CT-2021-002

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the acquisition of Tervita Corporation by Secure Energy Services Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to 92 of the *Competition Act*;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an interim order pursuant to section 104 of the *Competition Act*;

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

SECURE ENERGY SERVICES INC.

Respondent

COMMISSIONER OF COMPETITION'S BOOK OF AUTHORITIES

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1991 CarswellNat 1583
Competition Tribunal

Canada (Director of Investigation & Research) v. Southam Inc.

1991 CarswellNat 1583, [1991] C.C.T.D. No. 16, 38 C.P.R. (3d) 68

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, as amended

In the Matter of the direct and indirect acquisitions by Southam Inc. of equity interests in the businesses of publishing The Vancouver Courier, the North Shore News and the Real Estate Weekly

The Director of Investigation and Research, Applicant and Southam Inc. Lower Mainland Publishing Ltd. Rim Publishing Inc. Yellow Cedar Properties Ltd. North Shore Free Press Ltd. Specialty Publishers Inc. Elty Publications Ltd., Respondents

Reed J., Roseman Member

Heard: June 14, 1991
Judgment: June 27, 1991
Docket: CT-90/1

Counsel: Stanley Wong, Keith C.W. Mitchell, for Director of Investigation & Research
Neil R. Finkelstein, Mark C. Katz, for Respondents, Southam Inc., Lower Mainland Publishing Ltd., Rim Publishing Inc., Yellow Cedar Properties Ltd., North Shore Free Press Ltd., Specialty Publishers Inc., Elty Publications Ltd.

Subject: Intellectual Property; Property; Corporate and Commercial
Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.g Investigation and prosecution
VI.5.g.iv Conduct of investigation
VI.5.g.iv.A General principles
Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Investigation and prosecution — Conduct of investigation — General principles
Respondent seeking answers from Director concerning procedures used by Director in investigation — Director not required to provide answers to questions on basis of privilege and lack of relevance.
In 1989, Director decided to take no action on the acquisition by respondent of a community newspaper, but in 1990 Director challenged that acquisition. Respondent sought answers to questions Director refused to answer at discovery. The questions concerned the conduct of the investigation in 1989, the procedures of the Director in investigations, and sought reference to documents relied upon.
Held: The procedures were privileged and not relevant.
Matters preceding the "no action" decision were not relevant, and Director was not required to identify all documents.
Table of Authorities
Cases considered:
Andres Wines Ltd. v. T.G. Bright & Co. (1978), 41 C.P.R. (2d) 113, 1978 CarswellNat 703 (Fed. T.D.) — referred to

Barrett v. Vardy (1989), 1989 CarswellOnt 2908 (Ont. Dist. Ct.) — referred to
Blais v. Andras (1972), [1972] F.C. 958, 30 D.L.R. (3d) 287, 1972 CarswellNat 50 (Fed. C.A.) — referred to
Canada (Director of Investigation & Research) v. Air Canada (1989), 1989 CarswellNat 1248 (Competition Trib.) — referred to
Canadian National Railway v. McPhail's Equipment Co. (1977), [1978] 1 F.C. 595, 12 L.C.R. 297, 16 N.R. 295, 1977 CarswellNat 124, 1977 CarswellNat 124F (Fed. C.A.) — referred to
Canadian National Railway v. Milne (1980), [1980] 2 F.C. 285, 17 C.P.C. 50, 1980 CarswellNat 6, 1980 CarswellNat 568 (Fed. T.D.) — referred to
Champion Truck Bodies Ltd. v. Canada (1986), 7 F.T.R. 284, 1986 CarswellNat 80, 1986 CarswellNat 80F, [1987] 1 F.C. 327 (Fed. T.D.) — referred to
Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1989), 27 C.P.R. (3d) 1, 1989 CarswellNat 720 (Competition Trib.) — considered
Cominco Ltd. v. Westinghouse Canada Ltd. (1979), 11 B.C.L.R. 142, 1979 CarswellBC 69 (B.C. C.A.) — referred to
Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 61 Alta. L.R. (2d) 319, 22 C.P.R. (3d) 290, 90 A.R. 323, 1988 CarswellAlta 148 (Alta. C.A.) — referred to
Graydon v. Graydon (1921), 51 O.L.R. 301, 67 D.L.R. 116 (Ont. S.C.) — referred to
Grossman v. Toronto General Hospital (1983), 41 O.R. (2d) 457, 35 C.P.C. 11, 146 D.L.R. (3d) 280, 1983 CarswellOnt 433 (Ont. H.C.) — referred to
Hodgkinson v. Simms (1988), 33 B.C.L.R. (2d) 129, 36 C.P.C. (2d) 24, 55 D.L.R. (4th) 577, [1989] 3 W.W.R. 132, 47 C.C.L.T. 94, 1988 CarswellBC 437 (B.C. C.A.) — referred to
Santa Ursula Navigation S.A. v. St. Lawrence Seaway Authority (1981), 25 C.P.C. 78, 1981 CarswellNat 11 (Fed. T.D.) — referred to

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34

s. 10 — referred to

Rules considered:

Competition Tribunal Rules, SOR/94-290

Generally — referred to

R. 14(1) — referred to

R. 14(2) — referred to

Words and phrases considered:

LITIGATION PRIVILEGE

Litigation privilege protects from disclosure documents which were brought into existence for the dominant purpose of litigation (actual or contemplated): *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 22 C.P.R. (3d) 290 . . . (C.A.) . . . The purpose for the privilege is to ensure effective legal representation by counsel for his or her client.

Decision of the Board:

1 This motion raises some fundamental issues about the scope of discovery which a respondent should be entitled to obtain from the Director of Investigation and Research ("Director"). The respondents take the position that the Director should be subject to discovery in a manner analogous to any party in civil proceedings. The Director takes the position that his role before the Tribunal is not analogous to a private party, that as an applicant he is acting in a representative capacity and therefore discovery as against him is not a meaningful procedure or at least should be significantly curtailed. The answers to many of the questions which the respondents pose are refused on the ground of either litigation privilege or public interest privilege. Many of the questions are also argued to be irrelevant and some to elicit opinions or conclusions of law.

2 The Director's counsel took the position that the Director has no direct knowledge of the facts relevant to the application and thus his representative on discovery was in no position to make any admissions of fact. Counsel stated that the Director's representative was being put forward only to answer questions concerning the facts that are in the knowledge of the Director but not to make admissions with respect thereto. This is a semantic argument. To the extent that any party on discovery does not have first hand knowledge of the facts to which the questions relate, that party is only stating what is known by him, her or it at the time. In addition, insofar as "admissions" on discovery are said to be "binding" on the party making them, it is of course always open to contradict or modify such "admissions" at trial. [1] Admissions are obtained to narrow the issues. While they are said to "bind" the parties, this is not an irrevocable position.

3 Discovery has two purposes: (1) the obtaining of admissions so that the issues between the parties can be narrowed; (2) the obtaining by one party of the information in the knowledge of the other. [2] Despite the Director's contention that his representative cannot make admissions because of a lack of direct information, it is to be hoped that certain issues of fact can be agreed upon and admitted. Indeed, the Director's commitment to present an agreed statement of facts prior to the hearing belies the contention that it is not possible for him to make admissions at the discovery stage.

4 Counsel for the Director argues that the present proceedings are different from a normal discovery where parties are actually participants and have knowledge of the transactions. This is not a convincing reason to deny the respondents a right to discover a representative of the applicant. Discovery procedures work in other contexts where government investigating officers are in charge of preparing one side of the case (e.g. tax litigation). Discovery procedures have worked in other cases before the Tribunal. [3] On some occasions it may be that the complainant is the proper person to be put forward for discovery instead of an official from the Director's office. In the *Chrysler* case, the complainant was examined for discovery and this was most appropriate since the issue (refusal to deal) was one which exclusively involved the respondent and the complainant.

5 The Director's position is that discovery as against his office should not occur, that it is not a meaningful procedure because all of his investigations (information collecting activities) are privileged (public interest or litigation privilege). Counsel argues that the position of the respondents and the Director is asymmetrical, with the Director having a number of highly intrusive powers. Thus a procedure is suggested whereby the Director will provide the respondents with a summary of the evidence he plans to produce as well as "will say" statements from his witnesses at some time prior to trial. While the Director has agreed in this case, and in previous proceedings before the Tribunal, to be examined on discovery, on reflection the appropriateness of that procedure is now being questioned. At the outset of the discovery, counsel for the Director stated:

> I would like to put something on the record. The Director is of the view that the respondents should have fair disclosure of the evidence that the Director will present in the hearing of the application. I have been instructed by the Director to say the following: Counsel for the Director undertakes to provide to counsel for the respondents, prior to the commencement of the hearing, a summary of the evidence that he intends to present to the Competition Tribunal. We will advise you before the end of June the date by which this disclosure will be made. In addition, counsel for the Director intends to seek the agreement of counsel for the respondents, that as a general practice each counsel should give reasonable notice of calling a witness with a "will say" statement of that witness to opposing counsel prior to the calling of the witness. [4]

This commitment was relied upon by the Director's representative when refusing to answer a number of questions.

6 The *Competition Tribunal Rules* do not expressly require oral discovery; they do require documentary discovery. Also, in previous applications before the Tribunal, discovery (both oral and documentary) has proceeded in a reasonably normal way as between the parties. There is no reason in principle why it should not do so in this case. The procedure which the Director proposes may be of additional benefit to the respondents and to the proceedings before the Tribunal. It is not, however, a substitute for discovery particularly in the context of the present case where discovery was agreed to by the parties. Indeed, the Director's conduct on the examination for discovery was much more forthcoming than the position set out above would seem to indicate.

7 What is at the heart of the present dispute is the fact that on March 6, 1989, the Director sent the respondent Southam Inc. ("Southam") a "no-action" letter with respect to its January 27, 1989 acquisition of the *North Shore News*. The Director, however, now challenges that acquisition in the application filed November 29, 1990. The application challenges not only the January 1989 acquisition of the *North Shore News* but also the May 8, 1990 acquisition of some other community newspapers (the *Real Estate Weekly* and *The Vancouver Courier*).

8 Many of the questions which counsel for the respondents seeks to have answered relate to the nature of the investigation which was carried out prior to the issue of the no-action letter. In this context, the respondents seek information concerning discussions which occurred in the Director's office between officials prior to the no-action letter being sent, information on whether acquisitions of other newspaper mergers (Brabant) had been taken into account, information concerning the process of investigation which occurred after the letter was sent and information as to what caused the Director to change his mind. Counsel for the Director argues that answers to these types of question are covered by litigation privilege and, what is more, that they are irrelevant on the basis of the pleadings as they stand: the conduct of the Director is not in issue.

9 The Tribunal agrees that many of the questions which the Director's representative has been asked are not relevant to the present litigation: how many merger investigations have you been involved in (Q. 59); in investigating this one did you consider other newspaper mergers (Q. 61); when you did an interview and got an answer ... did you cut your interview short (Q. 91, 92, 93); who in the Bureau had conversations with respect to Exhibit 5.[5] (Q. 183); was there disagreement between the investigating officers (Q. 186); produce any documents or correspondence relating to those disagreements or arguments (Q. 187); did any of the investigators disagree re the facts in Exhibit 5 (Q. 189); when Mr. McAllistair received Exhibit 6,[6] did he show it to anybody (Q. 193); was any agreement or disagreement expressed orally or in writing by those reviewing the transaction (Q. 203); what was Mr. Wetston thinking when he wrote the no-action letter (Q. 230); what did the Director and his staff rely on in writing the no-action letter (Q. 245); was any inquiry done by the Director and his staff between receipt of Exhibit 5 and receipt of Exhibit 6 (Q. 247).

10 The issue before the Tribunal is not the conduct of the Director's investigation. The issue is whether the challenged acquisitions are likely to result in a substantial lessening of competition and particularly the market definition which is relevant for that determination. The no-action letter is relevant only in an indirect way to these proceedings. It is *not relevant* to the *fundamental* issues before the Tribunal. It does provide evidence of the context within which the present application arises and to that extent has peripheral relevance. As has been noted, whether the Director issued his no-action letter on the basis of extensive investigation or after minimal review is not relevant. In addition, the letter itself commits the Director only to taking no action at the time when the letter was written and it is based on the knowledge then in the hands of the Director. It may occur that there are changed circumstances between the date of a no-action letter and a subsequent challenge by the Director and that as a result the time when certain information was obtained by the Director becomes relevant. There is, however, no allegation that would make that date (or dates) a relevant factor for the purpose of this case.

11 The following questions, as well as those set out above, need not be answered because they relate primarily to the conduct of the investigation, discussions within the Director's office or to other investigations which the Director might have carried on: 24, 54, 58, 60, 62, 63, 83, 105, 110, 114, 136, 137, 138, 140, 181, 184, 188, 195, 196, 210, 216, 226, 227, 229, 232, 241, 242, 243, 244, 246, 247, 248, 251, 252, 254, 255, 256, 257, 258, 259, 260, 264, 265, 270, 273, 276, 320, 321, 322, 325, 326, 333, 334, 348, 372, 373, 374, 672. Of a similar nature are questions which are directed at determining the date when the Director obtained certain information: 269, 323, 324, 331, 369. Questions 137 and 672 seek non-public documentation which is in the Director's hands and which supports the commencement of the section 10 inquiry. These questions by their breadth encompass internal memoranda prepared for the Director. These are not relevant to the present proceedings.

12 Another category of questions which can easily be disposed of is that concerning the relevance or preparation of pleadings. Some questions are irrelevant to the issues at hand, others call for conclusions of law. Two examples of such questions are: why is no reference made to the no-action letter in the Director's notice of application (Q. 144); why are paragraphs 11, 12,

13 and 14 in the notice of application (Q. 145). These need not be answered. Other questions of a similar nature which need not be answered are 163 and 423.

13 A number of questions ask for opinions from the witness and therefore need not be answered: which newspaper has a *comparable circulation* to the Courier's Wednesday edition (Q. 161); has the circulation of the Southam dailies *remained stable* (Q. 356). Question 513 is of a similar nature: "... even if there was an actual decline in retail advertising revenues by the dailies ... there's no way of calculating how much of this decline is attributable to the *north shore news* and *the courier* as opposed to other community newspapers ...?" With respect to the questions concerning comparable or stable circulation, the circulation figures for the newspapers in question are in the hands of both parties. The conclusions to be drawn therefrom are not something that a party must answer on discovery. At the same time, why answers to questions 161 and 356 were not provided, merely to expedite the discovery process, is not clear. If a co-operative attitude had prevailed at discovery it seems likely that the witness would have answered these questions as a matter of course. Also, the fact that question 513 was not answered (the answer surely being obvious) seems the result of an unduly technical approach.

14 A number of questions which peripherally relate to the internal procedures of the Director's office (filing procedures) have a direct relevance to the admissibility of evidence before the Tribunal. Questions 282, 283, 291, 292, 300 and 314 seek information concerning the files from which documents number 1 to 35 in the Director's affidavit of documents were obtained. Counsel for the respondents are of the view that these documents were obtained pursuant to a warrant and are being used for purposes outside that warrant. The questions should be answered. The public interest, if any, which exists in the Director being entitled to keep his filing procedures confidential is clearly outweighed by the respondents' interest in having answers given.

15 With respect to question 66, counsel for the Director took it "under advisement". It is not clear why counsel for the respondents considered his response to be a refusal; the question should be answered. The question seeks information concerning the Director's merger policy in light of the *Merger Enforcement Guidelines* which were released on April 17, 1991 and the previous Information Bulletin, no. 1, June 1988.

16 Some questions were not answered because they were considered by counsel for the Director to be unreasonable. In general, individuals when being discovered need not answer questions seeking information which is in the questioner's knowledge or questions that would put a burden on the party being questioned which is out of all proportion to the benefit to be gained from the answer by the examining party. Among the questions which need not be answered for these reasons are those which relate to the allegation that *The Vancouver Courier* and the *North Shore News* have the highest circulations of the community newspapers in the Lower Mainland (Q. 148, 152, 161 and 162). [7] Question 161 might also be classified as an opinion question (*supra*). The circulation figures for the newspapers are in the hands of both parties. Indeed, the Director obtained much of his information in this regard from the respondents.

17 Another series of questions which need not be addressed for the above noted reasons are those seeking reference *to every* document which is relied upon by the Director for the allegation that community newspapers compete with the daily newspapers in the Lower Mainland (Q. 472, 475 and 477) [8] and those seeking identification by the Director of *every* document (or part thereof) on which he relies for support of the allegation that the Southam dailies were in direct competition with the *North Shore News* (Q. 564). The Director's representative answered the first series of questions by identifying some documents in schedule 2 of the Southam affidavit of documents which the Director specifically had in mind in making these allegations: document 20 and Pacific Press document 111, a confidential report entitled "Future Value of the Vancouver B.C. Marketplace". Question 564 was answered in a similar fashion by reference to illustrative documents.

18 It is unreasonable to expect a party to identify *every* document or part thereof which might be relied upon to support an allegation such as those under consideration here. The allegations by their nature are of a type that a great many documents might relate thereto, some of minimum probative value. The conclusion respecting whether competition has been substantially lessened is a complex one and, while factually based, is likely to be formed with the assistance of expert evidence. Every copy of every newspaper concerned might relate to these issues. It is sufficient if a party on discovery indicates the significant sources on which it relies for its allegation when the conclusions which these facts go to support are constructs of the type in question.

It is always open to a party, if truly surprised by the sources chosen from the materials produced on discovery, upon which an opposing party relies, to object to the introduction of such evidence by reason of prejudice or to seek additional time to respond. While counsel for the respondents referred to the great quantity of documents which had been produced on discovery and to which reference might be made as support for this allegation, the Tribunal was not persuaded that there was a serious difficulty in this regard.

19 Other questions which need not be answered are those seeking identification of all the facts and documents upon which the Director relies for the allegation that there has been over the years a loss of advertising revenue from the Southam dailies to the *North Shore News* and *The Vancouver Courier*. Again a vast quantity of documents might serve in a general way as evidence for such a conclusion. It is sufficient if the Director indicates the main sources upon which he proposes to rely. This is true with respect to the request for further information both in a general sense, and secondly as found in the documents provided to the Director by Southam (Q. 489, 497, 499, 500, 501, 503). The purpose of discovery is to reveal facts on which the other party relies (an outline of the case); it is not intended to require disclosure of minute details of the evidence by which those facts will be proved.

20 The most difficult issue to resolve with respect to discovery which has been raised by the present motion is the status of those questions which seek access to information collected by the Director in reviewing the transactions in question. These questions are clearly relevant to the issues before the Tribunal. The questions which fall into this category are: Q. 87, 88, 111, 112, 115, 129, 131, 134, 135, 197, 198, 228, 246, 324, 408, 455, 483, 502, 588, 658, 665, 666, 682, 683, 706, 736. These are of the following nature: what interviews were held with industry participants, who was interviewed, what industries were looked at, what economic experts were spoken to, what information was collected, who did the interviews, produce the interview notes. The Director argues that these questions are covered by either litigation privilege or public interest privilege.

