no clear findings as to irrelevancy or any other specific criterion. Instead, in the passage quoted he appears to adopt the respondents' approach in order to "move the case forward expeditiously, within the meaning of Rule 3".

6 The learned prothonotary then proceeds to discuss the need for a broad discretion in case-management judges. Also earlier in the reasons he had referred to the appellant's argument based on relevance as a "theoretical approach", contrasting that to the "practical reality ... that the Court may wish to see the case move forward in accordance with Rule 3". (Reasons, paras 7 and 8). Consequently he refused to order answers to the loose categories of questions referred to by the respondents in paragraph 19 of their submissions.

7 On appeal to a motions judge, the appellant argued that the prothonotary had erred in law and in principle by not basing his decision principally on the relevance or irrelevance of the questions. This it argued was not a matter of the exercise of discretion but rather a matter of law. The motions judge rejected this approach. Citing *James River Corp. of Virginia v. Hallmark Cards Inc.* (1997), 72 C.P.R. (3d) 157 (Fed. T.D.), at 160-61 he held that with the advent of the new case management rules it was within the discretion of the prothonotary to decide what questions need be answered on discovery. He stated:

Ordering answers to questions refused during discoveries affects the pre-trial process and the time management of a file, thus falling within the powers of the prothonotary managing the case. (Reasons for Order, paragraph 17).

The motions judge did, however, also consider that the prothonotary had ruled on relevancy by "adopting" Merck's approach in paragraph 19 of its submissions, as discussed above. Further, he stated that the prothonotary was not obligated to restrict himself only to the relevancy test and was entitled to exercise his discretion so as "to ensure that the proceedings be resolved expeditiously".

8 The appellant appeals from this decision asserting that the learned motions judge failed to apply the well-established and overriding principle of relevance to the pleaded issues as the test for compelling answers on examination

for discovery. This it says is a substantive right which cannot be overridden by considerations of expediency or expedition in case management.

Analysis

Standard of Review

9 It is common ground that when a motions judge hears an appeal from a prothonotary, assuming that no questions vital to the final issue of the case are involved, the reviewing judge can only exercise his or her own discretion in place of the prothonotary's if he or she concludes that the exercise of discretion by the prothonotary "was based upon a wrong principle or upon a misapprehension of facts...". (*R. v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (Fed. C.A.) at para. 95) In the present case the question for this Court is whether the prothonotary's decision was based upon a wrong principle. If so, the learned motions judge should have set it aside and exercised his own discretion.

The Law of Discovery

10 The Rules of Court provide as follows:

223(1) (2) An affidavit of documents shall be in Form 223 and shall contain (a) separate lists and descriptions of all relevant documents... 240 A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that (a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party....	223(1) ....(2) L'affidavit de documents est établi selon la formule 223 et contient: *a*) des listes séparées et des descriptions de tous les documents pertinents... 240 La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui: *a*) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge....

The jurisprudence in this Court on the scope of discovery is well settled. For convenience it is summarized in *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* (1988), 24 C.P.R. (3d) 66 (Fed. T.D.), at 70-72 . It is clear that the primary consideration is relevance. If a prothonotary or a judge does, however, find a question to be relevant he or she may still decline to order the question to be answered if it is not at all likely to advance the questioner's legal position, or if the answer to a question would require much time and effort and expense to obtain and its value would appear to be minimal, or where the question forms part of a "fishing expedition" of vague and far-reaching scope.

Law of Case Management

11 The respondents, the prothonotary, and the motions judge have laid considerable stress on two rules which, they say, underpin the case management system and authorize the Court to refuse answers to any questions if necessary to ensure the expeditious hearing of a case.

3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits. 385(1) A case management judge or a prothonotary assigned under paragraph 383(c) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may	3. Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible. 385(1) Le juge responsable de la gestion de l'instance ou le protonotaire visé à l'alinéa 383*c*) tranche toutes les questions qui sont soulevées avant l'instruction de l'instance à gestion spéciale et peut:

(a) give any directions that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits...

a) donner toute directive nécessaire pour permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible....

Conclusion

12 In appeals from the decisions of motions judges reviewing the decisions of prothonotaries, this Court is very reluctant to interfere. This is particularly true in respect of decisions of case management judges and prothonotaries where it has been said that this Court will interfere "only in the clearest case of a misuse of judicial discretion" (*Sawridge Band v. R.* (2001), [2002] 2 F.C. 346 (Fed. C.A.), at 354).

13 In my view, however, in the present case there has been an error of principle which has fettered the exercise of discretion by the prothonotary, and his decision has been confirmed by the motions judge. I do not understand Rule 385 to authorize a case management judge or prothonotary, in giving directions that are necessary for the "just, most expeditious and least expensive determination of the proceeding on its merits" to enable them to deny a party the legal right to have questions answered on examination for discovery which are relevant to the issues in the pleadings. That right is not merely "theoretical" (as the prothonotary put it) but is clearly spelled out in Rule 240 and I do not take the general words of Rule 385(1)(a) or of Rule 3 to be sufficient to override that specific right. I would also observe that the word "just" which appears in both these rules relied on by the respondents and the decision-makers below confirms that justice is not to be subordinated to expedition. A person who is a party to a civil action is entitled to ask any question on discovery that is relevant to the issue: that is a matter of justice to him, subject of course to the discretionary power of the prothonotary or a judge to disallow the question where it is abusive for one of the reasons mentioned above. No such findings have been made in this case.

14 I would also observe that limiting the scope of questions for the sake of speed may in some cases be counterproductive. One of the purposes of discovery is to simplify proof at trial and another is to narrow the issues which remain in dispute. Both of these purposes are fully consistent with "expedition", so it is wrong to assume that completeness of discovery will always be an obstruction to the "most expeditious ... termination of the proceeding on its merit...".

15 In the present case I am not satisfied that the learned prothonotary directed his mind to specific questions of relevance. The relevance issues were not raised clearly before him in paragraph 19 of the respondents' submissions, on which he relied and which he adopted as his rationale. Further, his reasons suggest that his ultimate conclusion was based on what he understood to be the imperatives of case management and not on any test of relevance. In particular, he did not specifically conclude that the questions should not be answered because, although relevant, they would for example be abusive because calling for an opinion or because of their scope.

16 For the same reasons, the motions judge should have identified the error in principle on which the prothonotary's decision was based and should have exercised the discretion himself.

17 Therefore the appeal must be allowed and the matter sent back to the prothonotary.

Disposition

18 The appeal will be allowed, the decision of the motions judge confirming the decision of the prothonotary in respect of the questions he refused to order answered will be set aside, the matter will be referred back to the prothonotary for a redetermination of the motion in respect of the questions whose answers he refused to order. Costs in this Court, before the motions judge, and before the prothonotary, are awarded to the appellant without regard to the final disposition of the case.

***Sharlow J.A.*:**

I agree.

***Malone J.A.*:**

I agree.

Appeal allowed.

TAB 3

2011 CAF 120, 2011 FCA 120
Federal Court of Appeal

Lehigh Cement Ltd. v. R.

2011 CarswellNat 1015, 2011 CarswellNat 2188, 2011 CAF 120, 2011 FCA 120, [2011] 4 C.T.C. 112, [2011] F.C.J. No. 515, 200 A.C.W.S. (3d) 1219, 2011 D.T.C. 5069 (Eng.), 417 N.R. 342

Her Majesty the Queen, Appellant and Lehigh Cement Limited, Respondent

John M. Evans, Eleanor R. Dawson, Carolyn Layden-Stevenson JJ.A.

Heard: March 3, 2011
Judgment: March 31, 2011
Docket: A-263-10

Proceedings: affirming *Lehigh Cement Ltd. v. R.* (2010), 2010 CarswellNat 2097, 2010 TCC 366, 2010 D.T.C. 1239 (Eng.) (T.C.C. [General Procedure])

Counsel: Daniel Bourgeois, Geneviève Léveillée, for Appellant
Warren J.A. Mitchell, Q.C., Mathew G. Williams, Natasha Reid, for Respondent

***Eleanor R. Dawson J.A.*:**

1 This is an appeal from an interlocutory order of the Tax Court of Canada (Tax Court) rendered in respect of a motion brought by Lehigh Cement Limited (Lehigh). Lehigh moved for an order requiring Her Majesty the Queen (the Crown) to answer a question objected to on discovery and to produce certain documents. The issue raised on this appeal is whether the Judge of the Tax Court erred by ordering the Crown to:

> 1. Answer the following question: If the shares of CBR Cement Corp. had been owned by the appellant instead of a non-resident company related to the appellant, would the Crown have contested the arrangement (the disputed question).
>
> 2. Produce internal memoranda of the Canada Revenue Agency (CRA) from 2000 to July 2007 that specifically relate to the development of a general policy concerning paragraph 95(6)(*b*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act), not including documents relating to a particular taxpayer (the disputed documents).

A subsidiary issue is raised with respect to the appropriate level of costs to be awarded on this appeal.

2 The Judge's reasons in support of the order under appeal are cited as 2010 TCC 366, 2010 D.T.C. 1239 (Eng.) (T.C.C. [General Procedure]).

The Facts

3 The relevant facts and the procedural context are set out succinctly in the following paragraphs from Lehigh's memorandum of fact and law:

> 1. In 1995 the Respondent, Lehigh Cement Limited ("Lehigh"), borrowed US$100,000,000 in Canada and contributed the US$100,000,000 as a capital investment in CBR Development NAM LLC ("CBR-LLC"), its wholly-owned U.S. subsidiary. Lehigh deducted the interest paid on the said loan pursuant to s. 20(1)(c) of the *Income Tax Act* (the "Act").

2. CBR-LLC in turn lent the US$100,000,000 to CBR Cement Corp. ("CBRUS"), a United States operating company, the shares of which were owned by CBR Investment Corporation of America ("CBR-ICA"), also a United States corporation.

3. In the years 1996 and 1997, CBR-US carried on an active business and paid interest to CBR-LLC of CDN $11,303,500 and CDN$11,305,800 respectively.

4. Lehigh, CBR-LLC and CBR-US were all treated as "related" corporations as that term is defined in the Act. Subparagraph 95(2)(a)(ii) of the Act, as it read at the time, provided that so long as the corporations were *related*, the interest so paid would retain its character as active business income to CBR-LLC, and as such become exempt surplus of CBR-LLC.

5. CBR-LLC paid dividends to Lehigh in 1996 and 1997 of CDN$8,294,940 and CDN$14,968,784 respectively. Paragraph 113(1)(a) of the Act provides that to the extent such dividends were paid out of exempt surplus of CBR-LLC, Lehigh was entitled to deduct such dividends in computing its taxable income, which it did.

[...]

7. Notices of Reassessment for each of the 1996 and 1997 taxation years were issued on November 30, 2004 and on May 3, 2005. The Minister's primary basis of reassessment was s. 95(6)(b), asserting that the effect of that provision was that the shares of CBR-LLC were deemed not to have been issued, with the result that the deduction under s. 113(1)(a) of the Act should be disallowed. The alternate basis was s. 245 of the Act, the general antiavoidance rule (the "GAAR").

8. Lehigh objected to the reassessments. On February 27, 2009 the Minister confirmed the reassessments. Lehigh appealed to the Tax Court of Canada.

The Decision of the Judge

4 After setting out the background facts, the Judge framed the dispute before her in the following terms:

9. The appellant's objective in bringing this motion is to have a better understanding of the respondent's position on the scope, and object and spirit, of s. 95(6)(*b*). The respondent resists largely on grounds that the information sought is not relevant.

5 The Judge then noted that the principles applicable to the issues before her had recently been discussed by the Tax Court in *HSBC Bank Canada v. R.*, 2010 TCC 228, 2010 D.T.C. 1159 (Eng.) (T.C.C. [General Procedure]) at paragraphs 13 to 16. The Judge particularly noted that the purpose of discovery is to provide a level of disclosure so as to allow each party to "proceed efficiently, effectively and expeditiously towards a fair hearing, knowing exactly the case each has to meet." The Judge indicated that while fishing expeditions are to be discouraged, "very little relevance need be shown to render a question answerable." No specific challenge is made to the Judge's statement of general principles.

6 With respect to the disputed question, the Judge reasoned:

12. [...] It is not in the interests of fairness or efficiency for the respondent to resist answering the question on grounds of principle. The answer will help the appellant know what case it has to meet and is within the broad purposes of examinations for discovery.

13. The purposes of discovery were summarised in *Motaharian v. Reid*, [1989] OJ No. 1947:

(a) to enable the examining party to know the case he has to meet;

(b) to procure admissions to enable one to dispense with formal proof;

(c) to procure admissions which may destroy an opponent's case;

(d) to facilitate settlement; pre-trial procedure and trial;

(e) to eliminate or narrow issues;

(f) to avoid surprise at trial.

7 The Judge's conclusion with respect to the disputed documents was as follows:

15. As for the production of internal CRA memoranda, these documents are potentially relevant because it appears that they directly led to the respondent's position in this appeal. Effectively, these documents are the support for the assessments even though CRA's policy may have been in the formative stages when the assessments were issued. This type of disclosure is proper: *HSBC Bank*, para. 15.

16. It is also significant that the appellant's request is not broad. Mr. Mitchell indicated in argument that there are likely only a few documents at issue.

17. Disclosure will therefore be ordered, except that the formal order will clarify that production will apply only to memoranda that specifically relate to the development of a general policy. It will exclude documents that relate to a particular taxpayer.

The Asserted Errors

8 The Crown asserts that in making the order under appeal the Judge erred by:

a. failing to observe principles of natural justice by accepting factual assertions made by counsel for Lehigh without providing the Crown with an opportunity to challenge them;

b. making findings of fact unsupported by the evidence and relying on such facts in support of her decision;

c. ordering the production of internal CRA memoranda; and

d. ordering the Crown to answer a hypothetical question aimed at eliciting the Crown's legal position.

Consideration of the Asserted Errors

a. Did the Judge fail to observe principles of natural justice?

9 The Crown identifies three factual submissions made by counsel for Lehigh that it states were not supported by affidavit evidence. It states that it objected to these "bare assertions" being made because they were unsupported by evidence so that the Crown had no opportunity to challenge the assertions through the cross-examination of a deponent. The three impugned submissions are:

1. During oral discovery, counsel for Lehigh singled out two CRA officers, Wayne Adams and Sharon Gulliver, when questioning on the existence of internal memoranda.

2. Counsel for Lehigh stated at the hearing that the alleged change in CRA policy "was developed between 2000 and July 2007, when the CRA announced the new policy."

3. Counsel for Lehigh stated at the hearing that he did not think there would be many memoranda concerning the new policy. He only expected there to be three or four memoranda.

These assertions are said to have significantly influenced the Judge's decision.

10 For the following reasons, I conclude that the Judge did not err as the Crown submits.

11 To begin, the first impugned submission was not made to the Judge. What is complained of is a question asked by counsel for Lehigh on his discovery of the Crown when he sought production of the disputed documents. Counsel stated his request was "specifically but not exclusively" with respect to documents emanating to and from the two named employees. Such a question asked on discovery does not breach principles of natural justice.

12 The remaining two impugned submissions were made to the Judge by counsel for Lehigh. However, counsel for Lehigh was explicit in his submissions to the Court that "[w]e don't know if there are any documents, to begin with. We are saying, if there are documents that give the context of this assessment we would like to see them." (Transcript of oral argument, Appeal Book page 81 lines 14-19). This makes clear that counsel was not improperly giving evidence about matters within his knowledge. I read counsel's submissions as being in the nature of supposition as to when any memoranda would have been produced and the number of such memoranda. The Judge's reference to the number of documents reflected counsel's submissions.

13 Further, counsel's submissions were informed by a memorandum prepared by Sharon Gulliver dated May 2, 2002 (Gulliver memorandum). The Gulliver memorandum was produced by the Crown following oral discovery, but before the hearing before the Judge, and was appended to the affidavit filed in support of Lehigh's motion. It will be described in more detail later in these reasons.

14 The Crown has not established any breach of the principles of natural justice.

b. Did the Judge make and rely upon findings of fact which were unsupported by the evidence?

15 The Crown asserts that the Judge based her decision to order the production of the disputed documents on the basis of two allegations which were not substantiated by evidence. The allegations were that:

1. The disputed documents led directly to the Crown's position in the underlying appeal.

2. The disputed documents provided the support for the assessments under appeal, even though the CRA's policy may have been in the formative stages when the assessments were issued.

The Crown points to paragraph 15 of the Judge's reasons, quoted above, to argue that the Judge made and relied upon these assumptions.

16 In my view, the Judge's reasons, read fairly, fall well short of a finding of fact that the disputed documents either led directly to the Crown's position on the appeal or provided the support for the assessment. I reach this conclusion for the following reasons.

17 First, as set out above, Lehigh was explicit that it did not know if the disputed documents existed. At paragraph 6 of her reasons, the Judge correctly stated that it was an assertion made by Lehigh, not an established fact, that the CRA's policy concerning the application of paragraph 95(6)(*b*) was developed between 2000 and July 2007 when the CRA announced the new policy.

18 Second, the Judge noted in paragraph 15 of her reasons that the disputed documents were "potentially relevant because *it appears* that they directly led [...]." No determination was made by the Judge that the documents existed, had led to the Crown's position on this appeal or had provided support for the assessment.

19 Third, the Gulliver memorandum was in evidence before the Judge. This memorandum provided a basis for the Judge's conclusion by way of inference that any subsequent memoranda were potentially relevant. From the content of the Gulliver memorandum it was at least arguable that subsequent memoranda expressed the basis for the assessments

at issue. As explained below, the Crown's disclosure of the Gulliver memorandum evidenced the Crown's position that it was relevant to Lehigh's appeal.

20 The Crown has not persuaded me that any of the impugned findings of fact were indeed made by the Judge.

21 The Crown also argues that Lehigh had specific knowledge of documents relating to a change in policy "but chose not to adduce any evidence which might have shed light on the nature, volume and relevance of these documents." I agree with Lehigh's responsive submission that only the Crown possessed the knowledge of whether the disputed documents exist or if any existing documents are relevant. In such a circumstance it is difficult to see how Lehigh could have provided better affidavit evidence that shed light on these points.

c. Did the Judge err by ordering the production of internal CRA memoranda?

22 I begin by noting that while the Judge ordered the production of internal CRA memoranda prepared from 2000 to July 2007, during oral argument counsel for Lehigh significantly narrowed the relevant timeframe to be from the date of the Gulliver memorandum (May 2, 2002) to the date of the assessments (November 30, 2004 and on May 3, 2005).

23 The Crown argues that in ordering the production of internal memoranda the Judge erred because:

> 1. Opinions expressed by CRA officials outside of the context of a particular taxpayer's situation are irrelevant.
>
> 2. Official publications issued by the CRA are relevant only where a taxpayer seeks to establish that the CRA's interpretation of the Act, expressed in an official publication, is correct and contradicts the interpretation upon which the assessment in issue was made.

24 The scope of permissible discovery depends upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles. See *Bristol-Myers Squibb Co. v. Apotex Inc.*, 2007 FCA 379, 162 A.C.W.S. (3d) 911 (F.C.A.) at paragraph 35. In the words of this Court in *Eurocopter c. Bell Helicopter Textron Canada Ltée*, 2010 FCA 142, 407 N.R. 180 (F.C.A.) at paragraph 13, while "the general principles established in the case law are useful, they do not provide a magic formula that is applicable to all situations. In such matters, it is necessary to follow the case-by-case rule."

25 It follows from this that the determination of whether a particular question is permissible is a fact based inquiry. On appeal a judge's determination will be reviewed as a question of mixed fact and law. Therefore, the Court will only intervene where a palpable and overriding error or an extricable error of law is established. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.); *Bristol-Myers Squibb Co. v. Apotex Inc.*, as cited above, at paragraph 35.

26 In this case, consideration of whether a particular question is permissible begins with Rule 95 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a which governs the scope of oral discovery. Rule 95(1) states:

> 95. (1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding or to any matter made discoverable by subsection (3) and no question may be objected to on the ground that
>
> (a) the information sought is evidence or hearsay,
>
> (b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or
>
> (c) the question constitutes cross-examination on the affidavit of documents of the party being examined.
>
> [emphasis added]

95. (1) La personne interrogée au préalable répond, soit au mieux de sa connaissance directe, soit des renseignements qu'elle tient pour véridiques, aux questions pertinentes à une question en litige ou aux questions qui peuvent, aux termes du paragraphe (3), faire l'objet de l'interrogatoire préalable. Elle ne peut refuser de répondre pour les motifs suivants:

a) le renseignement demandé est un élément de preuve ou du ouï-dire;

b) la question constitue un contre-interrogatoire, à moins qu'elle ne vise uniquement la crédibilité du témoin;

c) la question constitue un contre-interrogatoire sur la déclaration sous serment de documents déposée par la partie interrogée.

[Non souligné dans l'original.]

27 The Crown correctly observes that prior to its amendment in 2008, Rule 95(1) required a person examined for discovery to answer any proper question "relating to" ("qui se rapporte ô) any matter in issue in the proceeding. A question was said to relate to any matter in issue if it was demonstrated that "the information in the document may advance his own case or damage his or her adversary's case". See *SmithKline Beecham Animal Health Inc. v. R.*, 2002 FCA 229, 291 N.R. 113 (Fed. C.A.) at paragraphs 24 to 30. At paragraph 31 of its reasons this Court characterized this test to be substantially the same as the train of inquiry test.

28 The Crown submits, however, that it "is doubtful that the 'train of inquiry' test, in its present form, will survive the amendment" of Rule 95(1) in 2008. The Crown argues that the jurisprudence relied upon by Lehigh does not address the impact of the narrower wording of Rule 95(1).

29 In my view, the 2008 amendment to Rule 95(1) did not have a material impact upon the permissible scope of oral discovery. I reach this conclusion for the following reasons.

30 First, I believe that the general purpose of oral discovery has not changed. Justice Hugessen described that purpose in the following terms in *Montana Band v. R.* (1999), [2000] 1 F.C. 267 (Fed. T.D.) at paragraph 5:

The general purpose of examination for discovery is to render the trial process fairer and more efficient by allowing each party to inform itself fully prior to trial of the precise nature of all other parties' positions so as to define fully the issues between them. It is in the interest of justice that each party should be as well informed as possible about the positions of the other parties and should not be put at a disadvantage by being taken by surprise at trial. It is sound policy for the Court to adopt a liberal approach to the scope of questioning on discovery since any error on the side of allowing questions may always be corrected by the trial judge who retains the ultimate mastery over all matters relating to admissibility of evidence; on the other hand any error which unduly restricts the scope of discovery may lead to serious problems or even injustice at trial.

[emphasis added]

31 That the amendment of Rule 95(1) was not intended to effect a change in the scope of permissible questions is supported by the Regulatory Impact Analysis Statement (RIAS) accompanying the *Rules Amending the Tax Court of Canada Rules (General Procedure)*, SOR/2008-303, *Canada Gazette*, Part II, Vol. 142, No. 25 at pages 2330 to 2332. The RIAS describes the amendment to Rule 95(1) to be a "technical amendment". Courts are permitted to examine a RIAS to confirm the intention of the regulator. See *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533 (S.C.C.) at paragraphs 45 to 47 and 155 to 157.

32 Second, in *Owen Holdings Ltd. v. R.* (1997), 216 N.R. 381 (Fed. C.A.) this Court considered and rejected the submission that the phrase "relating to" (as then found in Rule 82(1) of the *Tax Court of Canada Rules (General*

Procedure)) encompassed the concept of a "semblance of relevance." The Court indicated that "relating" and "relevance" encompassed similar meanings. At paragraphs 5 and 6 of its reasons the Court wrote:

> 5. With respect to the appeal, counsel for the appellant argues that the judge erred in holding that only documents which are relevant, that is to say which may advance the appellant's case or damage that of the respondent, should be disclosed. Rule 82(1),[1] counsel says, uses the phrase "relating to" not "relevant to," a basic distinction clearly confirmed and acted upon by this Court in *Canada (Attorney-General) v. Bassermann*.[2] At this stage, submits counsel, relevance should be of no concern; a "semblance of relevance," if necessary, should suffice, an abuse of process being the only thing to be avoided.
>
> 6. We indicated at the hearing that we disagreed with counsel's argument. Although obviously not synonyms, the words "relating" and "relevant" do not have entirely separate and distinct meanings. "Relating to" in Rule 82(1) necessarily imparts an element of relevance, otherwise, the parties would have licence to enter into extensive and futile fishing expeditions that would achieve no productive goal but would waste judicial resources. The well established principles that give rise to the relatively low relevance threshold at the stage of discovery, as opposed to the higher threshold that will be required at trial for the admission of evidence, are well known. We simply do not believe that the Tax Court ever had the intention of abandoning those principles any more than this Court could have had such an intention when, in 1990, it changed the word "related" to "relevant" in revising its corresponding provisions, namely subsections (1) and (2)(a) of Rule 448.[3]
>
> [emphasis added and footnotes omitted]

33 Finally, there is an abundance of jurisprudence from this Court which has interpreted the permissible scope of examination under Rule 240 of the *Federal Courts Rules*, SOR/98-106. Like Rule 95(1), Rule 240 incorporates the test of whether a question is "relevant" to a matter which is in issue. Rule 240 states:

> A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that
>
> (a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or
>
> (b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.
>
> [emphasis added]
>
> La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui:
>
> a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge;
>
> b) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action.
>
> [Non souligné dans l'original.]

34 The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks

to establish or refute. See *Eurocopter* at paragraph 10, *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287, 381 N.R. 93 (F.C.A.) at paragraphs 61 to 64; *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraphs 30 to 33.

35 Where relevance is established the Court retains discretion to disallow a question. The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. See *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraph 34. The Court might disallow a relevant question where responding to it would place undue hardship on the answering party, where there are other means of obtaining the information sought, or where "the question forms part of a 'fishing expedition' of vague and far-reaching scope": *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, 312 N.R. 273 (F.C.A.) at paragraph 10; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2008 FCA 131, 166 A.C.W.S. (3d) 850 (F.C.A.) at paragraph 3.

