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OTTAWA, ONT.

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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 section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant/Responding Party

- and -

SECURE ENERGY SERVICES INC.

Respondent/Moving Party

**BOOK OF AUTHORITIES OF THE MOVING PARTY
SECURE ENERGY SERVICES INC.
(Motions to compel answers to questions refused on discovery)**

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TAB 1

2015 FC 1176, 2015 CF 1176
Federal Court

Bard Peripheral Vascular, Inc. v. W.L. Gore & Associates, Inc.

2015 CarswellNat 5023, 2015 CarswellNat 8784, 2015 FC
1176, 2015 CF 1176, 138 C.P.R. (4th) 7, 259 A.C.W.S. (3d) 354

**Bard Peripheral Vascular, Inc. and Bard Canada Inc., Plaintiff/
Defendants by counterclaim and W.L. Gore & Associates, Inc. and W.L.
Gore & Associates Canada Inc., Defendant/Plaintiffs by counterclaim**

René LeBlanc J.

Heard: September 29, 2015

Judgment: October 16, 2015

Docket: T-2105-13

Counsel: Ms Joanne Chriqui, Mr. Eric Bellemare, for Plaintiff
Mr. Jonathan Giraldi, Mr. Sean Jackson, for Defendant

René LeBlanc J.:

I. Introduction

1 This is an appeal by the Defendants/Plaintiffs by counterclaim, W.L. Gore & Associates Inc. [Gore US] and W.L. Gore & Associates Canada Inc. [Gore Canada] [collectively referred to as Gore], pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 [the Rules], of part of Prothonotary Richard Morneau's Order, dated August 24, 2015 [the Order], disposing of the request for answers to questions posed to the representative of the Plaintiffs/Defendants by counterclaim [Bard] during discovery. Gore seeks to compel answers be given by Bard's representative, Mr. Scott Randall, to a number of questions which Prothonotary Morneau held need not be given.

1 Gore also challenges the part of Prothonotary Morneau's Order awarding costs to Bard.

2 For the reasons that follow, Gore's appeal is dismissed.

II. Background

3 This appeal arises in the context of an action brought by Bard seeking a declaration that Gore has infringed Canadian Patent No. 1,341, 519 [the 519 Patent] as well as injunctive relief and damages, including punitive and exemplary damages. The 519 Patent, entitled *Prosthetic Vascular Graft*, contains 27 claims and relates to prosthetic devices, including artificial veins and arteries, made of expanded Teflon known as *ePTFE*. Bard alleges that 12 broad families of Gore products include all the elements of, and therefore infringe, certain claims of the said patent.

4 Gore is denying infringement and has counterclaimed that the 519 Patent is invalid in several respects, including lack of utility, insufficient disclosure, overbreadth, and co-inventorship.

5 As noted by Prothonotary Morneau, the parties to this case are not strangers to each other or to the technology and patent in suit as this matter has been prosecuted and litigated for more than four decades both in Canada and the United States. The 519 Patent was issued on January 2, 2007 to the named inventor, Dr. David Goldfarb, from a Canadian application filed in January 1975, which claimed priority based on a US application filed by Dr. Goldfarb on October 24, 1974. The Canadian

application was put into conflict by the Canadian Patent Office in 1980 against an application filed in Canada by Gore US in order to determine the issue of inventorship. This gave rise to proceedings before this Court. In February 2001, Justice François Lemieux held that Dr. Goldfarb, instead of Peter Cooper, an employee of Gore US who had assigned his rights to Gore US, was the first inventor (*Goldfarb v. W.L. Gore & Associates Inc.*, 2001 FCT 45, 200 F.T.R. 184 (Fed. T.D.)) [*Goldfarb*]. This judgment was affirmed on appeal (*Goldfarb v. W.L. Gore & Associates Inc.*, 2002 FCA 486, 235 F.T.R. 167 (note) (Fed. C.A.)). Dr. Goldfarb's US patent application was also put in an interference proceeding against an application filed by Gore US. In 2002, after years of litigation, a US patent was issued to Dr. Goldfarb.

6 Justice Lemieux, in *Goldfarb*, above, described Dr. Goldfarb's invention as follows:

[118] The first step in the analysis to determine who, as between Dr. Goldfarb and Mr. Cooper, was the first inventor of a successful artificial small vascular human vein or artery replacement, is to define exactly what the invention is.

[119] The invention relates to an artificial vascular prosthesis made from ePTFE. The properties and method of manufacture of ePTFE are not new. They are prior art. Robert Gore was the inventor and obtained, in 1976, a patent on that invention.

[120] What was not known in 1970, however, was whether ePTFE tubing could have a medical use. Experimentation or search for use for it as a vascular graft in replacement for natural arteries and veins in humans began almost immediately after Mr. Gore filed his U. S. patent application in 1970.

[121] The invention, an appropriate range of fibril length in the material, is what made the ePTFE tubing useful for such purpose. The essential feature of the invention is the distance between the nodes (or the length of the fibres connecting them) which forms part of the internal structure of ePTFE tubing.

[122] An appropriate fibril length is what permits this ePTFE tubing to act as a useful artificial graft which remains patent because it allows cellular or fibroblastic movement and thus tissue ingrowth.

7 The present action was initiated in 2013. It is casemanaged by Prothonotary Morneau as a specially managed proceeding. By Order dated November 12, 2014, the trial - on the issues of infringement and validity - is scheduled to commence in a year from now, that is on October 3, 2016. Discoveries of each party's corporate representative were held in the spring of 2015 and followed by written questions. In each case approximately 1200 questions were not answered by the other side's representative and motions were brought to compel answers to some of them. Bard sought to compel answers to 72 refused or unanswered questions whereas Gore sought the adjudication of some 940 unanswered questions. At the time of the hearing of both motions held before Prothonotary Morneau on August 12, 2015 and as a result of ongoing efforts to reduce the issues in dispute, these figures were brought down to six questions by Bard and to approximately 450 by Gore.

8 Gore's 450 questions were broken down into some 30 categories or sub-categories. The questions at issue in this appeal are in relation to three of these categories: the Prosecution Questions, the Aneurysm Questions, and the Pore Size Questions. There were 17 questions at issue initially but this total was reduced to 13 [the Refused Questions] at the outset of the hearing of the appeal.

9 After having set out what were, in his view, the legal principles applicable to the analysis of both parties' motions to compel answers, and pointed to the Notice to the Profession, issued by the Chief Justice of this Court on June 25, 2015 with a view of bringing increased proportionality in complex litigation before the Court [the Proportionality Guidelines], Prothonotary Morneau held that the Refused Questions need not be answered either because they were not relevant to unadmitted allegations of fact or because they sought expert opinion, legal conclusions, or expressions of opinion or state of mind.

10 On the whole, Gore was successful on 13 of the 450 questions for which it sought answers from Bard's representative. Given this limited success and being of the view that Gore's motion to compel answers, by its magnitude, was unreasonable and excessive, Prothonotary Morneau awarded costs to Bard at the top of Column IV of the Tariff.