21 While the Director is opposed to providing the actual interview notes and similar detailed information, particularly the identity of the interviewees, he is not opposed to providing a summary of the information which has been obtained at least insofar as he intends to rely on it in presenting his case to the Tribunal. The nature of the dispute between the parties in this regard can be illustrated by portions of the transcript: [9]

At pp. 208-215:

> MR. WONG: Sorry, to be clear, *we're not going to tell you who said what, but we're prepared to tell you what the facts that we have derived from the investigation are in support of the case*....
>
> MR. FINKELSTEIN: I said upon what facts does the Director rely for the allegation that there is significant direct competition between the Vancouver courier and the Southam dailies.
>
> A Well, the creation of Flier Force for one thing.
>
> 575 Q Okay. Now, please explain that.
>
> A Pacific Press, or the parent corporation of Flier Force, Southam perhaps, felt necessary to be able to offer increased penetration in the market served by both the courier and also the north shore news. Presumably this was a function of the less than satisfactory or adequate penetration offered by the dailies in those markets and Flier Force would have delivered fliers as a supplement to any insert availability by the dailies in the market served by the Vancouver courier.
>
> . . .
>
> 579 A I believe a study was prepared — Excuse me. An article appeared in 1984 by Ms. Urban and it was, has been received as, it was an Exhibit during the Discovery of Mr. Ballard and it stood for the proposition that inserts had a better — We have the document here, why should I paraphrase it? Okay.

MR. WONG: I think it was marked as a separate Exhibit, called the Advantage Flier wasn't it?

A "Get the Inserted Advantage".

MR. WONG: I don't think we have the actual Exhibit number, but we do have the actual document, but it's produced under tab 2 of Schedule 1 of the Rim productions.

. . .

MR. FINKELSTEIN:

583 Q Mr. Brantz, you were going through the facts upon which you rely for the proposition that flier inserts are more effective than free-standing fliers.

A Correct.

584 Q Continue. Or have I heard it all?

A Oh, no.

585 Q Well, let's have the rest.

MR. WONG: This is a document market as Exhibit "24" in the Discovery of Mr. Peter Ballard. It's the other part of the Urban article which was marked as Exhibit "27" to this Examination.

MR. FINKELSTEIN: Okay. Can we mark that as the next Exhibit? (EXHIBIT "28" - URBAN ARTICLE)

MR. FINKELSTEIN:

586 Q Anything else?

A Yes. The fact that fliers are dropped off in lobbies and remain there whereas community papers with inserts in them tend to be picked up at a greater rate and, therefore, penetrate in apartment buildings the higher rate than would a stand-alone flier.

587 Q Now, is that your theory or do you have some evidence in support of that?

A *That view has been expressed to us by a number of executives in the community newspaper field here in British Columbia*.

588 Q *Which I take it you're not going to tell me about?*

A Correct.

MR. WONG: That's a refusal.

A That's correct.

MR. FINKELSTEIN:

589 Q Are there any other facts upon which you rely for your proposition that flier inserts are more effective than free-standing fliers?

A Certainly. Climatic factors in British Columbia make that inserts are dryer than fliers left on the doorstep.

MR. KWINTER: What do you mean by "climatic effects"?

A They don't get wet from the rain.

MR. FINKELSTEIN:

590 Q Is that your theory or do you have some evidence in support of that?

A That is a view put to me by advertisers here in the Vancouver market.

591 Q And you're not going to tell me about that I take it?

A *I will not identify the person who made that comment*.

592 Q I see. You've heard it from one person. Is that it?

A Actually, no, I've heard it from several.

593 Q How many?

A I cannot be more specific. Two or three perhaps.

594 Q Have you got any way of finding out?

A I don't believe so.

595 Q What other facts do you rely upon in support of this proposition that flier inserts are more effective than free-standing fliers?

A Certainly the — I believe MetroVan, which was an association, is an association, was an association of community newspapers offered the possibility of offering total market coverage. I'm sorry, excuse me, you're making the proposition whether inserts are — No.

596 Q No further facts?

A None that come to mind at this time.

597 Q Well, if there are any others you'll let me know?

A Certainly.

(Emphasis added)

At pp. 230-232:

655 Q But Mr. Ballard's evidence was that the courier's most direct competitors were other community newspapers operating in the courier's market. I take it that you accept that evidence generally?

A No.

656 Q Okay. Can you tell me why not?

A Many of the community newspapers in the market served by the courier have relatively insignificant circulations, 2,200 I believe in one case, 9,500 copies in another, and as such could not be put forward as more direct competitors for advertising business than would be the case for the dailies.

657 Q Do you rely upon any other facts for your disagreement with Mr. Ballard that his most direct competitors are other community newspapers operating in his market?

A Yes. Having regard to advertisers; other community paper publishers, present or former; former employees, dailies, and I guess that's, that's about it.

658 Q *And you're not going to tell me about those conversations or anything arising out of them; is that right?*

A *I will not identify who I spoke to*.

659 Q *And I take it you also won't tell me what was said?*

MR. WONG: *We'll tell you in a general summary way what was said*.

MR. FINKELSTEIN:

660 Q I'm listening.

A It has been advanced that the courier was possibly a threat to the dailies inasmuch as it might be transformed at some future time into a daily itself. That proposition has not been advanced in respect of any other community paper in the courier market.

661 Q Is that it?

A The size of the courier in terms of the number of pages, the size of its circulation make it a more direct competitor for advertising revenues with the dailies than with other community papers.

662 Q Is that a complete summary now of what you've been told by all these people that you spoke to?

A To the extent that a premium or a, may have been paid for the courier in respect of its influence in the market-place. That might be an indice of its present or potential competition to the daily newspapers.

663 Q Is that it for the summary of the conversations?

A I believe that's the case.

664 Q *Now I'm asking you for details of all of those conversations*.

. . .

MR. WONG: *No*.

. . .

MR. WONG: *Mr. Brantz has given you a summary of the facts known to the Director concerning the questions you've asked*

MR. FINKELSTEIN: And I take it that's all he's going to give me?

MR. WONG: That's right.

(Emphasis added)

At pp. 241-243:

MR. FINKELSTEIN: Now, Mr. Wong, you've directed the witness *not to answer generally about his interview with Mr. Robson, not to say when he was interviewed, where he was interviewed, whether a transcript was kept. I take it that that instruction to the witness not to answer also includes an instruction not to inform me what it was that Mr. Robson said*.

MR. WONG: That is correct.

MR. FINKELSTEIN: If I understand you correctly the witness is relying upon information from Mr. Robson to the effect that the courier had the potential to go daily, but you're not going to tell me what it is that Mr. Robson said that the witness is relying upon for that allegation. Do I have that correct?

MR. WONG: *I will direct the witness to provide you with a summary of the information we have obtained from Mr. Robson*. Go ahead, Mr. Brantz.

MR. FINKELSTEIN: I take that as a refusal.

MR. WONG: All right.

MR. FINKELSTEIN: *So we're clear, I want the details of who did the interview, when, where, what was said, any notes and records and so on*.

MR. WONG: That's a refusal.

MR. FINKELSTEIN:

684 Q Without prejudice to that, being a refusal, let's have the summary.

A I believe Mr. Robson stated that Southam was concerned about the possibility of community papers in the Vancouver area possibly becoming dailies and threatening the cash flow generated by the Pacific Press dailies in the Vancouver area. I believe the expression was used that Southam wished to "close the back door."

685 Q On what?

A So that a weekly would not get strong enough to become a daily and decrease the — in Mr. Robson's response, "... million dollar per year profit."

686 Q You have just read that from somewhere. Could you tell me what you read it from?

A Exhibit 36 answer 2(d).

687 Q What was the source of Mr. Robson's information?

A Mr. Robson I believe had at least one — two, possibly three meetings with Mr. David Perks at which time the discussion involved the subject of the setting up of a chain of community newspapers in the lower mainland market.

688 Q And did Mr. Robson tell you that he was told by Mr. Perks that Mr. Perks was concerned that the courier would become — had the potential to become a daily newspaper?

A I cannot say whether he specifically identified the courier. I can't recall that specifically, but definitely that there was concern that community papers in the Vancouver area could possibly become dailies, yes.

689 Q Would you make inquiries of Mr. Robson to find out whether Mr. Perks specifically told him that he was concerned that the courier had the potential to become a daily newspaper?

MR. WONG: Are you asking the witness to make inquiries?

MR. FINKELSTEIN: Yes.

MR. WONG: We're not going to do that. You can speak to Mr. Robson.

MR. FINKELSTEIN:

690 Q Would you make inquiries of whoever it was who did the interview, you're not telling me who that is, to see whether they recall whether Mr. Robson said he was told specifically that the courier, or anyone at Southam was concerned that the courier had the potential to become a daily newspaper?

MR. WONG: We'll do that.

(Emphasis added)

22 The Director refuses to provide the respondents with more details concerning both the interviews which were conducted and the information collected on the ground that these are protected from disclosure by either litigation privilege or public interest privilege. The Director argues that all documents from the beginning of his review of the acquisition of the *North Shore News*, which commenced in the late fall of 1988, are covered by litigation privilege. It is argued that all of the Director's activities are in contemplation of litigation.

23 The respondents argue that documents are not covered by litigation privilege if they were prepared for the purposes of reviewing the transaction and not with a view to an actual or contemplated application to the Tribunal. It is argued that an analogy can be drawn to the preparation of appraisal and other reports prepared with a possibility of litigation in mind. [10] Counsel's argument relies heavily on the fact that most of the transactions which the Director reviews do not lead to an application being made to the Tribunal and the Director's preferred course of action is to negotiate changes with the parties involved rather than proceeding to the Tribunal. In addition, it is argued that only documents passing to or from counsel and his client are covered by the privilege.

24 Documents which were prepared before the no-action letter was sent in March 1989 cannot in any circumstances, it is argued, be covered by litigation privilege. That letter expressly states not only that litigation is not being commenced but that no inquiry for the purpose of investigating the transaction further is being undertaken. Counsel for the respondents concedes that in the present case litigation was contemplated from at least October 3, 1990. On that date a letter was sent to counsel for Southam stating that a section 10 inquiry would be commenced and an application would be filed with the Competition Tribunal.

25 A number of issues are raised by the assertion of litigation privilege. Certainly a broad definition of the privilege could undercut any meaningful discovery by a respondent of the applicant's case. It may very well be that for Tribunal purposes a distinction between a solicitor's work product and communications with the client (a distinction which pertains in some United States jurisdictions) is the appropriate dividing line to apply in order to decide when documents are protected by litigation privilege. In any event, at the very least in the present case it is difficult to consider that the review process which took place prior to September 1990 would be protected by litigation privilege. Litigation privilege protects from disclosure documents which were brought into existence for the dominant purpose of litigation (actual or contemplated). [11] The purpose for the privilege is to ensure effective legal representation by counsel for his or her client. While litigation may have been a theoretical possibility prior to September 1990, there is no reason to think that the possibility of commencing litigation was being considered in such a manner that it could be said to be in contemplation. A reasonable distinction can be drawn between the Director's initial review procedures and the more intense and focused investigating procedures provided for by section 10 which in this case at least were clearly exercised in contemplation of litigation. When a litigation privilege is asserted the party making the assertion has the burden of proof.

26 Whether or not litigation privilege applies, however, is somewhat academic since in the Tribunal's view public interest privilege covers much of what the Director seeks to keep from the respondents. The Director refuses to provide the specific interview notes, to identify the individuals interviewed, when they were interviewed and who they were interviewed by. At the same time, he has agreed to give the respondents a summary of what was said. In the competition law area, at least in merger and abuse of dominant position cases, the individuals who are interviewed may be potential or actual customers of the respondents, they may be potential or actual employees. They may fear reprisals if they provide the Director with information which is unfavourable to the respondents. Many of them are likely to be in a vulnerable position vis-à-vis the respondents. It is in the public interest, then, to allow the Director to keep their identities confidential, to keep the details of the interviews confidential, to protect the effectiveness of his investigations. It is in the public interest to keep the interview notes confidential except when the interviewees are called as witnesses in a case or otherwise identified by the party claiming privilege. In addition, the Director is not required to prepare the respondents' case by identifying potential witnesses for them.

27 It is conceivable that in some cases a respondent's ability to answer a case might be impaired if information concerning the identity of those interviewed or detailed information concerning the interview is not given (although it is difficult to conceive of a situation where this would be so). In any event, there is no indication that this is the case in the present litigation. The public interest in keeping the details of the interviews confidential outweighs any benefit that the respondents might obtain from them. This is particularly so given the fact that the Director has agreed to provide summaries of the relevant information.

28 The Director's position that a summary of the information obtained from the interviews will be provided is a reasonable one. It raises, however, three issues: (1) at what time should the information be provided; (2) whether the summary should encompass only information on which the Director intends to rely in presenting his case; (3) how is the obligation to provide accurate but general summaries to be enforced.

29 With respect to the first consideration, in the present proceedings there is an obligation to provide the information in the context of the discovery proceedings. An undertaking to provide a summary at some later time of information *which is known now* is not appropriate. In many instances the Director may in fact have already provided the information as is obvious, for example, from the answers to questions 684 to 690 set out above. If he has not done so, then he should do so now rather than promising to do it in the future.

30 With respect to the extent of the information which should be provided, the Tribunal is of the view that the Director has an obligation to provide in a general way (aggregated form) not merely information which supports his case but also information which favours the respondent. For example, some of the general descriptions and observations found in document number 59 (provided to the Tribunal in response to a request for sample documents) would satisfy this requirement. The respondents are particularly entitled to a summary of the information which was collected by the Director prior to his decision to commence an application before the Tribunal.

31 This leaves for consideration the question of how compliance with these requirements can be assured in the absence of some review of the actual documents (for example, interview notes). Ensuring compliance with a discovery obligation of this nature is no different from ensuring compliance with ordinary documentary discovery. In both cases confidence is placed in the parties to accurately produce information within their control. If a serious question were to arise in this regard it is always open to the parties to seek an order for further discovery or a review by the Tribunal.

32 One aspect of the present dispute between the parties which was not explored is the extent to which the respondents are conceding by their present request that the names, times and details of interviews and discussions they have had with various industry participants are required to be disclosed to the applicant. If the applicant is required to provide such information, would the respondents not similarly be required to do so?

33 The respondents raise in questions 74 and 79 the adequacy of the Director's claim for privilege. The Director's affidavit of documents contains a blanket clause in this respect. That clause describes the documents for which privilege is claimed as follows:

> Confidential communications and documents which, since the commencement of this proceeding or in view of this proceeding, whilst it was contemplated or anticipated, have passed between any of the Applicant, his servants or agents, his solicitors or Counsel, or have been created by them, for the purpose of obtaining or furnishing information or materials to be used as evidence on his behalf in this proceeding or to enable such evidence to be obtained and to enable solicitors and Counsel for the said Applicant to conduct this proceeding on his behalf and to advise with reference thereto. [12]

In the *Chrysler* decision [13] it was held that a general description of the above type was sufficient (at the time the documents had been filed with the Tribunal). The respondents' affidavits of documents contain a similar blanket claim. There is also authority that a more detailed listing is necessary. [14] There is no doubt that a general practice has developed in the profession of using blanket descriptions as was done in the present case. The better view is that a detailed listing should be provided but not one which by its terms breaches the confidence which it is sought to protect (e.g. by giving the name of an interviewee). At the same time, a need for practicality may require that documents be described in some group manner. In the present case there are apparently over 500 documents (not all of them relevant) which were not provided to the respondents. Within the constraint of practicality, documents for which privilege is claimed should be identified in some more specific form than by a general blanket clause.

34 Subsection 14(1) of the *Competition Tribunal Rules* require the filing and serving of an affidavit of documents which contains "a brief description of each of the documents". Subsection 14(2) provides within that context that a claim "that a document is privileged ... shall be made in the affidavit of documents". Thus, it is contemplated that claims for privilege will be made within the context of an affidavit of documents in which each document has been described.

35 That having been said, however, in the present circumstances there is no need to provide such further description because the Tribunal has already actually reviewed some of the documents and stands ready, as noted below, to review the rest. At the hearing of the present motion, the Tribunal asked counsel for the applicant to provide it with a representative sample of the 500 documents (a sample of both those which were claimed to be irrelevant and those which were relevant but claimed to be privileged). Sixty such documents were provided. These were reviewed for the purpose of assessing the public interest and litigation privileges which were asserted and for assessing the claim of irrelevancy. Only one of them in the Tribunal's view seems relevant and not privileged (document 48). If counsel for the Director wishes to make further argument in this regard it might be addressed at the next session of the pre-hearing conference.

36 Counsel for the respondents objected to counsel for the applicant being allowed to choose a sample for review. While the Tribunal has no doubt that the sample was fairly chosen, if counsel for the respondents are still of the view that all documents which *are relevant* and for which public interest or litigation privilege is claimed should be reviewed by the Tribunal, then this will be done. If such a review is requested, counsel for the respondents should inform counsel for the applicant and the Tribunal quickly so that a review can be completed before the next session of the pre-hearing conference.

37 Five questions remain to be considered: 689, 715, 725, 732 and 736. Question 689 is quoted above and asks the Director to seek information from Mr. Robson as to what he was told by Mr. Perks. Mr. Perks is the publisher of *The Gazette* in Montreal, a Southam paper, and he was involved in the Southam acquisition which the Director challenges. The question need not be answered. As indicated, it is within the respondents' ability to ask Mr. Robson this question directly. The remaining four questions relate to market definition and ask whether the Director accepts as accurate certain information set out in Exhibit 20, a report prepared for Southam in 1987 by Urban and Associates. Counsel for the Director objected to these questions on two grounds: questions of market definition are legal questions; it is unreasonable to ask the Director to go through the respondents' report page by page and say whether he thinks it is accurate.

38 With respect to the proposition that market definition is a legal question, it is not. It is a mixed question of fact and law. The Director's representative can be asked questions relating to that issue although the pleadings do define the issues between the parties on this point in a fairly clear way (whether the market should be defined as the supply of newspaper retail advertising services, print real estate advertising services or more broadly as including other forms of media such as radio and T.V.). The

questions which seek to have the Director's representative state on a page by page basis whether the information contained in the Urban report is accurate are unreasonable and need not be answered.

39 In so far as discovery is resisted by the Director on the ground that discovery does not lie against the Crown, it is too late to raise that argument. If any such immunity exist, it has been waived.

40 THE TRIBUNAL THEREFORE ORDERS THAT:

1. Questions 66, 282, 283, 291, 292, 300 and 314 shall be answered. These can be answered in writing and there is no need for Mr. Brantz to reattend to answer them.

2. The Director shall provide summaries of the information he has collected, as set out in the reasons for this order, in those cases where he has not already done so. Mr. Brantz shall reattend in Vancouver for this purpose unless counsel agree that this might be done in writing.

3. Mr. Brantz shall reattend in Vancouver to answer questions about the facts and documents upon which the Director relies for his position on market definition, if counsel for the respondents so requests.

Footnotes

1 See, for example, *Holmested and Gale on the Ontario Judicature Act and Rules of Practice*, vol. 2 (Toronto: Carswell, 1983) at 1745, para. 2.12.

2 C.E. Choate, *Discovery in Canada* (Toronto: Carswell, 1977) at 8, para. 29; *Graydon v. Graydon* (1921), 51 O.L.R. 301 (Ont. S.C.) : the primary purpose of discovery is to enable the party opposite to know what is the case he has to meet and its *secondary* and subsidiary purpose is to enable the party examining to extract from his opponent admissions which may dispense with more formal proof at the hearing. See also Choate, *ibid*. at 5, para. 15 and at 8, para. 26.

3 *Canada (Director of Investigation & Research) v. Air Canada* [1989 CarswellNat 1248 (Competition Trib.)] CT-88/1, Reasons and Order, February 14, 1989; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* [1989 CarswellNat 720 (Competition Trib.)] , CT-88/4, Reasons and Order, October 13, 1989.