36 This Court's comment at paragraph 64 of the *Eli Lilly* decision is of particular relevance to the Crown's submission that the 2008 amendment effected a material change. There, the Court wrote:

> 64. Furthermore, the Prothonotary's reference to a fishing expedition in paragraph 19 of her Reasons was one where a party was required to disclose a document that might lead to another document that might then lead to useful information which would tend to adversely affect the party's case or to support the other party's case. In my view, limiting the "train of inquiry" test in this manner is consistent with the test described in *Peruvian Guano*, *supra*, and applied by this Court in *SmithKline Beecham Animal Health Inc. v. Canada*, [2002] 4 C.T.C. 93 (F.C.A.), where, at para. 24 of her Reasons for the Court, Madam Justice Sharlow wrote:
>
> > [24] The scope and application of the rules quoted above depend upon the meaning of the phrases "relating to any matter in question between ... them in the appeal" and "relating to any matter in issue in the proceeding". In *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 (C.A.), Brett, L.J. said this about the meaning of the phrase "a document relating to any matter in question in the action" (at page 63):
> >
> > > It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.
> >
> > [emphasis in original]

37 As can be seen, when interpreting relevance under the *Federal Courts Rules* the Court quoted with approval its prior articulation of the train of inquiry test in *SmithKline Beecham.* That decision concerned the proper interpretation of the pre-2008 version of Rule 95(1) of the *Tax Court of Canada Rules (General Procedure)*. Thus, the train of inquiry test has been found to be appropriate both under the pre-2008 *Tax Court of Canada Rules (General Procedure)* and the current *Federal Courts Rules* where the test is relevance.

38 Turning to the application of these principles, in the present case the Crown had disclosed the Gulliver memorandum to Lehigh. The memorandum was produced in response to a request that the Crown provide "all correspondence and memoranda within head office, the district office, and between head office and the district office, giving instructions or dealing with their advisement on the GAAR issue."

39 The Gulliver memorandum makes the following points:

1. The CRA was "pursuing cases coined 'indirect loans' whereby a Canadian company invests money into the equity of a newly created company in a tax haven and those funds are then lent to a related but non-affiliate non-resident company."

2. With respect to subsection 95(6) of the Act:

> While subsection 95(6) has been amended for taxation years after 1995, in nearly all of the "indirect loan" cases reviewed, the structure was in place prior to the amendments. We did consider whether paragraph 95(6)(*b*), as it then read, could apply to the "indirect loan" issue with respect to the incorporation of the tax haven company and its issuance of shares to CANCO. However, it was concluded from its wording that it was contemplated that the foreign affiliate or a non-resident corporation that issued the shares already existed before the series of transactions. In addition, without the use of the tax haven company, there was no certainty that CANCO would have otherwise transferred fund [*sic*] to the non-resident borrower so that there would be "tax otherwise payable". Therefore, subsection 95(6) was not proposed but in our view, this provision demonstrates that it is not acceptable to insert steps to misuse the foreign affiliate rules. [11]
>
> [emphasis added]

3. Footnote 11 to the above passage stated:

> [11] We have no written legal opinion on the matter at the present time. It is possible that Appeals or Litigation might see merit in arguing subsection 95(6).
>
> [emphasis added]

40 In my view, the inference may be drawn from the Gulliver memorandum and the subsequent reassessment of Lehigh on the basis of subsection 95(6) that there may well be subsequent memoranda prepared within the CRA that considered whether subsection 95(6) of the Act could be argued to be a general anti-avoidance provision. Such documents, if they exist, would be reasonably likely to either directly or indirectly advance Lehigh's case or damage the Crown's case. In my view, the Judge did not err in ordering their production. The trial judge will be the ultimate arbiter of their relevance.

41 In so concluding, I have considered the Crown's arguments that the opinions of CRA officials outside the context of a particular taxpayer are irrelevant and that official publications of the CRA are of limited relevance. Those may well be valid objections in another case. However, in the factual and procedural context of this case, the Crown has already disclosed as relevant the Gulliver memorandum. For Lehigh to proceed expeditiously towards a fair hearing, knowing exactly the case it has to meet, it should receive any subsequent memoranda relating to the development of a general policy concerning paragraph 95(6)(*b*) of the Act.

d. Did the Judge err by ordering the Crown to answer a hypothetical question aimed at eliciting the Crown's legal position?

42 The Crown argues that the Judge erred in ordering it to answer the disputed question because:

1. The question is hypothetical.

2. The purpose of the question is to elicit from the Crown details pertaining to its legal argument.

3. The question is a pure question of law.

43 Lehigh responds that the purpose of the question is to determine if in reassessing Lehigh, paragraph 95(6)(*b*) of the Act was applied because the shares of CBR-US were owned by CBR-ICA, a non-resident corporation and not by Lehigh, a Canadian resident corporation.

44 The Judge ordered the question to be answered in order to help Lehigh know the case it has to meet. In the context of this proceeding the question is not a pure question of law, nor does it elicit details of the Crown's legal argument. Lehigh is entitled to know the basis of the reassessment and what led the CRA to conclude it had acquired its shares in CBR-LLC for the principal purpose of avoiding the payment of taxes that would otherwise have been payable. In the factual and procedural context before the Court, the Crown has not demonstrated that the Judge erred in concluding that the disputed question should be answered.

45 For all of the above reasons I would dismiss the appeal.

Costs and Conclusion

46 Should this appeal be dismissed, Lehigh seeks an award of costs fully indemnifying its expenses in bringing the motion in the Tax Court and in opposing this appeal. Such an award is estimated to be in excess of $125,000.00.

47 Lehigh concedes that such an award is commonly made where a party is found to have acted in a reprehensible, scandalous, or outrageous manner. Lehigh acknowledges that no such conduct has occurred in the present case. It submits, however, that such an award is justified in this case because the discoveries were held on November 11, 2009 and Lehigh has been put to delay and considerable expense "all for no just cause."

48 Rule 400 of the *Federal Courts Rules* provides that the Court has full discretionary power over the award of costs. Rule 407 provides that unless the Court orders otherwise, party-and-party costs are to be assessed in accordance with column III of the table to Tariff B of the Rules. This reflects a policy decision that party-and-party costs are intended to be a contribution to, not an indemnification of, solicitor-client costs.

49 Lehigh has not established exceptional circumstances that would warrant departure from the principle that solicitor-client fees are generally awarded only where there has been reprehensible, scandalous, or outrageous conduct on the part of one of the parties. See *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at paragraph 77. The willingness of one party to incur significant expense on an issue cannot by itself transfer responsibility for that expense to the opposing party. The question then becomes, what is the appropriate contribution to be made to Lehigh's costs if the appeal is dismissed?

50 If successful, the Crown seeks, in lieu of assessed costs, costs here and in the Tax Court fixed in the amount of $5,000.00. Having particular regard to the complexity of the issues, I see nothing in the record to make this an unreasonable quantification of party-and-party costs. As Lehigh was awarded its costs in the Tax Court, on this appeal I would dismiss the appeal and order the appellant to pay costs to Lehigh in the Tax Court and in this Court fixed in the amount of $5,000.00, all-inclusive, in any event of the cause.

***John M. Evans J.A.*:**

I agree

***Carolyn Layden-Stevenson J.A.*:**

I agree

Appeal dismissed.

TAB 4

2006 SCC 39, 2006 CSC 39
Supreme Court of Canada

Blank v. Canada (Department of Justice)

2006 CarswellNat 2704, 2006 CarswellNat 2705, 2006 SCC 39, 2006 CSC 39, [2006] 2 S.C.R. 319, [2006] S.C.J. No. 39, 270 D.L.R. (4th) 257, 352 N.R. 201, 40 C.R. (6th) 1, 47 Admin. L.R. (4th) 84, 51 C.P.R. (4th) 1, J.E. 2006-1723

Minister of Justice (Appellant) and Sheldon Blank (Respondent) and Attorney General of Ontario, The Advocates' Society and Information Commissioner of Canada (Interveners)

McLachlin C.J.C., Bastarache, Binnie, Deschamps, Fish, Abella, Charron JJ.

Heard: December 13, 2005
Judgment: September 8, 2006
Docket: 30553

Proceedings: affirming (2004), 2004 CarswellNat 6082, 2004 CarswellNat 3101, *(*sub nom. *Blank v. Canada (Minister of Justice))* 325 N.R. 315, 21 Admin. L.R. (4th) 225, *(*sub nom. *Blank v. Canada (Minister of Justice))* [2005] 1 F.C.R. 403, 2004 FCA 287, 244 D.L.R. (4th) 80, 34 C.P.R. (4th) 385 (F.C.A.)**Proceedings: reversing in part (2003), 2003 CarswellNat 5040, 2003 FCT 462 (F.C.)**

Counsel: Graham Garton, Q.C., Christopher M. Rupar for Appellant
Sheldon Blank for himself
Luba Kowal, Malliha Wilson, Christopher P. Thompson for Intervener, Attorney General of Ontario
Wendy Matheson, David Outerbridge for Intervener, The Advocates' Society
Raynold Langlois, Q.C., Daniel Brunet for Intervener, Information Commissioner of Canada

***Fish J.*:**

I

1 This appeal requires the Court, for the first time, to distinguish between two related but conceptually distinct exemptions from compelled disclosure: the *solicitor-client privilege* and the *litigation privilege*. They often co-exist and one is sometimes mistakenly called by the other's name, but they are not coterminous in space, time or meaning.

2 More particularly, we are concerned in this case with the litigation privilege, with how it is born and when it must be laid to rest. And we need to consider that issue in the narrow context of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*"), but with prudent regard for its broader implications on the conduct of legal proceedings generally.

3 This case has proceeded throughout on the basis that "solicitor-client privilege" was intended, in s. 23 of the *Access Act*, to include the litigation privilege which is not elsewhere mentioned in the Act. Both parties and the judges below have all assumed that it does.

4 As a matter of statutory interpretation, I would proceed on the same basis. The *Act* was adopted nearly a quarter-century ago. It was not uncommon at the time to treat "solicitor-client privilege" as a compendious phrase that included both the legal advice privilege and litigation privilege. This best explains why the litigation privilege is not separately mentioned anywhere in the *Act*. And it explains as well why, despite the *Act's* silence in this regard, I agree with the parties and the courts below that the *Access Act* has not deprived the government of the protection previously afforded

to it by the legal advice privilege *and* the litigation privilege: In interpreting and applying the *Act*, the phrase "solicitor-client privilege" in s. 23 should be taken as a reference to both privileges.

5 In short, we are not asked in this case to decide whether the government can invoke litigation privilege. Quite properly, the parties agree that it can. Our task, rather, is to examine the defining characteristics of that privilege and, more particularly, to determine its lifespan.

6 The Minister contends that the solicitor-client privilege has two "branches", one concerned with confidential communications between lawyers and their clients, the other relating to information and materials gathered or created in the litigation context. The first of these branches, as already indicated, is generally characterized as the "legal advice privilege"; the second, as the "litigation privilege".

7 Bearing in mind their different scope, purpose and rationale, it would be preferable, in my view, to recognize that we are dealing here with distinct conceptual animals and not with two branches of the same tree. Accordingly, I shall refer in these reasons to the solicitor-client privilege as if it includes only the legal advice privilege, and shall indeed use the two phrases — solicitor-client privilege and legal advice privilege — synonymously and interchangeably, except where otherwise indicated.

8 As a matter of substance and not mere terminology, the distinction between litigation privilege and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a "branch" of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.

9 The Minister's claim of litigation privilege fails in this case because the privilege claimed, by whatever name, has expired: The files to which the respondent seeks access relate to penal proceedings that have long terminated. By seeking civil redress for the manner in which those proceedings were conducted, the respondent has given them neither fresh life nor a posthumous and parallel existence.

10 I would therefore dismiss the appeal.

II

11 The respondent is a self-represented litigant who, though not trained in the law, is no stranger to the courts. He has accumulated more than ten years of legal experience first-hand, initially as a defendant and then as a petitioner and plaintiff. In his resourceful and persistent quest for information and redress, he has personally instituted and conducted a plethora of related proceedings, at first instance and on appeal, in federal and provincial courts alike.

12 This saga began in July 1995, when the Crown laid 13 charges against the respondent and Gateway Industries Ltd. ("Gateway") for regulatory offences under the *Fisheries Act*, R.S.C. 1985, c. F-14, and the *Pulp and Paper Effluent Regulations*, SOR/92-269. The respondent was a director of Gateway. Five of the charges alleged pollution of the Red River and another eight alleged breaches of reporting requirements.

13 The counts relating to reporting requirements were quashed in 1997 and the pollution charges were quashed in 2001. In 2002, the Crown laid new charges by way of indictment — and stayed them prior to trial. The respondent and Gateway then sued the federal government in damages for fraud, conspiracy, perjury and abuse of its prosecutorial powers.

14 This appeal concerns the respondent's repeated attempts to obtain documents from the government. He succeeded only in part. His requests for information in the penal proceedings and under the *Access Act* were denied by the government on various grounds, including "solicitor-client privilege". The issue before us now relates solely to the *Access Act* proceedings. We have not been asked to decide whether the Crown properly fulfilled, in the criminal proceedings, its disclosure obligations under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.). And in the record before us, we would in any event be unable to do so.

15 In October 1997, and again in May 1999, the respondent requested from the Access to Information and Privacy Office of the Department of Justice all records pertaining to his prosecution and the prosecution of Gateway. Only some of the requested documents were furnished.

16 Additional materials were released after the respondent lodged a complaint with the Information Commissioner. The Director of Investigation found that the vast majority of the remaining documents were properly exempted from disclosure under the solicitor-client privilege.

17 The respondent pursued the matter further by way of an application for review pursuant to s. 41 of the *Access Act*. Although the appellant relied on various exemptions from disclosure in the *Access Act*, proceedings before the motions judge focussed on the appellant's claims of solicitor-client privilege in reliance on s. 23 of the *Access Act*.

18 On the respondent's application, Campbell J. held that documents excluded from disclosure pursuant to litigation privilege should be released if the litigation to which the record relates has ended (*Blank v. Canada (Department of Justice)*, 2003 CarswellNat 5040, 2003 FCT 462 (F.C.)).

19 On appeal, the Federal Court of Appeal divided on the duration of the privilege. Pelletier J.A., for the majority on this point, found that litigation privilege, unlike legal advice privilege, expires with the end of the litigation that gave rise to the privilege, "subject to the possibility of defining ... litigation ... broadly" ([2005] 1 F.C.R. 403, 2004 FCA 287 (F.C.A.), at para. 89). He therefore held that s. 23 of the *Access Act* did not apply to the documents for which a claim of litigation privilege is made in this case because the criminal prosecution had ended.

20 Létourneau J.A., dissenting on this point, found that the privilege did not necessarily end with the termination of the litigation that gave rise to it. He would have upheld the privilege in this case.

III

21 Section 23 of the *Access Act* provides:

> The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

22 The narrow issue before us is whether documents once subject to the litigation privilege remain privileged when the litigation ends.

23 According to the appellant, this Court has determined that litigation privilege is a branch of the solicitor-client privilege and benefits from the same near-absolute protection, including permanency. But none of the cases relied on by the Crown support this assertion. The Court has addressed the solicitor-client privilege on numerous occasions and repeatedly underlined its paramount significance, but never yet considered the nature, scope or duration of the litigation privilege.

24 Thus, the Court explained in *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), and has since then reiterated, that the solicitor-client privilege has over the years evolved from a rule of evidence to a rule of substantive law. And the Court has consistently emphasized the breadth and primacy of the solicitor-client privilege: see, for example, *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.); *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.); *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (S.C.C.); *R. v. Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209, 2002 SCC 61 (S.C.C.); and *Ontario (Ministry of Correctional Services) v. Goodis*, 2006 SCC 31 (S.C.C.). In an oft-quoted passage, Major J., speaking for the Court, stated in *McClure* that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance" (para. 35).

25 It is evident from the text and the context of these decisions, however, that they relate only to the legal advice privilege, or solicitor-client privilege properly so called, and not to the litigation privilege as well.

26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients'cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

28 R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client)
>
> R.J. Sharpe, "Claiming Privilege in the Discovery Process", in *Law in Transition: Evidence*, [1984] *Special Lect. L.S.U.C.* 163, at pp. 164-65.

29 With the exception of *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 (B.C. C.A.), a decision of the British Columbia Court of Appeal, the decisions of appellate courts in this country have consistently found that litigation privilege is based on a different rationale than solicitor-client privilege: *Lifford Wine Agencies Ltd. v. Ontario (Alcohol & Gaming Commission)* (2005), 76 O.R. (3d) 401 (Ont. C.A.); *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)* (2002), 62 O.R. (3d) 167 (Ont. C.A.) ("*Big Canoe*"); *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, 2002 BCCA 665 (B.C. C.A.); *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716, 2001 MBCA 11 (Man. C.A.); *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* (2000), 188 N.S.R. (2d) 173, 2000 NSCA 96 (N.S. C.A.); *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.) [hereinafter "Chrusz"].

30 American and English authorities are to the same effect: see *L. (A Minor) (Police Investigation: Privilege), Re* (1996), [1997] A.C. 16 (U.K. H.L.), and *Three Rivers District Council & Ors v. The Bank of England*, [2004] Q.B. 916, [2004] EWCA Civ 218 (Eng. C.A.), and *Hickman v. Taylor*, 329 U.S. 495 (U.S. Pa. 1947). In the United States communications with third parties and other materials prepared in anticipation of litigation are covered by the similar "attorney work product" doctrine. This "distinct rationale" theory is also supported by the majority of academics: Sharpe; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 745-46; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at pp. 197-98; J.-C. Royer, *La preuve civile* (3rd ed. 2003), at pp. 868-71; G.D. Watson and F. Au, "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation" (1998), 77 *Can. Bar Rev.* 315. For the opposing view, see J. D. Wilson, "Privilege in Experts' Working Papers" (1997), 76 *Can. Bar Rev.* 346, and "Privilege: Watson & Au (1998) 77 *Can. Bar Rev.* 346: REJOINDER: 'It's Elementary My Dear Watson'" (1998), 77 *Can. Bar Rev.* 549.

31 Though conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation. But treating litigation privilege and legal advice privilege as two branches of the same tree tends to obscure the true nature of both.

32 Unlike the solicitor-client privilege, the litigation privilege arises and operates *even in the absence of a solicitor-client relationship*, and it applies indiscriminately to all litigants, whether or not they are represented by counsel: see *Alberta Treasury Branches v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407 (Alta. Q.B.). A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or "chamber" of privacy. Another important distinction leads to the same conclusion. Confidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.

33 In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

34 The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

35 Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary," to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.

36 I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege: *Boulianne v. Flynn*, [1970] 3 O.R. 84 (Ont. Co. Ct.); *Wujda v. Smith* (1974), 49 D.L.R. (3d) 476 (Man. Q.B.); *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (Ont. H.C.); *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1995), 176 A.R. 134 (Alta. Q.B.). See also Sopinka, Lederman and Bryant; Paciocco and Stuesser.

37 Thus, the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.

38 As mentioned earlier, however, the privilege may retain its purpose — and, therefore, its effect — where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In

this regard, I agree with Pelletier J.A. regarding "the possibility of defining ... litigation more broadly than the particular proceeding which gave rise to the claim" (at para. 89): see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (Alta. C.A.).

39 At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.

40 As a matter of principle, the boundaries of this extended meaning of "litigation" are limited by the purpose for which litigation privilege is granted, namely, as mentioned, "the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (Sharpe, p. 165). This purpose, in the context of s. 23 of the *Access Act* must take into account the nature of much government litigation. In the 1980s, for example, the federal government confronted litigation across Canada arising out of its urea formaldehyde insulation program. The parties were different and the specifics of each claim were different but the underlying liability issues were common across the country.

41 In such a situation, the advocate's "protected area" would extend to work related to those underlying liability issues even after some but not all of the individual claims had been disposed of. There were common issues and the causes of action, in terms of the advocate's work product, were closely related. When the claims belonging to that particular group of causes of action had all been dealt with, however, litigation privilege would have been exhausted, even if subsequent disclosure of the files would reveal aspects of government operations or general litigation strategies that the government would prefer to keep from its former adversaries or other requesters under the *Access Act*. Similar issues may arise in the private sector, for example in the case of a manufacturer dealing with related product liability claims. In each case, the duration and extent of the litigation privilege are circumscribed by its underlying purpose, namely the protection essential to the proper operation of the adversarial process.

IV

42 In this case, the respondent claims damages from the federal government for fraud, conspiracy, perjury and abuse of prosecutorial powers. Pursuant to the *Access Act*, he demands the disclosure to him of all documents relating to the Crown's conduct of its proceedings against him. The source of those proceedings is the alleged pollution and breach of reporting requirements by the respondent and his company.

43 The Minister's claim of privilege thus concerns documents that were prepared for the dominant purpose of a criminal prosecution relating to environmental matters and reporting requirements. The respondent's action, on the other hand, seeks civil redress for the manner in which the government conducted that prosecution. It springs from a different juridical source and is in that sense unrelated to the litigation of which the privilege claimed was born.

44 The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.

45 Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.

46 Finally, in the Court of Appeal, Létourneau J.A., dissenting on the cross-appeal, found that the government's status as a "recurring litigant" could justify a litigation privilege that outlives its common law equivalent. In his view, the "[a]utomatic and uncontrolled access to the government lawyer's brief, once the first litigation is over, may impede the possibility of effectively adopting and implementing [general policies and strategies]" (para. 42).

47 I hesitate to characterize as "[a]utomatic and uncontrolled" access to the government lawyer's brief once the subject proceedings have ended. In my respectful view, access will in fact be neither automatic nor uncontrolled.

48 First, as mentioned earlier, it will not be automatic because all subsequent litigation will remain subject to a claim of privilege if it involves the same or related parties and the same or related source. It will fall within the protective orbit of the *same litigation defined broadly*.

49 Second, access will not be uncontrolled because many of the documents in the lawyer's brief will, in any event, remain exempt from disclosure by virtue of the legal advice privilege. In practice, a lawyer's brief normally includes materials covered by the solicitor-client privilege because of their evident connection to legal advice sought or given in the course of, or in relation to, the originating proceedings. The distinction between the solicitor-client privilege and the litigation privilege does not preclude their potential overlap in a litigation context.

50 Commensurate with its importance, the solicitor-client privilege has over the years been broadly interpreted by this Court. In that light, anything in a litigation file that falls within the solicitor-client privilege will remain clearly and forever privileged.

51 I hasten to add that the *Access Act* is a statutory scheme aimed at promoting the disclosure of information in the government's possession. Nothing in the Act suggests that Parliament intended by its adoption to extend the lifespan of the litigation privilege when a member of the public seeks access to government documents.

52 The language of s. 23 is, moreover, permissive. It provides that the Minister *may* invoke the privilege. This permissive language promotes disclosure by encouraging the Minister to refrain from invoking the privilege unless it is thought necessary to do so in the public interest. And it thus supports an interpretation that favours *more* government disclosure, not *less*.

53 The extended definition of litigation, as I indicated earlier, applies no less to the government than to private litigants. As a result of the *Access Act*, however, its protection may prove less effective in practice. The reason is this. Like private parties, the government may invoke the litigation privilege only when the original or extended proceedings are pending or apprehended. Unlike private parties, however, the government may be required under the terms of the *Access Act* to disclose information once the original proceedings have ended and related proceedings are neither pending nor apprehended. A mere hypothetical possibility that related proceedings may in the future be instituted does not suffice. Should that possibility materialize — should related proceedings in fact later be instituted — the government may well have been required in the interim, in virtue of the *Access Act*, to disclose information that would have otherwise been privileged under the extended definition of litigation. This is a matter of legislative choice and not judicial policy. It flows inexorably from Parliament's decision to adopt the *Access Act*. Other provisions of the *Access Act* suggest, moreover, that Parliament has in fact recognized this consequence of the Act on the government as litigator, potential litigant and guardian of personal safety and public security.

54 For example, pursuant to s. 16(1)(*b*) and (*c*), the government may refuse to disclose any record that contains information relating to investigative techniques or plans for specific lawful investigations or information the disclosure of which could reasonably be expected to be injurious to law enforcement or the conduct of lawful investigations. And, pursuant to s. 17, the government may refuse to disclose any information the disclosure of which could reasonably be expected to threaten the safety of individuals. The special status of the government as a "recurring litigant" is more properly addressed by these provisions and other legislated solutions. In addition, as mentioned earlier, the nature of government litigation may be relevant when determining the boundaries of related litigation where multiple proceedings involving the government relate to common issues with closely related causes of action. But a wholesale expansion of the litigation privilege is neither necessary nor desirable.

55 Finally, we should not disregard the origins of this dispute between the respondent and the Minister. It arose in the context of a criminal prosecution by the Crown against the respondent. In criminal proceedings, the accused's

right to discovery is constitutionally guaranteed. The prosecution is obliged under *Stinchcombe* to make available to the accused all relevant information if there is a "reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence ..." (p. 340). This added burden of disclosure is placed on the Crown in light of its overwhelming advantage in resources and the corresponding risk that the accused might otherwise be unfairly disadvantaged.

56 I am not unmindful of the fact that *Stinchcombe* does not require the prosecution to disclose everything in its file, privileged or not. Materials that might in civil proceedings be covered by one privilege or another will nonetheless be subject, in the criminal context, to the "innocence at stake" exception — at the very least: see *McClure*. In criminal proceedings, as the Court noted in *Stinchcombe*:

> The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. [p. 340]

57 On any view of the matter, I would think it incongruous if the litigation privilege were found in civil proceedings to insulate the Crown from the disclosure it was bound but failed to provide in criminal proceedings that have ended.

V

58 The result in this case is dictated by a finding that the litigation privilege expires when the litigation ends. I wish nonetheless to add a few words regarding its birth.

59 The question has arisen whether the litigation privilege should attach to documents created for the substantial purpose of litigation, the dominant purpose of litigation or the sole purpose of litigation. The dominant purpose test was chosen from this spectrum by the House of Lords in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (U.K. H.L.). It has been adopted in this country as well: *Davies v. Harrington* (1980), 115 D.L.R. (3d) 347 (N.S. C.A.); *Voth Brothers Construction (1974) Ltd. v. North Vancouver School District No. 44* (1981), 29 B.C.L.R. 114 (B.C. C.A.); *McCaig v. Trentowsky* (1983), 148 D.L.R. (3d) 724 (N.B. C.A.); *Nova, an Alberta Corp. v. Guelph Engineering Co.* (1984), 5 D.L.R. (4th) 755 (Alta. C.A.); *Ed Miller Sales & Rentals; Chrusz; Lifford; Mitsui; College of Physicians; Gower*.