11 The issue to be determined in this case is whether the Court should interfere with these findings.

III. Analysis

A. The Standard of Review

12 Prothonotaries' decisions ordering questions to be answered or not answered on discovery are interlocutory, discretionary decisions (*Eurocopter c. Bell Helicopter Textron Canada Ltée*, 2010 FCA 142 (F.C.A.) [*Bell Helicopter*], at para 17; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2008 FCA 131 (F.C.A.), at para 3; *Hayden Manufacturing Co. v. Canplas Industries Ltd.* (1998), 161 F.T.R. 57, 85 A.C.W.S. (3d) 12 (Fed. T.D.), at para 8 [*Hayden Manufacturing*]; *Letourneau v. Clearbrook Iron Works Ltd.*, 2005 FC 475 (F.C.), at para 4; *Astrazeneca Canada Inc. v. Apotex Inc.*, 2008 FC 1301, [2009] 4 F.C.R. 243 (F.C.), at para 22 [*AstraZeneca Canada*]).

13 As is well-settled, discretionary orders of Prothonotaries ought not to be disturbed on appeal before a judge of the Court unless they raise questions vital to the final issue of the case or they are clearly wrong in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or upon a misapprehension of the facts. Therefore, the Court may only consider the matter *de novo* when the Prothonotary's decision falls within the scope of one of these two criteria (*R. v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, 61 F.T.R. 44 (Fed. C.A.) [*Aqua-Gem*]; *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 (S.C.C.); *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, 246 F.T.R. 319 (note) (F.C.A.); *Bell Helicopter*, above at para 18; *Apotex Inc. v. Sanofi-Aventis Canada Inc.*, 2011 FC 52, 383 F.T.R. 37 (Eng.) (F.C.), at para 13 [*Sanofi-Aventis*]; *NOV Downhole Eurasia Ltd. v. TLL Oilfield Consulting Ltd.*, 2014 FC 889 (F.C.), at paras 13-14 [*NOV Downhole*]).

14 As Justice Yves de Montigny stated in *Sanofi-Aventis*, above, it will be a rare occurrence when it can be shown that the denial of further discovery will be vital to the outcome of a case (*Sanofi-Aventis*, at para 14). Here, Gore has not attempted to show that the part of Prothonotary Morneau's Order under appeal is vital to the final issue of the case.

15 Therefore, the issue is whether Prothonotary Morneau, in finding that Bard's representative need not answer the questions at issue in this appeal, exercised his discretion based upon a wrong principle or upon a misapprehension of the facts. If he did not, then his decision attracts considerable deference and should only be interfered with "in the clearest case of misuse of judicial discretion" (*NOV Downhole*, above at para 14; *Sawridge Band v. R.*, 2001 FCA 338 (Fed. C.A.), (*sub nom Sawridge Band v. R.*) (2001), [2002] 2 F.C. 346 (Fed. C.A.), at para 11). This is particularly the case where, as here, the impugned decision was rendered in the context of case management. In such context, it is generally recognized that the burden of a party seeking to overturn an interlocutory order by a case-manager is a heavy one as a casemanager is normally intimately familiar with the history, details, and complexities of the casemanaged matter (*Sanofi-Aventis*, above at para 15).

16 In other words, I should not substitute my discretion for that of Prothonotary Morneau, even if I may have arrived at different results had I been hearing the matter at first instance, unless he made a fundamental error of principle or misapprehended the evidence or the pleadings (*Merck & Co. c. Apotex Inc.*, 2005 FC 582, 273 F.T.R. 160 (Eng.) (F.C.), at para 59; *Hayden Manufacturing*, above at para 12).

B. Oral Discovery: Relevant Principles

17 As reaffirmed by the Federal Court of Appeal in *Lehigh Cement Ltd. v. R.*, 2011 FCA 120 (F.C.A.), at paragraph 30 [*Lehigh Cement*], the general purpose of discovery "is to render the trial fairer and more efficient by allowing each party to inform itself fully prior to trial of the precise nature of all other parties' positions so as to define fully the issues between them." This calls for a liberal approach to the scope of questioning on discovery (*Lehigh Cement*, at para 30; *Sanofi-Aventis*, above at para 19).

18 Examinations on discovery in proceedings before this Court are governed by Rules 234 to 248. Rules 240 and 242(1) are of particular relevance to the present case. Rule 240 provides for the scope of the examination for discovery. It states that a person examined for discovery is required to answer, *inter alia*, any questions relevant to any unadmitted allegation of fact disclosed in the pleadings. In *Lehigh Cement*, above, the Federal Court of Appeal reiterated 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" (*Lehigh Cement*, at para 34).

19 For its part, Rule 242(1) establishes permissible objections during an examination for discovery. It provides that a person may object to a question when, for example, the answer is not relevant, is unreasonable, is unnecessary, or would be unduly onerous to answer. 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" (*Apotex Inc. v. Pharmascience Inc.*, 2004 FC 1198, 260 F.T.R. 254 (Eng.) (F.C.), at para 19; *AstraZeneca Canada*, above at para 14).

20 There is more to it. The simple fact that a question is "relevant" does not mean that it must inevitably be answered and cannot, as a result, be objected to. In *AstraZeneca Canada*, above, the Court held that relevance is always subject to the overriding discretion of a Prothonotary to control abuses of the discovery process:

[16] "Relevance" alone is not the test as to whether a question put on discovery must be answered. Of course, if a question is irrelevant, it need not be answered. However, if a question is relevant to some degree or another, then, if an objection is raised, the Court must consider factors such as the degree of relevance, how burdensome is it to obtain an answer, is the question fair, is it abusive and so forth. Strayer JA. when he was in the Federal Court of Appeal wrote in *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, 28 C.P.R. (4th) 491 at paragraph 13:

A person who is a party to a civil action is entitled to ask any question on discovery that is relevant to the issue: that is a matter of justice to him, subject of course to the discretionary power of the prothonotary or a judge to disallow the question where it is abusive for one of the reasons mentioned above.

[17] The Federal Court of Appeal again considered the scope of "*relevance*" in the context of oral discovery in *Apotex Inc. v. Bristol-Myers Squibb Co.*, 2007 FCA 379. In that decision Shallow JA. for the Court, considered "*relevance*" as including not only that which will go to proving or disproving the case of one or other party, and considered the "*train of inquiry*" test which she stated was subject always to the "... *overriding discretion of a prothonotary or judge to control abuses of the discovery process*". At paragraphs 30, 31 and 35, Shadow JA. wrote:

30 In determining the propriety of a particular question posed in the examination for discovery of Dr. Ryan, the test is whether it is reasonable to conclude that the answer to that question might lead Apotex to a train of enquiry that may either advance its case or damage the case of BMS: *Apotex v. Canada*, [2005] F.C.J. No. 1021, 2005 FCA 217. For example, Apotex is entitled to ask any question that could elicit an admission by BMS as to a relevant fact, or that could elicit information about the existence of documents that have not been disclosed but that meet the test of relevance for the purposes of pre-trial discovery, as set out in the Further and Better Order, subject always to the overriding discretion of a prothonotary or judge to control abuses of the discovery process.

31 In determining whether the test of relevance is met in a particular case, it is necessary to consider the allegation that the questioning party is attempting to establish or refute. In this case, Apotex is attempting to advance its allegation of inutility (based on its interpretation of the promise of the 436 patent as explained above), or to damage the position of BMS that denies the allegation of inutility.

[...]

35 The task of distinguishing proper questions from improper ones requires consideration of the factual and procedural context of the case, informed by an appreciation of the applicable legal principles. The determination made by the judge or prothonotary at first instance will stand if it is reasonable, unless it is based on an error of law.