4 Transcript of Examination for Discovery of Andre Brantz, An Authorized Representative of the Director of Investigation and Research, vol. I at 1.

5 Southam's letter of December 15, 1988 advising the Director of the proposed acquisition of the *North Shore News* and providing information in relation thereto.

6 Letter from Southam to the Director dated January 31, 1991.

7 Although, again, why one finds it necessary to adopt so technical an approach in refusing to answer questions is difficult to understand.

8 Decisions which have considered unreasonable questions are: *Andres Wines Ltd. v. T.G. Bright & Co.* (1978), 41 C.P.R. (2d) 113 (Fed. T.D.) and *Cominco Ltd. v. Westinghouse Canada Ltd.* (1979), 11 B.C.L.R. 142 (B.C. C.A.) .

9 *Supra*, note 4, vol. II at 208-215, 230-232; vol. III at 241-243.

10 *Blais v. Andras*, [1972] F.C. 958 (Fed. C.A.); *Canadian National Railway v. McPhail's Equipment Co.* (1977), 16 N.R. 295 (Fed. C.A.) ; *Canadian National Railway v. Milne*, [1980] 2 F.C. 285 (Fed. T.D.); *Houle v. The Queen in Right of Canada*, 2 W.D.C.P. 439.

11 *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 61 Alta. L.R. (2d) 319 (Alta. C.A.) ; *Santa Ursula Navigation S.A. v. St. Lawrence Seaway Authority* (1981), 25 C.P.C. 78 (Fed. T.D.) ; *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.) .

12 Schedule 1, Part 2.

13 *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* , CT-88/4, Reasons and Order, July 5, 1989.

14 *Barrett v. Vardy* (Ont. Dist. Ct.) (Hawkins D.C.J.); *Grossman v. Toronto General Hospital* (1983), 35 C.P.C. 11 (Ont. H.C.) ; *Champion Truck Bodies Ltd. v. Canada* (1986), [1987] 1 F.C. 327 (Fed. T.D.).

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1989 CarswellNat 1074
Competition Tribunal

Canada (Director of Investigation & Research) v. NutraSweet Co.

1989 CarswellNat 1074, [1989] C.C.T.D. No. 54

In the Matter of an application by the Director of Investigation and Research under sections 79 and 77 of the Competition Act, R.S.C., 1985, c. C-34, as amended

In the Matter of The NutraSweet Company

The Director of Investigation and Research, Applicant and The NutraSweet Company, Respondent and Tosoh Canada Ltd., Intervenor

Reed Member, Roseman Member

Heard: November 9, 1989
Judgment: November 29, 1989
Docket: CT8902/79

Counsel: *Warren Grover, Q.C.*, for Applicant
Bruce C. McDonald, *James B. Musgrove*, for NutraSweet Co.

Subject: Corporate and Commercial

Decision of the Board:

1 The respondent, The NutraSweet Company ("NutraSweet"), brings an application to require the representative of the Director of Investigation and Research ("Director"), who is being examined on discovery, to produce certain documents and to answer certain questions. The applicant, the Director, brings an application to require the respondent, NutraSweet, to produce more detailed information regarding its costs, price trends for its product outside of Canada and its interpretation of contract terms.

2 The main action to which these motions relate is an application pursuant to sections 77 and 79 (formerly sections 49 and 51) of the *Competition Act*, R.S.C., 1985, c. C-34. That application seeks an order prohibiting the respondent from engaging in certain allegedly restrictive trade practices (abuse of dominant position, exclusive dealing, tied selling).

Respondent's Motion

3 The information which NutraSweet seeks from the Director has been divided into ten roughly drawn categories. They are as follows:

(1) the written complaint which was filed with the Director which led to the initiation of the Director's investigation;

(2) the memoranda which record interviews with 21 to 23 customers, distributors and competitors and one other person, conducted by the Director in the course of his investigation into the complaint or, failing this, the names of the persons interviewed;

(3) copies of contracts (contractual type documents) which NutraSweet entered into and upon which the Director intends to rely to make his case, other than those which NutraSweet has already produced pursuant to its obligation to produce all relevant documents of which it has knowledge;

(4) the factual basis of the Director's allegations in paragraphs 5(g) and 61 of the application, i.e., what does the Director mean when he refers to "acquisition cost" and what does he mean when he refers to "long run average cost";

(5) the identity of specific customers, competitors or others, specific advantages, specific contracts or other documents which form the basis of the Director's allegations that NutraSweet engaged in pricing practices that:

(i) prevented other manufacturers from entering the market,

(ii) NutraSweet priced below cost,

(iii) NutraSweet engaged in differential pricing, and

(iv) NutraSweet used the bargaining strength of its Canadian patent to negotiate advantageous contracts;

(6) facts on which the Director relies for his conclusion that NutraSweet engaged in differential pricing, facts on which the Director relies for his conclusion that NutraSweet coerced customers into placing its brand on the customer's product as a condition of obtaining supply, facts on which the Director relies for his conclusion that NutraSweet used the strength of its patent as a bargaining lever, and the factual underpinning for other assertions made by the Director;

(7) explanations of the Director's position on certain matters (e.g., what is the tied product and what is the tying product; whether it is the Director's position that exclusive use or supply clauses in contracts beyond one year in duration are anti-competitive);

(8) the relevance of certain documents which are among those produced by the Director;

(9) the origin and authorship of certain of the documents produced by the Director;

(10) the Director's knowledge, information and belief regarding statements made in certain documents he has produced (e.g., the assertion that selective underselling has taken place); information which the Director has as to why one potential NutraSweet customer decided to buy from Tosoh Canada Ltd. ("Tosoh").

4 The fundamental disagreement between counsel for the parties, as to the proper scope of discovery in these proceedings, has arisen because of the hybrid nature of the proceedings. The respondent is not being prosecuted for anti-competitive behaviour by way of a criminal process. Indeed, the enactment of the *Competition Act*, in 1986, was specifically designed to establish a civil procedure to evaluate certain business practices and, where necessary, to control them. Criminal law was seen as too blunt an instrument. At the same time, the new procedure which was devised was not private litigation *simpliciter*. A private person is not empowered to commence an action directly against a competitor or supplier. Only the Director can commence such actions.

5 The Director commences an application before the Tribunal in response to complaints which are filed with him. In the usual course of things, the Director is not likely to know as much about the industry or industries being investigated as the industry participants themselves. (This is particularly true in an abuse of dominant position case where much of the information will be with the person who holds the dominant position.) It is the Tribunal's understanding that the procedure the Director follows after a complaint is filed, is to conduct an investigation. When that investigation is completed, if it is determined that proceedings before the Tribunal might be commenced, inquiries are held for the purpose of collecting evidence.

6 In the context of the hybrid procedure established by the *Competition Act*, the *Competition Tribunal Rules* provide a requirement for discovery by one party of the other. The questions raised in the present motions concern the proper scope of that process. Counsel for the respondent argues that the Director is using the discovery process as a sort of investigation

tool, that the discovery is all one-sided, that the Director is not disclosing any of the sources of the information which he holds but is requiring the respondent to provide full discovery.

7 As we understand counsel for the Director's position, he does not fundamentally disagree with the respondent's characterization. He notes that in this case the Director did not attempt to use his powers of seizure to obtain documents from the respondent. Nor did the Director choose to proceed under section 11 of the *Competition Act*. That section provides a mechanism for obtaining documents and information prior to the bringing of an application even when the documents are outside the country. I quote from counsel for the Director's argument (at p. 58 of the confidential transcript of the hearing of November 9, 1989):

> ... the NutraSweet Company has no Canadian subsidiary; it has a tremendously tiny Canadian operation. My friend keeps talking about: "Could not we have gone and taken their documents?" I can just see the RCMP walking into Deerfield, Illinois to swoop down on The NutraSweet Company. ... it seemed to me that the obvious place to get the information; so far as The NutraSweet Company was going to be concerned, was from discovery, which was a procedure set out to help the Director find out what NutraSweet had.

As has been noted, the Director chose to proceed by way of discovery to obtain the relevant documents and, as counsel for the Director argues, discovery in such a case is necessarily one-sided.

8 Part of the Director's argument seemed to be that the Tribunal, because it has expertise of its own, by virtue of the inclusion of lay members on its panels, operates in a fashion different from a court. He seemed to argue that, therefore, he does not, at this stage of the proceedings, have to disclose the totality of his case to the respondent but could wait for the hearing. If this was indeed the Director's argument, the Tribunal disagrees. Although the expertise of the non-judicial members allows the Tribunal to assess the evidence, which is presented by the parties or intervenors, in a more searching fashion than could be done by a body lacking that expertise, the procedure is a normal civil proceeding in which there is a *lis* between the parties. The Director is inserted between what in a strictly civil proceeding would be the plaintiff (applicant) and the defendant (respondent). It was clearly contemplated that the Director would act somewhat like a public prosecutor and respondents thereby would be protected from frivolous actions.

9 The respondent contends that the Director, through his witness, on discovery must provide the respondent with the factual information which the Director has which underlies the case he is making against the respondent. Counsel argues that the respondent must be given this information so that it can know the case that it has to meet. Three areas are in dispute: whether certain information is privileged and therefore does not have to be provided by the Director; whether facts contained in documents that may enjoy privilege must be disclosed, if they are relevant to the issues at hand; and whether, under a proper interpretation, certain information constitutes facts or evidence, since there is agreement that only the former have to be provided. The Tribunal is of the view that the respondent's argument is basically correct. The respondent should be provided, on discovery, with the factual information which underlies the Director's application.

10 In this context, then, it is necessary to turn to the discovery which the respondent seeks of the Director.

(1) Complaint Document - Public Interest Privilege

11 The first document sought to be produced is the complaint which led to the Director's investigation in this case. The Director argues that it should not be produced because it falls under the public interest privilege. The public interest test is sometimes referred to as the "Wigmore test". It was set out in *Slavutych v. Baker* (1975), 55 D.L.R. (3d) 224 (S.C.C.), at p. 228 as follows:

> (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.

12 Applications of the principle that disclosure should be refused, when it is in the public interest to do so, are also found in *D. v. National Society for the Prevention of Cruelty to Children*, [1977] 2 W.L.R. 201 (H.L.) and in *Rogers v. Secretary of State for the Home Department*, [1972] 2 All E.R. 1057 (H.L.). At page 1061 of the *Rogers* decision, the following passage is found:

> The letter called for in this case came from the police. I feel sure that they could not be deterred from giving full information by any fear of consequences to themselves if there were any disclosure. But much of the information which they can give must come from sources which must be protected and they would rightly take this into account. Even if information were given without naming the source, the very nature of the information might, if it were communicated to the person concerned, at least give him a very shrewd idea from whom it had come.

13 The courts in the two above-mentioned cases determined that the public interest in non-disclosure outweighed the right to disclosure of all relevant documents. The Director argues that in the present circumstances there is a public interest which requires that documentation and information collected by the Director at the inquiry stage be protected from disclosure: the public interest of encouraging individuals to come forward and complain about perceived anti-competitive behaviour, in confidence and without fear of reprisals from the dominant player in the market.

14 It is to be noted that it is not the identity of the complainant in the present case which it is sought to protect. It is known that the complainant is Tosoh. It is the contents of the complaint and presumably the identity of the sources that provided information to the complainant which it is sought to protect.

15 It is to be noted that Tosoh applied for and was granted intervenor status in these proceedings. Tosoh sought, in that context, to be given the right to make discovery of the respondent, NutraSweet. Tosoh did so on the understanding that if such right were given, Tosoh itself would be subject to discovery by NutraSweet. NutraSweet argued that discovery rights should not be granted to Tosoh and the Tribunal accepted that argument. Consequently NutraSweet did not obtain discovery of Tosoh.

16 The Tribunal accepts the Director's argument that documents created at the investigation stage, including the complaint, fall within what has been described as the public interest privilege. The public interest in protecting their confidentiality, in order to allow complainants to come forward in an uninhibited fashion, outweighs the respondent's right to have all relevant documents produced. For the reasons given, the Director will not be required to produce the complaint document.

(2) Interview Notes - Litigation Privilege

17 The second category of documents sought to be produced are the interview notes made by counsel for the Director when he interviewed customers, competitors, and others, at the inquiry stage of the proceeding. Mr. Grover, counsel for the Director who appeared before the Tribunal, conducted those interviews. He stated to the Tribunal that these were done at the inquiry stage of the process and that "once the Director goes on inquiry ... he is preparing for litigation". On the basis of that assertion it is the Tribunal's conclusion that these documents fit into the litigation privilege category. The dominant purpose of their preparation was for use in litigation. See *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.) and *Susan Hosiery Limited v. Minister of National Revenue*, 69 D.T.C. 5278 (Exch. Ct.), for a discussion of the applicable legal principles. This is consonant with the Tribunal's decision of July 5, 1989 in *The Director of Investigation and Research v. Chrysler Canada Ltd (CT - 8814)*.

(3) Contractual Documents of which the Director has Knowledge

18 The third category of documents which the respondent seeks are contracts or contractual type documents which NutraSweet has entered into, which the Director has in his possession, and upon which the Director relies. As has already been noted, the *Competition Tribunal Rules* require each party to disclose to the other party all relevant documents of which it has knowledge. The documents sought by NutraSweet are ones to which it would be a signatory and of which it should have copies.

19 Counsel for NutraSweet argues that the request for disclosure of contracts in the Director's possession is made because it is possible that there are some documents which the Director has, upon which he intends to rely, which NutraSweet does not recognize as contractual in nature and therefore has not produced. Counsel for the Director argues that NutraSweet's request is really a disguised attempt to find out what the Director already knows and then to produce only those documents which the Director already has, in his possession, rather than giving full and complete discovery. Also, he argues that to require disclosure of the documents he has, will result in disclosure of the identity of his informants. He states that he intends to ask the respondent whether it has any further documents respecting certain customers and thus obtain the relevant documentation out of the mouth of the respondent without having to disclose the sources of the Director's information.

20 This is a very strange cat and mouse situation. Under the *Competition Tribunal Rules* both parties are obligated to file a list of documents of which they have knowledge and which are relevant to these proceedings. Thus, the Director should have disclosed, already, the documents in his possession. Equally, the respondent should have produced, already, all documents of which it has knowledge which are relevant. If it is clear, after that process, that there are documents which the respondent should have produced, pursuant to its obligation to produce, which it did not produce, then an adverse inference can be drawn against the respondent in that regard. Also, while counsel for the Director says he will seek further documents from the respondent, with respect to certain customers and certain years, and thereby obviate the need to disclose the sources of the information which he has obtained, this surely should have been done some time ago. The Director shall produce the documents of which he has copies, if he has not done so already. If these are not among the respondent's productions and there is no patently clear reason why they are not, then an adverse inference in that regard will be drawn against the respondent.

(4) "Acquisition cost" and "long run average cost"

21 The fourth category of information which the respondent seeks is a definition of what the Director means by the terms "acquisition cost" and "long run average cost". As we understand the Director's response, it is that the term "acquisition cost" is an undefined term in subsection 78(i) of the *Competition Act*. The Director's witness did state, on discovery, that the Director believed that acquisition cost was synonymous with long run average cost (p. 28 of the transcript of discovery). Mr. Grover indicated, however, that information that has come to light during the examination of NutraSweet's witness could affect that belief (p. 72 of the confidential transcript of the hearing of November 9, 1989). Until the Tribunal makes a ruling on what that term means he does not want to bind himself, by way of admission, to one definition as opposed to another.

22 With respect to "long run average cost", counsel for the Director sent to counsel for the respondent an excerpt from a book which tried to define "long run average cost". He also asserts that expert evidence will be called to speak to this concept. At page 73 of the confidential transcript of the hearing of November 9, 1989, counsel for the Director argues:

> It seems to me, my job is to put before the Tribunal: ... all the items of cost that the NutraSweet Company says goes into the total costs and I mean fixed, variable, any other cost, advertising. Then, I will make my submissions as to which of those I think should be counted and whether or not it is a predatory or a negative abuse of the dominant position, but it will be the Tribunal that will decide.

23 Both questions (i.e., that with respect to acquisition cost and that with respect to long run average cost) relate to the position which the Director proposes to take as opposed to the facts upon which that position is based. On discovery

it is facts which have to be disclosed, not the conclusion, which either party intends to argue, should be drawn from those facts. We note that counsel for the Director did provide a fairly explicit explanation, of what might be called his "theory of the case", to counsel for the respondent. He did explain why and on the basis of what evidence, available to him prior to discovery, he based his tentative conclusions (pages 113 to 120 of the transcript of the *in camera* hearing of November 9, 1989).

(5) Identity of Customer Contracts and Activities which Form the Basis of Director's Allegations

24 The fifth category of information which counsel for the respondent seeks, relates to: the identity of specific customers, competitors or others, specific advantages, specific contracts or other documents which form the basis of the Director's allegation that NutraSweet engaged in certain pricing practices and used the bargaining strength of its Canadian patent to negotiate advantageous contracts.

25 It must be admitted that some of the question and answer sequences have a strange quality about them. For example:

NutraSweet asked the Director:

> "... How many world-wide contracts does NutraSweet have?" (Q. 453).

The Director's representative replied:

> I believe I have answered ... [number]. [1]

NutraSweet then asked: "Who are they with?" (Q. 454).

The Director's representative replied:

> Well our position remains unchanged ... confidential.

And NutraSweet's counsel responded:

> [names].

The Director's counsel then stated:

> ... We are not prepared ...

NutraSweet's counsel said:

> You are not prepared to admit that those are the [number] corporations ...

And the Director's counsel stated: "No we are not."

The above exchange has a rather "Alice-in-Wonderland" character. One would assume that NutraSweet knows how many world-wide contracts it has and that the Director's knowledge of this would be secondary at best.

26 In any event, the Director resists answering questions in category five on the grounds that: (1) the contractual documents have been produced, they are not voluminous and the respondent can read them, itself, to ascertain the portions relevant to the allegations made against it; (2) the Director does not have to answer questions which would disclose the source of his information, the identity of his informants; (3) the information which the respondent seeks is evidence not facts and a party is not required, on discovery, to disclose evidence.

27 Questions 144 and 148 will be considered first. These relate to the allegation by the Director that the respondent sold aspartame in Canada below cost so as to result in a lessening of competition. When asked as to what facts the Director relies upon for this information (Q. 131), the Director's representative replied:

> It is the Director's information based on the interviews conducted with customers and competitors or potential competitors and based on information contained in the documents that the Director has supplied that this pricing practice along with the other practices have resulted in an inability of competitors to enter the market.

Question 144 seeks an answer to the question which documents of those produced by the Director are relied upon for this allegation. Question 148 seeks an answer to the question which specific transactions were below cost. The Director answers with respect to question 144 that he does not need to specify the exact documents in the three binder collection provided to the respondent and that the answer to question 148 is a matter of evidence which need not be answered.

28 Questions 144 and 148 need not be answered. The concept of sale below cost as used by the Director need not relate to specific individual transactions. Based on information provided by Mr. Grover the Director's position was initially arrived at using global cost and revenue figures rather than specific sales. In addition, the requirement that the Director identify exactly which documents he is relying upon for this allegation is not necessary (the documents are not voluminous) and many are from public sources, drawn on, apparently, for background information on the industry.