60 I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure. As Royer has noted, it is hardly surprising that modern legislation and case law

> [TRANSLATION] which increasingly attenuate the purely accusatory and adversarial nature of the civil trial, tend to limit the scope of this privilege [that is, the litigation privilege]. [para. 1139]

Or, as Carthy J.A. stated in *Chrusz*:

> The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. [p. 331]

61 While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process. In this context, it would be incongruous to reverse that trend and revert to a substantial purpose test.

62 A related issue is whether the litigation privilege attaches to documents gathered or copied — but not *created* — for the purpose of litigation. This issue arose in *Hodgkinson*, where a majority of the British Columbia Court of Appeal, relying on *Lyell v. Kennedy (No. 3)* (1884), 27 Ch. D. 1 (Eng. C.A.), concluded that copies of public documents gathered by a solicitor were privileged. McEachern C.J.B.C. stated:

> It is my conclusion that the law has always been, and in my view, should continue to be, that in circumstances such as these, where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse production. [p. 142]

63 This approach was rejected by the majority of the Ontario Court of Appeal in *Chrusz*.

64 The conflict of appellate opinion on this issue should be left to be resolved in a case where it is explicitly raised and fully argued. Extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect.

VI

65 For all of these reasons, I would dismiss the appeal. The respondent shall be awarded his disbursements in this Court.

***Bastarache J.*:**

66 I have read the reasons of Fish J. and concur in the result. I think it is necessary to provide a more definitive and comprehensive interpretation of s. 23 of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*"), however, so as not to leave open the possibility of a parallel application of the common law rule regarding litigation privilege in cases where the *Access Act* is invoked. I therefore propose to determine the scope of s. 23 and rule out the application of the common law in this case.

67 Here, the government institution has attempted to refuse disclosure by claiming litigation privilege pursuant to s. 23 of the *Access Act*. The question of whether these documents are covered by litigation privilege only arises once it is decided that s. 23 includes litigation privilege within its scope. The question is whether Parliament intended that the expression "solicitor-client privilege" in s. 23 also be taken to include litigation privilege. Whether s. 23 is interpreted so as to include litigation privilege or notdoes not constitute a departure from litigation privilege *per se*. Either way, the privilege is left unaffected by the legislation. In my view, litigation privilege cannot be invoked at common law to refuse disclosure which is statutorily mandated. Either Parliament intended to include litigation privilege within the phrase "solicitor-client privilege" or litigation privilege cannot be invoked.

68 It is unclear, from a legal standpoint, why the government would be able to refuse a statutory duty to disclose information by claiming litigation privilege as a matter of common law. In *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), at p. 875, this Court held that legislation may infringe solicitor-client privilege (let alone litigation privilege), though such legislation would be interpreted restrictively. The *Access Act* is such legislation and it is not unique in mandating disclosure of certain information. Corporations'legislation, legislation governing certain professions, securities legislation, to name but a few examples, include statutory provisions that require certain persons to disclose information/documentation to directors, tribunals or governing bodies. It has not been open to those persons to resist disclosure on the basis of solicitor-client or litigation privilege. However, where related litigation arises, those persons will often argue that the compulsory disclosure to an auditor (for example) does not amount to a waiver of the privilege (see *Interprovincial Pipe Line Inc. v. Minister of National Revenue* (1995), [1996] 1 F.C. 367 (Fed. T.D.)). In that case, the appellants had disclosed legal advice to their auditors pursuant to s. 170 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Before the Federal Court, they argued that this did not constitute a waiver of the privilege. The judge cited the following passage from this Court's decision in *Descôteaux* at p. 875:

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.

2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.

3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively. [Emphasis added, p. 377]

69 It is my view, however, that as a matter of statutory interpretation an exemption for litigation privilege should be read into s. 23. In 1983, litigation privilege was merely viewed as a branch of solicitor-client privilege. This means that Parliament most likely intended to include litigation privilege within the ambit of "solicitor-client privilege". *R. v. Amato*, [1982] 2 S.C.R. 418 (S.C.C.) (*per* Estey J., dissenting), and R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 358-60, suggest that the incorporation of the common law concept of solicitor-client privilege into the *Access Act* does not freeze the development of the common law for the purposes of s. 23 at its 1983 state.

70 Nonetheless, my view is that the two-branches approach to solicitor-client privilege should subsist, even accepting that solicitor-client privilege and litigation privilege have distinct rationales. The Advocates' Society, intervener, suggests at para. 2 of its factum that:

> At an overarching level, litigation privilege and legal advice privilege share a common purpose: they both serve the goal of the effective administration of justice. Litigation privilege does so by ensuring privacy to litigants against their opponents in preparing their cases for trial, while legal advice privilege does so by ensuring that individuals have the professional assistance required to interact effectively with the legal system.

71 Reading litigation privilege into s. 23 of the *Access Act* is the better approach because, in fact, litigation privilege has always been considered a branch of solicitor-client privilege. As the reasons of my colleague acknowledge, at para. 31, "[t]hough conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation."

72 Second, in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.), at p. 336, Carthy J.A. commented that "[w]hile solicitor-client privilege stands against the world, litigation privilege is a protection only against the adversary, and only until termination of the litigation." Thus, even if litigation privilege is read into s. 23 of the *Access Act*, it is not clear that the Crown could properly invoke it as against a third party, such as the media. This is also a question to be dealt with as a matter of statutory interpretation. In my view, once the privilege is determined to exist, s. 23 grants the institution a discretion as to whether or not to disclose. Although litigation privilege is understood as existing only *vis-à-vis* the adversary in the litigation (*Chrusz*), the effect of s. 23 is to permit the government institution to refuse disclosure to any requester so long as the privilege is found to exist.

73 I would also disagree with the reasons of Fish J., at para. 5, that "we are not asked in this case to decide whether the government can invoke litigation privilege". This appeal turns on the proper interpretation of s. 23 of the *Access Act*. Either litigation privilege must be read into s. 23 or it must be acknowledged that the Crown cannot invoke litigation privilege so as to resist disclosure under the *Access Act*. The consequences of this latter option would have to be considered in the context of the other exemptions provided for by the Act — including those contained in ss. 16-17 and outlined at para. 54 of the reasons of my colleague:

For example, pursuant to ss. 16(1)(*b*) and (*c*), the government may refuse to disclose any record that contains information relating to investigative techniques or plans for specific lawful investigations or information the disclosure of which could reasonably be expected to be injurious to law enforcement or the conduct of lawful investigations. And, pursuant to s. 17, the government may refuse to disclose any information the disclosure of which could reasonably be expected to threaten the safety of individuals.

74 For the reasons expressed by Fish J., I agree that the Minister's claim of litigation privilege fails in this case because the privilege has expired.

75 I would dismiss the appeal.

Appeal dismissed.

Pourvoi rejeté.

TAB 5

12.10 — SUMMARY OF THE LITIGATION PRIVILEGE RULE

Legal Topics

Litigation privilege, also called work product privilege, applies to communications between a lawyer and third parties or a client and third parties, or to communications generated by the lawyer or client for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing. Generally, it is information that counsel or persons under counsel's direction have prepared, gathered or annotated.

Litigation privilege is a class privilege, meaning that documents that meet the conditions for its application must not be disclosed unless one of the limited exceptions applies. In other words, once documents are found to be litigation privileged, there is a prima facie presumption of inadmissibility.[1]

Information sought to be protected by litigation privilege must have been created for the dominant purpose of use in actual, anticipated or contemplated litigation.

Litigation privilege can protect documents that set out the lawyer's mental impressions, strategies, legal theories or draft questions. These documents do not have to be from or sent to the client. This is the first broad category of documents that are most often protected by litigation privilege as part of the lawyer's brief. The second broad class of documents records communications by the lawyer, client or third party, brought into existence for the purpose of litigation, for example, witness statements, expert opinions and other documents from third parties.

Litigation privilege allows a lawyer a "zone of privacy" to prepare draft questions and arguments, strategy or legal theories.

Litigation privilege has its origins in the adversarial system. It arises from the concept that lawyers control the information that gets presented to the court about their case. It is based on the proposition that counsel must be free to make investigations and do their research without risking disclosure of their opinions, strategies and conclusions.

It is the nature of the documents which governs litigation privilege, not who might see them.[1a]

The elements required in order to claim work product or litigation privilege over documents or communications are as follows:

- the documents or communications must be prepared, gathered or annotated by counsel or persons under counsel's direction;
- the preparation, gathering or annotating must be done in anticipation of litigation;
- the documents or communications must meet the dominant purpose test;

- the documents, or the facts contained in the documents, need not be disclosed under the legal rules governing the proceedings; and

- the documents or facts have not been disclosed to the opposing party or to the court.

The document in question must have been prepared for realistically anticipated litigation. While anticipated litigation does not have to be the sole purpose — as that would impose too strict a requirement — if there is more than one purpose or use for the document then the factual determination should reveal that the dominant purpose was for the anticipated litigation. The dominant purpose is to be assessed at the time at which the document is created.

The anticipated litigation must be real — not a possibility or suspicion.

Litigation privilege does not protect disclosure of relevant facts.

The party claiming privilege has the onus of establishing its right to privilege. The claim should be supported by affidavit evidence providing sufficient facts and grounds for each claim of privilege.

The privilege claims must always be determined in the context of the rules of court or rules of civil procedure in each province that generally provide for generous interpretation of disclosure of documents and communications relevant to the litigation.

However, litigation privilege cannot be abrogated unless there is clear, explicit and unequivocal language used.[1a.1]

Waiver of litigation privilege can be explicit, implicit or inadvertent.

Litigation privilege in criminal proceedings is usually called "work product privilege" and is sometimes referred to as a subset of solicitor-client privilege. The communications covered by work product privilege are generally narrower than those in the civil context and are confined to lawyers' notes, theories, opinions and strategies, and police work in preparation for the trial (as opposed to investigative work).

Settlement privilege protects settlement agreements and communications leading up to settlement because the law encourages settlement, and effective negotiations require that the parties be able to exchange full and frank views without the fear that their comments will later be held against them.

FOOTNOTES

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[1] *Lizotte c. Aviva Cie d'assurance du Canada* (2016), 2016 CarswellQue 10692, 404 D.L.R. (4th) 389, 62 C.C.L.I. (5th) 31 (S.C.C.).

[1a] *Danilova v. Nikityuk*, 2013 ONSC 2757, 2013 CarswellOnt 5793 (Ont. S.C.J.), at para. 18.

1a.1 *Lizotte v. Aviva, Supra*, footnote 1.

TAB 6

1969 CarswellNat 296
Exchequer Court of Canada

Susan Hosiery Ltd. v. Minister of National Revenue

1969 CarswellNat 296, [1969] 2 Ex. C.R. 27, [1969] C.T.C. 353, 69 D.T.C. 5278

SUSAN HOSIERY LIMITED, Appellant, and MINISTER OF NATIONAL REVENUE, Respondent

Jackett, P.

Judgment: February 19, 1969

Proceedings: in an application by the Minister for an order requiring the production of certain documents and the answers to certain questions

Counsel: *Benzion Sischy*, for the Appellant.
Gordon V. Anderson, for the Respondent.

***Jackett, P.*:**

1 This is a motion on behalf of the respondent for an order

> (a) requiring the Appellant to produce for inspection the memorandum prepared by the Appellant's solicitor, and referred to in question number 163 of the Examination for Discovery of Alexander Slomo Strasser;
>
> (b) requiring the Appellant to produce for inspection the letter from its auditor, Mr. A. Pal to its solicitor, W. Goodman, dated the 1st day of December 1964, and referred to in question number 175 of the Examination for Discovery of Alexander Slomo Strasser;
>
> (c) requiring the Appellant to produce the letter of the 2nd day of December 1964 from W. Goodman to Spenser, Pal & Co., and the memorandum of the 4th day of December 1964, both of which are referred to in the answer given to question number 189 of the Examination for Discovery of Alexander Slomo Strasser;
>
> (d) requiring that Alexander Slomo Stresser reattend the examination for discovery and answer questions numbered 164, 165, 175 and 176, and such further questions as may arise from the answers given.

The motion came on for hearing before me at Toronto on October 15, 1968, at which time I rejected the motion in so far as paragraph (a), *supra*, was concerned and gave the parties leave to file further material and to make written submissions concerning the remainder of the motion. Since the parties indicated, by letter dated January 20 last, that they had completed their submissions, I have read the decisions cited by them and have considered their arguments.

2 I shall consider first the problem raised concerning the documents referred to in paragraphs (b) and (c) of the portion of the Notice of Motion quoted above. Two affidavits have been filed on behalf of the appellant from which the nature of these documents may be determined. The first is an affidavit of Marshall A. Cohen, sworn October 21, 1968, and reading as follows:

> 1. I am a partner in the law firm of Goodman and Carr, Solicitors for the Appellant herein.

2. I have inspected the four documents referred to in the Notice of Motion, brought by the Respondent, returnable on the 15th day of October, 1968, and dated the 19th day of September, 1968. The said documents can be briefly described as follows:

(a) Typewritten memorandum of three pages dated the 10th day of November, 1964, and being a memorandum of a meeting between Mr. W. D. Goodman, Mr. Harry Wolfe and Mr. Andrew Pal.

(b) Typewritten letter of three pages dated December 1st, 1964, from Mr. Andrew Pal to Mr. W. D. Goodman.

(c) Typewritten copy of a letter of one page dated December 2nd, 1964, from Mr. W. D. Goodman to Mr. Andrew Pal.

(d) Typewritten memorandum of one page dated December 4th, 1964, relating to a telephone conversation of December 3rd, 1964, between Mr. Andrew Pal and Mr. W. D. Goodman.

3. From advice received from Mr. W. D. Goodman, Mr. Andrew Pal and Mr. Harry Wolfe, from my own knowledge including therein my inspection of the aforesaid documents I verily believe the following statements set out in paragraphs 4 to 8 inclusive to be true.

4. At all material times at which such documents aforesaid came into existence, Mr. W. D. Goodman was a member of the law firm of Goodman, Cooper, Cohen & Farano, and the said law firm and in particular Mr. W. D. Goodman was retained to give specific advice to the Appellant herein and the principal shareholders thereof.

5. At all material times at which such documents aforesaid came into existence, Mr. Harry Wolfe was a member of the law firm of Lorenzetti, Mariani and Wolfe and the said law firm and Mr. Harry Wolfe in particular were the general solicitors of the Appellant herein and it was with the concurrence of and at the suggestion of the said Mr. Harry Wolfe that Mr. W. D. Goodman was consulted as aforesaid to give specific advice to the Appellant herein and to consult with Mr. Harry Wolfe with respect to the legal problem, for which such legal advice was sought.

6. Mr. Andrew Pal is a member of the Institute of Chartered Accountants of Ontario, and at that time and now was a member of a firm of Chartered Accountants bearing the name Spencer, Pal and Company.

7. At all material times at which such documents aforesaid came into existence Mr. Andrew Pal was retained by the Appellant herein as its agent for the purpose of communicating to Mr. Wolfe and to Mr. Goodman, certain information concerning the Appellant and for the further purpose of receiving from Mr. Wolfe and Mr. Goodman certain advice and opinion for transmission by him to the Appellant herein.

8. The aforesaid documents consist solely of professional communications of a confidential character or the later written recording of oral professional communications of a confidential character between the Appellant or the Appellant's agent and its solicitors and counsel for the purpose of obtaining or giving legal advice and assistance and confidential communications or the later written recording of oral confidential communications at the instance and at the request and for the use of the Appellant's solicitors and counsel for the aforesaid purposes.

The second is a further affidavit of Mr. Cohen sworn on November 20, 1968 and reading as follows:

1. I am a partner in the law firm of Goodman and Carr, Solicitors for the Appellant herein.

2. This Affidavit is made in supplement to my Affidavit filed in this action and sworn to on the 21st day of October, 1968.

3. I am informed by Mr. Pal and verily believe the following facts set out hereunder.

4. That for some years prior to the meeting of November 10th, 1964, from which the typewritten memorandum referred to in paragraph 2(a) of my Affidavit sworn to on the 21st day of October, 1968, arises Mr. Pal, in addition to his other duties as a public accountant to Susan Hosiery Limited, the Appellant herein, had been acting as financial adviser to the said Appellant and its principals.

5. That on the instructions of the principals of Susan Hosiery Limited, Mr. Pal was instructed to meet with Mr. Goodman and Mr. Harry Wolfe to discuss certain matters pertaining to the business affairs including future business affairs and "activities" of the Appellant and of the principals thereof and to obtain the advice of Mr. Goodman thereon.

6. That such meeting took place on November 10th, 1964, and that such discussion was had at such meeting and certain advice was obtained from Mr. Goodman on that day and that by reason of such advice it was decided by Mr. Pal, Mr. Wolfe and Mr. Goodman that further suggestions as to how the Appellant and its principals might wish to conduct their business affairs, including certain legal steps to be taken on their behalf should be given Mr. Goodman to enable him to advise thereon.

7. Mr. Pal thereafter and prior to December 1st, 1964, communicated to the Appellant through its principals and to the said principals the gist of the advice of Mr. Goodman and after discussion with such principals wrote on their behalf and on behalf of the Appellant to Mr. Goodman setting out suggested courses of action and giving Mr. Goodman certain instructions thereon. The said writing to Mr. Goodman is contained in the typewritten letter referred to in paragraph 2(b) of my Affidavit sworn to on the 21st day of October, 1968.

8. Mr. Goodman on receipt thereof wrote to Mr. Pal, firstly commenting upon the letter of December 1st, 1964, and asking Mr. Pal to speak to him, Mr. Goodman, about one aspect of the matters dealt with in the letter of December 1st, 1964. The said letter of Mr. Goodman is that referred to in paragraph 2(c) of my Affidavit sworn to on the 21st day of October, 1968.

9. Mr. Pal on receipt of such letter telephoned Mr. Goodman to give Mr. Goodman certain additional information required and answering the request to Mr. Goodman to speak to him as set out above. Such telephone conversation occurred on the 4th day of December, 1964, and is referred to in paragraph 2(d) of my Affidavit sworn to on the 21st day of October, 1968.

10. I verily believe that to describe the subject matter of the communications and advice above in other than general terms of "business affairs", "courses of action" and other similar terms would disclose the privilege hereby sought to be maintained.

3 The basic principles on which the appellant relies for his objection to the production of these documents are, in effect, as I understand them, unchanged from the time when they were authoritatively enunciated by Lord Blackburn in *Lyell v. Kennedy* (No. 2) (1883), 9 App. Cas. 81, where he said:

> ... the law of England, for the purpose of public policy and protection, has from very early times said that a client may consult a solicitor (I mean a legal agent) for the purposes of his cause, and of litigation which is pending, and that the policy of the law says that in order to encourage free intercourse between him and his solicitor, the client has the privilege of preventing his solicitor from disclosing anything which he gets when so employed, and of preventing its being used against him, although it might otherwise be evidence against him.
>
> This further rule has been established, that the other side is not entitled, on discovery, to require the opponent to produce as a document those papers which the solicitor or attorney has prepared in the course of the case, and has sent to his client. ... He may shew it if he pleases; but it is a good answer to a discovery to say, "It was prepared for me by my legal adviser, my attorney, confidentially, and it is my privilege to say that you shall not read it;" and I think that it is hardly disputed that on a discovery of documents you could not discover that brief.

4 The principles had been discussed in an illuminating way in an earlier decision of the Court of Appeal in *Wheeler v. Le Marchant* (1881), 17 Ch.D. 675. In that case, it was accepted as clear

> (a) that confidential communications between a client and his legal adviser were privileged, and
>
> (b) that documents obtained by a legal adviser for the purpose of preparing for litigation, actual or anticipated, were privileged;

but an attempt to extend the privilege concerning documents obtained by a legal adviser to documents obtained in situations where litigation was not contemplated was rejected. In that case Jessel, M.R. said at page 682:

> ... The actual communication to the solicitor by the client is ... protected, and it is equally protected whether it is made by the client in person or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction. Again, the evidence obtained by the solicitor, or by his direction, or at his instance, even if obtained by the client, is protected if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation. So, again, a communication with a solicitor for the purpose of obtaining legal advice is protected though it relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose. But what we are asked to protect here is this. The solicitor, being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, and it is said that the information given ought to be protected because it is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that to give such protection would not only extend the rule beyond what has been previously laid down, but beyond what necessity warrants.

and Cotton, L. J. said at pages 684 and 685:

> Their case is put, as I understand it, in this way: It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communication between the representatives of the client and the solicitor must be also privileged. That is a fallacious use of the word "representatives". If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position as the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the Defendants, to do certain work, but that work was not communicating with the solicitor to obtain legal advice. So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor. In fact, the contention of the Respondents comes to this, that all communications between a solicitor and a third person in the course of his advising his client are to be protected. It was conceded there was no case that went that length, and the question is whether, in order fully to develop the principle with all its reasonable consequences, we ought to protect such documents. Hitherto such communications have only been protected when they have been in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it. And that is reasonable, because then the solicitor is preparing for the defence or for bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information, are, in fact, the brief in the action, and ought to be protected. But here we are asked to extend the principle to a very different class of cases, and it is not necessary, in order to enable persons freely to communicate with their solicitors and obtain their legal advice, that any privilege should be extended to communications such as these.

5 None of the decisions concerning solicitor and client privilege to which I have been referred seem to me to have changed or added to the law, in so far as it is relevant to what I have to decide on this motion, as I find it laid down in the two leading decisions from which I have quoted.

6 In an attempt to avoid misunderstanding as to the effect of the decision that I propose to deliver, it may be well for me to attempt to put in my own words the law, as I understand it, on the understanding that, except in so far as is necessary for the decision of this case, I reserve the right to reconsider the precise extent of the doctrines that I am attempting to describe.

7 As it seems to me, there are really two quite different principles usually referred to as solicitor and client privilege, *viz*:

> (a) all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged; and
>
> (b) all papers and materials created or obtained specially for the lawyer's "brief" for litigation, whether existing or contemplated, are privileged.

In considering the ambit of these principles, it is well to bear in mind the reasons for them.

8 In so far as the solicitor-client communications are concerned, the reason for the rule, as I understand it, is that, if a member of the public is to receive the real benefit of legal assistance that the law contemplates that he should, he and his legal adviser must be able to communicate quite freely without the inhibiting influence that would exist if what they said could be used in evidence against him so that bits and pieces of their communications could be taken out of context and used unfairly to his detriment unless their communications were at all times framed so as not only to convey their thoughts to each other but so as not to be capable of being misconstrued by others. The reason for the rule, and the rule itself, extends to the communications for the purpose of getting legal advice, to incidental materials that would tend to reveal such communications, and to the legal advice itself. It is immaterial whether they are verbal or in writing.

9 Turning to the "lawyer's brief" rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the Court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.

10 What is important to note about both of these rules is that they do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. What is privileged is the communications or working papers that came into existence by reason of the desire to obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case. The facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if, otherwise, the party would be bound to give discovery of them. This appears clearly from the following passage in the judgment of Lord Blackburn in *Lyell v. Kennedy* (No. 2) *supra*, where he said at pages 86 and 87:

> But then it is argued that though that is so you may, as has been repeatedly said, search the conscience of the party by inquiring as to his information and belief from whencesoever derived, and that it consequently follows from that (this I think was the argument which was put) that although a brief has been refused, and it has been said, "You must not inspect that brief," you are nevertheless entitled to ask the party himself, "Did not you read the brief, and when you had read it what was your belief derived from reading that brief?" That, I think, was the position which

> was taken; and it was argued in support of it, if I understood and followed the argument rightly, that inasmuch as nobody had ever actually raised the point, and inasmuch as in all the different books of pleading and other things, where they very frequently do discuss what is the extent of discovery, nobody had hitherto discussed this point either one way or the other, the silence of people implied that it should be so, and that you ought to be able to put that question. Now as to that I believe that there is no authority, and I think that Cotton, L.J. says that there is no authority; but as it seems to me the plain reason and sense of the thing is that as soon as you say that the particular premises are privileged and protected, it follows that the mere opinion and belief of the party from those premises should be privileged and protected also. I do not mean to state (and I mention it in case I should be misunderstood) that a man has a privilege to say, "I have a deed, which you are entitled to see in the ordinary course of things, but I claim a privilege for that deed, because it was obtained for me by my attorney in getting up a defence to an action", or "in the course of litigation". That would be no privilege at all. So again with regard to another fact, such as a man being told by an attorney's brief that there is ground for thinking that there is a tombstone or a pedigree in a particular place — if the man went there and looked at it and saw the thing itself I do not think that he would be privileged at all in that case: because it is no answer to say, "I know the thing which you want to discover, but I first got possession of the knowledge in consequence of previous information." That is not within the meaning of privilege. But when the interrogatory is simply "what is the belief which you have formed from reading that brief?" it seems to me (and I think that that is the effect of what Cotton, L.J. says at the end of his judgment (23 Ch. D. at p. 408)) to follow that you cannot ask that question. It is a new point; it has never been raised before; but it seems to me that that is right.

In my view, it follows that, whether we are thinking of a letter to a lawyer for the purpose of obtaining a legal opinion or of a statement of facts in a particular form requested by a lawyer for use in litigation, the letter or statement itself is privileged but the facts contained therein or the documents from which those facts were drawn are not privileged from discovery if, apart from the facts having been reflected in the privileged documents, they would have been subject to discovery. For example, the financial facts of a business would not fall within the privilege merely because they had been set out in a particular way as requested by a solicitor for purposes of litigation, but the statement so prepared would be privileged.

11 Applying these principles, as I understand them, to materials prepared by accountants, in a general way, it seems to me

> (a) that no communication, statement or other material made or prepared by an accountant as such for a business man falls within the privilege unless it was prepared by the accountant as a result of a request by the business man's lawyer to be used in connection with litigation, existing or apprehended; and
>
> (b) that, where an accountant is used as a representative, or one of a group of representatives, for the purpose of placing a factual situation or a problem before a lawyer to obtain legal advice or legal assistance, the fact that he is an accountant, or that he uses his knowledge and skill as an accountant in carrying out such task, does not make the communications that he makes, or participates in making, as such a representative, any the less communications from the principal, who is the client, to the lawyer; and similarly, communications received by such a representative from a lawyer whose advice has been so sought are none the less communications from the lawyer to the client.