21 Relevance must therefore be weighed against matters such as the degree of relevance, how onerous it is to provide an answer, or if the answer requires fact or opinion or law. This is how the Court protects against abuses so as to secure, as required

by Rule 3, the just, most expeditious and least expensive resolution of every proceeding on its merits. As the Court reiterated in *AstraZeneca Canada*, above at paragraph 7, Rule 3 - the Rules' "procedural foundation" - is to be followed in all matters before the Court, including discovery.

22 As indicated previously, Prothonotary Morneau, in his Order dated August 24, 2015, spent quite some time setting forth the principles he relied on to reach his conclusions. He first reproduced the six principles regarding relevancy set out by Justice John McNair in *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* (1988), 25 F.T.R. 226, 24 C.P.R. (3d) 66 (Fed. T.D.), [*Reading & Bates*], pointing out that the first three define the parameters that determine whether a question is relevant whereas the last three set out a non-exhaustive series of circumstances or exceptions in which a question need not be answered. He then quoted extensively from *Merck & Co. c. Apotex Inc.*, 2004 FC 1166 (F.C.) [*Merck & Co*], a decision where he insisted, in reference to the fifth principle set out by Justice McNair in *Reading & Bates* above, on the need to maintain a balance between the broadest possible examinations for discovery and the tendency of parties, particularly in the field of intellectual property, to engage in fishing expeditions which should not be encouraged by the Court. The *Reading & Bates* fifth principle reads as follows at paragraph 10 of the decision:

[10] Before compelling an answer to any question on an examination for discovery, the court must weigh the probability of the usefulness of the answer to the party seeking the information, with the time, trouble, expense and difficulty involved in obtaining it. Where on the one hand both the probative value and the usefulness of the answer to the examining party would appear to be, at the most, minimal and where, on the other hand, obtaining the answer would involve great difficulty and a considerable expenditure of time and effort to the party being examined, the court should not compel an answer. One must look at what is reasonable and fair under the circumstances: *Smith, Kline & French Ltd. v. A.-G. Can.*, per Addy J. at p. 109.

23 Still quoting from his decision in *Merck & Co.*, above, Prothonotary Morneau had this to say, on the basis of this Court's Judgment in *Westinghouse Electric Corp. v. Babcock & Wilcox Industries Ltd.* (1987), 15 F.T.R. 154, 15 C.P.R. (3d) 447 (Fed. T.D.), about the need for such balancing in patent infringement cases where the defendant is attacking the validity of the patent it allegedly infringed:

[15] This passage therefore testifies more particularly that in a patent infringement action in which the defendant is attacking the validity of the patent, the Court has little inclination to force the plaintiff to engage in disproportionate research to support the allegations of invalidity raised by the defendant when, inter alia, the conclusions sought by this defending party pertain primarily to the interpretation that the Court will give to the patent claims in light of its reading of the patent, the state of the applicable law and any expert evidence adduced by the parties, and not in terms of what the plaintiff may have thought or argued in the past as to the validity of the patent.

[16] Similarly, Mr. Justice Hugessen, in *Eli Lilly and Co. v. Apotex Inc.* (2000), 8 C.P.R. (4th) 413 (upheld on appeal, at 12 C.P.R. (4th) 127), stated the following at pages 414-15 concerning the relevance of the inventor's knowledge about the obviousness of an invention:

I am not prepared to order the plaintiffs to produce documents relating to the state of knowledge of prior art on the part of the inventors or of the patentees at the time of the issue of the patents in suit. Such knowledge can only be relevant to the pleaded issue of obviousness. The test for obviousness is, in my view, and there is ample authority to this effect, an objective test. The touchstone is the person skilled in the art, whether or not the invention would have been obvious to that person. The actual knowledge of the inventor or inventors is irrelevant.

[Emphasis added]

24 Further quoting from *Merck & Co* at paragraph 19 of the Order, Prothonotary Morneau relied on *Philips Export B.V. v. Windmere Consumer Products Inc.* (1986), 1 F.T.R. 300, 8 C.P.R. (3d) 505 (Fed. T.D.), to state that "a party may not be required, on an examination for discovery, to answer a question that forces it to express an opinion, whether it is an expert opinion, its interpretation of a patent or its beliefs."

25 Finally, he referred to Justice Roger Hughes's comments in *AstraZeneca Canada*, above, regarding the tendency of parties and counsel in patent infringement cases to use the discovery process to uncover as much as possible from the other side however marginally relevant so as to defeat the real purpose of discovery, which is directed to what a party truly requires for trial, and found them to be "forcefully" applicable to the present case (*AstraZeneca Canada*, at paras 6 and 19).

26 It is "with that in mind, including the relevant jurisprudential principles, which comprehend those cited earlier as well as those raised by the parties" that Prothonotary Morneau disposed of Gore's motion to compel answers to the Refused Questions.

27 So far, I do not see any failure in Prothonotary Morneau's approach and identification of the relevant applicable principles.

C. The Refused Questions

(1) The Prosecution Questions

28 Gore claims that Prothonotary Morneau erred in law when he declined to compel Bard to answer a total of six questions pertaining to how the claimed numeric ranges within the 519 Patent were arrived at, on the basis that they were not relevant. More particularly, these questions essentially pertain to alleged discrepancies between what Dr. Goldfarb told his US Patent Agent, Mr. Sam Sutton, about these ranges and what Mr. Sutton put in the patent application.

29 Gore says these questions - the Prosecution Questions (numbered 781 to 786 in Gore's Confidential Chart) - are relevant to its allegation that the disclosure of the 519 Patent is insufficient within the meaning of subsection 34(1) of the *Patent Act*, RSC, 195, c P-4 (the Act) because it is broader than what was contemplated by Dr. Goldfarb, as well as to its allegation that the 519 Patent is invalid pursuant to section 53 of the Act on the ground that the statements in said patent about the ranges of certain claimed features are incorrect and were wilfully made for the purpose of being misleading.

30 Bard contends that Gore failed to direct the Court to specific legal principles which would have been wrongly considered or applied by Prothonotary Morneau and that what Gore is ultimately asking the Court to do is to substitute its own assessment of the same facts considered and arrive at conclusions different from those reached by the Prothonotary. This is indeed, in my view, what Gore's argument amounts to. As I indicated previously, this is not a permissible approach when one is appealing a Prothonotary's interlocutory, discretionary decision rendered in the context of case management. The burden on the appealing party is a heavy one and requires that it be shown that the impugned decision results from a clear misuse of judicial discretion. Overall, I am not satisfied that this demonstration has been made.

31 Gore insists that relevance is a matter of law and that no deference is therefore owed to Prothonotary Morneau's decision regarding the Prosecution Questions. This, again, is not entirely correct. As Justice Hughes stated in *AstraZeneca Canada*, above, at paragraph 23, "law establishes if a question is relevant, discretion may be applied as to whether, nonetheless, it is appropriate to Order, or not to Order, that an answer be given." This, in my view, quite appropriately sums up this Court's case law regarding relevancy and the nature of the decisions rendered in this respect by the Court's Prothonotaries.

32 Here, it is clear from the reasons for Prothonotary Morneau's decision that he was not only concerned with the relevance of the Prosecution Questions, from a strict legal technical standpoint, but also with the need to balance the usefulness of the information sought with the trouble and inconvenience involved in obtaining it, the Court's little inclination to force a plaintiff to engage in disproportionate research to support the allegations of patent invalidity often raised by the defendant in an action for patent infringement, and the tendency, observed by Justice Hughes in *AstraZeneca Canada*, above, by parties and counsel in patent infringement cases to lose sight of the real purpose of discovery by attempting to uncover as much as possible from the other side however marginally relevant.