29 With respect to the various questions which ask the Director to identify the particular document, or part thereof, upon which he relies for certain allegations of fact (Q. 161-163; Q. 415-416 (October 12)), these do not need to be answered. The requirement of a witness to specifically identify where, in documents, certain facts are to be found, was discussed by Mr. Justice Mahoney in *Foseco International Ltd. v. Bimac Canada* (1980), 53 C.P.R. (2d) 186, at p. 188:

> ... I accept that documentation produced may be so voluminous or otherwise so complex that an opposing party is entitled to have the sort of identification or definition asked for. The party seeking an order to that effect must establish the complexity and the Court is entitled to take account of that party's own probable capability of coping with what, to a layman, seems complex.

See also *Loewen, Ondaatje, McCutcheon & Co. Ltd. v. Snelling* (1985), 2 C.P.C. (2d) 93 (Ont. Sup. Ct.) and *Leliever v. Lindson* (1977), 3 C.P.C. 245 (Ont. Sup. Ct.). The documentation in the present case is not voluminous. The respondent has not demonstrated that the complexity of the material is such as to require the order sought.

30 The remaining questions in the fifth category are: Q. 150, 154, 155 and 164; Q. 158-162 and 165; Q. 962-963/966, 1033, 1042-1044, 1045-1046, 1052, 1055-1059, 1060-1065, 1134, 1138/1141, and 1158. These are to be answered. The respondent is entitled to know the details of the Director's case against it before trial. Discovery is designed to allow each side to gain an appreciation of the other side's case. If the Director does not disclose the facts on which he is relying, until trial, the respondent will be disadvantaged. While the Director can assert a privilege and protect the identity of informers, he cannot refuse to disclose the information upon which he is basing his allegations, once he decides to proceed against a respondent.

31 It may very well be that some of that information, in this category and in other categories where information is ordered to be provided, should be provided to counsel for the respondent under protection of a confidentiality order but it should, in any event, be provided.

32 Where the Director does not intend to rely on calling his sources of information as witnesses and there is a desire to protect the identity of the sources, who probably have continuing commercial relations with the respondent, the information provided to counsel for the respondent may be disclosed under protection of a confidentiality order. There is a confidentiality order existing in this case, for the purpose of protecting information the disclosure of which could cause commercial harm. It must be recognized, however, that there are limits to which this type of information can be kept

totally confidential in a case such as the present. The purpose of providing the information to counsel is to allow him to learn the facts surrounding the alleged events. To do so he must examine documents and interview employees of his client.

33 Also, it should be noted that in the context of the Director's investigations there is no reason to believe that much of the information collected is really of the "informer" type. The information which the Director collected through interviews, while technically given voluntarily, could have been obtained by using more formal means had voluntary disclosure not occurred. In providing the respondent with the information sought, the Director does not thereby necessarily disclose where he first obtained that information (e.g., from Tosoh or from others, as opposed to from the particular customer or distributor being interviewed, who may in the context of an interview merely have confirmed what the Director already knew). The Director does not have to disclose the source of his information but he does have to disclose that information.

34 With respect to the argument that the questions seek evidence rather than facts, the Tribunal does not share that view. Counsel for the Director cites *Scott Paper Co. v. Minnesota Mining and Manufacturing Co.* (1980), 49 C.P.R. (2d) 240 (F.C.T.D.); *Leco Industries Ltd. v. Union Carbide Corp. and Union Carbide Canada Ltd.* (1970), 64 C.P.R. 246 (Ex. Ct.); *Owens-Illinois, Inc. v. AMCA International Ltd.* (1987), 14 C.P.R. (3d) 357 (F.C.T.D.); and *Beloit Canada LtéelLtd v. Valmet 0Y* (1981), 60 C.P.R. (2d) 144 (F.C.A.). The *Scott Paper Co.* case does not assist the Director. That case held that the questions requesting the names of individuals who might be witnesses need not be answered. It was held that the source of information is evidence not fact. What the respondent seeks in this case, however, is not the names of prospective witnesses. It seeks the names of customers, competitors, distributors and others who allegedly were subjected to certain pricing practices by the respondent. That these might eventually be called as witnesses does not obviate the fact that what the respondent is seeking is the factual underpinnings to the Director's case and not disclosure of the prospective roster of witnesses.

35 The *Leco* and *Owens-Illinois* cases held that on discovery, a party is not required to discover and disclose the precise details of facts it hopes to establish through witnesses, as opposed to disclosing facts within the knowledge of that party. In the *Beloit* case it was held that on discovery a party is required to disclose only information within the knowledge or means of knowledge of the party being examined. It was held that a party is not required to disclose on discovery all the evidence on which it will rely at trial. In the present case none of the crucial facts are a matter of direct knowledge of the Director. All his information comes from third parties and all must be proven through them. This does not, however, insulate the Director from being required to provide to the respondent on discovery the information which the Director has at that time which underlies his case. The respondent is entitled to be made aware of the factual basis of the Director's allegations.

(6) Facts re: Differential Pricing, Coercion of Customers, etc.

36 The sixth category of information sought is described as facts or documents relied upon by the Director in making certain allegations in the application. Insofar as these questions seek the Director's position as opposed to the facts underlying that position, they need not be answered. See: *Philips Expert B.V. v. Windmere Consumer Products Inc.* (1986), 8 C.P.R. (3d) 505; *Sperry Corp. v. John Deere Ltd.* (1984), 82 C.P.R. (2d) 1 (F.C.T.D.); and *Owens-Illinois, Inc. v. AMCA International Ltd.* (1987), 14 C.P.R. (3d) 357 (F.C.T.D.). If the questions seek facts, they are to be answered. The same considerations apply with respect to these questions as are set out with respect to category five above. In this regard the following questions are to be answered: Q. 172-173 and 435; Q. 927-928, 932-933, 943, 952-953, 976-977, 982-984, 994-995, 996-1001, 1012-1014, 1026, 1039, 1078-1079, 1093, 1110-1112, 1150-1151/1153, 1173/1175/1179-1180, 1190, 1194/1197, 1201-1202, and 1219-1221 shall be answered. Questions 1008 and 1181 are too imprecisely worded for answers to be required. To the extent that the Director has facts or information underlying his allegations or that may be useful to the respondent, they should be disclosed on discovery.

(7) Positions of the Director

37 The seventh category of information sought relates to the position which the Director proposes to take. It is sufficient to quote some of these questions:

> Q. 934 ... is it the Director's position that every customer that places the NutraSweet brand on its packaging in Canada does so because NutraSweet has made it a condition of supply that it do so?
>
> Q. 968 ... does the Director say that [certain terms] in respondent contracts, that are not beyond one year in duration, are anti-competitive?
>
> Q. 1090 Does the Director accept, for the purposes of this proceeding, that Aspartame as a tabletop sweetener is reasonably interchangeable with sugar?

38 Questions of this nature need not be answered. They elicit conclusions and arguments which the Director proposes to make, on the basis of whatever facts are proven. They are not questions of fact which must be answered at the discovery stage.

(8) Relevance of Certain Documents

39 The eighth category of information sought seeks the Director's view as to the relevance of some of the documents which were produced by him. Counsel for the Director has answered the respondent's questions: the documents may not be relevant. Counsel for the Director indicated that the Director had produced all documents which had been sent or given to him in the course of his inquiry (except those for which confidentiality was claimed). At the moment he is not, himself, entirely sure of the relevance of all of these documents but he produced them because they were in his possession and had been sent to him by persons who thought they were relevant. This is a sufficient answer to the respondent's questions. In addition, the question of relevance is a question of law. It is not a question that can or should be addressed by a witness on discovery.

(9) Authorship/Source of Documents

40 The ninth category of questions seeks information as to the authorship and origin of certain of the documents produced by the Director. Counsel for the Director responded to this request by saying that the questions, in fact, had been answered to the extent the Director knew the origin of the document. A review of certain of the answers, however, indicates that on some occasions the Director did purport to have information about a document's source which he was not willing to disclose. For example, in question 82 the Director's representative was asked: "So are you saying to me, then, that even if the Director does know what corporation was the author of this document it will not tell us...". The response was affirmative. To the extent that the Director knows the authorship and origin of the documents referred to, the questions shall be answered.

(10) Director's Knowledge, Information or Belief

41 The last category of unanswered questions, in issue, are those seeking the Director's knowledge, information or belief regarding statements made in certain documents he has produced. It is instructive to quote one exchange in this category:

> Q. 152 Then, under paragraph (c) Trade name NutraSweet, the second full paragraph there provides in a bracket at the end of the paragraph that there has been selective underselling of potential H.S.C. clients with the intention to get rid of H.S.C. as the last one from the market.
>
> A. I see that.
>
> Q. 153 ... The question is, what selective underselling has been done? In other words, what customers or potential H.S.C. clients are we talking about?

... on what grounds are you objecting to that question?

A. Don't have to get into the precise details in relation to who was affected.

42 For reasons similar to those set out, under category five above, this type of question is to be answered. To the extent that the Director has information concerning the factual basis for the allegations he is making, those facts should be disclosed to the respondent on discovery. It is not enough for the Director to say that *the facts* he relies upon are, for example, the underselling of potential entrants in order to exclude them from the market. Without knowing the identity of the customers and the time periods during which the alleged events occurred, the respondent is not given a reasonable opportunity to prepare a defence. More detailed facts are required to enable the respondent to properly prepare. A distinction must be drawn between the conclusion of facts which are drawn and the specific facts which underlie that conclusion. The information respecting the specific facts is to be provided on discovery. The conclusions of fact (e.g., whether there was underselling of potential entrants concerned) is a matter which the Tribunal will decide. The questions listed in category ten are to be answered except for question 1258. Question 1258 has been answered. The answer given was: "I'm sorry, I don't know."

Applicant's Motion

43 To turn then to the Director's motion seeking: more detailed financial statements from the respondent; documents and answers to questions relating to its marketing, selling and pricing practices in Europe and the United States; answers to questions listed in schedule 1 to the Applicant's Pre-Hearing Conference Memorandum dated November 8, 1989.

44 The Director's request for more detailed financial information (see particularly questions 1132 and 1146 of the examination for discovery of Andrew G. Balbirer) was refused by counsel for the respondent on the ground that no such information would be produced until the Director described, in more detail, his position with respect to costs. The Director's position, as we understand it and as described above, is that in the absence of jurisprudence defining the meaning of acquisition cost and long run average costs, he is entitled to keep his options open and to present alternative arguments. As noted above, he has provided the respondent with an explanation of his tentative conclusions and the basis on which he reached those conclusions. He has provided some indication, by reference to the relevant literature (Areeda) of the arguments he proposes to make. It would be premature to require the Director to limit the scope of his argument in this regard. The information sought should be provided.

45 With respect to the information regarding the respondent's marketing, selling and pricing practices in Europe and the United States (see Question 149), counsel for the respondent argues that it is premature to order that those questions be answered because the respondent has not yet refused to answer. Counsel indicated on discovery that the question would be taken under advisement and that the respondent would "do what we think might be reasonable". Counsel for the Director argues that he has included these questions in his motion because it is the most expeditious way of proceeding, given that the status of unanswered questions arising out of discovery was to be put before the Tribunal in any event. The Tribunal agrees that it was an expeditious way of proceeding. The questions are relevant. They should be answered.

46 Counsel for the respondent argues that certain questions should not be answered because they seek interpretations of contracts and this is essentially a matter of law. This argument relates to questions 393 and 412. In any event, counsel notes that question 412 was answered. While the questions may have been infelicitously framed and on their face appear to require the interpretation of contracts, what is really sought by the question is information concerning the conduct of NutraSweet: information as to the kind of conduct NutraSweet considered the contract required. This is not a question of the legal interpretation of the contract. Counsel is correct, however, with respect to question 412. That question has been answered.

47 Question 418 relates to what is described as [certain terms] in the contracts, specifically as it relates to [name]. It is instructive to quote part of the transcript:

> Q. 416 Director's counsel: Well, specifically, as in a contract with [name]. Has it in any way been relative to Canada, discussed with [name], as to what it means? Do you have any information and belief about that?
>
> NutraSweet's counsel: The parties negotiated this clause.
>
> Director's counsel: No, but since that time, Mr. McDonald. That was in [date].
>
> Q. 417 Director's counsel: My understanding is that there may have been some conversations in [date] with respect to it.
>
> NutraSweet's counsel: I've not personally had any conversations with respect to it.
>
> Q. 418 Director's counsel: Has the company any information with respect to that clause?
>
> NutraStreet's counsel: Why don't you tell us what information you have, and we'll tell you whether we understand that or not.
>
> Director's counsel: Well, I'm not sure what information we have. We have heard, and that's why I'm asking you if you have information.
>
> NutraSweet's counsel: No idea.
>
> Director's counsel: Can you look into it?
>
> NutraSweet's counsel: No. If you want to give me some specifics, Mr. Grover, we can check. But to have an open-ended inquiry as to whether someone has ever discussed this clause with [name], no.

48 There is no doubt that the question as framed is too vague and broad to require an answer.

49 As put, question 548 which counsel for the Director seeks to have answered does not permit an easy reply. Moreover, it does not directly address the information that the Director is seeking according to the argument put forward at page 145 of the transcript of the hearing of November 9, 1989, i.e., whether there is a technical or other reason (beyond the obvious commercial advantage) that explains why NutraSweet requires through its contract with a customer that it use NutraSweet aspartame exclusively. This type of question must be answered, but the questions must be posed in a way that clearly states the information being sought.

50 The next question to be considered is question 580. The relevant portion of the transcript reads as follows:

> Q. 579 Is their volume in Europe as large or larger than [names] Canadian volume? I guess we should say Canadian plus European volume, if they're both -- I don't know if [names] are over there.
>
> A. I'm not certain. I believe our volume for [name] in Europe is probably somewhere between [name] and [name], in Canada.
>
> Q. 580 Director's counsel: If that turns out not to be true, will you let me know?
>
> NutraSweet's counsel: No. We're not going to inquire for this.

Counsel for the respondent argues that the information is marginally relevant and therefore should not be answered. It is the Tribunal's view that the relevance is sufficient to require the question to be answered.

51 The next question to consider is question 1341. The question seeks information as to whether an extension of NutraSweet's present contract with [name] is anticipated.

Q. 1341 And in terms of the actual negotiations, you would not be aware whether or not this sort of extension would be anticipated?

52 Counsel for the respondent argues that the question is not a proper one for the witness, that the answer is irrelevant. The Tribunal is of the view that the relevance is sufficient to require that the question be answered.

53 The last two questions to be considered are question 1435 and question 1574. The respondent considers that the answers should not be required because to do so would be unduly burdensome. Question 1435 seeks information concerning who made certain handwritten notes on a particular paper. Question 1574 seeks information concerning NutraSweet's Swirl Spotters campaign. Both questions should be answered.

Scheduling

54 Counsel for the respondent raised the possibility that the date for filing expert reports might be revised given the unanswered questions and undertakings arising out of discovery. We also understood his submissions to contemplate a postponement of the hearing date now scheduled for January 9, 1990.

55 As indicated at the hearing of these motions, the Tribunal is willing to entertain a revised schedule for the filing of expert evidence providing such is agreed to by both counsel. Any such revision, however, shall take place within the context of a hearing which is to begin on January 9, 1990. As was indicated to counsel, the Tribunal is not receptive to changing the January hearing date for two reasons.

56 Firstly, prior to the setting of a schedule for this application, counsel were asked to choose a schedule which was reasonable and realistic. They were asked to build into that schedule allowances for "slippage" as, for example, can occur consequent on unanswered discovery questions. At the same time, the Tribunal indicated that once a schedule was set it would expect that that schedule would govern this application in a fairly rigorous fashion.

57 Secondly, the Tribunal does not have much internal scheduling flexibility. For whatever reason, the government has not chosen to appoint the lay members which the legislation contemplates. Subsection 3(2) of the *Competition Tribunal Act* contemplates that the Tribunal should be composed of four judicial members and eight lay members. While four judicial members have been appointed, only two lay members have been appointed. One of these is part time. This situation certainly hobbles the Tribunal. It creates scheduling difficulties. It provides no opportunity to build up a body of experienced members, of the kind the legislation seems to contemplate, so as to provide the Tribunal with the requisite expertise. Sickness of one or more members, or absence for other reasons, can bring the operation of the Tribunal to a standstill. This is indeed unfortunate. In any event, under present circumstances if their application is to be rescheduled it would require a six month or longer postponement. Given that the legislation has asked the Tribunal to proceed as expeditiously as possible, it is not appropriate to consider such a postponement in these circumstances.

Footnotes

1 [ ] indicate information deleted at the request of the respondent who considers the information to be confidential.

Competition Tribunal Tribunal de la concurrence

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16
File No.: CT-2016-015
Registry Document No.: 135

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34 as amended;

AND IN THE MATTER OF a motion by Vancouver Airport Authority to compel answers to questions refused on discovery.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)

Date of hearing: October 13, 2017
Before Judicial Member: D. Gascon J. (Chairperson)
Date of Order and Reasons for Order: October 26, 2017

ORDER AND REASONS FOR ORDER GRANTING IN PART RESPONDENT'S MOTION TO COMPEL ANSWERS TO QUESTIONS REFUSED ON DISCOVERY

I. OVERVIEW

[1] On September 29, 2017, the Vancouver Airport Authority ("**VAA**") filed a motion before the Tribunal to compel the Commissioner of Competition ("**Commissioner**") to answer several questions that were refused during the examination for discovery of the Commissioner's representative, Mr. Kevin Rushton ("**Refusals Motion**"). VAA brought this Refusals Motion in the context of an application made against VAA by the Commissioner ("**Application**") under the abuse of dominance provisions of the *Competition Act*, RSC 1985, c C-34 ("**Act**").

[2] In this Refusals Motion, VAA seeks the following conclusions:

(a) An order requiring the Commissioner to answer, within fifteen days, the refusals set out in Schedule "A" to VAA's Notice of Motion (specifically those refusals set out in VAA's Memorandum of Fact and Law under the following categories: Category A – Facts known to the Commissioner ("**Category A**"), Category B – Questions regarding the third-party summaries ("**Category B**") and Category C – Miscellaneous ("**Category C**"));

(b) An order for VAA's costs of this motion; and

(c) Such further and other relief as the Tribunal deems just.

[3] In its Notice of Motion, VAA identified a total of 55 questions that remained unanswered or insufficiently answered ("**Requests**"). This initial list of Requests was narrowed down at the hearing, as discussed below. The Category A Requests seek all the facts that the Commissioner knows in relation to various issues in dispute in this Application, including specific references to the Commissioner's summaries of third-party information and to records in the Commissioner's documentary productions. The Category B Requests seek third-party information that is subject to public interest privilege. The Category C Requests relate to miscellaneous questions.

[4] For the reasons that follow, VAA's Refusals Motion will be granted in part, but only with respect to the "reformulated" version of some Requests. Upon reviewing the materials filed by VAA and the Commissioner (including the transcripts of the examination for discovery of Mr. Rushton), and after hearing counsel for both parties, I am not persuaded that there are grounds to compel the Commissioner to provide answers to the Category B and C Requests listed by VAA, as well as to the Category A Requests as these were initially formulated at the examination for discovery of Mr. Rushton. However, I am of the view that, when read down and "reformulated" as counsel for VAA discussed at the hearing (at times, in response to questions from the Tribunal), some of VAA's Category A Requests will need to be answered by the Commissioner's representative along the lines developed in these Reasons. In essence, in order to properly and sufficiently answer these "reformulated" Category A Requests, the Commissioner will need to provide more than a generic statement solely referring to all materials already produced to VAA. Nevertheless, a subset of the "reformulated" Category A Requests will not have to be answered in any event, based on additional reasons raised by the Commissioner.