12 Turning to the application of these views to the facts here, and reading the allegations of fact in the notice of appeal in the light of the allegations in the Reply together with what is said in Mr. Cohen's affidavits, I have no difficulty in concluding that the balance of probability is that Mr. Pal and Mr. Wolfe were acting as representatives of the appellant for the purpose of obtaining legal advice on behalf of the appellant from Mr. Goodman concerning the setting up of some arrangement such as that, according to the allegations referred to, the appellant in fact entered into. I think the Court may take judicial knowledge of the fact that corporations of all kinds are continuously faced with problems as to what arrangements are advisable or expedient having regard to the intricacies of the tax laws and that, while huge corporations have staffs of lawyers and accountants of their own through whom they seek advice of counsel learned in such special areas of practice, smaller corporations employ lawyers and accountants in general practice to act for them in

obtaining special advice in connection with such matters. I have no doubt as to the inherent probability of Mr. Cohen's statements that Mr. Wolfe and Mr. Pal were so acting for the appellant in obtaining Mr. Goodman's advice. While, therefore, I should have had some doubt as to whether Mr. Cohen's affidavits, based only on information and belief, would have been acceptable evidence if they had been objected to, as they have not been objected to, I reject the motion in so far as paragraphs (b) and (c) of the Notice of Motion are concerned.

13 I turn now to the order sought by the motion for an order

> (d) requiring that Alexander Slomo Strasser reattend the examination for discovery and answer questions numbered 164, 165, 175 and 176, and such further questions as may arise from the answers given.

To appreciate what is being sought here, it is necessary to refer to more of the Examination for Discovery of Alexander Slomo Strasser (who was examined as an officer of the appellant company) than the questions mentioned. The following portions seem to be relevant to the order sought:

> BY MR. AINSLIE:
>
> 155 Q. There was a meeting held then on the 10th of December, 1964?
>
> A. Yes.
>
> 156 Q. And am I correct that at that meeting was Mr. W. Goodman?
>
> A. No.
>
> MR. GOODMAN: Yes.
>
> BY MR. AINSLIE:
>
> 157 Q. Mr. W. Goodman, Mr. Pal, and Mr. H. Wolfe?
>
> A. Yes.
>
> 158 Q. And I am correct that Mr. Pal is your auditor and accountant?
>
> A. Yes.
>
> 159 Q. And that Mr. Wolfe is your general solicitor?
>
> A. Yes.
>
> 160 Q. And that Mr. Goodman was also your solicitor?
>
> A. That is correct.
>
> 161 Q. And at that meeting am I correct that a memorandum was prepared as to the purport of the discussion by Mr. Goodman?
>
> A. Yes.
>
> 162 Q. And that a copy was sent to the appellant?
>
> A. Yes.
>
> 163 Q. I would ask you to produce the memorandum setting forth the meeting of the 10th of December, 1964.

MR. GOODMAN: No, I think it is privileged.

MR. AINSLIE: Mr. Goodman, my position is that it is not a privileged document.

MR. GOODMAN: I appreciate you take that position.

MR. AINSLIE: Well, for the purpose of the record ...

MR. GOODMAN: And your department would be very quick to claim a similar privilege in connection with memoranda passing between a lawyer and his client in a matter your department was interested in.

MR. AINSLIE: Let me just speak for the purpose of the record, my position is the document is not privileged, it is not a document for which privilege has been claimed in the affidavit on production and therefore I am demanding production of the document.

MR. GOODMAN: No. That is not so. There is a reference in part II of the affidavit on production to various communications in respect to which privilege is claimed and this is one of them.

BY MR. AINSLIE:

164 Q. In other words, am I correct that on the 10th of November, 1964, you were seeking legal advice in anticipation that difficulty would arise from this plan?

MR. GOODMAN: I do not think you are obliged to answer that question.

MR. AINSLIE: The witness is instructed not to answer that question — is that correct?

MR. GOODMAN: The witness is instructed not to answer that question.

BY MR. AINSLIE:

165. Q. Now, would you direct your attention to the memorandum of the 10th of November, 1964, Mr. Strasser, and would you confirm that the memorandum reads in part as follows:

> "Since the Ontario Pension Benefit Act will come into force January 1st, 1965, there are decided advantages in having lump sums past service contributions made before that date into a new pension plan for benefit of key executives. Payments made after that date may not be withdrawn as freely by reason of the Act; however, payments made into a pension plan will now be subject to rigid statutory rules regarding investments whereas the parties would prefer that the monies simply be re-invested in the business. Accordingly I have suggested that any lump sum payments into the new pension plan before December 31st, 1964, be withdrawn before that date by the beneficiaries and immediately transferred by the beneficiaries into a deferred profit-sharing plan which will immediately be set up for their benefit."

MR. AINSLIE: I wonder if you could just read the introductory part back.

THE REPORTER:

> "Q. Now, would you direct your attention to the memorandum of the 10th of November, 1964, Mr. Strasser, and would you confirm that the memorandum reads in part as follows:"

MR. GOODMAN: The answer is "no".

A. The answer is no because in fact —

MR. GOODMAN: No.

. . . . .

BY MR. AINSLIE:

171 Q. Mr. Strasser, after the 10th of November did the officers of the appellant have any further discussions with their auditor as to the advisability of entering into the pension plan?

A. It is possible.

172 Q. And am I correct that the auditor in December wrote to your solicitor setting forth certain recommendations that should be taken in regard to the financial affairs of the appellant and its tax position?

MR. GOODMAN: No, he made certain suggestions for consideration and they are considered to be of a confidential nature.

BY MR. AINSLIE:

173 Q. And those suggestions were contained in a letter which was sent to your solicitor?

A. Yes.

174 Q. And that letter is dated — could you tell me the date of the letter, please?

A. December 1st.

175 Q. I wonder if you would produce that letter, please?

MR. GOODMAN: No, we consider that it is privileged.

MR. AINSLIE: Again, Mr. Goodman, I would say that it is not privileged because in my submission it is not a letter between a solicitor and client and it is not a letter in respect of which privilege has been claimed in the affidavit on production and I ask the witness to produce it.

MR. GOODMAN: The witness declines to produce it on advice of counsel.

MR. AINSLIE: Very well. I will adjourn the discovery on this portion and also on the portion of the memorandum of the 10th of November until after we have had an opportunity of having this matter decided by the courts.

BY MR. AINSLIE:

176 Q. And, Mr. Strasser, am I correct that one of the suggestions that the accountant, that your accountant made to your solicitor, was that the appellant should wind up the pension plan and transfer to a deferred profit-sharing plan the assets in the plan?

MR. GOODMAN: Decline to answer.

THE DEPONENT: I refuse to answer.

The respondent's position, in so far as Questions 164 and 165 are concerned, is clearly set out in that part of the submission of counsel for the respondent filed October 25, 1968, which reads as follows:

3. By Notice of Motion dated September 19, 1968, the Respondent made an application to this Honourable Court requesting, *inter alia*, that Alexander Slomo Strasser be required to reattend the examination for discovery

and answer Question No. 165 and such further questions as may arise from the answer given. Question No. 165 pertains to an extract of a certain memorandum, the said extract being marked Exhibit "A" for identification on the examination for discovery and found at page 94 of the Booklet being Exhibit "A" to the Affidavit of Murray Alexander Mogan filed in support of this application.

4. The extract was obtained by the Respondent in the following manner (see Affidavit of Raymond Sim, filed):

(a) Mr. Raymond Sim, employed as an assessor with the Department of National Revenue in its Toronto District Office, did in the year 1964, attend at the office of the Appellant, Susan Hosiery Limited, and was given permission by a Mr. Alexander Strasser to look at a number of documents contained in a filing cabinet.

(b) Mr. Raymond Sim found among the documents contained in the filing cabinet what appeared to be a memorandum dated November 10, 1964, relating to a meeting between Mr. W. Goodman, Mr. A. Pal and Mr. H. Wolfe.

(c) Mr. Raymond Sim made a handwritten copy of certain portions of this memorandum and has subsequently had the handwritten copy typed and placed in the Department of National Revenue, Toronto District Office, file relating to the Appellant.

5. On examination for discovery of Mr. Alexander Slomo Strasser, as an officer of the Appellant, Mr. Strasser was asked by counsel for the Respondent to confirm the accuracy of a portion of the said typewritten extract and Mr. Strasser, through his solicitor, refused to answer.

See Examination for Discovery,
p. 51 Q. 165 and pp. 52-53, Q. 166.

6. Mr. Pal is the auditor and accountant for the Appellant.

Examination for Discovery,
p. 49, Q. 158.

Mr. Wolfe is the general solicitor for the Appellant.

Examination for Discovery,
p. 49, Q. 159.

Mr. Goodman is also the solicitor for the Appellant.

Examination for Discovery,
p. 49, Q. 160.

RESPONDENT'S POSITION:

The respondent submits that secondary evidence as to the contents of a privileged document is admissible at trial; accordingly, the Respondent can use the extract from the memorandum as evidence at trial. The Respondent therefore submits that he is entitled on examination for discovery to verify the accuracy of the extract from the memorandum.

REASONS:

1. While the original memorandum of November 10, 1964 may be privileged from production on the basis of solicitor-client privilege, privilege does not encompass the extract from that memorandum which is in the possession of the Respondent.

Calcraft v. Guest, [1898] 1 Q.B. 759, 1 Q.B. 759, at 764 per Lindley, M.R.:

" '... Where an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?' The matter dropped there; but the other members of the Court (Lord Abinger, Gurney, B., and Rolfe, B.) all concurred in that, which I take it is a distinct authority that secondary evidence in a case of this kind may be received."

Delap v. Canadian Pacific R.W. Co. (1914), 5 O.W.N. 667 at 669 per Middleton, J.:

"It is suggested that the correspondence contains matter going to shew that the claim is not made in good faith. ... In *Calcraft v. Guest*, [1898] 1 Q.B. 759, it was held that the use of copies of privileged documents, where the production of the original cannot be compelled by reason of privilege, is not prevented even by fraud in the obtaining of the copies — a much stronger case than this, where the copies were not obtained fraudulently, but by the mere inadvertence of the solicitor."

Richard C.W. Rolka v. Minister of National Revenue, [1963] Ex. C.R. 138 at pp. 154-155 per Cameron, J.:

"... The fact is that the originals did come into the hands of the Minister's representative by the voluntary act of the solicitor and such privilege as may have previously existed in regard thereto has been lost. Reference may be made to *Phipson on Evidence*, 9th ed., at p. 202, where on the authority of *Calcraft v. Guest*, [1898] 1 Q.B. 759 (C.A.), the principle is stated thus:

'But, unlike the rule as to affairs of State, if the privileged document, or secondary evidence of it, has been obtained by the opposite party independently, even through the default of the legal adviser, or by illegal means, either will be admissible, for it has been said that the Court will not inquire into the methods by which the parties have obtained their evidence.' "

Holmested & Langton's Ontario Judicature Act, 5th Edition, at p. 1032:

"*Secondary Evidence*. In *Calcraft v. Guest*, [1898] 1 Q.B. 759, it was held, in effect, that though documents are privileged from production, secondary evidence of them may be given, And see per Cozens-Hardy, M.R., in *Ashburton v. Pape*, [1913] 2 Ch. 469, at 473; *Delap v. C.P.R.* (1914), 5 O.W.N. 667, at 669. But the actual decision in the *Calcraft* case seems to go no further than that a copy of a privileged document, obtained by accidental transfer of possession, may be admitted; see the principle stated by Wigmore, Evid., sec. 2325(3); and see the general principle, stated by Ferguson, J.A., in *Re United States of America v. Mammoth Oil Co.* (1925), 56 O.L.R. 635, at 646, that the privilege of communications between solicitor and client is one which the Court must enforce unless its enforcement is waived by the client."

Canadian Encyclopedic Digest (Ontario), 2nd Edition, Vol. 6, at pp. 16-17:

"The use of copies of privileged documents, where the production of the original cannot be compelled by reason of privilege, is not prevented."

The Annual Practice 1966, Vol. 1, at p. 526:

"*Secondary evidence or copies of privileged document*. — Secondary evidence as to the contents of a privileged document is admissible as against the party resisting its production (*Calcraft v. Guest*, [1898] 1 Q.B. 759, C.A.).

Thus if a party has an opportunity of taking or getting a copy of such a document he can use it as secondary evidence (ibid.)."

Wigmore on Evidence, 3rd Edition, Vol. VIII, at p. 629:

"S. 2326. Third Persons Overhearing. The law provides subjective freedom for the client by assuring him of exemption from its processes of disclosure against himself or the attorney or their agents of communication. This much, but not a whit more, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are entirely in the client's hands, and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge, is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy."

Halsbury's Laws of England, 3rd Edition, Vol. 12, at p. 41:

"Particulars may be ordered of a privileged document referred to in a pleading, and secondary evidence may be given of a privileged document despite the privilege attaching to the original, although, if a copy is obtained improperly, an injunction may be granted restraining the use of that copy."

Whether an injunction may be obtained by the Appellant restraining the use of the extract is not relevant to this application since the Appellant has not commenced proceedings for an injunction.

14 Assuming that the respondent may (and I am not to be taken as expressing any doubt with regard thereto) adduce evidence as to the communications that took place between the appellant and its solicitors if it has such evidence available at the trial and it is relevant to the material facts, the appellant is nonetheless entitled to rely on its privilege not to disclose such communications either by itself or its solicitors either on discovery, or at trial, or otherwise. Having come to the conclusion that the balance of probability is that the meeting between Mr. Pal, Mr. Wolfe and Mr. Goodman on December 10, 1964 was part of the process whereby Mr. Pal and Mr. Wolfe, as representatives of the appellant, were obtaining legal advice for the appellant from Mr. Goodman, and that the appellant is therefore entitled to a privilege against producing a memorandum of what occurred at that meeting, it seems clear to me that the same privilege extends to answering any questions as to what was or is contained in that memorandum.

15 Finally, with regard to Questions 175 and 176, it follows from my conclusion that Mr. Pal was one of the representatives of the appellant for obtaining legal advice that the appellant is privileged from producing, or giving evidence as to the contents of, a letter written by Mr. Pal as part of the process of obtaining such advice.

16 The application is dismissed with costs payable by the respondent to the appellant in any even of the cause, which costs are hereby fixed at $300.

TAB 7

2008 CarswellOnt 5408
Ontario Superior Court of Justice

Pearson v. Inco Ltd.

2008 CarswellOnt 5408, [2008] O.J. No. 3589, 169 A.C.W.S. (3d) 524

Wilfred Robert Pearson and Inco Limited

Cullity J.

Heard: September 11, 2008
Judgment: September 16, 2008
Docket: 12023/01

Counsel: Kirk Baert, Celeste Poltak for Plaintiff
Laura Fric for Defendant

***Cullity J.*:**

1 The parties moved to compel answers to numerous refusals and undertakings provided at the examinations for discovery of Mr Pearson and of a representative of Inco Limited ("Inco"). The great majority of the issues that have arisen were resolved by the parties before the hearing on September 11, 2008 and a consent order was signed on that occasion.

2 For the main part the unresolved issues involved claims for privilege by each of the parties. Nine of these concerned redacted portions of documents produced by Inco for which solicitor and client privilege was claimed. After reviewing the documents and hearing the submissions of the parties, I upheld a claim for privilege with respect to each redaction on the ground that it was a confidential communication between Inco and its internal, or external, solicitors either as legal advice, or for the purpose of providing it.

3 The most doubtful of these claims for privilege related to 2 redacted pages that were mistakenly identified as part of a non-privileged document. These pages were prepared by a consulting firm at the request of Inco's legal counsel for the purpose of providing legal advice to Inco with respect to litigation — but not, I was informed, this litigation. There is no evidence as to the nature of the litigation in question, but any litigation privilege attaching to the documents would not have survived it unless it was closely related to this proceeding: *Blank v. Canada (Department of Justice)*, [2006] S.C.J. No. 39 (S.C.C.). In the absence of evidence on either of these points, and I ruled that a claim for litigation privilege had not been substantiated. Nevertheless, after some hesitation, I indicated at the hearing that I accepted Ms Fric's submission that the redacted pages were covered by solicitor-and-client privilege as communications made to Inco's solicitor in confidence by an agent of Inco for the purpose of legal advice to be provided to Inco.

4 Having given this matter further consideration, I am of the opinion that the conclusion I reached at the hearing is not correct and that the evidence is insufficient to establish the privilege.

5 Apart from inferences to be drawn from my review of the documents in question, the evidence consists entirely of a sworn statement by one of the defendant's counsel that to the best to the best of his firm's knowledge,

> ... the redacted pages were prepared by a consulting firm at the request of Inco's internal legal counsel, Julie Lee Harris, for the purpose of providing legal advice to Inco in or about the year 2002.

6 It is established that some — but not all — communications by a third party to a solicitor for the purpose of enabling, or assisting, the solicitor to provide legal advice to a client will be privileged: *General Accident Assurance Co. v. Chrusz*

(1999), 45 O.R. (3d) 321 (Ont. C.A.), at page 352 *per* Doherty J.A., (Carthy and Rosenberg JJ.A. concurring, at pages 339 and 369, in the learned judge's analysis of solicitor — client privilege). In *Chrusz* it was held that the fact that the third party is properly described as an agent under the general law of agency is, in itself, not determinative that the privilege exists: *per* Doherty J.A. at page 356. It was held, further, that a communication would attract the privilege if the third party should be considered to be a line, or channel, of communication under which the third party carried information from the client to the solicitor, or assembled and explained, or interpreted, information provided by the client in order to make it relevant to the legal issues upon which advice was sought: *per* Doherty J.A. pages 353-4.

7 The Court of Appeal accepted that the existence of the privilege is not limited to the situations just mentioned. The principles that are to be applied in other cases were set out on pages 356-357 by Doherty J.A. as follows:

> I think that the applicability of client-solicitor privilege to third-party communications in circumstances where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.
>
> Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from a solicitor on behalf of a client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.
>
> If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.

8 Having reviewed the relevant documents in the light of the sworn evidence and Ms Fric's submissions, I do not consider that the third party was merely a channel of communication between Inco and its solicitor, or that it was merely interpreting information provided by Inco. To the extent that I am able to ascertain from the documents and the evidence — such as it is — the third party was retained by Inco's in-house counsel to gather — and, possibly, interpret — information from outside sources for the purposes of assisting counsel to provide legal advice to Inco. This conclusion is not excluded by the affidavit evidence of the solicitor acting for Inco in this litigation. If not otherwise excluded, litigation privilege — but not solicitor-client privilege — could attach to the documents. In *Chrusz*, at page 358, Doherty J.A. emphasised the need to preserve the boundaries of solicitor-client privilege and litigation privilege in cases of third party communications.

9 In consequence, the defendant has not, in my opinion, discharged its burden of establishing that this claim for privilege should be upheld. The opinion I expressed at the hearing is rescinded and the claim will be denied.

10 Inco also requested an order directing Mr Pearson to request from two of his neighbours a copy of documentation they received from the Ministry of Environment on September 20, 2000 that disclosed very high levels of nickel contamination on their property. This request was refused by the plaintiff on the ground that examination for discovery of class members other than the representative plaintiffs requires court approval. The document requested represents the first of a series of disclosures of contamination that are alleged to have directly caused the devaluation of the properties of class members and it is of some importance in the litigation. It was not disputed that the neighbours, or one of them, have been assisting the plaintiff in the litigation. They are members of the class in the proceeding and I am satisfied that I have jurisdiction to make the order requested pursuant to section 12 of the *Class Proceedings Act, 1992*, S.O. 1992,

c. 6, as well as otherwise. I indicated at the hearing that I would do so and thereby obviate the need for a subsequent motion for leave to discover one of the neighbours.

11 The last matter to be considered was Inco's request for disclosure of relevant facts obtained from residents of the area by a summer student employed by class counsel. It was not disputed that the information was obtained for the sole purpose of this litigation.

12 Initially, Ms Fric requested an order compelling production of all of the student's notes and memoranda that identified his informants and recorded his discussions with them. I declined this request on the ground that the notes were subject to litigation privilege. Ms Fric then submitted that, notwithstanding this, Inco was entitled to disclosure of the facts obtained by the student and recorded in his notes. This proposition was challenged by Mr Baert on the ground that disclosure would, in effect, emasculate the privilege attaching to the notes.

13 The issue that arises is whether Rule 36.01 requires Mr Pearson to disclose facts relating to issues in the action when privileged documents are the source of his information.

14 In Hubbard, Magotiaux and Duncan, *The Law Of Privilege in Canada*, at paragraph 12.230, (Canada Law Book, looseleaf), the learned authors state that there are conflicting authorities on the question. While they do not cite any decisions from Ontario, I believe there is, at least, an apparent conflict. Whether or not this can be explained by differences in the rules of practice in force in different provinces, it is, I believe, clear that divergent views have been expressed on where the line should be drawn between the dictates of litigation privilege and the desire to assure a trial on all the relevant facts. Decisions of the Court of Queen's Bench of Alberta and the Court of Appeal of Manitoba are in favour of the extension of the litigation privilege to facts that a party being discovered has obtained only from documents prepared by counsel or their agents for the purpose of litigation. The cases include *Blair v. Wawanesa Mutual Insurance Co.*, [2000] A.J. No. 728 (Alta. Q.B.); *Lytton v. Alberta*, [1999] A.J. No. 457 (Alta. Q.B.); *Sovereign General Insurance Co. v. Tanar Industries Ltd.*, [2002] A.J. No. 107 (Alta. Q.B.); and *Chmara v. Nguyen*, [1993] M.J. No. 274 (Man. C.A.). In these cases I understand the courts to have accepted and found compelling the same proposition that was advanced by Mr Baert in this case. Disclosure would, in the words of the court in *Chmara*, "fatally maim the litigation privilege rule".

15 I am satisfied that the authorities in Ontario do not endorse that proposition. The effect of the cases before the present Rules of Civil Procedure came into force was summarised by Professor Robert J. Sharpe in *Claiming Privilege in the Discovery Process* (Special Lectures of the Law Society of Upper Canada, 1984), at page 169:

> It is well established in the case law that where a party on discovery has asked for facts relating either to his own case or to that of his opponent, those facts must be revealed, not withstanding that the party's source of information is a privileged report or document.

16 One of the cases cited by Professor Sharpe (now Sharpe J.A.) was *April Investments Ltd. v. Menat Construction Ltd.* (1975), 11 O.R. (2d) 364 (Ont. H.C.) in which Pennell J. rejected the proposition that a party was entitled to refuse to disclose factual conclusions in a privileged report of an investigator. The learned judge stated:

> In considering the merits of the present application I have no intent to put the privilege attaching to the engineering reports to flight but there is need to preserve the purpose of an examination for discovery. I think there is a distinction between disclosure of privileged information and divulging the facts which are relied upon though the facts may be contained in a privileged document. The tendency of the courts is not to circumscribe the avenues of discovery but to widen them: *Henderson v. Mercantile Trust Co*. (1922), 52 O.L.R. 198.

17 The scope of oral discovery is now significantly wider under rule 36.01 than it was at the time of the decision in *April Investments* and there is, I believe, a consistent line of authorities that explicitly, or implicitly, support the conclusions of principle in that case. The cases include: *Sacrey v. Berdan*, [1986] O.J. No. 2575 (Ont. Dist. Ct.); *Dionisopoulos v. Provias*, [1990] O.J. No. 30 (Ont. H.C.); and *Murray v. Blackwood*, [1988] O.J. No. 1767 (Ont. Div. Ct.); see also, *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] C.T.C. 353 (Can. Ex. Ct.), at page 361.

18 Similar views have been expressed in the context of solicitor and client privilege: see for example, *Chrusz*, at page 347 *per* Doherty J.A.; and *Canadian Pacific Ltd. v. Canada (Director of Investigation & Research)*, [1995] O.J. No. 4148 (Ont. Gen. Div. [Commercial List]), at page 3, *per* Farley J..

19 In *Sacrey*, Borins Dist.Ct.J. (now Borins J.A.) stated, at para 12:

> It is also important to distinguish between discovery of documents, provided by R. 30, and discovery of information, provided by R. 31. It was submitted by the defendant that the plaintiff was not entitled to discovery of the information which it seeks on the ground that it is privileged. This, in my view, is incorrect and results from an attempt to apply the provisions of subr. 30.03 (2) (b) and, perhaps, r. 30.09, to r. 31.06. As indicated earlier, in her affidavit of documents the defendant objects to the production of the report of Equifax Services Ltd. on the ground that it is privileged as it was prepared in contemplation of litigation. However, the plaintiff does not seek discovery of the report. Subrules 31.06 (1) to (3) enable a party to obtain on examination for discovery much of the information contained in a document which is protected from production or discovery on the ground of privilege. Pursuant to these subrules the examining party is entitled to be told of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or a occurrences in issue, the substance of their expected evidence and, at unless an undertaking is given not to call an expert as a witness at trial, the names and addresses of experts, engaged by or on behalf of the party examined, together with the findings, opinions and conclusions of the expert. But witness statements and, subject to r. 53.03, expert's reports remain privileged from production as constituting part of the lawyer's work product and being a document prepared in contemplation of litigation respectively.

20 *Sacrey* and other decisions from Ontario were cited and followed in *Llewellyn v. Carter*, [2008] P.E.I.J. No. 38 (P.E.I. C.A.) where, in allowing an appeal, McQuaid J.A. concluded (at paras 44 and 57):

> 44. The Ontario courts give a plain meaning to rule 31.06 and a meaning that can be reconciled with rule 30 which permits a claim for privilege over a document itself. Rule 31.06 means that information relevant to matters in issue must be disclosed in oral discovery, and to this extent the right of litigation privilege has been abrogated. Documents remain protected from disclosure but the evidence in a particular document which is relevant to the proof of the facts in the matter must be disclosed in accordance with Rule 31.06. ...
>
> 57. In summary, for the reasons I have set forth above and based on a consideration of the above authorities, I accept the plain meaning interpretation given by the Ontario courts to the rules on documentary disclosure and discovery examination. I specifically reject the approach taken by the Manitoba Court of Appeal in ***Chmara v. Nguyen***, supra and by the motions judge in ***Breau v. Naddy*** {**[1995] P.E.I.J. No, 108 (P.E.I.S.C.)**}. Like the motions judge in this case, these two authorities failed to recognise the distinction made by the ***Rules of Court*** between documentary disclosure in Rule 30 and the broader informational disclosure required by the plain terms of Rule 31. On the other hand, the reasoning of the Ontario courts, interpreting precisely the same rules applicable in this court, recognizes the distinction between the two forms of disclosure, the result being a fairer and more reliable civil litigation process.