33 As Bard points out, Gore is asking Bard, through the Prosecution Questions, to answer questions pertaining to private discussions between Dr. Goldfarb and his then US Patent agent, Mr. Sutton, neither of whom are parties to the present proceedings or within the control of Bard, in an effort to arrive at what Dr. Goldfarb contemplated the 519 Patent to be.

34 In my view, it was open to Prothonotary Morneau, based on the considerations outlined in his Order, to find that the Prosecution Questions need not be answered. These considerations were all valid and supported by this Court's jurisprudence. I also agree with Bard that the case of *Ratiopharm Inc. v. Pfizer Ltd.*, 2009 FC 711, 350 F.T.R. 250 (Eng.) (F.C.) [*Ratiopharm*], relied on by Gore to argue that what was contemplated by Dr. Goldfarb is relevant to Gore's patent invalidity counterclaim, is distinguishable from the present case as evidence regarding what was contemplated by the inventors in that case was provided to the Court by the inventors themselves "live in the witness box" at trial and was so provided in a context where the Court will normally look at the patent itself in order to determine its sufficiency within the meaning of subsection 34(1) of the Act (*Ratiopharm*, above at paras 188 to 190). As Bard points out, *Ratiopharm* was brought to the attention of Prothonotary Morneau and I agree that it was within his discretion to distinguish it from the present scenario.

35 Bard claims that in any event, answers to the Prosecution Questions cannot be compelled on discovery as these questions relate to privileged communications between Dr. Goldfarb and his then US patent attorney, Mr. Sutton. This argument was not considered by Prothonotary Morneau as it was submitted on the eve of the hearing of the parties' motions to compel answers. This issue was discussed at some length by the parties at the hearing of Gore's appeal. However, given my conclusion that there is no basis to interfere with Prothonotary Moneau's finding regarding the Prosecutions Questions, there is no need to determine Bard's privilege assertion in this appeal.

(2) *The Aneurysm Questions and the Pore Size Question*

36 There are six Aneurysm Questions and one Pore Size Question at issue (numbered 1224, 1225, 1237, 1238, 1239, 1246 and 1073 in Gore's Confidential Chart). With respect to Question 1224, Gore claims that Prothonotary Morneau erred in law by declining to order Bard to provide an answer on the basis that this question is not relevant. Question 1224 sought Bard's knowledge, information, and belief about the alleged failure of certain early Gore products with a wall thickness between 0.2 and 0.8 mm. Bard contends that Gore's submissions shed no light as to how knowledge of the specification of Gore's product is relevant and that in any case, to the extent that this question concerns Gore's own products, there are other means for Gore to obtain the information sought.

37 Again, relevance alone does not determine whether an answer is to be given as there are other matters to be considered. As we have seen, deference is owed to a Prothonotary's decision regarding his or her consideration of those other matters and the burden on the party seeking to set aside such a decision is a heavy one, the test being not whether I might have arrived at a different result had I been hearing the matter in first instance but whether the decision amounts to a clear case of misuse of judicial discretion. Having read the context in which Question 1224 was put to Bard's representative, I will not interfere with Prothonotary Morneau's exercise of discretion in ordering that this question need not be answered even if I might have arrived at a different result had I been hearing the matter at first instance.

38 As for the remaining Aneurysm Questions and the Pore Size Question, Gore claims that Prothonotary Morneau erred in law in declining to order Bard to answer these questions on the ground that they required an opinion. More particularly, Gore contends that Prothonotary Morneau erred in principle by adopting Bard's blanket statement that questions seeking to elicit an opinion are not permitted. It says that this goes against the teachings of the Federal Court of Appeal's decision in *Bell Helicopter*, above, which stresses the fact that although the general principles set out in the case law regarding questions requiring an expression of opinion are useful, these principles do not provide a magic formula applicable to all situations and require, therefore, a case-by-case, or question-by-question, analysis (*Bell Helicopter*, above at para 13).

39 Bard submits that each of these questions do elicit its representative's opinion on the functioning of early Gore products and the alleged occurrence of certain graft failures as well as his interpretation as to the beliefs of others concerning the technical issues and conclusions discussed in the referred-to scientific publication. More particularly, Bard argues that nothing suggests that Prothonotary Morneau accepted its submission in this regard without proper consideration of the application of the law to the facts of the case or that he went against the directives of the Federal Court of Appeal in *Bell Helicopter*, above.

40 Bard claims that Gore has therefore failed to establish that Prothonotary Morneau's analysis of the remaining Aneurysm Questions and of the Pore Size Question was based upon a wrong legal principle or a misapprehension of the facts of the case and that as a result, Gore has not established that a *de novo* examination is required to decide where these questions need to be answered. I agree. There is indeed nothing to suggest that Prothonotary Morneau did not proceed on a question-by-question basis. As Bard points out, this Court has held on many occasions that it is virtually impossible for the Court's Prothonotaries to give detailed reasons for each order issued by them given the number of motions they have to decide, including burdensome motions seeking to compel answers to questions put on discovery where hundreds of question must often be considered, as was the case here, and where the only practical way to dispose of answerability issues is to state reasons cryptically (*Foseco Trading A.G. v. Canadian Ferro Hot Metal Specialties Ltd.* (1991), 46 F.T.R. 81, 36 C.P.R. (3d) 35 (Fed. T.D.), at para 5; *AstraZeneca Canada*, above at paras 19 and 25). As the Court further held in this regard, this is no reason to set aside Prothonotaries' decisions or to determine them *de novo* (*AstraZeneca Canada*, above at para 25; *Anchor Brewing Co. v. Sleeman Brewing & Malting Co.*, 2001 FCT 1066, 15 C.P.R. (4th) 63 (Fed. T.D.), at para 31).

41 Whether a question elicits opinion or fact is often not clear. It requires a contextualized measure of judgment. As the Court has stated on a number of occasions, Prothonotaries, in their case-management capacity in particular, are in the best position to direct and control the discovery process due to their intimate knowledge of the history and details of casemanaged matters (*Galerie au Chocolat Inc. v. Orient Overseas Container Line Ltd.*, 2010 FC 327 (F.C.), at para 10). In such matters, the office of a Prothonotary is not a mere "preliminary "rest-stop" along the procedural route to a motion judge" (*Aqua-Gem*, above at para 70).

42 On examining the remaining Aneurysm Questions and the Pore Size Question in context and considering the submissions of Gore's counsel, I am not satisfied that Prothonotary Morneau was wrong in ordering that these questions need not be answered. Again, this is not an instance of clear misuse of judicial discretion.

43 On the whole, I see no reason to interfere with Prothonotary Morneau's finding that the Refused Questions need not be answered.

D. Prothonotary Morneau's Determination on Costs

44 Gore claims that Prothonotary Morneau erred by awarding costs to Bard at the top of Column IV of Tariff B of the Rules. It contends that Prothonotary Morneau failed to give sufficient weight to paragraph 400(3)(k) of the Rules by not considering whether any step in the proceeding was improper, vexatious or unnecessary. In particular, Gore says that Prothonotary Morneau misapprehended the facts by not considering that the magnitude of its motion to compel answers was the result of Bard's excessive use of "under advisements" and improper refusals at the examination for discovery and by not considering Bard's decision to answer more than 300 questions after Gore's motion was brought.