II. BACKGROUND

[5] The Commissioner filed his Notice of Application on September 29, 2016, seeking relief against VAA under section 79 of the Act.

[6] VAA is a not-for-profit corporation responsible for the operation of the Vancouver International Airport ("**VIA**"). The Commissioner claims that VAA abused its dominant position by only permitting two providers of in-flight catering services to operate on-site at VIA, and in excluding and denying the benefits of competition to the in-flight catering marketplace. The Commissioner's Application is based upon, among other things, allegations that VAA controls the market for galley handling at VIA, that it acted with an anti-competitive purpose, and that the effect of its decision to limit the number of in-flight catering services providers was a substantial prevention or lessening of competition, resulting in higher prices, dampened innovation and lower service quality.

[7] In accordance with the scheduling order issued by the Tribunal in this matter, the Commissioner served VAA with his affidavit of documents on February 15, 2017 ("**AOD**"). The Commissioner's AOD lists all records relevant to matters in issue in this Application which were in the Commissioner's possession, power or control as of December 31, 2016. The AOD is divided into three schedules: (i) Schedule A for records that do not contain confidential information; (ii) Schedule B for records that, according to the Commissioner, contain confidential information and for which no privilege is claimed or the Commissioner has waived privilege for the purpose of the Application; and (iii) Schedule C for records that the Commissioner asserts contain confidential information and for which at least one privilege (i.e., solicitor-client, litigation or public interest) is being claimed. Since then, the original AOD has been amended and supplemented on a few occasions by the Commissioner (collectively, "**AODs**").

[8] The Commissioner states that, through the productions contained in his AODs, he has now provided to VAA all relevant, non-privileged documents in his possession, power or control ("**Documentary Productions**"). In total, the Commissioner says he has produced 14,398 records to VAA. Of these, 11,621 are in-flight catering pricing data records (i.e., invoices, pricing databases and price lists); 1,277 records were provided to the Commissioner by VAA itself and were simply reproduced by the Commissioner to VAA; and 342 records were email correspondence between VAA (or its counsel) and the Competition Bureau. Excluding these three groups of records, the Commissioner has thus produced 1,158 documents to VAA as part of his Documentary Productions.

[9] In March 2017, VAA challenged the Commissioner's claim of public interest privilege over documents contained in Schedule C of the AOD. This resulted in a Tribunal's decision dated April 24, 2017 (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6 ("***VAA Privilege Decision***"). In the VAA Privilege Decision, currently under appeal before the Federal Court of Appeal, I upheld the Commissioner's claim of public interest privilege over approximately 1,200 documents.

[10] As part of the proceedings, the Commissioner produced to VAA summaries of the facts obtained by him from third-party sources during his investigation leading up to the Application

and contained in the records for which the Commissioner has claimed public interest privilege ("**Summaries**"). The first version of the Summaries was produced on April 13, 2017. As it was not satisfied with the level of detail provided in the Summaries, VAA brought a motion to challenge the adequacy and accuracy of the Summaries. Prior to the hearing of that motion, on June 6, 2017, the Commissioner delivered revised and reordered Summaries to VAA. The Summaries are divided into two documents on the basis of the level of confidentiality asserted and total some 200 pages.

[11] On July 4, 2017, the Tribunal released its decision on VAA's summaries motion (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 8 ("***VAA Summaries Decision***")). In his decision, Mr. Justice Phelan dismissed VAA's motion and concluded that VAA had not made the case for further and better disclosure of source identification in the Summaries, even in a limited form or under limited access.

[12] On August 23 and 24, 2014, the Commissioner's representative, Mr. Rushton, was examined for discovery by VAA for two full days.

[13] In its Notice of Motion, VAA had initially identified a total of 55 Requests for which it seeks an order from the Tribunal compelling the Commissioner to answer them. At the hearing of this Refusals Motion before the Tribunal, counsel for the parties indicated that Requests 126, 129 and 130 under Category B have been withdrawn and that Request 114 under Category C has been resolved. This leaves a total of 51 questions to be decided by the Tribunal: 39 in Category A, 11 in Category B and one in Category C.

III. ANALYSIS

[14] Each of the categories of disputed questions will be dealt with in turn.

A. Category A Requests

[15] The refusals found in Category A generally request the Commissioner to provide the factual basis of various allegations made in the Application. VAA also asks, in its Category A Requests, for specific references to the relevant bullets listed in the Summaries as well as to the relevant records in the Commissioner's Documentary Productions.

[16] While the exact wording of VAA's 39 Category A Requests has varied over the course of the two-day examination of Mr. Rushton, VAA described all these questions using identical language in its Memorandum of Fact and Law, save for the actual reference to the particular allegation or issue at stake in each question. For example, Request 21 reads as follows: "Provide all facts that the Commissioner knows that relate to the market definition that does not include catering as alleged in paragraph 11 of the Commissioner's Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions" [emphasis added]. All Category A Requests reproduce these underlined introductory and closing words. This is what counsel for both parties referred to as the "stock undertaking" during the examination for discovery of Mr. Rushton, and at the hearing before the Tribunal.

[17] Through his counsel, the Commissioner had taken the 39 Category A Requests under advisement during the examination of Mr. Rushton. In his response provided to VAA after the examination, the Commissioner said that all Category A Requests have been answered, that he has already disclosed and provided to VAA all relevant facts in his possession at the time he produced his Documentary Productions and his Summaries, and that the answers to VAA's Category A Requests are found in the Summaries and Documentary Productions. Accordingly, the Commissioner submits that he has provided VAA, through the Summaries and Documentary Productions, with all relevant, non-privileged facts that he knows in relation to each of the issues referenced in the Category A Requests.

[18] The Commissioner repeated the same response for all Category A Requests. The Commissioner's exact response reads as follows:

> The Commissioner has produced to VAA all relevant, non-privileged information in the Commissioner's possession, power and control and has further produced to VAA summaries of relevant third party information learned by the Commissioner from third parties in the course of the Competition Bureau's review of this matter. Further, the Commissioner will comply with his obligations under the *Competition Tribunal Rules* as well as the safeguard mechanisms most recently discussed by Justice Gascon in *Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6 File No.: CT-2016-015. Accordingly, all relevant facts that the Commissioner knows regarding this issue have already been produced to VAA, subject to applicable privileges and safeguards described above. As previously advised, the Commissioner will provide VAA with a supplemental production and summary of third party information on 29 September 2017 pursuant to his ongoing disclosure obligations in order to make known information obtained since the Commissioner's last production.
>
> Further, and as described in a 30 August 2017 letter from counsel to the Commissioner to counsel to VAA, the Commissioner refuses to issue code the documents and information that the Commissioner has already produced to VAA. This question is improper and, in any event, disproportionally burdensome.

[19] Echoing the "stock undertaking" language used by counsel for the parties, this is what I refer to as the Commissioner's "stock answer" in these Reasons. In his Memorandum of Fact and Law, the Commissioner also identified additional reasons to justify his refusals with respect to 15 of the 39 Category A Requests.

[20] It is not disputed that VAA's Category A Requests relate to all facts *known by* the Commissioner, as opposed to facts *relied on by* the Commissioner. The distinction is important as it is well-recognized by the jurisprudence that, in an examination for discovery, a party can properly ask for the factual basis of the allegations made by the opposing party, but not for the facts or evidence relied on to support an allegation (*Montana Band v Canada*, [2000] 1 FCR 267 (FCTD) ("***Montana Band***") at para 27; *Can-Air Services Ltd v British Aviation Insurance*

Company Limited, 1988 ABCA 341 at para 19). I am also satisfied that the Category A Requests pose questions relating to topics and issues that are *relevant* to the litigation between the Commissioner and VAA in the context of the Application. Again, relevance is a primary factor in determining whether a question should be answered in an examination for discovery (*Apotex Inc v Wellcome Foundation Limited*, 2007 FC 236 at paras 16-17; *Federal Courts Rules*, SOR/98-106 ("**FCR**"), subsection 242(1)).

[21] The main concern raised by the Commissioner results from the scope of what is being sought by VAA in its Category A Requests. The Commissioner claims that, given the level of specificity requested by VAA, the Category A Requests in effect ask the Tribunal to compel the Commissioner to "issue code" (i.e., to organize by issue or topic) his Summaries and his Documentary Productions for VAA. The Commissioner argues that the relief sought is unreasonable, unsupported by jurisprudence and unprecedented in contested proceedings before the Tribunal and civil courts. The Commissioner further pleads that VAA's Category A Requests should be denied on the basis of proportionality, as they are disproportionately burdensome on the Commissioner and contrary to the expeditious conduct of the Application as the circumstances and considerations of fairness permit.

a. The questions effectively asked by VAA

[22] At the hearing before the Tribunal, a large part of the discussion revolved around the exact question effectively asked by VAA in its various Category A Requests, and the Commissioner's contention that VAA was in fact asking him to "issue code" his Summaries and his Documentary Productions. Counsel for VAA submitted that, in its early questions at the beginning of the examination, VAA was not truly looking for specific references to the Summaries and Documentary Productions, but ended up asking for these references further to the responses given by Mr. Rushton and indicating that the "facts known" by the Commissioner were in the materials already produced. He claimed that VAA wanted the Commissioner to provide all the facts in relation to specific allegations in the pleadings that are within the Commissioner's knowledge. He added that, if that could be achieved by the Commissioner without references to specific documents or summaries, this would be acceptable for VAA.

[23] In other words, counsel for VAA clarified that, in its Category A Requests, VAA's intention was to ask the Commissioner to answer the question regarding facts underlying an allegation or an issue in dispute, and that it was not necessarily seeking references to every specific bullet in the Summaries and to every specific document in the Documentary Productions.

[24] I admit that there was some confusion at the hearing before the Tribunal regarding the exact scope of what VAA was seeking in its Category A Requests. However, I understand that, in the end, counsel for VAA essentially retracted from the actual wording of the Category A Requests used in VAA's Memorandum of Fact and Law and now asks the Tribunal to read down its Requests and to ignore the language "including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions" contained in the Requests.

[25] The problem with VAA's modified position is that, on a motion to compel answers to questions refused on discovery, the Tribunal has to rule on the specific questions asked at the examination and which, according to the moving party, have been refused or improperly answered by the deponent. The questions asked are those formulated during the examination itself and which the deponent refused, was unable to answer or decided to answer in the way he or she did, at the examination itself or after having taken the questions under advisement. As rightly pointed out by counsel for the Commissioner, these are questions and answers arising from sworn testimony.

[26] Further to my review of the transcripts of the examination for discovery of Mr. Rushton, and of the actual questions asked under the various Category A Requests, I find that what was effectively asked by VAA at the examination was not only all the facts underlying an allegation or an issue in dispute, but also in the same breath all references to specific bullets in the Summaries and to specific documents in the Documentary Productions. These were the questions posed to Mr. Rushton, and these were the questions to which the Commissioner's representative responded. I understand that VAA's original question or intention might not have been to ask such broad and wide-ranging questions, but this is what was done for the Category A Requests. I note that the so-called "original question" is not before the Tribunal, and indeed does not form part of the 39 Category A Requests identified by VAA.

[27] I agree with VAA that questions asking for the factual basis of the allegations made by a party have been considered by the jurisprudence to be proper questions to ask on examinations for discovery. VAA was therefore entitled to ask for "all facts known to the party being discovered which underlie a particular allegation in the pleadings" (*Montana Band* at para 27). I am also ready to accept that, contrary to the Commissioner's contention, the vast majority of VAA's Category A Requests relate to specific and discrete topics and issues, as opposed to being generic, general or "catch-all" questions.

[28] However, the problem is the level of specificity asked by VAA in its Category A Requests, in terms of specific references to the Summaries and Documentary Productions. Pursuant to Rule 242 of the FCR, a person can object to questions asking for too much particularity on the ground that they are unreasonable or unnecessary. The Tribunal has previously established that the Commissioner does not generally have to identify every particular document upon which he relies to support an allegation (*Canada (Director of Investigation and Research) v Southam Inc*, [1991] CCTD No 16 ("***Southam***") at paras 17-18; *Canada (Director of Investigation and Research) v NutraSweet Co*, [1989] CCTD No 54 ("***NutraSweet***") at para 29). If it is unreasonable to expect a party to identify every document or part thereof which might be *relied upon* to support an allegation, I conclude that it is likewise unreasonable and improper, on an examination for discovery, to ask a party to identify every document *containing facts known* to that party and which underlie a specific allegation (*Southam* at para 18).

[29] I acknowledge that there could be situations where the volume and complexity of the documentation produced reach such a level that the specific identification of every document may become necessary (*NutraSweet* at para 29). Some courts have indeed held that, where documentary production is voluminous, a party may be required to identify which documents contained in its productions are related to or support particular allegations (*Rule-Bilt Ltd v Shenkman Corporation Ltd et al* (1977), 18 OR (2d) 276 (ONSC) ("***Rule-Bilt***") at paras 27-28;

International Minerals & Chemical Corp (Canada) Ltd v Commonwealth Insurance Co, 1991 CanLII 7792 (SKSB) ("***International Minerals***") at paras 6-10). However, I am not persuaded that, in this case, VAA has established or demonstrated the existence of such a voluminous or complex document production so as to require the Commissioner to identify every specific reference to documents or portions of summaries. I note that, when VAA's own productions and the catering pricing records are removed, the Commissioner's Documentary Productions amount to 1,158 records and that the Summaries add up to some 200 pages. In my opinion, and in the absence of any evidence demonstrating the contrary, this cannot be qualified as onerously voluminous or inherently complex, having particular regard to VAA's access to an electronic index and electronic data search function for these materials.

[30] I thus find that, as drafted in VAA's Memorandum of Fact and Law and as they were asked during the examination for discovery of Mr. Rushton, VAA's initial Category A Requests are overbroad and inappropriate and, for that reason, they need not be answered by the Commissioner. I agree with the Commissioner that answering them as they were expressed would in effect require the Commissioner to "issue code" its Summaries and Documentary Productions. This, in my opinion, cannot be imposed on the Commissioner.

[31] That being said, in the circumstances of this case, it would not be helpful nor efficient to end my analysis here. At the hearing, counsel for VAA indeed asked the Tribunal to also consider VAA's "reformulated" questions, namely a severed version of the Category A Requests asking for "all the facts known to the Commissioner" without necessarily referencing specific documents or specific bullets in the Summaries. He suggested that the Tribunal could read down and truncate the final portion of the Requests if it found VAA's initial Category A Requests too broad, and then assess whether those reformulated Requests were properly and sufficiently answered by the Commissioner.

[32] It is true that, in this Order, I could only consider VAA's Category A Requests as they were initially formulated, simply determine that they need not be answered because they are overbroad and unreasonable, and state that I decide so without prejudice to VAA returning in a further examination with read-down and reformulated questions addressing the same issues. However, in the context of this case and as the final steps for the preparation of the trial loom ahead, I am of the view that this option would not be a practical, expeditious and fair way to deal with the issues raised by VAA's Refusals Motion. The questions as framed in VAA's initial Category A Requests may be too broad but the subject matters of the questions are relevant. It is therefore much more preferable for me to deal with the "reformulated" Requests immediately, and this is what I will proceed to do.

b. The issue of proportionality

[33] I pause a moment to briefly address the subsidiary argument of the Commissioner based on the principle of proportionality, as it essentially applies in relation to the Commissioner's concern about VAA's request to "issue code" his productions and summaries. I know that, since I have just concluded that VAA's Category A Requests are overly broad and need not be answered, it is not necessary to consider this issue of proportionality for the purpose of this Order. However, in light of the representations made by counsel for the Commissioner at the hearing, I make the following remarks.

[34] The Commissioner claims that, in any event, the Tribunal should not order him to answer VAA's Category A Requests because it would be unduly burdensome and onerous for the Commissioner to issue code the Summaries and Documentary Productions to the level of specificity sought by VAA. The Commissioner has not filed an affidavit to support his claim regarding the disproportionate burden he would face to answer VAA's requests, but counsel for the Commissioner argues that, in this case, the Tribunal could determine this issue of proportionality in the Commissioner's favour despite the absence of affidavit evidence. I disagree with the Commissioner's position on this front.

[35] I do not dispute that the proportionality rule applies to Tribunal proceedings. More specifically, on questions such as those raised in this Refusals Motion, the Tribunal must always take into account issues of proportionality (*The Commissioner of Competition v Reliance Comfort Limited Partnership*, 2014 Comp Trib 9 ("***Reliance***") at paras 25-27). However, the case law is clear: claims invoking the principle of proportionality must be supported by evidence (*Wesley First Nation (Stoney Nakoda First Nation) v Alberta*, 2013 ABQB 344 at paras 93-94; *Montana Band* at para 33). It is not sufficient to merely raise the argument that it would be too onerous to comply with a request to provide answers to questions on discovery. Some evidence must be offered to support the claim and to establish how a request could be disproportionate to its value.

[36] Indeed, in the Tribunal's decision relied on by the Commissioner, Mr. Justice Rennie's finding that the request to compel answers would be too burdensome and disproportionate was predicated upon actual evidence coming from two affidavits detailing the costs, human resources and time needed to comply with the request made (*Reliance* at paras 32, 39 and 42). Similarly, in *The Commissioner of Competition v Air Canada*, 2012 Comp Trib 20 ("***Air Canada***"), affidavit evidence was filed to demonstrate how the questions asked would impose a massive and disproportionate burden (*Air Canada* at para 24).

[37] In the current case, the Commissioner has offered no evidence to support his plea of burdensomeness and disproportionality, and this alone would have been sufficient to reject his claim in this respect. I am not excluding the possibility that, in some circumstances, proportionality could dictate that disclosure requirements imposed on the Commissioner or a private litigant in an examination for discovery be more limited. These questions are highly fact-specific and will depend on the circumstances of each case. But, in each case, a claim of disproportionate burden will always require clear and convincing evidence meeting the balance of probability threshold (*FH v McDougall*, 2008 SCC 53 at para 46).

c. The "reformulated" questions asked by VAA

[38] I now consider VAA's "reformulated" Category A Requests, namely the questions asking for "all the facts that the Commissioner knows" with respect to a particular issue or allegation without necessarily referencing specific bullets in the Summaries or specific documents in the Documentary Productions. Of course, I understand that, as restated, these Requests were not actually put to Mr. Rushton during his examination for discovery and that neither Mr. Rushton nor the Commissioner has yet had an opportunity to consider them and to respond to them. In this regard, I accept that the responses already given by the Commissioner to VAA's initial Category A Requests, including his "stock answer", cannot simply be assumed to reflect what

Mr. Rushton and the Commissioner would effectively respond to the "reformulated" version of these Requests. In fact, I do not exclude the possibility that the overly broad nature of the Category A Requests formulated by VAA and of the "stock undertaking" used at Mr. Rushton's examination for discovery may have contributed to polarize the Commissioner's responses and to prompt him to reply with the "stock answer" he resorted to. In that context, Mr. Rushton and the Commissioner certainly deserve to be afforded the opportunity to effectively respond to the "reformulated" Category A Requests before the Tribunal can determine whether or not such questions have been properly and sufficiently answered.

[39] However, I believe that, in the circumstances of this case, it is also useful and practical for me to discuss what, in my view, would constitute a proper and sufficient answer by the Commissioner to such "reformulated" Category A Requests from VAA. As stated above, I am ready to accept that VAA was entitled to *ask* the Commissioner for "all facts known" with respect to a particular issue or allegation (*Montana Band* at para 27). What remains to be determined are the parameters that can assist the parties in defining what would constitute an acceptable *answer* by the Commissioner to questions seeking "all facts known" by him.