21 I am respectfully of the same opinion of the effect of the authorities in this jurisdiction. Accordingly, I am satisfied that, although Inco is not entitled to copies of the student's notes, it is entitled to disclosure of relevant facts contained in them. It is also entitled to the names and addresses of the student's informants pursuant to rule 36.06 (2).

22 I have not been provided with a copy of the notes and, in consequence, I do not know whether they contain information that is not relevant to the issues in the action or anything of a non-factual nature that bears on the preparation of the plaintiff's case and should attract privilege on that ground. If a question arises with respect to the extent or form of the required disclosure, I may be spoken to.

TAB 8

1998 CarswellNat 1051
Federal Court of Canada — Appeal Division

Stevens v. Canada (Prime Minister)

1998 CarswellNat 1051, 1998 CarswellNat 2311, [1998] 4 F.C. 89, [1998] F.C.J. No. 794, 11 Admin. L.R. (3d) 169, 147 F.T.R. 308 (note), 161 D.L.R. (4th) 85, 21 C.P.C. (4th) 327, 228 N.R. 142, 80 C.P.R. (3d) 390, 80 A.C.W.S. (3d) 711

The Honourable Sinclair M. Stevens, Appellant (Applicant) and The Prime Minister of Canada (The Privy Council), Respondent (Respondent)

Stone, Linden and Robertson JJ.A.

Heard: April 22, 1998
Judgment: June 5, 1998
Docket: A-263-97

Proceedings: affirming (1997), 144 D.L.R. (4th) 553 (Federal Court of Canada — Appeal Division)

Counsel: *Peter R. Jarvis* and *Elizabeth Grace*, for Appellant.
Richard Kramer, for Respondent.

The judgment of the court was delivered by *Linden J.A.*:

1 The main issue in this appeal is whether and to what extent the billing accounts of a lawyer are protected by the solicitor-client privilege from disclosure under the provisions of the federal *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act).

2 The appellant, the Honourable Sinclair Stevens, a former federal cabinet Minister, was the subject of an inquiry commissioned to investigate allegations of conflict of interest arising from certain business dealings. The Commissioner of the inquiry was Mr. Justice W.D. Parker. Commission counsel were David Scott, Marlys Edwardh, and Edward Belobaba. Counsel for Mr. Stevens was John Sopinka and for the Crown was Ian Binnie. During the course of the inquiry, Commission counsel allegedly took a strong, adversarial stance against Mr. Stevens. Before the conclusion of the inquiry, it is said that Mr. Justice Parker indicated to counsel for the appellant that Commission counsel would not be involved in drafting the report. The final report was submitted to the House of Commons on December 3, 1987. It was very critical of the appellant. He commenced an action in the Federal Court in 1987, challenging the substantive and procedural fairness of the Parker Commission of Inquiry and seeking to set aside the report. One of the allegations in the action is that the Commissioner allowed Commission counsel to write or to assist in the preparation of the report. [1] .

3 In December 1992, the appellant in accordance with the *Access to Information Act*, made an application to the Information Commissioner for disclosure by the Privy Council Office (PCO) of, *inter alia*, the billing accounts and the supporting documents of Commission counsel [2] . The request specified that the appellant sought the following information:

> All legal accounts submitted by and cheque requisitions or authorizations, subsequent to February 15th, 1987, until the present, for David W. Scott of Scott and Aylen; Edward P. Belobala of Gowling and Henderson; and Marlys Edwardh of Ruby and Edwardh relating to the Commission of Inquiry into Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens... [3] .

The request was partially successful, the appellant being provided with approximately 336 pages of legal accounts, receipts and other related documents. Typically, the legal accounts showed the names of the lawyer providing the services rendered, the dates on which the services were rendered, and the time spent each day. Disbursements were listed in detail. The total billings for the three Commission counsel amounted to over $230,000 for over 1,700 billed hours. However, the narrative portions on 73 pages of the disclosed accounts were expurgated on the basis of solicitor-client privilege pursuant to section 23 of the Act, which states:

> 23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

The Information Commissioner, after being requested to review the released material on June 17, 1993, wrote to the appellant on August 30, 1993, informing him that the expurgated material was properly withheld from disclosure. That letter stated in part:

> ...some information concerns solicitors accounts submitted to the Parker Commission by its counsel for repayment. In particular, these portions reveal the precise nature of the services rendered by the solicitors to their client. Because of the insight these portions gave into the affairs of the "client", I conclude that they properly fall within the ambit of solicitor-client privilege. In my view, then, the records are legitimately withheld under the provisions of section 23 of the Act. [4]

4 The appellant filed an application in the Trial Division of this Court, pursuant to section 41 of the Act, for a review of the decision. Mr. Justice Rothstein heard the matter at trial and dismissed the application in a decision dated February 26, 1997.

The Decision of the Trial Judge

5 A number of issues were dealt with by Rothstein, J. The fundamental question was whether the expurgated material was subject to solicitor-client privilege. Further, there was the matter of the waiver of the privilege. This point was raised because the client was Mr. Justice Parker and the solicitor was Commission Counsel. However, the solicitors' accounts were submitted not to the client for payment, but to the PCO. It was argued that this constituted disclosure to a third-party and, therefore, amounted to a waiver of the privilege. As well, there was disclosure of the unexpurgated records in two instances. This, it was contended, amounted to partial disclosure, and, therefore, consistency and fairness demanded that all the accounts be disclosed. Also, the appellant alleged that, in releasing expurgated records, the client has waived privilege with respect to the whole of the records. Finally, there was a question as to whether the government head's discretion was exercised properly and whether reasons should have been given for that decision.

6 Rothstein J. found that the material was protected by the solicitor-client privilege, as it was "directly related to the seeking, formulating or giving of legal advice or assistance" [5] . He also decided that disclosure to the PCO did not constitute disclosure to a third party, as the PCO is simply another department of government; therefore, there was no waiver of the privilege. Even in the event that the PCO were a third-party, disclosure to that office still would not amount to waiver, as the disclosure was compulsory pursuant to Order in Council P.C. 1986-1139. As well, the disclosure of some material did not amount to waiver as this disclosure was inadvertent. Likewise, he held that disclosure of part of the records, in the context of the Act, does not amount to waiver of the privilege attaching to the expurgated material. Finally, Rothstein J. found that there was nothing improper about the discretionary decision and that there was no duty to give reasons for that decision. He concluded:

> I find that the narrative portions expurgated by the Privy Council Office from the solicitors' accounts are subject to solicitor-client privilege. There has been no waiver of privilege express or implied, nor has the Privy Council Office failed to exercise discretion or erred in the exercise of discretion. [6]

It is this decision that is before us on appeal.

Submissions of the Parties

7 The appellant submits that Rothstein J. erred in finding that the material was subject to privilege. First, it is argued that the solicitor-client privilege should be applied narrowly in the context of the Act, which is designed to promote disclosure. Second, it is urged that only communications made for the purpose of obtaining legal advice are privileged. The accounts in question are not communications, it is said, but are acts of counsel to which privilege does not attach according to the authorities. What the appellant seeks is evidence that Commission counsel spent time doing research for the Parker Commission report or otherwise assisting in the report's preparation. The narrative portion of the accounts which the appellant seeks, it is said, are simply evidence of acts done by counsel and are not communications. The appellant submits that as long as the information does not disclose Commission counsel's actual research topics, the results of their research, what the drafts said, or the actual contents of their consultations with Commissioner Parker then no solicitor-client privilege attaches.

8 The respondent submits that Rothstein J.'s decision regarding the nature of solicitor-client privilege was correct. Specifically, it was consistent with the principles laid down by the Supreme Court in *Descôteaux c. Mierzwinski* [7], which held that, where rights to disclosure are in conflict with rights to confidentiality and privilege, the preference should be in favour of maintaining confidentiality and privilege. Further, the respondent says that where a statute provides for the disclosure of privileged material, that statute should be interpreted restrictively. Lastly, solicitors' accounts that make reference to the actual professional services rendered by lawyers on behalf of their clients have repeatedly been held to be protected by the privilege.

Some Background

9 The history of solicitor-client privilege is the history of a tension between the private right to maintain a confidence with regard to consultations with one's lawyer, and the public right of a court to have all the relevant evidence before it in order to function properly. This dichotomous approach is perhaps misleading, as it is unfair to characterize the right to absolute confidentiality in legal matters as a purely private right. The doctrine of solicitor-client privilege protects not only the particular client but protects all clients. Its goal is to promote the free flow of communication between clients and lawyers. This allows for lawyers to do their job more effectively and in turn promotes the public interest in the proper and fair administration of justice.

10 This tension, then, may also be described as one between the public interest in maintaining free communication between lawyers and clients and the public interest in the disclosure of relevant evidence before the court. The underlying justification in either case, disclosure or confidence, is the fair and proper administration of justice.

11 Solicitor-client privilege dates back to the 16th century. Originally, it grew out of the sense of honour on the part of lawyers and meant only that the lawyer was not compellable as a witness in a proceeding for the purpose of testifying as to discussions with the client [8]. It was recognized very early on that the solicitor-client relationship was a special one and that different rules would apply than did with respect to other professional relationships. This, it has been said, arose not so much out of respect for lawyers, nor for their clients, but because it was a necessary element of the legal system. Brougham L.C. in *Greenough v. Gaskell* [9] stated the justification for the privilege in this way:

> But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. [10]

The doctrine has evolved over the years. Nowadays any communication between a lawyer and a client in the course of obtaining, formulating or giving legal advice is privileged and may not be disclosed without the client's consent. The great Dean Wigmore has explained the privilege as follows:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived. [11]

12 This is the basic rule as it applies in Canadian law today. The rationale of the privilege is to ensure that a client is free to tell his or her lawyer anything and everything that is pertinent to the case, without any fear that this information may subsequently be divulged and used against them. Without this freedom, there is the possibility that the lawyer may not have the benefit of all the relevant information, and may not be able to do his or her job effectively. And that possibility must be avoided as contrary to the interests of justice.

13 A further basis for the privilege, one which approaches the privilege from a different angle, is that offered by Professor David Louisell, who highlights the privacy interests advanced by the right. He states:

> Primarily [privileges] are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping. Even when thrown into the lap of litigation, they are not the property of the adversaries as such; even in litigation, they may be exclusively the property of perfectly neutral persons who wish to preserve despite litigation, just as they preserved prior to litigation, their right to be left alone in their confidences. [12]

Though the administration of justice is an important consideration, Professor Louisell points to the more basic and intuitive idea that what is being protected is the privacy of the individual and the right to conduct his or her affairs without the intrusion of the state. Where the relationship involved is of such importance as the one existing between a solicitor and client, it is a vital value of our society to ensure that those dealings remain the business of the participants to the relationship and of no one else. Professor Louisell questions whether the free flow of communications between the solicitor and the client is actually promoted by the privilege. [13]

14 Of course, any rule of privilege works against another key interest in the administration of justice that all relevant material be placed before the court in order for it to perform its truth-finding function properly. One Canadian text on the law of evidence states:

> Accordingly, there always exists a tension when the doctrine of privilege is invoked as it consequentially obstructs the truth finding process. That being the natural result, the Courts have not shown great eagerness to proliferate the areas of privilege. [14]

There is a fine line to be drawn between these two vital interests. The Courts have sought an equilibrium in this regard, one which maintains a respect for the sanctity of the relationship between a solicitor and his or her client, but also recognizes the importance of promoting full disclosure of all material relevant to the truth-finding process. Professor Geoffrey Hazard, describing this dilemma, wrote:

> ...the definition of the privilege will express a value choice between protection of privacy and discovery of truth and the choice of either involves the acceptance of an evil -- betrayal of confidence or suppression of truth. [15]

15 It will be seen that Canadian law has sought to strike an appropriate balance between openness and secrecy by creating two exceptions to the privilege. One exception, which will be discussed later, is for communications which are themselves criminal or which counsel a criminal act (e.g. where a lawyer advises a client to conceal evidence). The second exception, which will be analysed in depth later, relates to that information which is not a communication but is rather

evidence of an act done by counsel or is a mere statement of fact. This prevents a stifling of the discovery process which would take place if a client could, by merely communicating a fact to his or her lawyer, prevent the discovery of that fact. Similarly, a person is not immune from discovery with regard to certain transactions merely because they were performed by counsel. Both exceptions acknowledge the tension involved in this area of the law, and both accept that justice is better served by lifting the privilege in those cases.

Some Preliminary Matters

16 In attempting to resolve this particular problem in the law of solicitor-client privilege as it relates to lawyers' bills of costs, there are some matters to be considered. The first of these is that the solicitor-client privilege is not identical with a guarantee of confidentiality. It is more accurate to say that the privilege is a type of confidentiality; the former is narrow and very strong, whereas the latter is broader and more prone to exception. Essentially, solicitor-client privilege has been primarily a rule of evidence, while the rule that a client's confidence must not be betrayed is an ethical or equitable doctrine. The law may in certain circumstances compel someone to betray a mere confidence, but the law may not compel someone to reveal something which is the subject of solicitor-client privilege.

17 The rule of confidentiality is an ethical and equitable doctrine which may be enforced through professional sanctions or through equitable remedies [16]. For example, Rule 4 of the Rules of Professional Conduct of the Law Society of Upper Canada, which is not atypical of the rules in other provinces, states:

> The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so. [17]

Where a lawyer is required by law to disclose information, and that information is not protected by solicitor-client privilege, then a lawyer must be careful to disclose only as much information as is required and no more.

18 This duty of confidentiality is much broader than the protection provided by the solicitor-client privilege. The classic elements of a legally protected privilege were enunciated by Dean Wigmore:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation [18].

Laskin C.J.C., in *Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into Confidentiality of Health Records)* [19], confirmed that the Wigmore criteria are a satisfactory guide with which to determine whether a privilege attaches to a given communication. Of course, there is no doubt that they are applicable to the relationship of a solicitor and his or her client. At the same time, they clearly indicate that, while confidentiality is certainly a necessary condition of solicitor-client privilege, it is by no means a sufficient condition.

19 While the privilege has traditionally been regarded as a rule of evidence, it has evolved over the years and, in *Solosky v. Canada* [20], the Supreme Court established that it had become a substantive right. In that case, an inmate of a penitentiary claimed that the institution was violating his right to solicitor-client privilege when, for security reasons, it opened and inspected correspondence from his lawyer. Dickson J. (as he then was) stated:

> Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits. [21]

20 This is not to say that the solicitor-client privilege has lost its evidentiary basis. In *Solosky* the Court found that it was being asked to extend the doctrine too far. In *Descôteaux v. Mierzwinski* [22] Lamer J. (as he then was) commented on the rationale in *Solosky*. In Lamer J.'s opinion the Court was not applying a rule of evidence, as there was no litigation or proceeding before a court in that case, but rather the court was appealing to the doctrine of confidentiality, which was akin to the privilege in litigation. He went on to set out the substantive rule of confidentiality:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively. [23]

21 Lamer J. outlined a very liberal approach to the scope of the privilege by extending it to include all communications made "within the framework of the solicitor-client relationship" [24] . The protection is very strong, as long as the person claiming the privilege is within that framework. If it is merely a claim for confidentiality, the protection, though broader, is not absolute, and it must be determined with a different set of criteria.

22 A second preliminary matter that must be considered in resolving the problem before us is that the identity of the client is irrelevant to the scope or content of the privilege. Whether the client is an individual, a corporation, or a government body there is no distinction in the degree of protection offered by the rule. In the case of a corporation or government the precise identity of the client may be more problematic, which may give rise to difficulties in determining whether or not the privilege has been waived. Also, it may be difficult to determine whether the privilege has been lost in some cases, where it is unclear who may claim the privilege and who may waive it within a corporate or a government context. However, these difficulties do not affect the substance of the right. Furthermore, I can find no support for the proposition that a government is granted less protection by the law of solicitor-client privilege than would any other client. A government, being a public body, may have a greater incentive to waive the privilege, but the privilege is still its to waive.

23 This last point leads to a third matter relevant to the disposition of this appeal. The effect of the provisions of the Act on the content of the privilege is nil. It was correctly determined by Rothstein J. that section 23 of the Act incorporates holus bolus the common law of solicitor-client privilege. That term is not defined elsewhere in the Act. Hence, it can only be presumed that what is covered by the words "solicitor-client privilege" is the common law doctrine of solicitor-client privilege. That being the case, it is necessary for the government head to determine, before considering the operation of the Act, whether a document is subject to the privilege. If it is, then he or she may refuse disclosure. But the preliminary question is determined not in the context of the Act, but in the context of the common law. If the material is subject to

the privilege, then the discretionary decision under section 23, whether to disclose it or not, is done in the context of the Act along with its philosophical presuppositions.

24 A related point is that, with respect to applications for information under the Act, it cannot be said that the appellant, by virtue of the particular purpose to which he wishes to put the information, has any more right to its disclosure than any other citizen who might make a similar application. The most that can be said is that the circumstances of the request may influence how the department head exercises his or her discretion, but it can have no relevance to whether there is any special entitlement to the information.

25 Perhaps the most important distinction that needs to be highlighted is that it is only communications that are protected by the privilege. Acts of counsel or mere statements of fact are not protected. In *Susan Hosiery Ltd. v. Minister of National Revenue* [25] Jackett P., after reviewing the rules relating to solicitor-client privilege stated:

> What is important to note about both of these rules is that they do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. What is privileged is the communications or working papers that came into existence by reason of the desire to obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case. The facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if, otherwise, the party would be bound to give discovery of them. [26]

The general rationale for not protecting matters of fact or acts done is the detrimental effect it would have on litigation. For example, a person cannot avail himself or herself of the privilege by simply communicating a fact to a lawyer or allowing the lawyer to perform an act in his or her place.

26 The exclusion of acts from the ambit of privilege is a longstanding rule. Authority for it is found as early as *Sandford v. Remington* [27] in the 18th century. Loughborough L.C. in that case allowed a lawyer to be called as a witness to testify as to acts done by his client that took place in his presence. He stated:

> This witness may be called on to disclose all, that did pass in his presence at the execution of the deed, as a witness; so his having been sent by his client with orders to put the judgment in execution: that is an act: but he is not to disclose the private conversation as to the deed with regard to what was communicated as to the reasons for making it. [28]

Although a great deal of importance is placed on protecting the relationship between a solicitor and his or her client, the paramount task is the administration of justice. To that end the privilege will be interpreted so that it protects only what it is intended to protect and nothing more.

27 The exception relating to statements of fact is also well-established, dating as far back as *Kennedy v. Lyell (No. 2)* [29] in the 19th century. As with acts of counsel, a person cannot shield facts from discovery simply by communicating them to his or her lawyer. In the case of *Dusik v. Newton* [30] a defendant, Mr. Newton, was questioned as to his knowledge of facts which he had learned from his solicitor, Mr. Norton. The facts stemmed from a conversation between Mr. Norton and a third party, Mr. Gooderham. Mr. Newton refused to answer the questions on the basis that the knowledge was privileged. Seaton J.A. held that the knowledge was privileged as the questions pertained to the communication between the lawyer and his client. He concluded:

> The Norton-Gooderham discussion is not privileged. Either of them can be asked about it. Newton's knowledge of what happened in that discussion is not privileged. He can be asked about it. What is privileged is the communication from Norton to Newton. It was a solicitor-client communication and neither Newton nor Norton can be required to answer questions about it. [31]

Thus statements of fact are not themselves privileged. It is the communication of those facts between a client and a lawyer that is privileged.

28 The last preliminary matter is that the privilege is of such importance to the administration of justice and held in such high regard by the courts that it is not necessary that the client personally object to the disclosure of the material. A court, of its own motion, may raise the matter of the privilege in order to protect the sanctity of the solicitor-client relationship. In *Beer v. Ward*[32], Lord Chancellor Eldon stated:

> ...the Court knows the privilege of the client, and it must be taken for granted that the attorney will act rightly, and claim that privilege; or that if he does not, the Court will make him claim it. [33]

This dictum underscores the idea that the protection of the privilege is not merely in the interest of the individual client in the particular circumstances, but it is also important to all present and future clients. The public should have the security of knowing that all communications with lawyers will be regarded as inviolate. Therefore, it is not only in the individual client's interest to assert the privilege, it is also in the court's interest, as long as no waiver has been given. Only in this way will the privilege facilitate the giving of advice in general.

Analysis

29 The judgment of the Supreme Court in *Descôteaux* is the natural starting place for any analysis of solicitor-client privilege today. Lamer J. determined that financial information given to a legal aid office for the purpose of obtaining legal aid was just as much subject to the privilege as any other information given in a solicitor-client relationship. He stated:

> I therefore do not think that a distinction should be made between information that must be given in order to establish the probable existence of a valid claim and that given to establish eligibility from the point of view of financial means, since, on the one hand, information concerning the person's financial situation may be just as highly confidential as any other information and since, on the other hand, the fact of being unable to meet the eligibility requirements respecting financial means is no less fatal to the ability to obtain the services sought. [34]

Information given in connection with arrangements in regard to the payment of fees, therefore, was held to be subject to the privilege. As well, it has already been noted that Lamer J. took a liberal approach to the interpretation of privilege. If a statement by the client as to his or her financial resources can be seen as privileged, it is not unreasonable to think that the information about what tasks the lawyer performed and for how much time and at what cost might also be privileged. As President Jackett has said in *Susan Hosiery Ltd*:

> all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged, [35]

30 It is essential to keep in mind that what the privilege protects is the integrity of the solicitor-client relationship. From a tactical point of view, in the context of litigation, clients should be free from the possibility that communications to their lawyers in "seeking, formulating, giving of legal advice" might be used against them. From a psychological point of view, in creating an atmosphere in which a client can be forthright and at ease, the privilege protects the relationship from the prying eyes of the state or other parties. A solicitor's bills of account are at the heart of that relationship. In my view, the terms and amounts of the retainer; the arrangements with respect to payment; the types of services rendered and their cost --all these matters are central to the relationship. If the relationship is indeed worth protecting, these matters must be immune to any intrusion.

31 What Lamer J. recognizes in *Descôteaux*, and what must be recognized here, is that the terms of the retainer of a solicitor by a client contains elements of a market transaction. It is not simply a relationship between hypothetical persons bound by honour, toiling for the love of justice. It is very much like any other market transaction that must be entered into in this day and age. As such, there are some basic realities about it that cannot be ignored. Just as it was necessary for the client to provide private information to the Legal Aid office in an effort to obtain legal advice, any other client must provide personal information and otherwise negotiate the terms of the relationship into which he or she is entering. That relationship is protected and the communications made in respect of that relationship -- the communications necessary to bring that relationship about -- are also protected. I am in total agreement with Rothstein J. when he wrote that "solicitors' accounts are directly related to the seeking, formulating or giving of legal advice or assistance" [36]. This point was made by Lamer J. in *Descôteaux* when he stated:

> It follows from the authorities referred to above that conversations with a solicitor's agents held for the purpose of retaining him would also be privileged, even though the solicitor was not then, or ever, retained. In my view, the principle protects from disclosure a conversation between an applicant for legal aid and the non-lawyer official of the Legal Aid Society who interviews him to see if he is qualified. [37]

Just as obtaining legal aid is part of obtaining legal advice, so too is the negotiation of financial terms of the relationship with a solicitor. The bills of account presented pursuant to that arrangement are merely a necessary extension of those negotiations.

32 This position is in accord with the historical rule, which, for the most part, seems to have favoured the inclusion of solicitor's bills of accounts within the ambit of the privilege. Professor Phipson, in his text on evidence, supported the view that solicitor's accounts are subject to a broad privilege [38]. One of the leading cases in support of this proposition was *Chant v. Brown* [39], where a solicitor's clerk was called to testify as to the contents of a bill of costs that he had prepared on behalf of his employer. It was held by Vice Chancellor Turner that the witness could only be examined for the purpose of proving the handwriting, but that was the extent of it. He stated:

> An attorney's bill of costs is, in truth, his history of the transactions in which he has been concerned; and if he cannot be called to prove the facts I think his clerk cannot be called to prove the history of them. [40]

One should notice about this dictum that it does not appear to differentiate between communications which are privileged and facts, which are not privileged.

33 The *Chant v. Brown* case was cited with general approval by Stirling J. in *Ainsworth v. Wilding* [41] In that case the plaintiff sought discovery of the defendant's bill of costs in related litigation as well as notes relating to matters that took place in chambers. Stirling J. paid close attention to the distinction between privileged communications and acts or mere statements of fact and found that the notes were privileged. As to the matter of the bill of costs, he was not required to determine the question with respect to the entire bills, as the defendant was willing to produce them. The objection was to disclosure of the notations and memoranda attached to the bills. Stirling J. examined some of the entries and came to this conclusion:

> Now, as regards the first, there is a portion of that which is covered up which in my judgment is clearly protected, but there is a portion of it which can be entirely severed from the rest, and consists of a simple statement of what took place in chambers. So in regard to the entry of November 15. It seems to me that too much has been covered up, and I should suggest, as the best way of dealing with the case, that the junior counsel for the defendant should examine the bills of costs, and I do not think he will have any difficulty in severing the portions which ought to be discovered from those which ought not. [42]

Despite the fact that the defendant had not asked that the entire bills be privileged, if a general rule that they are privileged did exist then it seems hard to accept the judgment that "too much has been covered up". It also seems quaint from a modern legal perspective that the parties would be willing to trust junior counsel for the defendant to examine the accounts for the purposes of determining what was privileged.

34 In modern Canadian jurisprudence the law is not entirely clear. There is authority that appears to go both ways. A number of authorities have expressly found that solicitor's accounts are privileged, while others seem to disagree [43]. Nevertheless, in my view, bills of account are privileged, but lawyer's trust accounts and other accounting records are not so privileged. What has been considered as two conflicting lines of authority can be reconciled.

35 The decisions which find specifically that bills of accounts are privileged are, in my view, the most influential, and so I shall deal with them first. Many of these arose in the context of tax litigation, where aspects of the solicitor-client privilege are defined in specific terms. Paragraph 232(l)(e) of the *Income Tax Act* [44] states:

> 232. (l)(e) "solicitor-client privilege" means the right, if any, that a person in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.

Courts have consistently found that bills of account are not "an accounting record of a lawyer", and have found them not to be within this statutory exception.