45 Bard responds that Gore's position proceeds from an erroneous understanding of Prothonotary Morneau's determination on costs. Bard claims that what prompted Prothonotary Morneau's determination is not Gore's initial motion seeking answers to some 940 questions but its motion, as it stood at the time of the hearing before Prothonotary Morneau, which still sought adjudication of over 450 questions in clear disregard of the purpose of discovery, jurisprudence related thereto, and the recommendations set out in the Proportionality Guidelines, all of which were properly taken into account by Prothonotary Morneau. Coupled with the fact that Bard was not ordered to pay costs to Gore because it "managed to reduce considerably the number of questions to be adjudicated" (to six), Bard submits that Prothonotary Morneau exercised his discretion within the appropriate framework and that there is therefore no basis to interfere with his costs determination.

46 I agree with Bard. Rule 400 of the Rules provides the Court with "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid." In other words, costs awards are highly discretionary and I have not been convinced by Gore that Prothonotary Morneau's determination as to costs resulted from an improper exercise of discretion.

47 As for this appeal, each party is claiming costs. Since it is the successful party to this appeal, costs, to be assessed in accordance with Column III of the table to Tariff B, are awarded to Bard in any event of the cause.

Order

THIS COURT ORDERS that:

1. The motion on appeal of Prothonotary Morneau's Order dated August 24, 2015, is dismissed; and
2. Costs shall be assessed in accordance with Column III of the table to Tariff B, payable in any event of the cause to the Plaintiffs/Defendants by counterclaim.

Appeal dismissed.

TAB 2

2011 CAF 120, 2011 FCA 120
Federal Court of Appeal

Lehigh Cement Ltd. v. R.

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

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

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

Heard: March 3, 2011

Judgment: March 31, 2011

Docket: A-263-10

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

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

Eleanor R. Dawson J.A.:

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

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

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

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

The Facts

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

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

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

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

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

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

[...]

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

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

The Decision of the Judge

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

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

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

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

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

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

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

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

- (c) to procure admissions which may destroy an opponent's case;
- (d) to facilitate settlement; pre-trial procedure and trial;
- (e) to eliminate or narrow issues;
- (f) to avoid surprise at trial.

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

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

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

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

The Asserted Errors

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

- a. failing to observe principles of natural justice by accepting factual assertions made by counsel for Lehigh without providing the Crown with an opportunity to challenge them;
- b. making findings of fact unsupported by the evidence and relying on such facts in support of her decision;
- c. ordering the production of internal CRA memoranda; and
- d. ordering the Crown to answer a hypothetical question aimed at eliciting the Crown's legal position.

Consideration of the Asserted Errors

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

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

- 1. During oral discovery, counsel for Lehigh singled out two CRA officers, Wayne Adams and Sharon Gulliver, when questioning on the existence of internal memoranda.
- 2. Counsel for Lehigh stated at the hearing that the alleged change in CRA policy "was developed between 2000 and July 2007, when the CRA announced the new policy."
- 3. Counsel for Lehigh stated at the hearing that he did not think there would be many memoranda concerning the new policy. He only expected there to be three or four memoranda.

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

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

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

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

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

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

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

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

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

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

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

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

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

19 Third, the Gulliver memorandum was in evidence before the Judge. This memorandum provided a basis for the Judge's conclusion by way of inference that any subsequent memoranda were potentially relevant. From the content of the Gulliver memorandum it was at least arguable that subsequent memoranda expressed the basis for the assessments at issue. As explained below, the Crown's disclosure of the Gulliver memorandum evidenced the Crown's position that it was relevant to Lehigh's appeal.

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

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

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

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

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

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

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

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

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

95. (1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding or to any matter made discoverable by subsection (3) and no question may be objected to on the ground that

- (a) the information sought is evidence or hearsay,
- (b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or
- (c) the question constitutes cross-examination on the affidavit of documents of the party being examined.

[emphasis added]

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

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

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

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

[Non souligné dans l'original.]

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

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

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

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

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

[emphasis added]

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

32 Second, in *Owen Holdings Ltd. v. R.* (1997), 216 N.R. 381 (Fed. C.A.) this Court considered and rejected the submission that the phrase "relating to" (as then found in Rule 82(1) of the *Tax Court of Canada Rules (General Procedure)*) encompassed the concept of a "semblance of relevance." The Court indicated that "relating" and "relevance" encompassed similar meanings. At paragraphs 5 and 6 of its reasons the Court wrote:

5. With respect to the appeal, counsel for the appellant argues that the judge erred in holding that only documents which are relevant, that is to say which may advance the appellant's case or damage that of the respondent, should be disclosed. Rule 82(1),¹ counsel says, uses the phrase "relating to" not "relevant to," a basic distinction clearly confirmed and acted upon by this Court in *Canada (Attorney-General) v. Bassermann*.² At this stage, submits counsel, relevance should be of no concern; a "semblance of relevance," if necessary, should suffice, an abuse of process being the only thing to be avoided.

6. We indicated at the hearing that we disagreed with counsel's argument. Although obviously not synonyms, the words "relating" and "relevant" do not have entirely separate and distinct meanings. "Relating to" in Rule 82(1) necessarily imparts an element of relevance, otherwise, the parties would have licence to enter into extensive and futile fishing expeditions that would achieve no productive goal but would waste judicial resources. The well established principles that give rise to the relatively low relevance threshold at the stage of discovery, as opposed to the higher threshold that will be required at trial for the admission of evidence, are well known. We simply do not believe that the Tax Court ever had the intention of abandoning those principles any more than this Court could have had such an intention when, in 1990, it changed the word "related" to "relevant" in revising its corresponding provisions, namely subsections (1) and (2)(a) of Rule 448.³

[emphasis added and footnotes omitted]

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

A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that

(a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or

(b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.

[emphasis added]

La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui:

a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge;

b) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action.

[Non souligné dans l'original.]

34 The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute. See *Eurocopter* at paragraph 10, *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287, 381 N.R. 93 (F.C.A.) at paragraphs 61 to 64; *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraphs 30 to 33.

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

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

64. Furthermore, the Prothonotary's reference to a fishing expedition in paragraph 19 of her Reasons was one where a party was required to disclose a document that might lead to another document that might then lead to useful information which would tend to adversely affect the party's case or to support the other party's case. In my view, limiting the "train of inquiry" test in this manner is consistent with the test described in *Peruvian Guano, supra*, and applied by this Court in *SmithKline Beecham Animal Health Inc. v. Canada*, [2002] 4 C.T.C. 93 (F.C.A.), where, at para. 24 of her Reasons for the Court, Madam Justice Sharlow wrote:

[24] The scope and application of the rules quoted above depend upon the meaning of the phrases "relating to any matter in question between ... them in the appeal" and "relating to any matter in issue in the proceeding". In *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 (C.A.), Brett, L.J. said this about the meaning of the phrase "a document relating to any matter in question in the action" (at page 63):

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

[emphasis in original]

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

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

39 The Gulliver memorandum makes the following points:

1. The CRA was "pursuing cases coined 'indirect loans' whereby a Canadian company invests money into the equity of a newly created company in a tax haven and those funds are then lent to a related but non-affiliate non-resident company."
2. With respect to subsection 95(6) of the Act:

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

proposed but in our view, this provision demonstrates that it is not acceptable to insert steps to misuse the foreign affiliate rules.¹¹

[emphasis added]

3. Footnote 11 to the above passage stated:

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

[emphasis added]

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

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

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

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

1. The question is hypothetical.
2. The purpose of the question is to elicit from the Crown details pertaining to its legal argument.
3. The question is a pure question of law.