[40] In this regard, VAA's Refusals Motion raises some fundamental questions on the extent of the disclosure obligations of the Commissioner in the context of examinations for discovery, and it is worth taking a moment to look at this issue from the more global perspective of oral discovery in Tribunal proceedings.

i. Examinations for discovery

[41] It is well-accepted that the purpose of discovery, whether oral or by production of documents, is to obtain admissions to facilitate proof of all the matters which are at issue between the parties, and to allow the parties to inform themselves prior to trial of the nature of the other party's position, so as to define the issues in dispute (*Canada v Lehigh Cement Limited*, 2011 FCA 120 ("***Lehigh***") at para 30; *Southam* at para 3). The overall objective of examinations for discovery is to promote both fairness and the efficiency of the trial by allowing each party to know the case against it (*Bell Helicopter Textron Canada Limitée v Eurocopter*, 2010 FCA 142 at para 14; *Montana* at para 5).

[42] It is also generally recognized that courts have taken a liberal approach to questions seeking "all facts known" by a party and that, in examinations for discovery, the relevant facts should be provided with sufficient particularity so that the information is not being buried in a mass of documentation or information. A sufficient level of specificity contributes to render the trial process fairer and more efficient. As such, a party will typically be entitled to know not only which facts are referred to in the pleadings but also where such description of facts is to be found (*Dek-Block Ontario Ltd v Béton Bolduc (1982) Inc* (1998), 81 CPR (3d) 232 (FCTD) at paras 26-27). Providing adequate references to relevant facts and their description in the documentary productions may require work, time and resources from the party on whom the burden falls but, in large and complicated cases, the fact that "the marshalling of facts and documents may require a great deal of work is something with which the parties simply have to live" (*Montana Band* at para 33). It remains, however, that answers to questions on examination for discovery will always depend on the facts of the case and involve a considerable exercise of discretion by the judge.

[43] Other factors colour the examination for discovery process in Tribunal matters. First, the Commissioner is a unique litigant in proceedings before the Tribunal. The Commissioner is a non-market participant and his representatives have no independent knowledge of facts regarding the market and behaviour at issue. Rather, all of the facts or information in the Commissioner's possession, power or control arise from what he has gathered from market participants in the course of his investigation of the matter at stake. The Commissioner and his representatives do not have the direct and primary knowledge of the facts supporting the Application. This means that it may typically be more difficult and challenging for a representative of the Commissioner to exhaustively describe "all facts known" to the Commissioner.

[44] Second, expeditiousness and considerations of fairness are two fundamental elements of the Tribunal's approach and proceedings. Subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) directs the Tribunal to conduct its proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit". Ensuring both expeditious litigation and adequate protection of procedural fairness is thus a statutory exigency central to the Tribunal's functions. The Tribunal endeavours to make its processes quick and efficient and, at the same time, never takes lightly concerns raised with respect to the procedural fairness of its proceedings. Furthermore, as I have indicated in the VAA Privilege Decision, since proceedings before the Tribunal are highly "judicialized", they attract a high level of procedural fairness (*VAA Privilege Decision* at para 159). It is well-established that the nature and extent of the duty of procedural fairness will vary with the specific context and the different factual situations dealt with by the Tribunal, as well as the nature of the disputes it must resolve (*Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at paras 25-26; *VAA Privilege Decision* at paras 165-170).

[45] Proceedings before the Tribunal move expeditiously and the Tribunal typically adopts schedules which are much tighter than those prevailing in usual commercial litigation, both for the discovery steps and the preparation of the hearing itself. These delays are generally measured in a limited number of months. This is the case for this Application, as the scheduling order provided for a timeframe of a few months to conduct documents and oral discovery. This entails certain obligations for all parties involved, and for the Tribunal. In determining what is proper and sufficient disclosure, concerns for expeditiousness always have to be balanced against fairness and efficiency of trial.

[46] In sum, what both the parties and the Tribunal are trying to achieve with examinations for discovery is a level of disclosure sufficient to allow each side to proceed fairly, efficiently, effectively and expeditiously towards a hearing, with sufficient knowledge of the case it has to meet. There is no magic formula applicable to all situations, and a case-by-case approach must always prevail to determine the appropriate level of disclosure required in examinations for discovery. The scope of permissible discovery will ultimately depend "upon the factual and procedural context of the cases, informed by an appreciation of the applicable legal principles" (*Lehigh* at para 24). In that context, determining whether a particular question is permissible on an examination for discovery is a "fact based inquiry" (*Lehigh* at para 25).

ii. The "stock answer" of the Commissioner

[47] In the case at hand, the first part of the Commissioner's response to VAA's initial Category A Requests summarily stated that he has produced to VAA all relevant, non-privileged information in the Commissioner's possession, power and control and has further produced to VAA summaries of relevant third-party information learned by the Commissioner from third parties in the course of the Competition Bureau's review of this matter. While he referred to his upcoming obligations under the *Competition Tribunal Rules* (SOR/2008-141) and in terms of issuance of witness statements, the Commissioner essentially said in this "stock answer" that the facts known to him in respect of the various questions raised by VAA could be found in the Summaries and Documentary Productions, with no further detail or direction.

[48] In my view, simply relying on this type of generic statement would not amount to a proper and sufficient answer by the Commissioner to the "reformulated" Category A Requests in the context of VAA's examination for discovery[1]. In the course of an examination for discovery of his representative, the Commissioner cannot just retreat behind his Summaries and his Documentary Productions and not take proper steps to provide more detailed answers and direction in response to specific questions and undertakings, beyond a reference to the mere existence of the materials he has produced. Stated differently, resorting to the "stock answer" that the Commissioner has used in this case would not be enough to meet the requirements of fairness, expeditiousness and efficiency of trial that should generally govern the examination for discovery process in Tribunal proceedings.

[49] Oral discovery has to mean something, including when the Commissioner is involved (*Commissioner of Competition v United Grain Growers Limited*, 2002 Comp Trib 35 ("***UGG***") at para 92). In my opinion, the Commissioner cannot cloak himself with the blanket of a generic statement that all documents and summaries have been produced, that there is nothing else, and that all relevant acts known to him are found somewhere in his documentary productions and summaries of third-party information, without any more detail or direction, and claim that this is sufficient to meet his disclosure obligations to relevant questions raised in an examination for discovery. Being an atypical litigant does not imply that the Commissioner can be insulated from the basic tenets of oral discovery or above the examination for discovery process (*NutraSweet* at para 35). In my view, if the Tribunal were to accept a generic statement like the "stock answer" used by the Commissioner in this case as constituting a proper and sufficient answer to VAA's Category A Requests, it could only serve to transform the oral discovery of the Commissioner's representative into a masquerade. It would reduce it to an empty, meaningless process. This is not an acceptable avenue for the Tribunal to follow, and it is certainly not a fair, efficient or even expeditious way to prepare for trial in this case.

[50] While I accept that requesting the Commissioner to "issue code" his documentary productions and summaries of third-party information and to identify every relevant document or piece of information in his materials is generally improper in the context of examinations for discovery in Tribunal proceedings, I find that simply responding that all relevant facts are

[1] As explained in more detail below, some of VAA's Category A Requests, even if "reformulated", need not be answered by the Commissioner for other reasons, and this discussion on the Commissioner's generic answer therefore does not apply to them.

contained somewhere in his documentary productions and summaries, without detail or direction, is equally an improper answer from the Commissioner. Neither of these two extremes is an acceptable option (*International Minerals* at para 7). I use the term "generally" as I am mindful that the disclosure requirements in an examination for discovery will vary with the circumstances of each case and that the decisions of the Tribunal on motions to compel answers always involve an exercise of discretion by the presiding judicial member seized of the refusals.

[51] I pause to make one observation regarding the examination for discovery of Mr. Rushton in this case. In making the above comments on the Commissioner's response to VAA's initial Category A Requests, I am by no means suggesting that resorting to the "stock answer" was reflective of the overall approach espoused by the Commissioner in the examination of Mr. Rushton, or of the testimony given by Mr. Rushton. On the contrary, throughout the two-day examination, most questions asked to Mr. Rushton did not lead to requests for undertakings by VAA as Mr. Rushton appears to have responded satisfactorily to the vast majority of them, notably by providing information, examples and sufficiently specific references to portions of the Summaries or of the Documentary Productions, and by referring to many facts that came to his mind. In fact, my reading of the examination tells me that Mr. Rushton was a cooperative and forthcoming witness over the two days of his examination. Unanswered questions were the exception rather than the rule and, at the end of two full days of examination, a total of only 39 Category A Requests emerged. For most questions raised during his examination, Mr. Rushton was far from simply retreating behind the Commissioner's Summaries and Documentary Productions and instead provided sufficient answers and direction in response to the questions asked by VAA.

[52] I observe that about three-quarters of the unanswered Category A Requests arose on the second day of Mr. Rushton's examination. A review of the transcripts leaves me with the impression that, as the examination progressed, counsel for both VAA and the Commissioner jumped somewhat hurriedly to simply flagging the "stock undertaking" and providing the "stock undertaking under advisement", without always giving an opportunity to Mr. Rushton to attempt to respond to some of the questions. This was followed by the "stock answer" eventually given by the Commissioner in response to the Category A Requests.

iii. Proper and sufficient answer to the "reformulated" questions

[53] Now, having said that about the "stock answer", how could the Commissioner properly and sufficiently respond to the "reformulated" Category A Requests in this case? Of course, I understand that determining whether a particular question is properly answered is a fact-based inquiry and will ultimately depend on the context of each question. Also, the Tribunal always retains the discretion to determine what amounts to a satisfactory and sufficient answer in each case. But, in light of the above discussion, I believe that some general parameters can be established to guide the Tribunal and the parties in making that determination.

[54] First, I accept that, like any other litigant, VAA has the responsibility to build and prepare its own case. It is not for the Commissioner to do the work for VAA. It is VAA's task to review and organize the materials produced by the other side, and the Commissioner does not have to give VAA a precise roadmap to find documents in the AODs or relevant extracts in the Summaries. To a certain extent, it is incumbent upon the recipient of a documentary disclosure to

comb through it and sort it out. The Commissioner has acknowledged that it has already produced all documents in its power, possession or control that could answer VAA's Requests, and both VAA and the Commissioner are in a position to perform the work of identifying the facts and sources underlying the various allegations made by the Commissioner. To some extent, the Commissioner is in no better position than VAA to do the work.

[55] At the same time, on discovery, VAA has the right to be provided with the relevant factual information underlying the Commissioner's Application and allegations therein (*NutraSweet* at paras 9, 35). It is entitled to know the case against it and to obtain sufficient information respecting the specific relevant facts (*The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp Trib 17 ("***Direct Energy***") at para 16; *NutraSweet* at paras 30, 42). Broadly speaking, the usual rules of discovery in civil proceedings apply.

[56] Another tempering element in this case, as is usually the situation for most respondents in proceedings initiated by the Commissioner before the Tribunal, is the fact that VAA is a market participant. VAA has considerable knowledge about the industry, its operations and the players and potential players. VAA already has a good sense of the information in the Commissioner's possession about the market in which it is alleged to have engaged into an abuse of dominant position. As observed earlier, 1,619 records produced by the Commissioner originate from VAA itself. Practicality dictates that I thus need to be mindful of VAA's own capability and knowledge.

[57] Indeed, I note that the number of documents other than VAA's records and in-flight catering pricing data records total less than 1,200 records and cannot be said to be voluminous, that the Summaries amount to just over 200 pages, and that these materials are fully searchable by both VAA and the Commissioner.

[58] I further observe that the Tribunal has previously recognized that it is "sufficient if a party on discovery indicates the significant sources on which it relies for its allegation" (*Southam* at para 18). Providing the main facts, significant sources, or categories of documents described in sufficient detail to enable to locate the facts has been found by the case law to be a proper and sufficient answer to questions raised in examinations for discovery (*Southam* at paras 18-19; *NutraSweet* at paras 30-35; *International Minerals* at paras 8-10). The degree of particularity needed will vary with the circumstances and complexity of the case, the volume of documents involved, and the familiarity of the parties with the documents (*Rule-Bilt* at para 25). While some of these precedents appear to have dealt with situations where the questions asked related to facts *relied on*, I am satisfied that these observations on the sufficiency of "significant sources" remain applicable to a certain extent for questions asking for relevant facts *known to* the Commissioner.

[59] Finally, and it is important to emphasize this, the Commissioner has clearly stated, and reiterated, that he has produced to VAA all relevant, non-privileged information in the Commissioner's possession, power and control, and that all relevant information learned by the Commissioner from third parties in the course of his investigation and subject to public interest privilege has been produced through the Summaries. Accordingly, it is not disputed that all relevant facts known to the Commissioner are already in the materials produced to VAA.

[60] In light of the foregoing, I consider that, for an answer to VAA's "reformulated" Category A Requests asking for "all facts known" to the Commissioner on a particular topic to be proper, it would be sufficient for the Commissioner to provide a description of the significant relevant facts known to him, with direction as to those sections, parts or range of pages of the Summaries and of the Documentary Productions where the significant sources of relevant facts are located. In other words, the Commissioner does not have to offer a complete roadmap to VAA, but he must at least provide signposts indicating what the significant facts known to the Commissioner are and offering direction as to where the information is located in the Commissioner's materials. In my view, answering the "reformulated" Category A Requests along these lines will result in a level of disclosure sufficient to allow both parties to proceed fairly, efficiently, effectively and expeditiously towards a hearing in this case.

[61] No magic formula exists to determine the precise level of description and direction needed, as it will evidently vary with the facts surrounding each particular case and question. If no agreement can be reached by the parties on a given question despite the above guidance, it will have to be assessed and determined by a presiding judicial member in the exercise of his or her discretion. However, I believe that the parties should generally be able to sort it out without the Tribunal's intervention if VAA and the Commissioner make good faith efforts to ask proper questions and provide proper answers.

[62] This means that the Commissioner will not have to go to the extreme advocated by VAA in this case, and precisely identify every single fact and document known by the Commissioner for each specific question asked by VAA in the "reformulated" Category A Requests. This, in my view, would be an unreasonable requirement in the context of an examination for discovery in this case. For greater clarity, describing the significant relevant facts, and providing direction to the significant sources containing the relevant facts will therefore not necessarily mean that these facts or sources identified by the Commissioner's representative constitute an exhaustive recount of "all" the facts known to the Commissioner. Again, requiring such an absolute level of disclosure would likewise not be fair or practical, nor would it promote expeditiousness and efficiency at trial.

[63] I should add that requiring the Commissioner to provide an indication of the significant relevant facts or sources known to him should not be interpreted or construed as being a disguised way of requiring the Commissioner to identify the facts "relied upon" for his allegations at this stage of the proceedings. As indicated above, it is trite law that this is not something that can be requested in examinations for discovery.

iv. Specific assessment of the "reformulated" questions

[64] Having examined and considered VAA's 39 "reformulated" Category A Requests under that lens, I conclude that 24 of these Requests will need to be answered by Mr. Rushton and the Commissioner, using the approach developed in these Reasons as guidance. The remaining 15 "reformulated" Category A Requests will not need to be answered because of other compelling reasons discussed below.

[65] I observe that this subset of 24 Requests embodies different situations in terms of the answers already provided by Mr. Rushton and the Commissioner. Indeed, VAA had referred to

two different categories of Category A Requests in its Memorandum of Fact and Law: one where no specific answer was given and another where some partial information was provided. Among these 24 Category A Requests, there are instances where the response already provided by Mr. Rushton contained no reference whatsoever to any particular facts, and no direction as to where the relevant information was located in the Summaries or the Documentary Productions, and where he only mentioned that "nothing immediately comes to mind". There are others where Mr. Rushton provided references to "some information", "some communications" or "some examples" in the Summaries or Documentary Productions, where he mentioned facts but did not recall where the information was, where he was uncertain as to whether other responsive facts existed, or where he indicated that there could be some facts or references but needed to verify where such information was. In the latter group of answers, there was therefore an onset of response provided by Mr. Rushton. However, for none of these 24 Category A Requests did Mr. Rushton refer to "significant" facts or direct VAA to "significant" sources.

[66] In light of the foregoing, the following 24 "reformulated" Category A Requests will need to be answered by the Commissioner along the lines developed in these Reasons (i.e., through a description of the significant relevant facts known to the Commissioner, with direction as to those sections, parts or range of pages of the Summaries and of the Documentary Productions where the significant sources of relevant facts are located):

> Request 24 (recent in-flight catering business changes)[2];
>
> Request 30 (West-Jet's switching to in-flight catering);
>
> Request 47 (double-catering);
>
> Request 49 (factors considered by airlines when deciding whether to operate at an airport);
>
> Request 50 (VAA's ability to dictate terms upon which it supplies access to the airside);
>
> Request 57 (whether VAA participates in the market for galley handling other than sharing in revenue);
>
> Request 58 (VAA's competitive interest in the market for galley handling);
>
> Request 61 (exchange between a supplier and VAA about the supplier's renting requirements);
>
> Request 62 (VAA having a competitive interest in the market for supply of galley handling);

[2] The actual description of the various VAA Requests has been slightly modified in this decision to remove any confidential information and specific references to confidential material.

Request 64 (whether in-flight caterers and galley handling firms operate on- or off-airport in North America);

Request 67 (innovation, quality, service levels and more efficient business models new entrants would have brought);

Request 74 (VAA's purposely excluding new entrants);

Request 77 (intended negative exclusionary effect of VAA's practice);

Request 78 (leasing land or having a kitchen located on the airport);

Request 82 (actual events of exclusion/refusal to new entrants);

Request 83 (reasons for not granting a particular licence);

Request 84 (whether reasons expressed in a particular letter for the denial of a licence by VAA were the actual ones);

Request 86 (airports in Canada and beyond Canada that limit the number of galley handlers and number of galley handlers in Canadian airports);

Request 89 (food as being of particular importance to Asian airlines);

Request 91 (importance of food to business/first class passengers);

Request 93 (flight delays' effect on an airline's willingness to launch or offer routes to that airport);

Request 96 (access issues raised by VAA);

Request 102 (ability of existing galley handlers at VIA to service demand); and

Request 103 (why a particular supplier left in 2003).

[67] I mention that, further to my review of the transcripts of Mr. Rushton's examination, I find that the Commissioner's responses to the two following requests offer examples of instances where Mr. Rushton provided answers echoing, at least in part, the guidance developed in these Reasons. Request 47 on double-catering has been answered through several references made by Mr. Rushton to important relevant information and direction to a range of pages and even specific bullets in the Summaries. Similarly, Request 64 on whether in-flight caterers and galley handling firms operate on- or off-airport in North America contained references by Mr. Rushton to facts and to information being generally contained at certain pages and sections in the Summaries. These responses to Requests 47 and 64 are examples of minimal benchmarks that the Commissioner should use for constructing proper and sufficient answers.

[68] Conversely, for the remaining 15 "reformulated" Category A Requests, I find that, even if the requirement for specific references to the Summaries and Documentary Productions were severed from the requests, and despite the limited, insufficient response offered so far through the "stock answer" given by the Commissioner, they still do not need to be answered by the Commissioner for other various compelling reasons.