36 In *Taves v. Canada* [45] the issue arose in the context of the *Income Tax Act*. One of the items in question in that case involved a letter from a solicitor to the client which included a cheque stub, a cheque requisition and a computer printed document entitled "Billing Memo" which listed unbilled time and disbursements on the file and which sought a direction from the solicitor for fees and disbursements to be billed. Baker J. found:

> The letter in my view is privileged being in the nature of a statement of account which contains some description of services rendered. [46]

The Court went on to find that, while the cheque stub had to be disclosed by virtue of section 232(1)(e) of the *Income Tax Act*, the "Billing Memo" did not fall within the statutory exception to the privilege.

37 In *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)* [47] the Minister of National Revenue attempted to seize a number of documents which were communications between the insurance company and its lawyers. Southey J. found that:

> The privilege attaches not only to communications made by the client but obviously to communications made by the solicitor to the client as well and generally speaking covers all communications relating to the obtaining of legal advice. That general rule in my view would cover a statement of account. [48]

He went on to find, consistent with Baker J. in *Taves*, that the statement of account was not an accounting record of the lawyer, and so was not within the exception.

38 This determination was echoed in *Playfair Developments Ltd. v. Deputy Minister of National Revenue* [49] where Galligan J. was required to determine whether inter-office communications pertaining to the transactions involving client's accounts were privileged. In that case, as with *Mutual Life Assurance*, section 232(1)(e) of the *Income Tax Act* deemed lawyers' accounting records and any supporting voucher or cheques not to be communications covered by solicitor-client privilege. He stated:

> It seems to me that instructions given by solicitors to the accounting department which resulted in various financial activities that are recorded in the accounts do not fall within the meaning of "accounting record" or any "supporting voucher or cheque". Nor do I think that they form any part of the financial transactions themselves. It is my opinion therefore that all of those inter-office communications are privileged and I so rule. [50]

This ruling pertained not to the accounts themselves, but only to office communications.

39 One of the best treatments of the issue was written by Holmes J. in *Municipal Insurance Assn. of British Columbia v. British Columbia (Information & Privacy Commissioner)* [51] . This case did not involve the *Income Tax Act*, but was decided in the context of the access to information legislation in British Columbia. The respondent in that case had requested from the Information Commissioner disclosure of the government's legal bills with respect to a piece of litigation. The Information Commissioner had determined that the bills were not privileged. Holmes J. noted that the Information Commissioner had considered the decisions in *Mutual Life Assurance Co.* and *Taves*, but distinguished them on the basis that the account in question did not describe the legal services rendered to the client. In Holmes J.'s view this amounted to a "very narrow and restrictive test as to privilege attaching to a legal account" [52] .

He concluded:

> Communications of course need not contain legal advice to attract privilege, suffice they relate to obtaining advice of a lawyer and are made in confidence.
>
> An important and obvious breach of privilege, however, in my view occurred here because the information in the document reveals terms of the retainer.
>
> The terms of a solicitor/client relationship are privileged, although the existence of the relationship in itself is not. The privilege includes but is not limited to financial arrangements between the solicitor and the client. [53]

40 These cases are in sharp distinction to those which find that trust account ledgers and other financial records of that type are not privileged. None of these cases deals specifically with bills of account, and so cannot be relied on without understanding the nature of the material which was sought to be disclosed. Ultimately, these cases can be distinguished because acts of counsel or statements of fact are not privileged. In *Romeo's Place Victoria Ltd., Re* [54] , for example, a client was being investigated and the trust account ledgers of the client's solicitor were ordered to be disclosed. Collier J. held that it was the record of the lawyer, and not of the client, and, therefore, not subject to privilege. However, other cases have found such items to be outside the ambit of the privilege on the more substantive ground that they do not disclose communications, but only acts. In *Ontario (Securities Commission) v. Greymac Credit Corp.* [55] the question of privilege arose in the context of a solicitor's activities with respect to money held in trust for the client. Southey J. held that the privilege did not attach to this activity. He stated:

> Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications. Oral evidence regarding such matters, and the solicitor's books of account and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged... [56]

The accounts were examined and those things revealing privileged communications were severed. This decision might, at first glance, appear to be in conflict with Southey J.'s decision in *Mutual Life Assurance Co. of Canada*. However, as discussed *infra*, this decision is merely the proverbial exception that makes the rule -- it deals with acts of counsel and not communications.

41 In *Law Society (Prince Edward Island) v. Prince Edward Island (Attorney General)* [57], the R.C.M.P. attempted to seize documents in the possession of a lawyer relating to trust ledgers, general ledgers, and bank reconciliation ledgers which pertained to the dealings of a number of the lawyers clients. MacDonald C.J.T.D. determined:

> It is the communications between the client and his lawyer that are privileged. The trust ledgers, general ledgers and bank reconciliation ledgers are not communications between the solicitor and the client. These documents form part of the solicitor's records and are reports of acts, not communications. Privilege does not attach to these documents.

42 Thus, the jurisprudence in this area is not really in conflict. It merely reflects the existence of a broad exception to the scope of the privilege, namely, that it is only communications which are protected. The acts of counsel or mere statements of fact are not protected. This is an important balancing mechanism which, along with the prohibition against protecting communications which are themselves criminal, takes into account the public interest inherent in the proper administration of justice.

43 Where a lawyer is involved in the dealings of his or her client, like the disposition of funds held in trust for the client, as in *Greymac*, or the execution of an agreement for the purchase and sale of property, the existence or contents of these acts are not protected. The lawyer, in those situations, is not in the process of giving advice to the client, but is more like a witness to an objective state of affairs.

44 This explains the apparent conflict between the reasons of Southey J. in *Greymac* and *Mutual Life Assurance Co. of Canada*. In the former case the trust account was determined not to be protected by the privilege, while the solicitor's accounts in the latter case were held to be privileged. The statement of account is privileged because it is integral to the seeking, formulating and giving of legal advice. The trust account ledger is not protected because it relates to acts done by counsel.

45 Similarly, where the communication itself constitutes a criminal act, or counsels someone to commit a crime, then a client (or a solicitor) cannot hide behind the privilege. This is made quite clear in *Descôteaux*, where Lamer J. refused to protect the legal aid information, which would otherwise be privileged, because those communications comprised the substantive elements of the crime of fraud. He concluded:

> Thus communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged. [58]

This exception for criminal acts, ensures that the solicitor-client privilege cannot be used as a cloak for scoundrels who might seek to hide the truth for their own benefit. Society, despite the importance of fostering the sacred relationship between a solicitor and his or her client, will not allow it to become a cover for thievery and thuggery. [59]

46 The existence of these two exceptions to the solicitor-client privilege makes a broad ambit for its scope both desirable and logical. It is desirable from an administrative perspective. By giving bills of accounts the benefit of a blanket protection, the court avoids the procedural difficulties that would otherwise arise. [60] In each case it would be necessary for the Judge to inspect the accounts, and no doubt the lawyers for the parties would want to see them as well. This might put counsel in the awkward position of being privy to information that might be ordered not to be disclosed to his or her client -- a situation that is better to avoid. It would be better avoided not only because it may not be practical, but because the very fact that the opposing party's lawyer might get to know about the privileged communication may have a negative impact on the freedom of communication between the client and the lawyer. Furthermore, the blanket approach to protection of solicitor's bills of account prevents the pernicious prying of lawyers who might insist that each bill be viewed and judged individually in an effort to determine if any of the material contained therein could be disclosed. This would promote a situation where it was tactically advisable for the lawyer to persist in his or her efforts to effect discovery of the accounts in the hope that, because of some error induced by the sheer volume of documents,

some privileged information will fall into their hands. I do not think that such a state of affairs would promote the free flow of communication between lawyer and client, which the privilege is designed to foster.

47 We must always remember that the privilege does not protect only the communications between a solicitor an his or her client in the particular case at hand, but it must protect any future communications between clients and their lawyers in general. This is especially true in light of the Supreme Court's determination that this is now a substantive right and not merely a rule of evidence.

48 The rule is logical because it is consistent with the intention of Parliament. The Act does not contain any special definition of solicitor-client privilege. It was fully within the power of Parliament to insert a provision whereby these items would be specifically excluded from the ambit of privilege's protection. The expenses of government bodies, pertaining to legal fees or otherwise, are always of interest to the public. It is public money that is being spent. In so far as the intent of the Act is generally to promote the transparency of government activity, the incorporation of the common law doctrine of solicitor-client privilege indicates that it was meant to be excluded from the operation of the act. This same privilege, when considered by Parliament in the context of the *Income Tax Act*, led to a recognition that in the interests of collecting revenue, the privilege that might otherwise protect some solicitor's financial records, was dispensable. Parliament did not make that same determination in enacting this Act.

49 In the case at bar, though the appellant contends that the information which he seeks relates only to acts of counsel and therefore should not be privileged, I am satisfied that the narrative portions of the bills of account are indeed communications. This is not analogous to a situation where a lawyer sells a piece of property for the client or otherwise acts on the client's behalf. The research of a subject or the writing of an opinion or any other matter of that type are directly related to the giving of advice. Despite the fact that the appellant is content to have the specific topic of research remain privileged, those other portions of the bills of account still constitute communications for the purpose of obtaining legal advice. In those circumstances the lawyer is not merely a witness to an objective state of affairs, but is in the process of forming a legal opinion. This is true whether the lawyer is conducting research (either academic or empirical), interviewing witnesses or other third parties, drafting letters or memoranda, or any of the other myriad tasks that a lawyer performs in the course of his or her job. It is true that interviewing a witness is an act of counsel, and that a statement to that effect on a bill of account is a statement of fact, but these are all acts and statements of fact that relate directly to the seeking, formulating or giving of legal advice. And when these facts or acts are communicated to the client they are privileged. This is so whether they are communicated verbally, by written correspondence, or by statement of account.

The Other Issues

50 I am satisfied that Rothstein J.'s analysis of the waiver and discretion issues was correct. Given the importance of the right involved - the right to communicate freely and openly with one's solicitor without fear of disclosure of that communication - the case law provides ample support for the Trial Judge's conclusions. The question of whether or not people have waived their right to privilege, absent explicit waiver, is one which must be judged according to all the circumstances. This approach to the application of solicitor-client privilege is clearly described by Muldoon J. in *Double-E Inc. v. Positive Action Tool Western Ltd.* [61] :

> Having, through the canons of thorough discovery proceedings, practically eliminated trial by ambush, the Court ought not, as it did not in *Kulchar*, resort to permitting loss of privilege by inadvertence. [62]

51 With respect to the release of portions of the records, a similar view has been adopted in British Columbia. In *Lowry v. Canadian Mountain Holidays Ltd.* [63] Finch J. emphasized that all the circumstances must be taken into consideration and that the conduct of the party and the presence of an intent to mislead the court or another litigant is of primary importance. I believe that this approach is appropriate in this case, particularly in light of section 25 of the Act, which allows the disclosure of portions of privileged information. This is an attempt to balance the rights of individuals to access

to information, on the one hand, while maintaining confidentiality where other persons are entitled to that confidentiality on the other hand. It would be a perverse result if the operation of section 25 of the Act were thereby to abrogate the discretionary power given to the Government head under section 23 of the Act.

52 I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the Government *qua* client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. As I mentioned earlier, a Government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients.

53 I am not persuaded that the discretion exercised under section 23 of the Act was exercised improperly. There is simply no evidence of this. Furthermore, the decision cannot be impeached merely because no reasons were given. No statute or regulation requires reasons to be given and there is no particular reason why reasons should be necessary in this case. [64]

Conclusion

54 The appeal, therefore, should be dismissed with costs.

Appeal dismissed.

Footnotes

1 That law suit continues. A companion proceeding to remove Mr. Justice Parker as a party from that action is being disposed of along with this matter.

2 This was the second information request for the same documents. The first was unsuccessful and is not relevant in this proceeding.

3 Appeal Book, Volume III, at 415.

4 Letter from the Information Commissioner of Canada dated August 30, 1993, Appeal Book, Volume XIII, at 1420.

5 Reasons for Judgment of Justice Rothstein dated February 26, 1997, at 7.

6 Reasons, at 25.

7 [1982] 1 S.C.R. 860 (S.C.C.).

8 *Berd v. Lovelace* (1577), 21 E.R. 33 (Eng. Ch. Div.); *Dennis v. Codrington* (1580), 21 E.R. 53 (Eng. Ch.).

9 (1831), 39 E.R. 618 (Eng. Ch. Div.).

10 *Ibid*, at 620.

11 8 Wigmore, *Evidence* (McNaughton rev. 1961) para. 2292.

12 David W. Louisell, "Confidentiality, Conformity and Confusion: Privileges in Federal Court Today", (1956-57), 31 Tul. L. Rev. 101 at 110-111.

13 See also E. Morgan, "Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence" (1942-43), 10 U. Chi. L. Rev. 285.

14 J. Sopinka, S. Lederman, and A. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992), at 625-626.

15 Geoffrey C. Hazard, Jr., "An Historical Perspective on the Attorney-Client Privilege", (1978), 66 Calif. L. Rev. 1061 at 1085.

16 See *Slavutych v. Baker* (1975), [1976] 1 S.C.R. 254 (S.C.C.).

17 Rules of Professional Conduct as adopted by Convocation of the Law Society of Upper Canada, 30 January 1987 (as amended).

18 *Wigmore, supra*, note 10, at para. 2285.

19 [1981] 2 S.C.R. 494 (S.C.C.).

20 (1979), [1980] 1 S.C.R. 821 (S.C.C.).

21 *Ibid*, at 836.

22 *Supra*, note 6.

23 *Ibid*, at 875.

24 *Ibid*, at 893.

25 [1969] 2 Ex. C.R. 27 (Can. Ex. Ct.).

26 *Ibid*, at 34.

27 (1793), 30 E.R. 587 (Eng. Ch. Div.).

28 *Ibid*, at 587.

29 (1883), 9 App. Cas. 81 (Eng. H.L.).

30 (1983), 1 D.L.R. (4th) 568 (B.C. C.A.).

31 *Ibid*, at 573.

32 (1821), Jac. 77, 37 E.R. 779 (Eng. Ch. Div.); see also *Bell v. Smith*, [1968] S.C.R. 664 (S.C.C.); *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.) (per Wilson J.).

33 *Ibid*, at 80.

34 *Descôteaux, supra*, note 6, at 877 - 878.

35 *Supra*, note 24, at 33.

36 Reasons for Judgment, at 7.

37 *Descôteaux, supra*, note 6, at 880.

38 Howard, Crane, Hochberg eds. *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell, 1990) at 508.

39 (1852), 9 Hare 735, 68 E.R. 735 (Eng. V.-C.).

40 *Ibid*, at 9 Hare 794.

41 [1900] 2 Ch. 315 (Eng. Ch. Div.); See also *Burton v. Dodd* (1890), 35 Sol. Jo. 39 for a decision that envisions a general privilege but ordered the disclosure of certain aspects in the bill of costs.

42 *Ibid*, at 325.

43 R. Manes and M. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) at 173, where the authors state:
...entries in the lawyer's books and records consisting of dockets, accounts, cheques and the like are also not privileged because they also relate to acts.

44 S.C. 1970-71-72, c. 63 (continued as R.S.C. 1985, c. 1 (5th Supp.), s. 232(1)).

45 (1993), [1995] 2 C.T.C. 347 (B.C. S.C.).

46 *Ibid*, at 3.

47 (1984), 84 D.T.C. 6177 (Ont. H.C.).

48 *Ibid*, at 6179.

49 (1985), 85 D.T.C. 5155 (Ont. H.C.).

50 *Ibid*, at 5157.

51 (1996), 143 D.L.R. (4th) 134 (B.C. S.C. [In Chambers]).

52 *Ibid*, at 138.

53 *Ibid*, at 139 (citations omitted).

54 (1981), 128 D.L.R. (3d) 279 (Fed. T.D.).

55 (1983), 41 O.R. (2d) 328 (Ont. Div. Ct.).

56 *Ibid*, at 337.

57 (1994), 382 A.P.R. 217 (P.E.I. T.D.).

58 *Descôteaux, supra*, note 6, at 893.

59 See Hazard, *supra*, note 14, at 1091.

60 This is in conflict with the approach taken by Stirling J. in *Ainsworth v. Wilding, supra*.

61 (1988), [1989] 1 F.C. 163 (Fed. T.D.).

62 *Ibid*, at 172.

63 (1984), 59 B.C.L.R. 137 (B.C. S.C.) at 143.

64 See generally Morris, "Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate", (1997), C.J.A.L.P. 155.

TAB 9

1996 CarswellNat 3013
Competition Tribunal

Canada (Director of Investigation & Research) v. Washington

1996 CarswellNat 3013, 70 C.P.R. (3d) 317

In the Matter of an application by the Director of Investigation and Research for orders pursuant to section 92 of the Competition Act, R.S.C. 1985, c. C-34

In the Matter of the merger whereby Dennis Washington and K & K Enterprises acquired a significant interest in, and propose to acquire control of, Seaspan International Ltd.

In the Matter of the merger whereby Dennis Washington acquired Norsk Pacific Steamship Company, Limited

The Director of Investigation and Research, Applicant and Dennis Washington K & K Enterprises Seaspan International Ltd. Genstar Capital Corporation TD Capital Group Ltd. Coal Island Ltd. 314873 B.C. Ltd. C.H. Cates and Sons Ltd. Management Shareholders Preference Shareholders Norsk Pacific Steamship Company, Limited Fletcher Challenge Limited, Respondents

Rothstein J.

Heard: October 7-8, 1996
Judgment: October 8, 1996
Docket: CT-96/1

Counsel: *William J. Miller*, *Ann Wallwork*, for Applicant, Director of Investigation and Research
D.G. Morrison, for Respondents, Dennis Washington, K & K Enterprises, C.H. Cates and Sons Ltd.
Robyn M. Bell, for Respondent, Genstar Capital Corp.
Kent Thomson, for Respondent, TD Capital Group Ltd.

***Rothstein J.*:**

1 At the pre-hearing conference in this matter, held on October 7 and 8, 1996, the Tribunal dealt with two motions by the Director. The first motion arose from the oral discoveries of the respondents C.H. Cates and Sons Ltd. ("Cates") and Seaspan International Ltd. ("Seaspan"). The second motion arose from the oral discovery of the respondent Genstar Capital Corporation ("Genstar"). The Tribunal's orders were given from the bench at the pre-hearing conference, with brief reasons. The following is the text of those orders and the edited reasons.

I. Motion Regarding Oral Discovery of Cates and of Seaspan

2 The Director's notice of motion asks that the representative of the respondent Cates be required to re-attend to answer questions relating to the issue of "natural monopoly" as set out in the response at paragraphs I-24 to I-32, and question relating to the facts obtained from third party sources by the respondent or on its behalf by its counsel. He also asks that the respondent Cates advise what information it has from third party sources that is relevant to the issues and produce summaries of the statements of those third parties.

3 The Director also asks that he be allowed to put certain confidential documents of Cates to the Seaspan representative during his oral examination for discovery and vice versa.

A. Further and Better Answers

4 With respect to the request for further and better answers to questions asked of the deponent on discovery for Cates, I will first make some general observations and then deal with specific questions.

5 It seems that a problem may have arisen because of a misunderstanding between the parties as to the propriety of certain questions exploring the "natural monopoly" issue. Counsel for Cates may have thought that the questions were seeking economic or legal opinions whereas counsel for the Director was trying to get an understanding of the respondent's pleading relating to the natural monopoly issue and to obtain factual information regarding that issue. As a general rule, the party examining is entitled to ask questions that are grounded in the pleadings. In doing so, the party examining is entitled to specific, material, relevant facts but not economic or legal opinions.

6 There also seems to have been a misunderstanding as to whether the deponent on discovery had to inform himself about factual information obtained by counsel speaking to third party sources outside the respondent. The law is clear that factual information must be provided and is not protected by privilege even if facts were obtained through an investigation conducted by counsel. [1]

7 The way the questioning developed here, it seems to have led to the asking of broad, general questions about all facts obtained from third-party sources. It may be appropriate, if factual answers are given in response to a particular question, to ask the source of those facts. And it may be necessary that the sources be provided, but that is different from asking a broad, general question as to who all the sources were and what all the information obtained from those sources was. Generally, I think that type of broad inquiry is not appropriate. In this particular case, for practical purposes it may be necessary to place a greater onus on the party being examined than would normally be appropriate, just because the discoveries have gone some distance. This point is dealt with further below.

8 With respect to witness statements or statements from third-party sources, or summaries or "gists" of those statements, rule 458(1)(b) of the *Federal Court Rules*, which guides us in these proceedings, requires that the person being discovered:

> answer, to the best of the person's knowledge, information and belief, any question that ... concerns the names or addresses of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to any matter in question in the action.

There is no reference in the rule to providing statements or summaries of statements obtained from those third-party sources. Counsel for the Director provided some authority to the Tribunal that in Ontario there has been a practice of providing, for discovery purposes, summaries of evidence that witnesses may be expected to give. However, the authority in Ontario seems to be mixed on the point.

9 Rule 458(1)(b) was brought in force on December 6, 1990. While I do not want to place too fine a point on it, I am inclined to think that there was sufficient knowledge amongst lawyers and courts at that time that, had it been the intention to require "gists" or summaries of statements for discovery purposes in the Federal Court, there would have been some reference in rule 458. I do not see such reference. I am not suggesting that there may not be circumstances when "gists" or summaries might not be appropriate, and it may be within the Tribunal's discretion, when applying rule 458, to require such production. But, generally, I do not think that production of such "gists" or statements are contemplated by the rule and I would not require it in this case.

10 That is not to say, however, that "will-say" statements should not be provided for hearing purposes in this matter. I need not say more about that because it has been the Tribunal's practice to require the exchange of "will-say" statements prior to the hearing and there is merit to it in terms of the efficient conduct of the hearing. But here we are talking about providing such statements for discovery purposes, and I do not think that generally rule 458 contemplates such production.

11 Counsel for Cates has brought to the Tribunal's attention *Can-Air Services Ltd. v. British Aviation Insurance Co. Ltd.*,[2] a decision of the Alberta Court of Appeal. In that case the Court indicates that a question framed as, "On what facts do you rely?" is objectionable. Counsel for Cates does not object to counsel for the Director rephrasing questions that ask for factual information in another form.

12 To the extent, then, that the respondent Cates was asked for factual information relating to the issues arising from the pleadings or for the names and addresses of persons who have provided specific, material, factual information to Cates with respect to issues in the case, whether that information be positive or negative, such questions should be answered. The names of expert witnesses need not be provided.

13 Dealing specifically with the questions which the Director has sought to have answered in this motion, paragraph 1(a) of the notice of motion refers to questions relating to "natural monopoly". The Director is entitled to ask factual questions arising from the pleadings. In the course of argument, counsel for Cates agreed that such factual questions were not objectionable. Questions going to opinions need not be answered.

14 During argument on this motion, counsel for Cates gave some further explanation of the way in which the term "natural monopoly" was being used by Cates in its pleadings. The Director is entitled to rely upon that explanation for purposes of developing questions and seeking factual information with regard to the natural monopoly issue.

15 Paragraph 1(b) of the notice of motion asks for "facts, if any, additional to those provided at the examination which are within the knowledge of the said Respondent, including its counsel, based upon third party sources." As I previously indicated, generally that type of blanket question is not appropriate. However, in the circumstances of this case, because discoveries have proceeded some distance, practicality dictates, and the parties have agreed, that the deponent for Cates should review the information obtained from third-party sources, whether that information was obtained directly by Cates or by its counsel, for factual information. To the extent that there is factual information of which the deponent was not aware previously, he should indicate anything additional to or that changes the answers that he has already given. Again, additional information or changed information should be restricted to material facts and not opinions. For this purpose, the deponent should re-attend, although if the parties agree, the answers can be given in writing.

16 Paragraph 1(c) of the notice of motion asks that the deponent advise himself with respect to the matters set out in paragraphs 1(a) and 1(b). I have already dealt with that in the disposition of paragraphs 1(a) and 1(b). Paragraph 1(d) asks that Cates:

> advise if it has information from third-party sources which are facts relevant to the issues in this proceeding, and what those facts are, if not otherwise disclosed in the response of the witness Towill.

Also in paragraph 1(d), the Director asks for the production of summaries of statements, including the identity of the makers thereof, with respect to information obtained from third parties. Both these points also have been dealt with.

B. Confidential Documents

17 The Director seeks to place four confidential documents before the deponents on discovery of Cates and Seaspan and to ask them questions about the information in those documents. The documents are confidential to the respondent *other than* the one whose deponent will be questioned about them. The respondents Cates and Seaspan object on the ground that the documents contain sensitive marketing information of the other party that is not already known to the party for whom the deponent is appearing. Because I do not want these reasons, which will be public, to subvert the fact that I am not ordering any further disclosure of the documents, I will indicate only in broad terms why the four documents should not be disclosed to the deponent being examined.

18 I am satisfied from what counsel for Cates and Seaspan has told me that there is no objection to questions dealing with the substance of the information in the documents that is within the knowledge of the deponent properly

informed. Such questions may be asked and answers must be given. I am further satisfied that there is some material in the documents that should not be disclosed. The information, as far as I can appreciate it, is sensitive marketing information. I do not think it would be in the interest of any party that this type of information be disclosed when it does not appear absolutely necessary to do so.

19 The Director argues that the force of the examination might be somewhat stronger if a document could be placed in front of the witness. However, these are not documents which the respective deponents have even seen and, therefore, I find that argument somewhat marginal in these circumstances. The Director's counsel can ask the kind of questions that he wishes to ask, obtain the information that the deponent has and obtain whatever admissions he can obtain, to all intents and purposes, without the actual disclosure of the documents to the deponents.

II. Motion Regarding Oral Discovery of Genstar

20 The Director's notice of motion asks that the representative of the respondent Genstar be required to re-attend to answer questions relating to the competition issues which influenced the negotiations between Genstar and the Washington group leading to the sale of Seaspan (in particular questions 711 and 712) and relating to third party sources.

21 With respect to the first point, counsel for the Director did not convince me with respect to questions 711 and 712. As I understand it, the questions relate to prior proposed transactions that did not go forward as originally intended. It is not clear to me why these questions are relevant to the issues in this proceeding. However, without having to address that question, it does seem to me that the questions, in substance, seek the legal advice that was given to Genstar with regard to those prior proposed transactions. In that sense, I think the questions are objectionable as encroaching upon solicitor-client privilege and need not be answered.