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

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

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

Costs and Conclusion

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

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

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

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

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

John M. Evans J.A.:

I agree

Carolyn Layden-Stevenson J.A.:

I agree

Appeal dismissed.

TAB 3

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.

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 Ltée/Ltd v. Valmet OY* (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 (Areed) 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.

TAB 4

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.

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 marked 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* decision¹³ 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, *Holmsted 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.).

TAB 5

1997 CarswellBC 99
Supreme Court of Canada

M. (A.) v. Ryan

1997 CarswellBC 100, 1997 CarswellBC 99, [1997] 1 S.C.R. 157, [1997] 4 W.W.R. 1, [1997] S.C.J. No. 13, 138 W.A.C. 81, 143 D.L.R. (4th) 1, 207 N.R. 81, 29 B.C.L.R. (3d) 133, 34 C.C.L.T. (2d) 1, 42 C.R.R. (2d) 37, 4 C.R. (5th) 220, 68 A.C.W.S. (3d) 835, 85 B.C.A.C. 81, 8 C.P.C. (4th) 1, J.E. 97-408

A.M. (Appellant) v. Clive Ryan and Dr. Kathleen Parfitt (Respondents)

La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin, Iacobucci and Major JJ.

Heard: October 2, 1996
Judgment: February 6, 1997
Docket: 24612

Proceedings: Affirming (1994), 98 B.C.L.R. (2d) 1, [1995] 1 W.W.R. 677, 32 C.P.C. (3d) 66, 119 D.L.R. (4th) 19, 51 B.C.A.C. 135, 84 W.A.C. 135 (C.A.)

Counsel: *Brian J. Wallace, Q.C.*, and *Carolyn McCool*, for appellant.
Christopher E. Hinkson, Q.C., and *William S. Clark*, for respondent Ryan.

McLachlin J. (La Forest, Sopinka, Cory, Iacobucci and Major JJ. concurring):

1 After having been sexually assaulted by the respondent Dr. Ryan, the appellant sought counselling from a psychiatrist. The question on this appeal is whether the psychiatrist's notes and records containing statements the appellant made in the course of treatment are protected from disclosure in a civil suit brought by the appellant against Dr. Ryan. Put in terms of principle, should a defendant's right to relevant material to the end of testing the plaintiff's case outweigh the plaintiff's expectation that communications between her and her psychiatrist will be kept in confidence?

I. The Facts and History of Proceedings

2 When the appellant was 17 years old, she underwent psychiatric treatment from Dr. Ryan. In the course of treatment, Dr. Ryan had sexual relations with her. He also committed acts of gross indecency in her presence. The appellant asserts that this conduct injured her and has sued Dr. Ryan for damages. Dr. Ryan does not deny that this sexual conduct occurred. He contends, however, that the appellant consented to the acts. He also takes the position that the conduct was not the cause of the injury for which the plaintiff sues.

3 The appellant alleges that the sexual assault and gross indecency caused her mental distress and anguish, loss of dignity and self-esteem, humiliation and embarrassment, difficulty in forming and maintaining relationships with other persons, lasting psychological and emotional trauma, continuing fear and anxiety, foregone career and educational opportunities, inability to verbalize emotions and recollections of the events, repeated suicide attempts, severe depression and post-traumatic stress disorder. In order to deal with these difficulties as well as other problems, the appellant sought psychiatric treatment from Dr. Parfitt.

4 The appellant was concerned that communications between her and Dr. Parfitt should remain confidential. Dr. Parfitt assured her that everything possible would be done to ensure that their discussions would remain confidential. At one point, the appellant's concerns led Dr. Parfitt to refrain from taking her usual notes.

5 The British Columbia Rules of Court permit each party to an action to examine the other for discovery and to obtain discovery of all documents in the possession of the other party that are relevant to the lawsuit and not protected from disclosure by privilege or some other legal exemption. If a party has not voluntarily produced a required document, the court may order that it be produced. The rules also provide for documents to be obtained from third parties. Failing voluntary production, an application for production may be brought under Rule 26(11).

6 During the examination for discovery of the appellant, counsel for Dr. Ryan requested production of Dr. Parfitt's records and notes. The appellant's counsel advised that they would not be produced without a court order. Accordingly, Dr. Ryan's counsel brought a motion to obtain disclosure. At the hearing before Master Bolton, Dr. Parfitt agreed to release her reports, but claimed privilege in relation to her notes. Counsel for the appellant was present. He supported Dr. Parfitt's objections to production, but did not assert a formal claim to privilege on behalf of the appellant.

7 The Master found that Dr. Parfitt had no privilege in the documents and ordered that they all be produced to Dr. Ryan. In his view, there is no blanket privilege for communications between patient and physician. The only basis upon which privilege could be asserted would be under the principles approved by this Court for case-by-case privilege, sometimes referred to as the "Wigmore test". The first branch of this test requires that the communications originate in confidence. The Master ruled that this was not the case here, since the appellant had been fearful throughout that the doctor's notes would be disclosed and Dr. Parfitt had assured her only that everything possible would be done to ensure that their discussions were kept private. The Master went on to consider whether the discretion granted by the Rules of Court permitted him to accede to Dr. Parfitt's claim for confidentiality. He found the notes to be relevant. The only remaining question was whether Dr. Parfitt's "embarrassment" at revealing the notes outweighed this probative value. It did not, in the Master's view. Although he acknowledged the legitimate interest of keeping patient-therapist discussions free-ranging and confidential, he held that this was not a factor that he could consider under the law as it stood.

8 Dr. Parfitt appealed to the Supreme Court of British Columbia. That appeal was dismissed: (1993), 81 B.C.L.R. (2d) 180, [1993] 7 W.W.R. 480. Vickers J. agreed that the notes were not privileged, not on the ground that they had not been made in confidence as the Master had found, but on the ground that the public interest in the proper administration of justice outweighed confidentiality concerns where the appellant had placed the matters in issue by initiating the suit.

9 Dr. Parfitt appealed to the British Columbia Court of Appeal. The appeal was allowed in part: (1994), 98 B.C.L.R. (2d) 1, 119 D.L.R. (4th) 19, [1995] 1 W.W.R. 677, 51 B.C.A.C. 135, 84 W.A.C. 135, 32 C.P.C. (3d) 66. Southin J.A. began by stating that she was only concerned with Dr. Parfitt's privilege and not the plaintiff's, since the plaintiff had not properly claimed privilege. A physician could only assert privilege if disclosure would harm the physician. Dr. Parfitt had not shown this to be the case. Therefore, no claim for privilege could be made by anyone, and the matter fell to be considered exclusively under the Rules of Court.

10 Under Rule 26(11), relevant or "material" documents should be produced unless the order is oppressive of the plaintiff or will have such an adverse effect on her that it would be unjust to order production, the Court of Appeal ruled. In applying this test, the court should consider whether the particular invasion of privacy is necessary to the proper administration of justice and, if so, whether terms are appropriate to limit that invasion. On the one hand, a plaintiff should not be "scared away" from suing by fear of disclosure. On the other hand, a defendant should not be deprived of an assessment of the true loss caused by the alleged wrong. There is no perfect balance to be struck, in the Court's view.