[69] First, I agree with the Commissioner that several of these requests from VAA remain improper in any event, as they invite economic analysis, opinion or conclusions from the Commissioner on certain issues, or require comparative analyses between different price and non-price factors, as opposed to the facts themselves (*NutraSweet* at paras 23, 38; *Southam* at paras 12-13). Such requests essentially seek to reveal how the Commissioner assessed and interpreted facts, and therefore need not be answered. These are:

> Request 21 (market definition that does not include catering);
>
> Request 25 (geographic market definition being characterized solely as VIA);
>
> Request 48 (whether VIA competes with other airports);
>
> Request 53 (land rents charged to in-flight catering firms by VAA compared to other North American airports);
>
> Request 56 (VAA's latitude in determining prices and non-price dimensions for the supply of galley handling at VIA);
>
> Request 66 (whether concession fees charged by VAA are constrained by competition with other airports);
>
> Request 71 (whether the business of certain catering suppliers at VIA are profitable);
>
> Request 81 (market power of VAA in relation to galley handling affected by tying of airside access to leasing land at airport);
>
> Request 100 (impact at VIA of reduction from two caterers to one);
>
> Request 104 (scale and scope economies in catering and galley handling and how they would cross over from catering to galley handling);
>
> Request 105 (competition between certain suppliers for galley handling and catering at VIA); and
>
> Request 106 (how prices for catering/galley handling at VIA compare to prices at airports where new entry is not limited).

[70] Second, as counsel for VAA conceded at the hearing, Request 60 on pricing data has already been answered through the more than 11,000 in-flight caterer pricing data records provided by the Commissioner.

[71] Third, Requests 72 and 73 on certain meetings involving VAA need not be answered as VAA confirmed in its Memorandum of Fact and Law that it already has the facts. In addition, these requests are not asking for facts but, rather, for an interpretation or characterization of those facts by the Commissioner. Questions of this nature are improper and need not be answered.

B. Category B Requests

[72] VAA's 11 Category B Requests relate to questions that Mr. Rushton declined to answer on the basis of the Commissioner's public interest privilege. VAA claims that, to the extent the Commissioner asserts public interest privilege over information sought on oral discovery, he must establish that the information is in fact privileged and falls within that class of privilege. VAA contends that, in the challenged questions, the Commissioner simply made a bald assertion of public interest privilege, and that he has not addressed the scope of the public interest privilege or how such information falls within that scope.

[73] I disagree.

[74] As it was recently confirmed by the Tribunal in the VAA Privilege Decision, the Commissioner's public interest privilege has been approved as a class-based privilege. This privilege recognizes the existence of a class of documents and communications, created or obtained by the Commissioner during the course of a Competition Bureau investigation, as being protected, such that they need not be disclosed during the discovery phase of proceedings before the Tribunal. It guarantees to those persons having provided information to the Commissioner that their information will be kept in confidence and that their identities will not be exposed unless specifically waived by the Commissioner at some point in the proceedings.

[75] The assertion of the public interest privilege therefore allows, in the discovery process, the Commissioner to refuse to disclose facts that would reveal the source of the information protected by the privilege (*UGG* at para 93). I underline that this public interest privilege is limited, and extends only insofar as is necessary to avoid revealing the identity of the person or the source of the information gathered by the Commissioner. Needless to say, the privilege cannot be used by the Commissioner to avoid his normal disclosure obligations.

[76] In this case, the Commissioner (and also through Mr. Rushton in his examination for discovery) has refused to answer VAA's 11 Category B Requests in order to precisely avoid having to reveal the source of the information sought. In his sworn testimony, Mr. Rushton has indicated that answering those VAA questions would risk uncovering the identity of third-party sources. Accordingly, these questions are objectionable, as they encroach on the Commissioner's public interest privilege.

[77] VAA claims that, in the event the Commissioner asserts public interest privilege as the basis for refusing to respond to a question or undertaking, he is required to provide evidence as

to how responding to the question would reveal or risk revealing the source. I do not share that view. I am instead of the view that the burden lies on the party seeking disclosure to demonstrate why a communication or document subject to a class-based privilege should be disclosed. This is true for the public interest privilege of the Commissioner as it is for other class privileges such as the solicitor-client privilege. Once it is established that the relationship is one protected by the privilege, the information is *prima facie* privileged, and it is up to the opposing party to prove that the privilege does not apply. For instance, it belongs to the party seeking disclosure of a solicitor-client communication to demonstrate that the privileged communication should be disclosed, by proving, for example, that the privilege has been waived.

[78] In other words, it is incumbent upon VAA to demonstrate why the public interest privilege should be lifted in the case at hand. The burden does not suddenly shift back to the Commissioner to re-assert the class-based public interest privilege because VAA challenges it. The presumption of privilege is to be rebutted by the party challenging the privilege. VAA's proposed approach would in fact turn the class-based public interest privilege of the Commissioner into a case-by-case privilege. Privileges established on a case-by-case basis refer to documents and communications for which there is a *prima facie* presumption that they are <u>not</u> privileged and are instead admissible, but can be excluded in a particular case if they meet certain requirements. In those situations, there is no presumption of privilege, and it is then up to the party claiming a case-by-case privilege to demonstrate that the documents and communications at stake bear the necessary attributes to be protected from disclosure. The analysis to be conducted to establish a case-by-case privilege requires that the reasons for excluding otherwise relevant evidence be weighed in each particular case. This does not apply to class-based privileges.

[79] Furthermore, in the VAA Privilege Decision, I discussed the "unique way" in which the Commissioner's public interest privilege has developed, and I referred to two elements in that regard: "the safeguard mechanisms put in place by the Tribunal to temper the adverse impact of the limited disclosure and the high threshold (e.g., compelling circumstances or compelling competing interest) required to authorize lifting the privilege" (*VAA Privilege Decision* at para 81).

[80] The safeguard mechanisms have been mentioned by VAA in this Refusals Motion. They include: (1) the Commissioner's obligation to provide, prior to the examinations for discovery, detailed summaries of all information being withheld on the basis of public interest privilege, containing both favourable and unfavourable facts to the Commissioner's Application; (2) the option for the respondent to have a judicial member of the Tribunal, who would not be adjudicating the matter on the merits, to review the documents underlying the summaries to ensure they have been adequately summarized and are accurate; and (3) the fact that the Commissioner will have to waive privilege on relevant documents and communications and provide will-say statements ahead of the hearing, if he wants to rely upon information from certain witnesses in proceedings before the Tribunal (*VAA Privilege Decision* at paras 61, 82-87). I pause to note that, in the current case, the first two safeguard mechanisms have already been used, and the third one will likely kick in when the Commissioner files his witness statements.

[81] The second element I evoked in the VAA Privilege Decision was another mechanism available to VAA to challenge the public interest privilege of the Commissioner, namely by demonstrating the presence of "compelling" circumstances allowing one to circumscribe the reach of the Commissioner's public interest privilege (*VAA Privilege Decision* at paras 88-91). The public interest privilege of the Commissioner is not absolute and can be overridden by "compelling circumstances" or by a "compelling competing interest". But this requires clear and convincing evidence proving the existence of circumstances where the Commissioner's public interest privilege could be pierced, and it is a high threshold. As I had mentioned in the VAA Privilege Decision, Madam Justice Dawson notably expressed the test as follows: "public interest privilege will prevail unless over-ridden by a more compelling competing interest, and fairly compelling circumstances are required to outweigh the public interest element" (*Commissioner of Competition v Sears Canada Inc*, 2003 Comp Trib 19 at para 40).

[82] VAA had the option of bringing a motion to override the public interest privilege and to challenge the documents and information over which the Commissioner asserted a claim of public interest privilege, by demonstrating the presence of such compelling circumstances or compelling competing interests. It has not done so with respect to any of its 11 Category B Requests. Similarly, in the context of this Refusals Motion, VAA has offered no evidence sufficient for the Tribunal to even consider the potential exercise of its discretion to set aside the public interest privilege asserted by the Commissioner using that "compelling circumstances" mechanism. As admitted by counsel for VAA at the hearing, no evidence of compelling circumstances or compelling competing interests has been adduced or provided by VAA at this point, with respect to any of the Category B Requests. In the circumstances, I find that there are no grounds to compel the answers sought by VAA in its Category B Requests.

[83] I make one last comment on the issue of public interest privilege. I do not agree with the suggestion that, in the VAA Summaries Decision, Mr. Justice Phelan recognized or implied that questions requiring a circumvention of the public interest privilege would be automatically proper at the time of oral discovery of the Commissioner's representative. Mr. Justice Phelan instead stated that the identity of the sources "may be disclosed before trial if the Commissioner relies on the source for evidence", in fact alluding to the third safeguard mechanism referred above, namely the stage at which the Commissioner files his witness statements (*VAA Summaries Decision* at para 23). Contrary to VAA's position, I do not read Mr. Justice Phelan's comments as signalling that the public interest in not identifying third-party sources of information or not giving information from which sources may be identified could be quietly lifted at the oral discovery stage, without having to go through the demonstration of "compelling circumstances" or "compelling competing interests".

[84] For those reasons, VAA's Category B Requests 32, 39, 43, 117, 121, 122, 123, 124, 125, 127 and 128 need not be answered.

[85] I would further note that I agree with the Commissioner that Requests 39 and 43 need not be answered for an additional reason, as they relate to the conduct of the Commissioner's investigation and are thus not relevant to the Application (*Southam* at para 11).

[86] As to Request 117, I also find that it needs not be answered by the Commissioner for another reason: it is premature at this stage of the proceedings. The Commissioner does not have

to identify his witnesses prior to serving his documents relied upon and his witness statements (*Southam* at para 13). When the Commissioner does so on November 15, 2017 (as mandated by the scheduling order issued by the Tribunal), the third safeguard mechanism will require the Commissioner to waive his public interest privilege on relevant documents and communications from witnesses providing will-say statements, if he wants to rely on that information. The Commissioner does not have to identify his witnesses prior to that time and, if VAA believes that the Commissioner does not comply with his obligations when he serves his materials on November 15, 2017, it will be able to raise the issue with the Tribunal at that time.

[87] That being said, by finding that VAA's Request 117 is premature, I should not be taken to have determined that, in order to comply with his obligations at the witness statements stage, the Commissioner could simply waive his privilege claims over those documents and communications he will actually *rely on* in his materials, as opposed to all documents and communications related to the witness(es) for whom the privilege is waived. This is a fact based matter that the Tribunal will address as needed. I would however mention that, depending on the circumstances, considerations of fairness could well require that the privilege be waived on all relevant information provided by a witness appearing on behalf of the Commissioner, both helpful and unhelpful to the Commissioner, even if some of the information has not been relied on by the Commissioner (*Direct Energy* at para 16). As long as, of course, disclosing the information not specifically relied on by the Commissioner does not risk revealing the identity of other protected sources and imperil the public interest privilege claimed by the Commissioner over sources other than that particular witness.

C. Category C Requests

[88] I finally turn to VAA's Category C Requests, where Request 110 is the only item remaining. Request 110 asks the Commissioner to "[p]rovide a list of the customary requirements in each category – health, safety, security, and performance – that the Commissioner is asking the Tribunal to impose as part of its order". This Request need not be answered. I agree with the Commissioner that what makes any of these requirements "customary" will be determined through witnesses at the hearing of the Application on the merits, and that this is not a proper question to be asked from Mr. Rushton at this time.

IV. CONCLUSION

[89] For the reasons detailed above, VAA's Refusals Motion will be granted in part, but only with respect to the "reformulated" version of some Requests. I am not persuaded that there are grounds to compel the Commissioner to provide answers to the specific Category B and C Requests listed by VAA, as well as to the Category A Requests as these were initially formulated by VAA at the examination for discovery of Mr. Rushton. However, I am of the view that, when considered in their "reformulated" version, 24 of VAA's 39 Category A Requests will need to be answered by the Commissioner's representative along the lines developed in the Reasons for this Order. The remaining 15 "reformulated" Category A Requests will not have to be answered in any event, based on the additional reasons set out in this decision.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[90] The motion is granted in part.

[91] VAA's Category B and C Requests as well as VAA's Category A Requests as these were formulated at the examination for discovery of Mr. Rushton need not be answered.

[92] The "reformulated" Category A Requests 24, 30, 47, 49, 50, 57, 58, 61, 62, 64, 67, 74, 77, 78, 82, 83, 84, 86, 89, 91, 93, 96, 102 and 103 need to be answered along the lines developed in the Reasons for this Order, by November 3, 2017.

[93] The "reformulated" Category A Requests 21, 25, 48, 53, 56, 60, 66, 71, 72, 73, 81, 100, 104, 105 and 106 need not be answered.

[94] As success on this motion has in fact been divided, costs shall be in the cause.

DATED at Ottawa, this 26th day of October 2017.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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Competition Tribunal Tribunal de la concurrence

Reference: *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2019 Comp Trib 3
File No: CT-2018-005
Registry Document No: 84

IN THE MATTER OF an application by the Commissioner of Competition for orders pursuant to section 74.1 of the *Competition Act*, RSC 1985, c C-34 regarding conduct allegedly reviewable pursuant to paragraph 74.01(1)(a) and section 74.05 of the Act;

AND IN THE MATTER OF a motion by the Respondents to compel answers to questions refused on discovery.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Live Nation Entertainment, Inc, Live Nation Worldwide, Inc, Ticketmaster Canada Holdings ULC, Ticketmaster Canada LP, Ticketmaster L.L.C., The V.I.P. Tour Company, Ticketsnow.com, Inc, and TNOW Entertainment Group, Inc
(respondents)

Date of hearing: April 2, 2019
Before Judicial Member: D. Gascon J. (Chairperson)
Date of Order and Reasons for Order: April 5, 2019

ORDER AND REASONS FOR ORDER GRANTING IN PART THE RESPONDENTS' MOTION TO COMPEL ANSWERS TO QUESTIONS REFUSED ON DISCOVERY

I. INTRODUCTION

[1] On March 21, 2019, the Respondents filed a motion to compel the Commissioner of Competition ("**Commissioner**") to answer several questions that were refused during the examination for discovery of the Commissioner's representative, Ms. Lina Nikolova ("**Refusals Motion**"). Ms. Nikolova was examined for one day and a half on January 31 and February 1, 2019.

[2] In their Refusals Motion, the Respondents seek the following conclusions:

- An order compelling Ms. Nikolova to answer a list of questions that remained unanswered further to her examination for discovery and the expiry of the deadline provided for fulfilling answers to discovery undertakings ("**Refused Questions**");

- An order compelling Ms. Nikolova to attend for continued examination on discovery on behalf of the Commissioner or to provide follow-up answers in the form agreed upon by the parties, all in accordance with the scheduling order most recently amended on February 11, 2019;

- An order for the Respondents' costs of this motion; and

- Such further and other relief as the Tribunal deems just.

[3] At the hearing, the Respondents informed the Tribunal that they were no longer seeking an order compelling Ms. Nikolova to be further examined should the Tribunal order her to answer the Refused Questions, and that responses in writing would be satisfactory.

[4] In their Notice of Motion, the Respondents had initially identified a total of 34 Refused Questions grouped into four categories. However, in his response materials and in the days leading up to the hearing of this motion, the Commissioner provided answers to some of the questions that had been previously refused. In addition, the Respondents withdrew one of the Refused Questions for which they were seeking answers. The initial list of Refused Questions was thus narrowed down to 14 questions to be decided by the Tribunal, divided in two categories: (1) "Historical Conduct – Estoppel, Waiver and Remedy", which contained six outstanding questions relating to the Commissioner's review of the Respondents' conduct in 2009 ("**Category 1 Questions**"); and (2) "Individual Respondent Allegations – Liability", which referred to eight outstanding questions seeking details on which individual Respondents were specifically concerned by certain facts and allegations in the Commissioner's pleadings ("**Category 2 Questions**").

[5] The Respondents brought this Refusals Motion in the context of an application made against them by the Commissioner ("**Application**") under the deceptive marketing practices provisions of the *Competition Act*, RSC 1985, c C-34 ("**Act**"). In his Application, the Commissioner is seeking orders pursuant to section 74.1 of the Act regarding conduct allegedly reviewable under paragraph 74.01(1)(a) and section 74.05 of the Act. More specifically, the Commissioner alleges that one or more of the Respondents engaged in deceptive marketing practices by promoting the sale of tickets to the public on certain internet websites and mobile

applications ("**Ticketing Platforms**") at prices that are not in fact attainable, and then supplied tickets at prices above the advertised price on these platforms. The Commissioner's Notice of Application alleges that the reviewable conduct dates back to 2009, and continues until today. The relief sought by the Commissioner includes a prohibition order and administrative monetary penalties.

II. LEGAL PRINCIPLES

[6] I agree with the Respondents that, when dealing with refusals in the context of examinations for discovery, the Tribunal should not lose sight of the overarching objective of the discovery process, whether oral or by production of documents. The purpose of discovery is to render the trial process fairer and more efficient by allowing each side to gain an appreciation of the other side's case, and for the respondents to know the details of the case against them before trial (*Canada v Lehigh Cement Limited*, 2011 FCA 120 ("***Lehigh***") at para 30; *The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp Trib 17 at para 16). It is now well-recognized that a liberal approach to the scope of questioning on discovery should prevail (*Lehigh* at para 30). What the parties and the Tribunal are both trying to achieve with examinations for discovery is a level of disclosure sufficient to allow each side to proceed fairly, efficiently, effectively and expeditiously towards a hearing, with sufficient knowledge of the case each party has to meet (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("***VAA***") at para 46). If a party does not disclose relevant facts or information known to it until trial, the other side will be unfairly disadvantaged.

[7] The *Competition Tribunal Rules*, SOR/2008-141 ("**CT Rules**") do not deal specifically with refusals in examinations for discovery. However, subsection 34(1) of the CT Rules provides that, when a question arises as to the practice or procedure to be followed in cases not provided for by the rules, the *Federal Courts Rules*, SOR/98-106 ("**FC Rules**") may be followed. FC Rule 240 provides that a person being examined for discovery must answer, to the best of the person's knowledge, information and belief, any question that is relevant to the unadmitted facts in the pleadings. In addition, FC Rule 242 states that a party may object to questions asked in an examination for discovery on the ground that the answer is privileged, the question is not relevant, the question is unreasonable or unnecessary, or it would be unduly onerous to require the person to make the inquiries referred to in FC Rule 241.

[8] Relevance is the key element to determine whether a question is proper and should be answered. At the discovery stage, relevance is a generous and flexible standard (*Apotex Inc v Sanofi-Aventis*, 2011 FC 52 at para 19). Doubts on the issue of relevance are to be resolved in favour of disclosure, and questions will typically need to be answered unless they are clearly improper. In *Lehigh* at paragraph 34, the Federal Court of Appeal noted the broad scope of relevance on examinations for discovery:

> 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.

[9] And to determine the relevance of a question, one must look at the pleadings.

[10] That being said, even when questions do meet the standard of relevance, courts have nonetheless delineated some boundaries to the type of questions that may be asked on examinations for discovery. A party can properly ask for the factual basis of the allegations made by the opposing party and for the facts *known* by such party, but it cannot ask for the facts or evidence *relied on* by the party to support an allegation (*VAA* at paras 20, 27; *Montana Band v Canada*, [2000] 1 FC 267 (FCTD) ("***Montana Band***") at para 27; *Can-Air Services Ltd v British Aviation Insurance Company Limited*, 1988 ABCA 341 at para 19). In *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, aff'd 2005 FCA 144 ("***Apotex***"), the Federal Court further established that witnesses are not to testify on pure questions of law: a fundamental rule is that an examination for discovery may seek only facts, not law. Accordingly, the following types of questions have generally been found not to be proper subject matters for discovery: (i) questions seeking expert opinion, (ii) questions seeking the witness to testify as to questions of law, (iii) questions seeking law or argument, as opposed to facts, and (iv) questions where the witness is being asked "upon what facts do you rely for paragraph x of your pleading" (*Bard Peripheral Vascular, Inc v W.L. Gore & Associates, Inc*, 2015 FC 1176 at para 19).