22 Counsel for the Director did refer to an objection by counsel for Genstar during the discovery, which counsel for the Director took to purport to restrict the Director from asking questions about any "competition issues". I do not read the objection that way. However, in an abundance of caution, I will say that, to the extent that the deponent has factual information about a marketplace and about the kind of considerations that apply in determining whether a merger or a proposed merger may substantially lessen competition, questions pertaining to those factual matters are appropriate.

23 Regarding the second point, counsel for the Director concedes that he has received from Genstar's counsel a list of names of third parties who have information about the issues. However, he argues that so many names have been given that it is difficult to use the list and to determine who gave important information as opposed to information of marginal importance. Counsel for Genstar says that, with respect to people under the control of Genstar, it has given all relevant names and has indicated who are the persons who have the most knowledge. With regard to the other names, she says that Genstar is not in a position to know, at least not in every case, the extent of the involvement of individuals and is unable to say who has important information and who does not.

24 In reply, counsel for the Director submits that it would have been open to him, in asking specific questions, to enquire as to the source of the deponent's knowledge and thus find out the names of the third parties from whom the deponent obtained specific information, where the deponent's information came from third parties. He says that he should not be precluded from asking, at the end of the discovery, a compendious question summarizing what he could have obtained asking individual questions.

25 There is no allegation here of bad faith or disingenuousness against Genstar and no suggestion has been made that Genstar was trying to impede counsel for the Director by giving so many names that he would practically be unable to deal with them. It would appear that Genstar has complied with the letter of rule 458(1)(b). The Tribunal accepts that it may be difficult for Genstar to know the extent of knowledge of persons not under the control of Genstar. In the circumstances, if Genstar is in a position to advise the Director of any names of persons on the list already provided whose knowledge is not material or who have had a peripheral involvement only, Genstar should do so. Otherwise,

counsel for the Director has the names and it is up to him to take whatever steps he deems appropriate in communicating with such persons in an effort to advance the Director's case.

Order accordingly.

Footnotes

1 See *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] C.T.C. 353 (Ex. Ct).

2 [1989] 1 W.W.R. 750.

TAB 10

2018 CAF 24, 2018 FCA 24
Federal Court of Appeal

Vancouver Airport Authority v. Commissioner of Competition

2018 CarswellNat 3820, 2018 CarswellNat 98, 2018 CAF 24,
2018 FCA 24, 288 A.C.W.S. (3d) 232, 420 D.L.R. (4th) 163

VANCOUVER AIRPORT AUTHORITY (Appellant) and COMMISSIONER OF COMPETITION (Respondent)

David Stratas, Richard Boivin, J.B. Laskin JJ.A.

Heard: October 17, 2017
Judgment: January 24, 2018
Docket: A-149-17

Proceedings: reversing *Commissioner of Competition v. Vancouver Airport Authority* (2017), 2017 Trib. conc. 6, 2017 CarswellNat 8271, 2017 Comp. Trib. 6, 2017 CarswellNat 1725, Denis Gascon Chair (Competition Trib.)

Counsel: Calvin S. Goldman, Q.C., Julie Rosenthal, Ryan Cookson, for Appellant
Jonathan Hood, Katherine Rydel, Ryan Caron, Antonio Di Domenico, Jonathan Chaplin, for Respondent

***David Stratas J.A.*:**

1 The Vancouver Airport Authority appeals from the order dated April 24, 2017 of the Competition Tribunal (*per* Gascon J.): 2017 Comp. Trib. 6 (Competition Trib.).

2 In the Competition Tribunal, the Commissioner of Competition has brought competition proceedings against the Airport Authority for alleged abuse of dominant position. In proceedings such as these, parties whose conduct is impugned are entitled to pre-hearing disclosure. The Commissioner has disclosed many documents to the Airport Authority. But he has refused to produce roughly 1,200 documents. He says that these documents are covered by a class privilege that protects the confidentiality interests of those who have given him documents and information during his investigations.

3 In response, the Airport Authority brought a motion seeking disclosure of the documents. Before the Competition Tribunal, it submitted that the alleged class privilege does not exist and so the documents should be disclosed.

4 In well-expressed, clear and comprehensive reasons, the Competition Tribunal found that the alleged class privilege exists. Key to its reasons is its application of earlier authorities of this Court that it believed confirmed the existence of a class privilege. By order dated April 24, 2017, the Competition Tribunal dismissed the Airport Authority's motion for disclosure.

5 The Airport Authority appeals from that dismissal. The appeal turns on whether the alleged class privilege exists. I find that it does not. The earlier authorities of this Court that the Competition Tribunal invoked in support of its decision do not apply. In any event, they have been overtaken by later Supreme Court jurisprudence. This jurisprudence is against recognizing a class privilege in this case.

6 Therefore, I would allow the appeal, quash the order of the Competition Tribunal and remit the motion to it for redetermination.

A. Background

7 The Commissioner of Competition has applied to the Competition Tribunal for relief against the Airport Authority under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34. The relief stems from the Airport Authority's decision to allow only two in-flight caterers to operate at the Vancouver International Airport.

8 In his application, the Commissioner alleges that the Airport Authority controls the market for "galley handling" at the airport, the Airport Authority acted with an anti-competitive purpose when deciding to permit only two in-flight caterers to operate at the airport, and a "substantial prevention or lessening of competition" has resulted, causing "higher prices, dampened innovation and lower service quality."

9 The Airport Authority denies the Commissioner's allegations and defends against the relief sought. It asserts that it has been acting throughout to discharge its public interest mandate as a non-profit entity, including enhancing the airport's ability to attract and retain flights, thereby generating economic development for Vancouver and, more broadly, for British Columbia and the rest of Canada. The Airport Authority adds that it determined, legitimately, that allowing additional caterers to operate at the airport would imperil the viability of the two already operating at the airport. It also alleges that it does not substantially or completely control the market for galley handling at the airport, it did not have an anti-competitive purpose, and its decision to restrict the number of caterers at the airport did not lessen competition or cause deleterious effects.

10 In his investigation, the Commissioner of Competition obtained a number of orders under section 11 of the Act. These required four in-flight catering firms, two operating at the airport and two who want to operate at the airport, to produce to the Commissioner a broad array of documents.

11 The Commissioner of Competition delivered an affidavit of documents in the proceeding. That affidavit disclosed that the Commissioner had roughly 11,500 relevant documents in his possession, power or control. But he was willing to produce fewer than 2,000. Most of these were the Airport Authority's own documents.

12 Almost all of the remaining documents, roughly 9,500, were withheld in whole or in part on the basis of an alleged public interest class privilege. These documents comprise much of the case the Commissioner has against the Airport Authority.

13 The Airport Authority brought a motion for disclosure of the 9,500 documents. On the day the motion was to be heard, the Commissioner delivered an amended affidavit of documents. In that affidavit, he waived privilege over roughly 8,300 documents. This is 86% of the documents originally said to be covered by a class privilege. Roughly 1,200 documents — 12% of the documents originally withheld — remained withheld exclusively on the basis of a public interest class privilege.

14 The motion for disclosure went forward and concerned these 1,200 documents. The Commissioner continued to assert that these remaining documents were covered by a class privilege and could not be disclosed. The Commissioner argued that this class privilege covered all "records created or obtained by the Commissioner, [his] employees, servants, agents or solicitors or obtained from third parties during the Commissioner's investigations."

15 The Airport Authority urged the Competition Tribunal to reject the Commissioner's assertion of a class privilege. In its view, the Competition Tribunal should instead determine on a case-by-case or document-by-document basis whether a public interest privilege exists concerning any of the 1,200 documents.

16 In its decision, the Competition Tribunal disagreed with the Airport Authority and dismissed its motion for disclosure. It upheld the existence of the alleged class privilege and, thus, none of the 1,200 documents needed to be disclosed. Given this, it did not need to examine whether any of the individual documents were subject to public interest privilege on a case-by-case or a document-by-document basis.

17 The Airport Authority appeals from the dismissal of its motion for disclosure to this Court. The appeal is under subsection 13(1) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.).

B. Standard of review

18 In appeals to this Court from the Competition Tribunal, legal questions are to be reviewed for correctness: *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 (S.C.C.) at paras. 34 and 39; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 F.C. 185 (Fed. C.A.).

19 In this appeal, the central question before us is what is legally required for a court to recognize a class privilege. This is a legal question to be reviewed for correctness. In my view, for the reasons that follow, the Competition Tribunal erred in answering this question. Alternatively, in recognizing a class privilege in the circumstances of this case and based on this evidentiary record, the Competition Tribunal proceeded on the basis of an error in law or in legal principle. Its decision cannot stand.

C. Preliminary considerations

20 The submissions to us, truly excellent as they were, touched on many different concepts, some aspects of which were complex. These included the admissibility of evidence, pre-hearing disclosure obligations, and, more generally, procedural fairness obligations. The complexity was magnified by the fact that these concepts potentially have different content in court proceedings and administrative proceedings. At the outset, it is worth describing these concepts, how they operate and interrelate, and where they fit in the whole scheme of things.

(1) The admissibility of evidence

21 In court proceedings, the "fundamental 'first principle'" is that "all relevant evidence" going to the truth of the matter before the court "is admissible until proven otherwise": *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.) at p. 288, [1991] 6 W.W.R. 673 (S.C.C.) [hereinafter *Gruenke*] at p. 688 and see, *e.g.*, *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161, 400 D.L.R. (4th) 723 (F.C.A.) at paras. 79-82.

22 There are exceptions to this first principle: sometimes relevant evidence is inadmissible. For example, hearsay is ordinarily inadmissible. Another exception is public interest privilege: evidence covered by a legally recognized public interest privilege is inadmissible.

23 As in court proceedings, administrative proceedings are often directed at getting at the truth of the matter. What happened? Who did what? How was it done? Why? With what effects? As a general rule, within the limits of materiality and proportionality, administrative decision-makers want to receive all possible evidence bearing on these questions. They too are on a quest for the truth of the matters before them and they often formulate their evidentiary rules with that in mind. This is certainly true for the administrative decision-maker here, the Competition Tribunal.

24 And just like courts, many administrative decision-makers recognize exceptions to general rules of admissibility.

25 The law of evidence before administrative decision-makers is not necessarily the same as that in court proceedings. An administrative decision-maker's power to admit or exclude evidence is governed exclusively by its empowering legislation and any policies consistent with that legislation: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 (S.C.C.) at para. 16; on how to interpret legislation that empowers administrators, see *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609 (S.C.C.), *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 (S.C.C.), *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) and *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.). The empowering legislation, properly interpreted, might allow an administrative decision-maker to admit material that courts would ordinarily reject as inadmissible.

26 This being said, privileges designed to protect fundamental confidentiality interests such as legal professional privilege have the same force in administrative proceedings as in court proceedings. Any administrative decisions or legislation governing administrative decision-makers that weakens or undercuts the privileges may be, respectively, unreasonable or infringe the protection of privacy interests in section 8 of the Charter: *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 (S.C.C.); *R. v. Lavallee, Rackel & Heintz*, 2002 SCC 61, [2002] 3 S.C.R. 209 (S.C.C.).

27 In the case before us, the Competition Tribunal recognizes, and all before us accept, that evidence covered by a legally recognized public interest privilege is inadmissible.

(2) Pre-hearing disclosure obligations: an aspect of procedural fairness

28 Administrative proceedings must be procedurally fair. The level of procedural fairness that must be given varies according to a number of factors: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 (S.C.C.) at paras. 23-28.

29 Before us are administrative proceedings that are adjudicative in nature. Usually in such proceedings, the requirements of procedural fairness are high: *Baker* at para. 23; *Bell Canada v. C.T.E.A.*, 2003 SCC 36, [2003] 1 S.C.R. 884 (S.C.C.). This is particularly so where the proceedings have the potential to significantly affect a party's interests: *Baker* at para. 25; *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.) at p. 1113, (1980), 110 D.L.R. (3d) 311 (S.C.C.) at p. 322; *R. v. Higher Education Funding Council* (1993), [1994] 1 All E.R. 651 (Eng. Q.B.) at p. 667. The Competition Tribunal correctly found that "a high degree of procedural protection is needed in Tribunal proceedings because of its court-like process" and "[t]he Tribunal resides very close to, if not at, the 'judicial end of the spectrum', where the functions and processes more closely resemble courts and attract the highest level of procedural fairness" (at para. 169).

30 The procedural fairness obligations require the Commissioner of Competition to disclose to the Airport Authority evidence that is relevant to issues in the proceedings. This is necessary for the Airport Authority to know the case it has to meet and to fairly defend itself against the allegations. Often — as the Commissioner has recognized in this case by releasing roughly 8,300 documents from his investigatory file — this includes exculpatory material or other material resting in the investigatory file that could assist the party whose conduct is impugned in testing the evidence called by the Commissioner or in building its own case: see, *e.g.*, in other contexts, *Shooters Sports Bar Inc. v. Ontario (Alcohol & Gaming Commission)* (2008), 238 O.A.C. 9, 168 A.C.W.S. (3d) 580 (Ont. Div. Ct.); *Markandey v. Ontario (Board of Ophthalmic Dispensers)*, [1994] O.J. No. 484 (Ont. Gen. Div.) at para. 43; *Thompson v. Chiropractors' Assn. (Saskatchewan)*, [1996] 3 W.W.R. 675, 36 Admin. L.R. (2d) 273 (Sask. Q.B.) at paras. 3-6; *Shambleau v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1629, [2003] O.J. No. 4089 (Ont. Div. Ct.) at para. 6; *Fauth, Re*, 2017 ABASC 3 (Alta. Securities Comm.); *Law Society of Upper Canada v. Savone*, 2015 ONLSTA 26 (L.S. Trib. App. Div.) at para. 23, aff'd 2016 ONSC 3378, [2016] O.J. No. 2988 (Ont. Div. Ct.). In some cases, there may be limits on the obligation to disclose based on materiality, proportionality, applicable legislative standards and the nature of the proceedings: *Ciba-Geigy Canada Ltd., Re*, [1994] 3 F.C. 425, 55 C.P.R. (3d) 482 (Fed. T.D.), affirmed (1994), 56 C.P.R. (3d) 377, 170 N.R. 360 (Fed. C.A.); *Sheriff v. Canada (Attorney General)*, 2006 FCA 139, [2007] 1 F.C.R. 3 (F.C.A.).

(3) The relationship between issues of admissibility and issues of pre-hearing disclosure

31 The obligation to disclose is not necessarily limited by the law of admissibility. Material that is inadmissible can be subject to a disclosure obligation.

32 To illustrate this, suppose that an authority such as the Commissioner of Competition possesses a document written by one person recounting a discussion with a particular individual. Although that document may be hearsay and arguably inadmissible to prove the contents of what the particular person said, nevertheless the requirements of

procedural fairness may require that it be disclosed. The document may be extremely useful, indeed necessary, to the party whose conduct is impugned in the proceedings.

33 For example, during a party's pre-hearing preparation, it may decide that it should interview the particular individual whose words are recounted in the document. Perhaps it may decide to call that person as a witness so that the truth of what was said is in evidence. Maybe the fact that the discussion took place at a particular time is an important fact in the scheme of things. And perhaps the document will be necessary to put to an adverse witness during cross-examination.

34 However, sometimes inadmissible evidence cannot be disclosed. One instance is where privileges that protect fundamentally important interests in confidentiality apply, the privileges have not been waived, and no other exception recognized by law applies. For example, unless legal professional privilege has been waived, material covered by it is normally confidential for all purposes, in just about all circumstances; only the rarest of circumstances will displace the privilege, such as criminal cases where innocence is at stake as a result of the non-disclosure: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 (S.C.C.) at para. 43.

35 The central issue before us is whether the 1,200 remaining documents that the Commissioner refuses to disclose are covered by a public interest class privilege. Assuming the privilege exists, the Commissioner holds the privilege and has not waived it. At least no one has argued waiver either by explicit act or implied conduct: see, *e.g.*, *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 (F.C.A.) at paras. 253-262 (dissenting, but the majority not disagreeing with the legal principle). Accordingly, in the circumstances of this case, if the class privilege exists, *prima facie* the Commissioner need not disclose any documents covered by it. If the class privilege does not exist and the Commissioner wants to maintain confidentiality over individual documents that were said to be in that class, the Commissioner will have to claim a public interest privilege on a document-by-document or case-by-case basis.

D. The public interest privilege claimable on a document-by-document or case-by-case basis compared with a class privilege: how do they differ?

36 What is the nature of public interest privilege, claimable on a document-by-document or case-by-case basis? When does it exist?

37 Certain basic principles are at stake in a claim for public interest privilege. In *Carey v. Ontario*, [1986] 2 S.C.R. 637 (S.C.C.) at p. 647, (1986), 35 D.L.R. (4th) 161 (S.C.C.) at p. 169, the Supreme Court identified a basic tension resting at the heart of a claim for public interest privilege:

> It is obviously necessary for the proper administration of justice that litigants have access to all evidence that may be of assistance to the fair disposition of the issues arising in litigation. It is equally clear, however, that certain information regarding governmental activities should not be disclosed in the public interest.

38 Another formulation of this is found in a classic British authority:

> It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

(*Conway v. Rimmer*, [1968] 1 All E.R. 874 (U.K. H.L.) at p. 880.)

39 A leading Canadian text puts the matter this way:

> The court, therefore, must balance the possible denial of justice that could result from non-disclosure against the injury to the public arising from disclosure of public documents which were never intended to be made public.

(Lederman, Bryant and Fuerst, *The Law of Evidence in Canada*, 4th ed. (Markham, Ont.: LexisNexis, 2014) at p. 1074.)

40 We engage with these competing interests by rigorously assessing a claim for public interest privilege using four criteria:

> First, the [evidence] must originate in a confidence.... Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be 'sedulously fostered' in the public good ('Sedulous[ly]' being defined in the New Shorter Oxford English Dictionary on Historical Principles (6th ed. 2007), vol. 2, at p. 2755, as 'diligent[ly]... deliberately and consciously'). Finally...the court must consider whether in the instant case the public interest served by [confidentiality over the evidence] outweighs the public interest in getting at the truth.

(*R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477 (S.C.C.) at para. 53, citing *Wigmore on Evidence* (McNaughton Rev. 1961), vol. 8, at § 2285.)

41 The four criteria from *Wigmore* are not "carved in stone" but rather provide a "general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court": *Gruenke* at p. 290 S.C.R., p. 689 W.W.R, cited with approval in *National Post* at para. 53; *Globe & Mail c. Canada (Procureur général)*, 2010 SCC 41, [2010] 2 S.C.R. 592 (S.C.C.) at para. 54.

42 No one disputes that the Commissioner could try to claim public interest privilege over the 1,200 remaining documents on a document-by-document or case-by-case basis. But in this case, as his primary position, the Commissioner does not assert that documents are covered by a case-by-case privilege.

43 Instead, the Commissioner says that the 1,200 documents are part of a group of 9,500 documents, all of which are covered by a class privilege. In this case, the class is said to cover all "records created or obtained by the Commissioner, [his] employees, servants, agents or solicitors or obtained from third parties during the Commissioner's investigations."

44 The Commissioner says that this class privilege is necessary. Without it, those complaining about anti-competitive conduct, fearing reprisal, would be reluctant to complain to the Commissioner and offer candid evidence in support of their complaints.

45 A class privilege applies if the documents and information fall within a class that legally qualifies for blanket protection from disclosure. Documents and information are protected from disclosure only because of their membership in a protected class; their contents and the circumstances surrounding them do not otherwise matter. In the words of the Supreme Court, a class privilege applies "without regard to the particulars of the situation" and "is insensitive to the facts of the particular case": *National Post* at para. 42.

46 Class privileges are granted because of the need to protect a particular relationship of importance. "Once the relevant relationship is established between the confiding party and the party in whom the confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation": *National Post* at para. 42. The class protection is granted because "anything less than blanket confidentiality" would "fail to provide the necessary assurance[s]" to parties in the relationship to perform as they must within the relationship: *National Post* at para. 42; *Lizotte c. Aviva Cie d'assurance du Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521 (S.C.C.) at paras. 39-40.

47 In contrast, a case-by-case or document-by-document public interest privilege looks at the nature of a particular document or information and the circumstances surrounding it, not its membership in a class. A party claiming the privilege over certain documents must make an affirmative case, document-by-document, to successfully shield them from disclosure. Unlike a class privilege, this sort of privilege offers no presumptive or default protection from disclosure.

48 So, for example, take the relationship of legal professional and client, established for the purpose of the giving and obtaining of legal advice. Loosely put, the law recognizes that the entire class of all communications within that relationship, including all documents relating to the giving or seeking of legal advice, must be protected on a default, blanket basis from disclosure. The blanket nature of the privilege provides certainty. If only case-by-case or document-by-document privilege could be claimed, uncertainty would be created about whether some information or documents within the relationship might have to be disclosed. The uncertainty might lead clients not to seek legal advice or the legal advice would have to be couched or be less than frank, or both. The effect? The democratic right of people to ascertain their full legal rights and make well-informed decisions would suffer, with resulting damage to the administration of justice. The paramount importance of the relationship between legal professionals and their clients and the vital objectives served by it justify the blanket, presumptive, default protection of confidentiality that class privilege provides.

49 Due to the breadth and generality of a class privilege, it can be blunt, sweeping and indiscriminate in operation and, thus, can work against the truth-seeking purpose of a court or administrative proceeding. A case-by-case or document-by-document privilege — tailored and case-specific as it is — can be more consistent with the truth-seeking purpose.

50 The Supreme Court put this point as follows:

> ...[W]hile the result of any privilege is to impede the search for truth, and thereby to run the risk of an injustice to the persons opposed in interest to the claimant, a class privilege is more rigid than a privilege constituted on a case-by-case basis. It does not lend itself to the same extent to be tailored to fit the circumstances.

(*National Post* at para. 46.)

51 In *Carey*, the Supreme Court expressed concern about the "absolute character of [a class] protection...without regard to subject matter, to whether [the documents] are contemporary or no longer of public interest, or to the importance of their revelation for the purpose of litigation" (at p. 659 S.C.R., p. 178 D.L.R.).

52 Because of these concerns, traditionally courts have been reluctant to find class privileges. Only "very few" class privileges have been found: *National Post* at para. 42. The Supreme Court has gone as far as to say that public interest claims on a class basis will have "little chance of success": *Carey* at p. 655 S.C.R., p. 175 D.L.R. Class privileges can be found only where there is "clear and compelling evidence [they are] necessary" or "really necessary": *R. v. Chief Constable of the West Midlands Police*, [1994] 3 All E.R. 420 (U.K. H.L.) at p. 446; *Conway*, above at p. 888.

53 Recently, the Supreme Court has set the threshold for finding new class privileges as high as can be. New class privileges can be recognized only if they are supported by policy rationales as compelling as the class privilege over solicitor-client communications: *National Post* at para. 42; *Gruenke* at p. 288 S.C.R., p. 688 W.W.R. How compelling is that? The policy rationale behind solicitor-client privilege is an interest protected by our highest law, the Constitution, specifically the privacy interest under section 8 of the Charter: *Lavallee, Rackel & Heintz*, above.

54 Commenting on this, Lederman *et al.*, above observe that new class privileges demand "that the external social policy in question is of such unequivocal importance that it cannot be sacrificed before the altar of the courts" (at p. 919).

55 The Supreme Court also suggests that class privileges — privileges that are "more rigid than a privilege constituted on a case-by-case basis" and cannot "be tailored to fit the circumstances" — are inapt where the relationship said to give rise to the need for blanket confidentiality varies in practice and depends upon the circumstances: *National Post* at paras. 44-46; *Bisaillon c. Keable*, [1983] 2 S.C.R. 60 (S.C.C.) at pp. 97-98, (1983), 2 D.L.R. (4th) 193 (S.C.C.) at p. 223. Further, the existence of a comparable class privilege in "other common law jurisdictions with whom we have strong affinities" can assist in the determination: *National Post* at paras. 43, 47-48.

56 The extremely high threshold for the recognition of class privileges means that to date only four have been recognized — legal professional privilege, litigation privilege, informer privilege and settlement privilege: *Lizotte*, above at paras. 33-36.

57 As well, this extremely high threshold has led the Supreme Court to opine that "in future such 'class' privileges will be created, if at all, only by legislative action": *National Post* at para. 42. For good measure, the Supreme Court repeated this in *Harkat, Re*, 2014 SCC 37, [2014] 2 S.C.R. 33 (S.C.C.) at para. 87.

58 *Harkat* shows how high the threshold for establishing a class privilege now is. In *Harkat* the provisions of the *Immigration and Refugee Protection Act* concerning security certificates fell before the Supreme Court for consideration.

59 Broadly speaking, security certificates are issued against those who are reasonably believed to have come to Canada, among other things, for the purpose of engaging in terrorism. Once the certificates are issued, the Federal Court must assess their reasonableness. If the security certificate is found to be reasonable, the certificate becomes the equivalent of an order requiring the person named in the certificate to be removed from Canada.

60 Often in the Federal Court proceedings to assess reasonableness much sensitive evidence is adduced. This can include evidence from human intelligence sources — evidence of the highest level of sensitivity. Improper disclosure of that sort of evidence can have the highest of consequences: the lives of sources whose identities are revealed can be put at grave risk. It is notorious in international intelligence circles that improper disclosure has sometimes killed human intelligence sources.

61 A stronger policy rationale for a class privilege imposing blanket confidentiality over a class of evidence can scarcely be imagined. But in *Harkat*, the Supreme Court — citing its reluctance to recognize new class privileges in *National Post* — declined to recognize a class privilege covering evidence from human intelligence sources. As in *National Post*, it held that if a class privilege is warranted, Parliament, not the courts, should enact one (at para. 87):

> Nor, in my view, should this Court create a new privilege for [Canadian Security Intelligence Service] human sources. This Court has stated that "[t]he law recognizes very few 'class privileges'" and that "[i]t is likely that in future such 'class' privileges will be created, if at all, only by legislative action": *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 42. The wisdom of this applies to the proposal that privilege be extended to [Canadian Security Intelligence Service] human sources: *Canada (Attorney General) v. Almalki*, 2011 FCA 199, [2012] 2 F.C.R. 594, at paras. 29-30, *per* Létourneau J.A. If Parliament deems it desirable that [Canadian Security Intelligence Service] human sources' identities and related information be privileged, whether to facilitate coordination between police forces and [Canadian Security Intelligence Service] or to encourage sources to come forward to [Canadian Security Intelligence Service] (see [dissenting] reasons of Abella and Cromwell JJ. [in *Harkat*]), it can enact the appropriate protections.