11 Southin J.A. ordered disclosure of Dr. Parfitt's reporting letters and notes recording discussions between her and the appellant. Southin J.A. did not order disclosure of Dr. Parfitt's personal notes which she uses to make sense of what the patient is telling her. These notes were not disclosed because the appellant assured the court that Dr. Parfitt would not be called at trial and therefore, her diagnosis was "of no moment" (p. 19 B.C.L.R.). The disclosure ordered was protected by four conditions: that inspection be confined to Dr. Ryan's solicitors and expert witnesses, and that Dr. Ryan himself could not see them; that any person who saw the documents should not disclose their contents to anyone not entitled to inspect them; that the documents

could be used only for the purposes of the litigation; and that only one copy of the notes was to be made by Dr. Ryan's solicitors, to be passed on as necessary to Dr. Ryan's expert witnesses.

12 The appellant objects to this order for limited production and appeals to this Court.

II. The Legislation

13 British Columbia Supreme Court Rules, Rule 26(11)

Where a document is in the possession or control of a person who is not a party, the court, on notice to the person and all other parties, may order production and inspection of the document or preparation of a certified copy that may be used instead of the original. An order under Rule 41(16) in respect of an order under this subrule may be made if that order is endorsed with an acknowledgment by the person in possession or control of the document that the person has no objection to the terms of the proposed order.

III. Preliminary Issues

14 The findings of the courts below raise three preliminary issues. The first is whether the appellant's alleged failure to assert privilege in the records before the Master deprives her of the right to claim it. I respectfully dissent from the Court of Appeal's view that it did. If the appellant had privilege in the documents, it could be lost only by waiver. The appellant's conduct does not support a finding of waiver. It is true that she did not claim privilege to the notes and records at issue in her affidavit of documents. However, the notes and records were not in her possession but Dr. Parfitt's. The argument that they were technically in her control and hence should have been mentioned establishes at best omission from the affidavit of documents, not a conscious waiver of privilege. The motion for production before the Master was directed not at the appellant but at Dr. Parfitt. As a result, the appellant was not called upon directly to assert privilege in the documents. However, she appeared through counsel and supported Dr. Parfitt's claim for privilege. Far from waiving privilege, the appellant has asserted it throughout the proceedings.

15 A second preliminary issue concerns the relationship between the Rules of Court and the common law rule of privilege. In my view, the present appeal falls to be decided solely on the law of privilege. Where the doctrine of privilege applies, it displaces any residual discretion which might otherwise be thought to inhere in favour of the party claiming privilege. A two-step process which requires a judge to consider first privilege and then a residual discretion under Rule 26(11) would be redundant and confusing.

16 Where the person objecting to production is a party to the action and privilege is raised, there is no need for a supplementary discretion under Rule 26(11), since in considering whether privilege exists on a case-by-case basis, the judge must take into account the interest of the person being asked to disclose. The fourth branch of the Wigmore test for privilege requires the judge to consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and correctly disposing of the litigation. This means that the complainant's privacy interest and interest in maintaining a productive and healing relationship with her psychiatrist must be considered and weighed in determining whether privilege lies. The fact that her privacy interest arises and hence falls to be considered in the context of her relationship to her psychiatrist does not negate the fact that what is at issue is her privacy interest and whether it should, in the circumstances of the case, prevail over the defendant's right to disclosure. It thus becomes unnecessary to reconsider the same matters after having decided whether privilege lies. Having determined the issue of privilege, nothing remains to be considered under the Rule.

17 Requiring the judge to reconsider the matter under a residual discretion conferred by Rule 26(11) according to a different methodology would, moreover, be confusing for trial judges. Even more serious, it might on occasion result in a conflicting conclusion. This would amount to a procedural rule enacted not by the Legislature but by Order in Council, trumping the common law. Such a result would be wholly inappropriate.

18 A third preliminary issue concerns the distinction between absolute or blanket privilege, on the one hand, and partial privilege on the other. While the traditional common law categories conceived privilege as an absolute, all-or-nothing proposition, more recent jurisprudence recognizes the appropriateness in many situations of partial privilege. The degree of

protection conferred by the privilege may be absolute or partial, depending on what is required to strike the proper balance between the interest in protecting the communication from disclosure and the interest in proper disposition of the litigation. Partial privilege may signify that only some of the documents in a given class must be produced. Documents should be considered individually or by sub-groups on a "case-by-case" basis.

IV. General Principles

19 The common law principles underlying the recognition of privilege from disclosure are simply stated. They proceed from the fundamental proposition that everyone owes a general duty to give evidence relevant to the matter before the court, so that the truth may be ascertained. To this fundamental duty, the law permits certain exceptions, known as privileges, where it can be shown that they are required by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth": *Trammel v. United States*, 445 U.S. 40 (1980), at p. 50.

20 While the circumstances giving rise to a privilege were once thought to be fixed by categories defined in previous centuries — categories that do not include communications between a psychiatrist and her patient — it is now accepted that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate: *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *R. v. Fosty*, (sub nom. *R. v. Gruenke*) [1991] 3 S.C.R. 263, at p. 286. The applicable principles are derived from those set forth in *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), §2285. First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

21 It follows that the law of privilege may evolve to reflect the social and legal realities of our time. One such reality is the law's increasing concern with the wrongs perpetrated by sexual abuse and the serious effect such abuse has on the health and productivity of the many members of our society it victimizes. Another modern reality is the extension of medical assistance from treatment of its physical effects to treatment of its mental and emotional aftermath through techniques such as psychiatric counselling. Yet another development of recent vintage which may be considered in connection with new claims for privilege is the *Canadian Charter of Rights and Freedoms*, adopted in 1982: *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, (sub nom. *R.W.D.S.U. v. Dolphin Delivery Ltd.*) [1986] 2 S.C.R. 573, at pp. 592-93; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 876-77; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 121.

22 I should pause here to note that in looking to the *Charter*, it is important to bear in mind the distinction drawn by this Court between actually *applying* the *Charter* to the common law, on the one hand, and ensuring that the common law *reflects Charter values*, on the other. As Cory J. stated in *Hill, supra*, at paras. 93 and 95:

When determining how the *Charter* applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action.

.....

The most that the private litigant can do is argue that the common law is inconsistent with *Charter values*. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common law only to the extent that the common law is found to be inconsistent with *Charter* values. [Emphasis in original.]

23 While the facts of *Hill* involved an attempt to mount a *Charter* challenge to the common law rules of defamation, I am of the view that Cory J.'s comments are equally applicable to the common law of privilege at issue in this case. In view of the purely private nature of the litigation at bar, the *Charter* does not "apply" *per se*. Nevertheless, ensuring that the common law of privilege develops in accordance with "*Charter* values" requires that the existing rules be scrutinized to ensure that they reflect

the values the *Charter* enshrines. This does not mean that the rules of privilege can be abrogated entirely and replaced with a new form of discretion governing disclosure. Rather, it means that the basic structure of the common law privilege analysis must remain intact, even if particular rules which are applied within that structure must be modified and updated to reflect emerging social realities.