[11] It remains, however, that answers to questions on examination for discovery will always depend on the particular facts of the case and involve a considerable exercise of discretion by the judicial member seized of a refusals motion. There is no magic formula applicable to all situations, and a case-by-case approach must prevail to determine the appropriate level of disclosure required in examinations for discovery. The scope of permissible discovery will ultimately depend "upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles" (*Lehigh* at paras 24-25; see also *VAA* at paras 41-46).

III. CATEGORY 1 QUESTIONS

[12] The six Category 1 Questions deal with the Commissioner's knowledge of a prior investigation into the Respondents' price displays in 2009 and 2010. The Respondents submit that these Refused Questions are relevant as they relate to the Respondents' pleading of estoppel and waiver, and to the issue of remedy, since the duration of the alleged reviewable conduct and the manner and length of the investigation are factors to be taken into account when determining any administrative monetary penalties. The Respondents claim that the Commissioner reviewed the Respondents' Ticketing Platforms for deceptive marketing practices in 2009, but raised no issues about the displays of prices that he now alleges were deceptive. In fact, say the Respondents, the Commissioner did not raise his current complaints with the Respondents until 2017. They therefore contend that the Commissioner's 2009-2010 review, and his eight-year delay in proceeding, are relevant both to the Respondents' pleading of estoppel and waiver and to the determination of any remedy by the Tribunal. In this context, they argue that they should be permitted to ask the Category 1 Questions about the Commissioner's 2009-2010 investigation. The Commissioner replies that the Category 1 Questions are improper and not relevant, and that they are unreasonable, unnecessary and unduly onerous.

[13] I agree with the Respondents that, in the context of this Application, questions relating to the 2009-2010 investigation and to what the Commissioner had previously reviewed are

generally relevant in light of the Respondents' pleading on estoppel and waiver and on the issue of remedy. It cannot be said that these questions are totally unrelated to the issues in dispute. Moreover, I observe that facts surrounding the Competition Bureau's prior investigation of the Respondents' conduct have been referred to by the Commissioner in his own materials. The Commissioner has produced, as relevant documents in the Commissioner's documentary production in this Application, some customer complaints from the 2009 period, as well as records relating to the Competition Bureau's investigation of certain Ticketing Platforms in 2009 and 2010. Indeed, the questions in dispute in this first category relate to particular factual issues emanating from specific documents produced by the Commissioner, such as Exhibit 114.

[14] I further note that, in her examination for discovery, Ms. Nikolova has already provided answers to many questions asked about the 2009-2010 investigation. I am not persuaded – subject to the caveat explained below with respect to the two "why" questions – that the remaining outstanding questions have gone too far and should be treated any differently. The facts surrounding the 2009-2010 investigation are relevant to the Respondents' pleading, and the Commissioner cannot select what he wants to answer and what he prefers not to disclose. The Commissioner should instead provide all relevant facts relating to this prior investigation. In the same vein, I do not share the Commissioner's views that the Category 1 Questions constitute a fishing expedition into the Commissioner's previous investigation. Nor do I find that question 679 is overly broad as it focuses on the 2009 or 2010 fee display.

[15] The Commissioner further argues that, since the Category 1 Questions relate to the "conduct" of the 2009-2010 investigation, they need not be answered. I disagree. In light of the estoppel defence raised by the Respondents, the Commissioner's conduct in the investigation is clearly at play in this Application, as well as the timing and dates of the Competition Bureau's actions in that respect. Contrary to the situation in *Canada (Director of Investigation and Research) v Southam Inc*, [1991] CCTD No 16, 38 CPR (3d) 68, at paragraphs 10-11, the conduct of the Commissioner is one of the issues before the Tribunal, and it is directly relevant to the present proceedings on the basis of the pleadings.

[16] I pause to underline that the issue at this stage is not whether the estoppel argument raised by the Respondents in their pleading will ultimately be successful on the merits. It is whether the Category 1 Questions ask for relevant information. I am satisfied that the Respondents have established that they are relevant to their estoppel defence and to the issue of remedy.

[17] In light of the foregoing, questions 461, 462, 677 and 679 therefore need to be answered.

[18] However, with respect to questions 685 and 1199 respectively asking why it took eight years for the Commissioner to raise the complaint with the Respondents and why the Commissioner did not do anything about investigations that he might have carried on, I am not satisfied that they are proper questions on this examination for discovery. True, they relate to the Competition Bureau's 2009-2010 investigation, but they ask about the thought process of the Commissioner and essentially seek to obtain the opinion from the Commissioner on those two issues. What is relevant are the facts that the Commissioner apparently took eight years to raise the complaint with the Respondents and allegedly did not follow-up on complaints received in 2008, not the reasons or explanations behind those decisions of the Commissioner. Questions 685 and 1199 therefore need not be answered.

IV. CATEGORY 2 QUESTIONS

[19] Turning to the Category 2 Questions, they seek to obtain answers clarifying to which of the individual Respondents certain allegations made by the Commissioner relate. The Respondents argue that the Commissioner has named eight different Respondents, but that most of his allegations simply assert conduct by the "Respondents", without distinguishing among them. In his Notice of Application, at paragraphs 10 to 18, the Commissioner states generally that the Respondents "have acted separately, jointly and/or in concert with each other" or that they "work together and/or individually" in making the impugned representations or in permitting them to be made. The Respondents submit that which Respondent is actually alleged to have taken what steps, and with whom, is relevant information that should be provided. The Respondents have pleaded that some of the Respondents are not proper parties and do not have any responsibility for the representations that the Commissioner says are misleading or deceptive. The Commissioner does not object to the Category 2 Questions on the basis of relevance but on the ground that, as formulated, they ask for a legal interpretation and are improper.

[20] There is no doubt, in my view, that questions relating to individual Respondents and how the facts known by the Commissioner can be linked with each of them are relevant to this Application. The Commissioner's pleadings do not specify with great detail how each of the Respondents are specifically linked to the allegations. In light of the Respondents' pleading to the effect that several of the Respondents were not involved in the Ticketing Platforms and should not be targeted by this Application, I accept the general proposition that the Respondents are entitled to ask questions as to which of the Respondents the facts and allegations made by the Commissioner relate.

[21] Indeed, in the order issued by the Tribunal on October 17, 2018 with respect to the affidavits of documents to be produced in this Application, Justice Phelan addressed the problem of attribution of documents to each Respondent and noted that the Respondents insisted on being treated separately, on defending separately, and on pleading that some Respondents were not proper parties to the Application. Accordingly, Justice Phelan ordered that separate affidavits of documents were required for each Respondent, as requested by the Commissioner, thus recognizing the relevance and importance of information tailored to each individual Respondent.

[22] The problem raised by the Category 2 Questions lies in the way the questions have been formulated by the Respondents. It is useful to reproduce the eight questions in dispute. They read as follows:

- Q 285-286 -- [When you said that you are not aware of any facts linking VIP Tour Company to ticketmaster.ca at this time], does that include directly or indirectly by acting in concert or jointly with somebody else?

- Q 844-848 -- What facts are associated with Live Nation Entertainment Inc. [or any of the other seven respondents] acting jointly with another respondent in respect of the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?

- Q 845-848 -- What facts does the Commissioner have in association with whether Live Nation Entertainment Inc. [or any of the other seven respondents] acted in concert in respect of the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?

- Q 846-848 -- What facts or information is the Commissioner aware of with respect to whether Live Nation Entertainment Inc. [or any of the other seven respondents] acted separately, in any way, with respect to the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?

- Q 847-848 -- What information does the Commissioner have, or is the Commissioner aware of, with respect to, or in connection with, whether Live Nation Entertainment Inc. [or any of the other seven respondents] permitted some other respondent to act in any particular way with respect to the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?

- Q 1119 -- Which respondents are said to make the price representations in question and which respondents are said to permit others to make the price representations in question?

- Q 1120 -- I would like to have the Commissioner's information with respect to the manner in which each of the respondents permits another respondent to make price representations

- Q 1121 -- I would like to have the Commissioner's information as to the manner in which each respondent makes the price representations that are the subject of this application

[23] As stated above, it is not disputed that the Respondents can rightfully ask for the factual basis behind the allegations made by the Commissioner and for the facts *known* by Ms. Nikolova, but they cannot ask for the facts or evidence *relied on* by the Commissioner to support an allegation. Moreover, a witness cannot be asked pure questions of law, as opposed to facts. Indeed, the Commissioner acknowledged that it would have been fine to ask questions on the facts linking each Respondent to the representations at stake, as long as the questions did not seek the facts *relied on* for the Commissioner's legal arguments. For example, questions would have been proper and acceptable if they had asked about facts known to the Commissioner that relate to the involvement of the individual Respondents with respect to the representations in dispute.

[24] However, the Commissioner argues that, as formulated, the Category 2 Questions go one step too far and in fact ask for a "legal interpretation" to be made by the witness, as they would require Ms. Nikolova to assess whether the facts sought by the Respondents effectively qualify as "acting in concert", "acting jointly" or "acting separately", or as "making" or "permitting" to make the impugned representations. The Commissioner submits that questions asking a witness to testify on questions of law or to provide argument as to what is relevant in order to prove a given plea are improper as examinations for discovery may only seek facts, not law (*Apotex* at

para 19). The Commissioner pleads that the questions asked by the Respondents would in fact force Ms. Nikolova to think of the law applicable or relied upon for the Commissioner's allegations, and to select facts in accordance with her understanding of the law.

[25] I am ready to accept that this effectively happens when a party asks a discovery witness questions relating to the facts *relied on* in support of an allegation. However, I am not persuaded that this always happens when a witness is asked about facts in relation or in connection with allegations incorporating a legal test to be met, or simply because the questions contain language referencing provisions of the applicable legislation at stake or certain terms capable of having a legal connotation. Stated differently, I am not convinced that questions asking for facts or information known to the Commissioner's representative being discovered in connection with a particular allegation in the pleadings can be deemed to be automatically improper (and not subject to answer) because they import or refer to a legal concept or to a specific element of the conduct being challenged in the application.

[26] Depending on how they are actually formulated, questions seeking facts or information known to the Commissioner and underlying his allegations with respect to the various elements of an alleged conduct can be considered as appropriate questions on discovery, even if they contain a certain legal dimension. If I were to accept the Commissioner's position, it would mean that, as soon as a question would include wording repeating the language of the Act or the elements of an alleged conduct that is the subject of an application, it would run the risk of being refused on the ground that it is considered as requiring a legal interpretation. This would significantly restrain the scope of any discovery of the Commissioner's witness by the respondents, or risk transforming examinations for discovery into an exercise too focused on semantics, where counsel for the respondents would be expected to look for creative wording in order to avoid any reference to a term used in the Act or in the specific provisions at the source of the application.

[27] There is, of course, no question that examinations on discovery are designed to deal with matters of fact. However, the line of demarcation between seeking a disclosure of facts and asking for evidence relied upon for an allegation is often hazy. Likewise, there is always a fine line between questions asking for facts *relied on* by a party in support of an allegation (which are always improper) and questions seeking facts *known* to a party that underlie an allegation (which are proper even when they may contain certain elements of law in them). Similarly, it is also difficult to distinguish between facts and law, and the boundary between them is often not easy to draw (*Montana Band* at paras 20, 23).

[28] As such, determining when a question becomes a request for a legal interpretation that would be clearly improper on an examination for discovery is a highly case-specific exercise. Indeed, at the hearing, counsel for the parties have not referred to authorities providing guidance on this precise point. And I am not aware of decisions from the Tribunal or from the Federal Court addressing specifically whether, on examinations for discovery, a question about facts known to a witness that uses words with a legal connotation or legal language that is ultimately for the trier of fact to decide, such as language contained in an applicable legislation, would be improper. In my view, a distinction needs to be made between "pure" questions of law, and questions of fact that may imply a certain understanding of the law or that arise against a legal contextual background. It is well established that pure questions of law, such as questions asking

a witness to provide a legal definition of words or terms or to explain a party's position in law, are not permissible on examinations for discovery. However, the facts underlying questions of law can be discoverable. In the same vein, questions on discovery may mix fact and law. Questions relating to facts which may have legal consequences remain nonetheless questions of fact and may be put to a witness on discovery (*Montana Band* at para 23).

[29] In *Montana Band*, Justice Hugessen expressed the view that "it is proper on discovery (although it may not be so at trial) to ask a party as to the facts underlying a particular conclusion of law" (*Montana Band* at para 28). Questions can thus ask for facts behind a conclusion of law and for facts underlying a particular allegation or conclusion of law (*Montana Band* at para 27). While it is not proper to ask a witness what evidence he or she has to support an allegation, it is quite a different thing to ask what facts are known to the party being discovered which underlie a particular allegation in the pleadings. Even when the answer may contain a certain element of law, it remains in essence a question of fact (*Montana Band* at para 27). Similarly, the Federal Court wrote that "[q]uestions which seek to identify the factual underpinning of [a] position are proper questions even if they require an interpretation of the [legislation]" (*Sierra Club of Canada v Canada (Minister of Finance)*, 174 FTR 270, 1999 CanLII 8722 (FC) at para 9).

[30] To deny the possibility of asking about such facts would amount to refuse and frustrate the very purpose of discovery, which is to learn the facts, or often equally more important, the absence of facts, underlying each and every allegation in the pleadings. Moreover, bearing in mind the principled approach to examinations for discovery, whenever there is doubt as to whether a question relates sufficiently to facts as opposed to law, the resolution should be in favour of disclosure. This is especially true when the questions at issue are clearly relevant, as is the case here for the Category 2 Questions.

[31] In light of the foregoing, I am of the view that six of the eight Category 2 Questions disputed in this Refusals Motion need to be answered. They are questions 285-286; 844-848; 845-848; 846-848; 847-848 and 1119. As stated above, deciding on objections to questions on discovery is a fact-specific exercise and one needs to carefully look at what is being asked and how it is asked. As posed, these six questions require an answer of mixed fact and law which, in my opinion, do not require an improper "legal interpretation" to be conducted. They refer to terms which may be seen as having a legal connotation, but these terms are simply there as a contextual premise to answer what are factual questions.

[32] The first four questions relate to facts in association with whether individual Respondents acted "separately", "in concert" or "jointly" with other Respondents in respect of certain specific events. These words were used by the Commissioner in his pleadings; sometimes, the Commissioner also used the words "work together" and "jointly" as equivalents in referring to the Respondents. These are factual questions regarding which of the Respondents work together or in concert, and whether they act individually or separately.

[33] Question 847-848, on its part, seeks information in connection with individual Respondents "permitting" others to make the representations. As to question 1119, it specifically asks about the individual Respondents that are "<u>said to make</u> the price representations" or "<u>said to permit</u> others to make" them (emphasis added). I acknowledge that these two questions specifically refer to terms found in the deceptive marketing practices provisions at issue in this

Application: the term "make" is expressly used in paragraph 74.01(1)(a) of the Act and it includes "permitting a representation to be made" pursuant to subsection 52(1.2) of the Act.

[34] I do not agree with the Commissioner that these six questions improperly ask for a legal interpretation to be made by the witness. In my opinion, asking whether individual Respondents acted in concert, jointly or separately are questions of fact that are highly relevant in the context of this Application, and as formulated, the questions do not venture into the forbidden territory of asking "pure" questions of law or seeking facts or evidence *relied on* by the Commissioner. The references to the Respondents acting separately, jointly and/or in concert are part of the Commissioner's pleadings, and the Respondents are entitled to ask about the facts or information known to the Commissioner that underlie these allegations in connection with the various specific Respondents. I would add that terms like "acting in concert", "acting jointly" or "acting separately" are ordinary words which are not found in the provisions of the Act forming the basis of this Application. While these terms may have a legal connotation, they are also common words, as opposed to technical terms or terms requiring a technical interpretation. They are the kind of terms that any person can understand. In my view, no conclusion of law is required to answer the questions incorporating them. The same is true for the terms "permitting", "said to make" or "said to permit" used in Questions 847-848 and 1119 even though they echo wording used in the provisions of the Act at issue in the Application.

[35] In addition, I would point out that Ms. Nikolova has been involved in the Competition Bureau's investigation leading to the Application. It is reasonable to expect that she has a high level of knowledge of the context of the Application, and will be able to understand the terms used to frame these six Category 2 Questions and the specific factual questions being asked.

[36] I am therefore not persuaded that, as formulated, these six Category 2 Questions bear the attributes that would render them improper and inacceptable in the context of an examination for discovery of the Commissioner's representative. In my view, they do not require Ms. Nikolova to make a legal interpretation of the terms "make", "permit", "separately", "in concert" or "jointly", but instead ask for the facts allowing one to link the individual Respondents to the impugned deceptive marketing practices. The questions do not require her to assess whether the facts meet the precise legal test of paragraph 74.01(1)(a) and whether the facts indeed qualify as "making" or "permitting to make" the representations at issue.

[37] Questions 1120 and 1121 raise a more delicate issue. They broadly ask for the "Commissioner's information as to the manner in which each respondent makes the price representations" or "permits another respondent to make price representations". These questions not only specifically refer to the terms "make" and "permit" found in the deceptive marketing practices provisions at issue in this Application, but they also amount to asking about all the facts and evidence that the Commissioner has with respect to the reviewable conduct at issue. I acknowledge that the word "rely" is not used in these two questions but, broadly formulated as they are, I find that they are essentially to the same effect and lead to a similar result. They effectively ask for admissions of law and for the evidence in support of the Commissioner's allegations.

[38] As formulated, I find that they are problematic and improper, and they need not be answered.

[39] I make one last comment. Had the Respondents reformulated the Category 2 Questions and simply asked about facts or information known by the Commissioner in relation to the involvement of the various individual Respondents in the impugned representations on the Ticketing Platforms, those questions would have been allowed without hesitation, and without having to conduct the more detailed analysis described in these reasons. Determining whether questions are properly refused on examinations for discovery or cross the boundary into the territory of inappropriate questions is a fact-specific exercise, and it will ultimately depend on how the questions are formulated in the context of each given case. I agree that examinations for discovery should not be reduced to an exercise of semantics, but words used in questioning do matter. The parties will always be on safer grounds if the questions asked are carefully limited to the facts and do not import what may be perceived as legal language that the trier of fact will eventually have to interpret and assess.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[40] The Respondents' motion is granted in part.

[41] The Respondents' questions 461; 462; 677; 679; 285-286; 844-848; 845-848; 846- 848; 847- 848; and 1119 need to be answered in writing by the Commissioner's representative, Ms. Nikolova.

[42] The Respondents' questions 685; 1199; 1120 and 1121 need not be answered.

[43] As success on this motion has been divided, and considering that 20 of 34 Refused Questions initially listed in the Notice of Motion have been answered by the Commissioner or resolved by the parties, costs shall be in the cause.

DATED at Ottawa, this 5th day of April 2019.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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CT-2021-002

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the acquisition of Tervita Corporation by Secure Energy Services Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to 92 of the *Competition Act*;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an interim order pursuant to section 104 of the *Competition Act*;

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

SECURE ENERGY SERVICES INC.

Respondent

COMMISSIONER OF COMPETITION'S BOOK OF AUTHORITIES

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