62 In light of these authorities, it is perhaps not far from the truth to say that it is now practically impossible for a court, acting on its own, to recognize a new class privilege.

E. Analysis

63 Based on the foregoing principles, the Commissioner's claim to a public interest privilege over the roughly 1,200 documents he has refused to disclose must be rejected. I offer several reasons in support of this conclusion.

— I —

64 The Commissioner stresses that he is not asking this Court to recognize a new class privilege. He says that this Court has already recognized a class privilege covering all documents and information supplied to the Commissioner from third party sources during the Commissioner's investigation: *D & B Co. of Canada Ltd. v. Canada (Director of*

Investigation & Research) (1994), 58 C.P.R. (3d) 353, 176 N.R. 62 (Fed. C.A.); *Hillsdown Holdings (Canada) Ltd. v. Canada (Director of Investigation & Research)*, [1991] F.C.J. No. 1021 (Fed. C.A.).

65 The Commissioner adds that in cases like *National Post*, the Supreme Court has not cast doubt on already recognized class public interest privileges, such as the one recognized in *D&B Companies* and *Hillsdown*.

66 Thus, to the Commissioner, this case is a simple one: we need only apply the class privilege recognized in *D&B Companies* and *Hillsdown*.

67 The Competition Tribunal stated, properly, that it is bound by decisions of our Court. Accordingly, it considered itself bound by this Court's recognition of the class privilege in *D&B Companies* and *Hillsdown*. It applied the class privilege to the 1,200 documents and refused to order that they be disclosed.

68 The Airport Authority disagrees with both the Commissioner and the Competition Tribunal. It submits that this Court's decisions in *D&B Companies* and *Hillsdown* do not recognize the class privilege the Commissioner seeks to assert in this case. In those cases, this Court applied a deferential standard of review and decided only that the Competition Tribunal had made, in today's terms, a reasonable decision. Whether the Competition Tribunal was *correct* in recognizing the class privilege was not before this Court. After *D&B Companies* and *Hillsdown*, the standard of review changed to correctness as a result of *Superior Propane* and *Tervita*, both above. Thus, according to the Airport Authority, the case at bar is the first time this Court has been called upon to assess on the standard of correctness whether the Commissioner has the class privilege it asserts.

69 In the alternative, the Airport Authority says that if those cases do recognize the class privilege, *D&B Companies* and *Hillsdown* can no longer be seen as good authority because they have been overborne by later Supreme Court jurisprudence: *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149 (Fed. C.A.) (circumstances where this Court may depart from earlier authorities); *National Post*.

70 I agree with the Airport Authority. First, I shall examine *D&B Companies*.

71 *D&B Companies* must be seen in light of the standard of review this Court applied in that case. In *D&B Companies*, this Court applied a deferential standard of review. It stated that "a certain curial deference is due to tribunals even on statutory appeals when the issue in question, whether factual or legal, is within the particular expertise of the tribunal" (at p. 357 C.P.R., para. 5 N.R.). In this Court's view, the necessary balancing of the interests between disclosure and confidentiality drew upon "special expertise in the problems of protecting competition in the market place" and, thus, was within the preserve of the Competition Tribunal (*ibid.*). Accordingly, the Court "should not lightly substitute its own views of the proper balance in these circumstances" (*ibid.*).

72 This Court also observed that class privileges "are created as a matter of policy" and the assessment of policy was "within the competence" of the Competition Tribunal, not the Court (at p. 358 C.P.R., para. 7 N.R.). In its view, the Supreme Court decision in *Gruenke*, above, on the recognition of class privileges generally, was not inconsistent with what the Tribunal had done (*ibid.*).

73 In my view, this Court decided in *D&B Companies* that the Tribunal's recognition of a public interest privilege was owed deference and could not be interfered with. This Court did not affirm for itself, nor did it need to affirm for itself given the deferential standard of review, that a class privilege exists.

74 *Hillsdown* is similar to *D&B Companies*. There, the Competition Tribunal did not allow disclosure of certain interview notes. It relied on an earlier Tribunal decision that acknowledged the need to keep certain notes confidential in the public interest so that those making a complaint would not suffer reprisal. This Court applied a deferential standard in its review of the Tribunal's decision, finding "no reviewable error" because the conclusion was "reasonably open" to the Tribunal (at paras. 1-2). In *Hillsdown*, this Court did not affirm for itself that a class privilege exists.

75 I would add that had this Court in *D&B Companies* or *Hillsdown* affirmed that the public interest class privilege actually exists, these holdings can no longer stand in light of later Supreme Court cases such as *National Post* and *Harkat*. To some extent this point has been made during the discussion of these cases earlier in these reasons at paras. 46-62. And this point will be developed further below when I measure the Commissioner's claim for a class privilege against these cases.

76 The Commissioner cites other cases that support the existence of the public interest class privilege it asserts: *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5386, 231 A.C.W.S. (3d) 922 (Ont. S.C.J.) at para. 15; *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2016 BCSC 97, 262 A.C.W.S. (3d) 883 (B.C. S.C.) at paras. 11 and 25; *Canada (Commissioner of Competition) v. Toshiba of Canada Ltd.*, 2010 ONSC 659, 100 O.R. (3d) 535 (Ont. S.C.J.) at para. 27; *Commissioner of Competition v. Air Canada*, 2012 Comp. Trib. 21 (Competition Trib.) at paras. 3-6; *Canada (Commissioner of Competition) v. United Grain Growers Ltd.*, 2002 Comp. Trib. 35 (Competition Trib.) at para. 59. None of these bind this Court. All of these rely directly or indirectly upon *D&B Companies*, *Hillsdown*, or both.

77 In dismissing the Airport Authority's motion for disclosure, the Competition Tribunal described *D&B Companies*, *Hillsdown* and its own case law as "long standing and unanimous" on the existence of the class privilege, considered it binding, and relied upon it in dismissing the Airport Authority's motion (at para 5.). This was an error in law.

— II —

78 It is not possible on the jurisprudence for this Court or the Competition Tribunal to recognize a new class privilege in these circumstances. See the discussion at paras. 46-62, above. The blunt, sweeping nature of a class privilege, even over the public interest in the truth-finding function of the Competition Tribunal, is not supportable in these circumstances. Further, as both *National Post* and *Harkat* suggest, these days the sort of class privilege the Commissioner seeks should only be granted by Parliament.

79 Parliament has already spoken to confidentiality and privilege concerns in the Act. Its failure to enact the class privilege the Commissioner seeks is noteworthy. This provides another reason why this Court should not construct one itself.

80 The *Competition Act* and *Competition Tribunal Rules*, SOR/2008-141 provide a scheme to address the Commissioner's concerns about confidentiality and privilege. For example, the Act requires inquiries to be private (subsection 10(3)), allows third parties to claim solicitor-client privilege (section 19), demands that the Bureau keep a wide range of information obtained confidential (subsection 29(1)) and provides protection for whistleblowing employees against employer reprisals (sections 66.1-66.2). The Rules explain that the public is entitled to access all documents filed or received in evidence subject only to a confidentiality order (sections 22, 66).

81 These avenues to protect confidentiality under the Act and Rules also show that lesser measures are available, short of the extreme step of recognizing a public interest class privilege over all materials gathered by the Commissioner from third parties during his investigation: see also the discussion in *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2003), 28 C.P.R. (4th) 335 (Competition Trib.) at para. 69.

— III —

82 Even if the threshold for judicial recognition of a class privilege were not as high as the Supreme Court has set it, a class privilege could not be recognized on the basis of the evidentiary record in this case.

83 In order to establish a class privilege covering all documents and information received from third parties during his investigations, the Commissioner must prove that the relationship between him and third party sources warrants blanket confidentiality protection. In practical terms, like the example of the legal professional and client discussed at para.

48 above, the Commissioner must prove that anything less than blanket confidentiality protection would substantially impair the relationship, thereby frustrating the Commissioner's ability to discharge his legislative responsibilities.

84 The Commissioner says just that. He says that if anything less than blanket confidentiality protection were afforded to documents and information supplied by third party sources, there might be reprisals or the threat of reprisals against them. Thus, third party sources might be less inclined to act. And the Commissioner would be less able to discharge the important responsibilities Parliament has assigned to him in the *Competition Act*. The public interest would suffer.

85 The Commissioner did not file any evidence before the Competition Tribunal establishing these matters. Thus, in this case, there is no evidentiary basis to support the existence of a class privilege. On this evidentiary record, a class privilege cannot be recognized. Given the consequences of recognizing a class privilege and the high threshold that must be met, the unsworn say-so of the Commissioner in submissions cannot suffice.

86 In upholding the existence of the class privilege, the Competition Tribunal appeared to assume that the prerequisites for it were met (at para. 62). Is this permissible?

87 In the abstract, I accept that, provided procedural fairness obligations are respected, some administrative decision-makers in some circumstances can make assessments without evidence, relying on facts gleaned from their own experience and expertise in their field. As discussed earlier, the rigorous evidentiary requirements in court proceedings do not necessarily apply in certain administrative proceedings: it depends on the text, context and purpose of the legislation that governs the administrative decision-maker.

88 In another case, I put this point as follows:

> The investigator [of the Public Service Commission] did not need specific evidence [that if a vacant public service position were advertised, candidates would apply]. Parliament did not vest decision-making authority over this subject-matter in a body of generalist judges sitting in court who will need evidence of every last thing. Rather, Parliament chose to vest decision-making authority in the Public Service Commission, including investigators employed by it — a body acting within a specialized area of employment, armed with expert appreciation of the nature and functioning of this area.
>
> The Commission knows the skills and capabilities of people who apply for various types of public service positions and the operational needs and pressures bearing upon a staffing decision. From this, the Commission can determine whether an advertising process likely would have found qualified candidates for the position in a timely way.
>
> To insist that the Commission have the sort of evidence a court would require on every element of this determination is to ossify and over-judicialize a process that Parliament intended to be fair and more informal, one enriched by knowledge and insights built from years of administrative specialization and expertise. We should not depart from the decades-old principle of administrative law that "[t]he purposes of beneficent legislation must not be stultified by unnecessary judicialization": *Re Downing and Graydon* (1978), 92 D.L.R. (3d) 355 at p. 373, 21 O.R. (2d) 292 at p. 310 (C.A.).

(*Canada (Attorney General) v. Shakov*, 2017 FCA 250 (F.C.A.) at paras. 94-96 (dissenting, but the majority not disagreeing with the legal principle).)

89 Even accepting for argument's sake that the Competition Tribunal can sometimes draw on its own experience and expertise to make certain assessments in certain circumstances, I am not persuaded that the Competition Tribunal could do so here on its own or by adopting its earlier decisions on this issue.

90 I accept that the Competition Tribunal might be in a position to accept in a general way that third party sources *might* have a fear of reprisal if they assist the Commissioner in an investigation. But the Competition Tribunal is in no position to make definitive conclusions without evidence about the Commissioner's relationship with third party sources

if the class privilege is not recognized. In particular, without evidence it cannot conclude that the fear of reprisal *actually* exists, third party sources *will* be less inclined to assist, and the Commissioner *will* be prevented from carrying out his investigation and enforcement mandate under the *Competition Act*.

91 The knowledge about third parties' possible fear of reprisal if they cooperate lies with the Commissioner that deals with third party sources, not the Competition Tribunal. From its legislative mandate and the cases it hears, the Competition Tribunal is not well placed to know whether third party sources are reluctant to complain to the Commissioner. But the Commissioner is. It was incumbent on the Commissioner to adduce evidence on this point and allow the Airport Authority to test it.

92 The Competition Tribunal's decision in this case and the Tribunal decisions it relies upon all assume that a public interest class privilege is necessary in order to cause third party sources to come forward and be candid. But in another public interest privilege context, the Supreme Court has cast doubt on the validity of assumptions about the need for candour, particularly where a blanket privilege over a broad class of documents is sought: *Carey*, above at p. 659 S.C.R., p. 178 D.L.R. In *Carey*, Justice La Forest put it this way (at p. 657 S.C.R., p. 176 D.L.R.):

> I am prepared to attach some weight to the candour argument but it is very easy to exaggerate its importance. Basically, we all know that some business is better conducted in private, but generally I doubt if the candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation. Certainly the notion has received heavy battering in the courts.

93 In these circumstances, I conclude that it was incumbent on the Commissioner to adduce evidence before the Competition Tribunal establishing the prerequisites of the public interest class privilege. It did not.

94 The Competition Tribunal found that the class privilege asserted by the Commissioner had "sound policy rationales" (at para. 20) based on previously decided jurisprudence. An examination of that jurisprudence, particularly Competition Tribunal jurisprudence, shows only the most general, and often cursory, consideration of the matter, with the possible exception of *Canada (Commissioner of Competition) v. Sears Canada Inc.*, [2003] C.C.T.D. No. 16 (Competition Trib.) (Q.L.), (2003), 28 C.P.R. (4th) 385 (Competition Trib.). Rather, in these cases, the Competition Tribunal should have examined in a rigorous way whether the blanket confidentiality protection afforded by a class privilege — one that protects from disclosure all documents gathered from third party sources in the course of the Commissioner's investigation — was needed in order to ensure a sufficiently uninhibited sharing of information by third party sources with the Commissioner: see Kent Thomson, Charles Tingley and Anita Banicevic, "Truncated Disclosure in Competition Tribunal Proceedings in the Aftermath of Canada Pipe: An Experiment Gone Wrong," (2006), 31 *The Advocates' Quarterly* 67 at p. 104.

95 And "sound policy rationales" are not enough to recognize the class privilege. It will be recalled that the policy rationales supporting a class privilege must be as compelling as those supporting the class privilege over solicitor-client communications and these are extremely compelling, at the level of constitutionally protected interests: see discussion at paras. 53-54, above.

96 The gist of the Competition Tribunal's finding on the alleged public interest class privilege appears in para. 62 of its reasons:

> By its very nature, the Commissioner's mandate and statutory functions require the collection of commercially sensitive information from businesses and actors in various sectors of the economy. In undertaking his investigations of alleged anti-competitive conduct, the Commissioner requires the input from the industry and from various players in the marketplace, including customers, suppliers and competitors of persons under investigation. The Commissioner thus relies on the cooperation of these third parties and on information provided by them, either voluntarily or through compulsion. Disputed matters coming before the Tribunal, such as applications challenging an alleged abuse of dominance, mergers alleged to be anti-competitive or civil arrangements between competitors,

> involve situations where customers, suppliers and competitors in the marketplace may be at a commercial disadvantage *vis-à-vis* the respondents targeted by the Commissioner. Protecting their identities and information through public interest privilege claims reduces the risk of witness intimidation or reluctance to provide information, and thus preserves the effectiveness of the Competition Bureau's investigations. To gain and secure this cooperation, sources of information must not be concerned about fear of reprisal in the marketplace or other potential adverse consequences, and must be satisfied that their information will be kept in confidence and their identities will not be exposed, unless they are called as witnesses. This is true whether the information is provided voluntarily or pursuant to a Section 11 order.

97 In my view, this is nothing more than an expression that a class privilege would be desirable in increasing the flow of useful information to the Commissioner. Nowhere does the Competition Tribunal find that blanket confidentiality protection is necessary for the preservation of the relationship or the continuance of the information flow. As we shall see in the next section of these reasons, even if the Competition Tribunal could have acted without evidence I doubt that it could have made such a finding.

— IV —

98 Even putting aside the absence of a satisfactory evidentiary record and taking the Commissioner's submissions at face value, the Commissioner has not established that blanket confidentiality protection is absolutely necessary for the preservation of the relationship. The Commissioner falls short in a number of respects.

99 The relationship between the Commissioner and third party sources very much depends upon the circumstances, the type of assistance sought and the nature of the particular investigation. For example, sometimes cooperation from a third party source is voluntary; other times it is not. In such circumstances, a rigid class privilege is inapt; a case-by-case or document-by-document privilege may be more appropriate: see *National Post* at paras. 43 and 47-49 and *Bisaillon*, above at pp. 97-98; and see the discussion in these reasons at para. 55, above. Perhaps due to the fact that a determination of public interest privilege often depends on the specific circumstances and particular documents in issue, some opine that while public interest privilege is possible on a case-by-case basis, a public interest class privilege is not: Hubbard, Magotiaux and Duncan, *The Law of Privilege in Canada* (looseleaf) Aurora, Ont.: Canada Law Book, 2006 (loose-leaf updated December 2017) at §3.20; of interest is that these commentators are aware that the Commissioner asserts a public interest class privilege (see *ibid.* at §3.50.50).

100 The class privilege the Commissioner asserts applies even in the case of evidence it compels from third parties under section 11 of the *Competition Act*. When a witness is compelled to cooperate fully with an investigation, there is far less need to motivate a party to come forward or be any more forthcoming in providing evidence: the candour rationale for protection is markedly reduced or, in some situations, even eliminated. In the words of one commentator, "if [an] agency can obtain...information by compulsion of statute then the sources cannot be said to 'dry up' if the confidentiality is breached": T.G. Cooper, *Crown Privilege*, (Aurora, Ont: Canada Law Book, 1990) at p. 56.

101 Similarly, the class privilege is said to apply regardless of whether any promise or undertaking of confidentiality was made to persons with information and documents and whether they relied upon any such promise or undertaking in providing documents and information. This makes no sense:

> Where the information is provided to government agencies by outsiders, there is a greater prospect that the providers of that information may be less frank or will not provide the information at all if there is a prospect of disclosure. *Of course, where no expectation of confidentiality exists, the candour argument is without merit*.
>
> [emphasis added]

(Lederman, above at p. 1079; see also *Gruenke* at pp. 291-292 S.C.R., p. 691 W.W.R.)

102 Indeed, there is material suggesting that those providing information to the Commissioner can never have any assurance or expectation of confidentiality. In proceedings before the Competition Tribunal, the Commissioner has consistently taken the view that "anyone providing information to the [Commissioner] either voluntarily or pursuant to an order under s. 11 [of the Act] must expect that such information may be used by the [Commissioner] in the administration of the Act including the bringing of an application before this Tribunal under the Act": *Canada (Director of Investigation & Research) v. Air Canada* (1993), 46 C.P.R. (3d) 312 (Competition Trib.) at p. 316.

103 Further, as the facts of this case demonstrate, the alleged public interest class privilege, if asserted by the Commissioner, is waivable by the Commissioner and only the Commissioner at any time. Thus, there is no assurance of confidentiality. This differs from the informer class privilege, which the law recognizes. Informer class privilege belongs jointly to the Crown and to the informer and cannot be waived without the informer's consent: *R. v. Leipert*, [1997] 1 S.C.R. 281, 143 D.L.R. (4th) 38 (S.C.C.) at para. 15.

104 Further, the purported scope of the privilege — "records created or obtained by the Commissioner, [his] employees, servants, agents or solicitors or obtained from third parties during the Commissioner's investigations" — is unnecessarily broad and detached from the compelling public interest asserted by the Commissioner. At the very least, there must be some nexus between these documents and the identity of a third party source and/or information provided by those third party sources to be captured by any public interest privilege. If a document emanates from outside of the purportedly essential relationship between the Commissioner and third party sources, there is no need for the privilege to attach.

105 In these circumstances, measures falling short of a blanket class privilege might suffice to protect the confidentiality interests and preserve the relationship between the Commissioner and third party sources who can assist his investigation. For example, it may be possible for confidentiality to be protected by redactions of documents, undertakings of confidentiality, sealed volumes of documents, or *in camera* sessions.

106 At the hearing of this appeal, we asked the parties whether any other regulator, competition or otherwise, domestic or foreign, has found it necessary to assert the sort of class privilege the Commissioner seeks here. The parties were unable to identify even one. Nor is this Court aware of any.

107 In particular, American, European, Australian and New Zealand competition authorities have not found it necessary to recognize a class privilege over information and documents supplied by third parties. Like the Commissioner here, these authorities gather sensitive information from customers, suppliers and competitors of the party under investigation, with every possibility of retaliation against them for supplying the information. The same is true for domestic agencies which regulate fields such as securities, tax, the environment, human rights and occupational health and safety. All these competition authorities and domestic regulators are able to conduct investigations and make orders without the benefit of a class privilege over information and documents supplied by third parties.

108 In my view, this is a salient legal consideration to be taken into account when assessing whether a class privilege should be recognized. The Supreme Court has suggested that the experience of foreign jurisdictions and whether they have recognized a class privilege in other circumstances should be examined when considering whether to recognize a class privilege: see discussion earlier in these reasons at para. 55 and *National Post* at paras. 43, 47-48. These considerations go directly to the issue whether blanket confidentiality protection is necessary or warranted for the preservation of the relationship between the Commissioner and third party sources.

109 Contrary to this, the Competition Tribunal considered that the experience of foreign competition authorities and domestic regulators was of "no moment" (para. 20). This was a legal error.

— V —

110 The Commissioner attempts to support the existence of the alleged class privilege by suggesting that he does not cause any procedural unfairness. The Commissioner reviews the documents covered by the class privilege and

exercises his discretion to provide the documents necessary to fulfil his procedural fairness obligations. Respondents to competition proceedings brought by the Commissioner receive summaries of the information supplied by third party sources and, later, witness statements if any third party sources are called to testify. Concerns about the adequacy of the summaries can be brought before the Competition Tribunal. Further, if the Commissioner intends to rely on a privileged document at a hearing, it must disclose the document: subsection 68(1) of the *Competition Tribunal Rules*, SOR/2008-141.

111 As an illustration of fairness, the Commissioner points to what it did in this case. While some 9,500 documents were covered by the public interest privilege, the Commissioner exercised his discretion to waive the privilege over roughly 8,300 of these documents and disclose them to the respondent. Summaries of undisclosed documents were vetted and provided to the Airport Authority.

112 As the discussion of case law above shows, the recognition of a class privilege does not depend on whether the beneficiary of the privilege is prepared to act fairly. And the Commissioner cannot defend a class privilege on the basis that it does not create procedural unfairness if there is no sufficient, proven reason for the class privilege to exist in the first place. In any event, fairness is in the eye of the beholder: the Airport Authority believes that the withholding of the 1,200 documents is working unfairness.

113 There is something to this. If the class privilege urged by the Commissioner is recognized, something incongruous emerges: Competition Tribunal proceedings are subject to procedural fairness obligations at the highest level, akin to court proceedings, yet the Commissioner can unilaterally assert a class privilege and withhold all documents obtained from third parties in his investigation — here, the entire case against the Airport Authority — unless the Commissioner unilaterally decides to waive the privilege over some of the documents. Thus, as far as disclosure of the case against the party whose conduct is impugned is concerned, that party gets only what the Commissioner deigns to give it. And requests for more disclosure may well be dismissed by the Competition Tribunal because, on the authority of a decision by this Court upholding the class privilege, the interests in confidentiality supporting the class privilege will be seen to be very high. Perhaps summaries of withheld documents might be provided. But by definition, summaries leave information out. What may seem innocuous or irrelevant to the preparers of the summaries may be critical to the party whose conduct is impugned. And the actual documents authored by participants in the matters under investigation are often more useful for cross-examination than summaries prepared by non-participants. This entire scenario is fraught with the potential of interference with procedural fairness rights and the truth-finding function of the proceedings: see discussion earlier in these reasons at paras. 28-33.

114 The Commissioner's submission that he has acted fairly by disclosing so many documents and by providing summaries is also telling in a related way. After conducting a document-by-document review of the documents covered by the alleged class privilege in this case, the Commissioner found that confidentiality was unnecessary for 86% of them and so it disclosed these documents. As for the others, it says that some information can be disclosed by summaries. This tends to show a number of things:

- the blanket 100% confidentiality coverage of a class privilege is unnecessary for maintaining the relationship between the Commissioner and third party sources;

- a case-by-case public interest privilege — one that the Supreme Court says gives "the necessary flexibility to weigh up and balance competing public interests in a context-specific manner", where established on the evidence, may be more appropriate: National Post at para. 51; in any event, a class privilege that is so significantly whittled down through waiver after a document-by-document review is no more effective in maintaining the relationship between the Commissioner and third party sources than a case-by-case, document-by-document public interest privilege;

- other lesser measures to protect confidentiality and the relationship between the Commissioner and third party sources, even short of asserting a public interest privilege, may be more appropriate for many of the documents, such as redactions, non-disclosure undertakings, sealed volumes or in camera portions of proceedings.

115 For the foregoing reasons, I conclude that the Commissioner has not established that there is a class privilege preventing disclosure of the 1,200 remaining documents. If, as a policy matter, the Commissioner considers that there ought to be a class privilege over information and documents supplied by third party sources during his investigations, he can ask Parliament for it.

116 It follows that the Competition Tribunal erred in law in finding a class privilege and, thus, erred in dismissing the Airport Authority's motion on that basis.

F. Where does this leave the parties?

117 Because the Competition Tribunal found the presence of a public interest class privilege over the 1,200 remaining documents, it did not assess whether any of them are covered by a case-by-case or document-by-document public interest privilege. Under the disposition of this appeal I propose below, the motion will be remitted to the Competition Tribunal for redetermination. The Airport Authority agrees that in the redetermination the Commissioner should have an opportunity to argue for privilege over individual documents.

118 In considering whether a particular document should be covered by a case-by-case or document-by-document public interest privilege, the Competition Tribunal will wish to follow the legal test discussed earlier in these reasons. In assessing the interests of confidentiality and the extent to which they are sufficiently compelling, the Competition Tribunal should consider whether alternative, lesser means of protecting the relevant confidentiality interests are available, such as redacting portions of individual documents, undertakings of confidentiality, protective orders, sealed volumes of documents, *in camera* sessions, and other effective measures that might be devised: see, *e.g.*, the creative and detailed sealing order made in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2002 BCSC 1509, 8 B.C.L.R. (4th) 281 (B.C. S.C. [In Chambers]).

G. Proposed disposition

119 I would allow the appeal, and set aside the order of the Competition Tribunal, including its award of costs. I would award the Airport Authority its costs of the appeal. I would remit the motion to the Competition Tribunal for redetermination in accordance with these reasons.

***Richard Boivin J.A.*:**

I agree

***J.B. Laskin J.A.*:**

I agree

Appeal allowed.