V. Privilege for Communications Between Psychiatrist and Patient

24 The first requirement for privilege is that the communications at issue have originated in a confidence that they will not be disclosed. The Master held that this condition was not met because both the appellant and Dr. Parfitt had concerns that notwithstanding their desire for confidentiality, the records might someday be ordered disclosed in the course of litigation. With respect, I do not agree. The communications were made in confidence. The appellant stipulated that they should remain confidential and Dr. Parfitt agreed that she would do everything possible to keep them confidential. The possibility that a court might order them disclosed at some future date over their objections does not change the fact that the communications were made in confidence. With the possible exception of communications falling in the traditional categories, there can never be an absolute guarantee of confidentiality; there is always the possibility that a court may order disclosure. Even for documents within the traditional categories, inadvertent disclosure is always a possibility. If the apprehended possibility of disclosure negated privilege, privilege would seldom if ever be found.

25 The second requirement — that the element of confidentiality be essential to the full and satisfactory maintenance of the relation between the parties to the communication — is clearly satisfied in the case at bar. It is not disputed that Dr. Parfitt's practice in general and her ability to help the appellant in particular required that she hold her discussions with the appellant in confidence. Dr. Parfitt's evidence establishes that confidentiality is essential to the continued existence and effectiveness of the therapeutic relations between a psychiatrist and a patient seeking treatment for the psychiatric harm resulting from sexual abuse. Once psychiatrist-patient confidentiality is broken and the psychiatrist becomes involved in the patient's external world, the "frame" of the therapy is broken. At that point, it is Dr. Parfitt's practice to discontinue psychotherapy with the patient. The result is both confusing and damaging to the patient. At a time when she would normally find support in the therapeutic relationship, as during the trial, she finds herself without support. In the result, the patient's treatment may cease, her distrustfulness be exacerbated, and her personal and work relations be adversely affected.

26 The appellant too sees confidentiality as essential to her relationship with Dr. Parfitt. She insisted from the first that her communications to Dr. Parfitt be held in confidence, suggesting that this was a condition of her entering and continuing treatment. The fact that she and Dr. Parfitt feared the possibility of court-ordered disclosure at some future date does not negate the fact that confidentiality was essential "to the full and satisfactory maintenance" of their relationship.

27 The third requirement — that the relation must be one which in the opinion of the community ought to be sedulously fostered — is equally satisfied. Victims of sexual abuse often suffer serious trauma, which, left untreated, may mar their entire lives. It is widely accepted that it is in the interests of the victim and society that such help be obtained. The mental health of the citizenry, no less than its physical health, is a public good of great importance. Just as it is in the interest of the sexual abuse victim to be restored to full and healthy functioning, so is it in the interest of the public that she take her place as a healthy and productive member of society.

28 It may thus be concluded that the first three conditions for privilege for communications between a psychiatrist and the victim of a sexual assault are met in the case at bar. The communications were confidential. Their confidence is essential to the psychiatrist-patient relationship. The relationship itself and the treatment it makes possible are of transcendent public importance.

29 The fourth requirement is that the interests served by protecting the communications from disclosure outweigh the interest of pursuing the truth and disposing correctly of the litigation. This requires first an assessment of the interests served by protecting the communications from disclosure. These include injury to the appellant's ongoing relationship with Dr. Parfitt and her future treatment. They also include the effect that a finding of no privilege would have on the ability of other persons suffering from similar trauma to obtain needed treatment and of psychiatrists to provide it. The interests served by non-disclosure

must extend to any effect on society of the failure of individuals to obtain treatment restoring them to healthy and contributing members of society. Finally, the interests served by protection from disclosure must include the privacy interest of the person claiming privilege and inequalities which may be perpetuated by the absence of protection.

30 As noted, the common law must develop in a way that reflects emerging *Charter* values. It follows that the factors balanced under the fourth part of the test for privilege should be updated to reflect relevant *Charter* values. One such value is the interest affirmed by s. 8 of the *Charter* of each person in privacy. Another is the right of every person embodied in s. 15 of the *Charter* to equal treatment and benefit of the law. A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong. The result may be that the victim of sexual assault does not obtain the equal benefit of the law to which s. 15 of the *Charter* entitles her. She is doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress — redress which in some cases may be part of her program of therapy. These are factors which may properly be considered in determining the interests served by an order for protection from disclosure of confidential patient-psychiatrist communications in sexual assault cases.

31 These criteria, applied to the case at bar, demonstrate a compelling interest in protecting the communications at issue from disclosure. More, however, is required to establish privilege. For privilege to exist, it must be shown that the benefit that inures from privilege, however great it may seem, in fact outweighs the interest in the correct disposal of the litigation.

32 At this stage, the court considering an application for privilege must balance one alternative against the other. The exercise is essentially one of common sense and good judgment. This said, it is important to establish the outer limits of acceptability. I for one cannot accept the proposition that "occasional injustice" should be accepted as the price of the privilege. It is true that the traditional categories of privilege, cast as they are in absolute all-or-nothing terms, necessarily run the risk of occasional injustice. But that does not mean that courts, in invoking new privileges, should lightly condone its extension. In the words of Scalia J. (dissenting) in *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996), at p. 1941:

It is no small matter to say that, in some cases, our federal courts will be the tools of injustice rather than unearth the truth where it is available to be found. The common law has identified a few instances where that is tolerable. Perhaps Congress may conclude that it is also tolerable. ... But that conclusion assuredly does not burst upon the mind with such clarity that a judgment in favour of suppressing the truth ought to be pronounced by this honorable Court.

33 It follows that if the court considering a claim for privilege determines that a particular document or class of documents must be produced to get at the truth and prevent an unjust verdict, it must permit production to the extent required to avoid that result. On the other hand, the need to get at the truth and avoid injustice does not automatically negate the possibility of protection from full disclosure. In some cases, the court may well decide that the truth permits of nothing less than full production. This said, I would venture to say that an order for partial privilege will more often be appropriate in civil cases where, as here, the privacy interest is compelling. Disclosure of a limited number of documents, editing by the court to remove non-essential material, and the imposition of conditions on who may see and copy the documents are techniques which may be used to ensure the highest degree of confidentiality and the least damage to the protected relationship, while guarding against the injustice of cloaking the truth.

34 In taking this approach, I respectfully decline to follow the all-or-nothing approach adopted by the majority of the Supreme Court of the United States of endorsing an absolute privilege for all psychotherapeutic records in *Jaffee v. Redmond*, *supra*. The Court of Appeals in the judgment there appealed from, 51 F.3d 1346 (1995), had held that the privilege could be denied if "in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counselling sessions outweighs that patient's privacy interests" (p. 1357). The majority in the Supreme Court, *per* Stevens J., rejected that approach, stating that to make confidentiality depend upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would be "little better than no privilege at all" (p. 1932).

35 It must be conceded that a test for privilege which permits the court to occasionally reject an otherwise well-founded claim for privilege in the interests of getting at the truth may not offer patients a guarantee that communications with their psychiatrists will never be disclosed. On the other hand, the assurance that disclosure will be ordered only where clearly necessary and then only to the extent necessary is likely to permit many to avail themselves of psychiatric counselling when certain disclosure might make them hesitate or decline. The facts in this case demonstrate as much. I am reinforced in this view by the fact, as Scalia J. points out in his dissenting reasons in *Jaffee v. Redmond*, that of the 50 states and the District of Columbia which have enacted some form of psychotherapist privilege, none have adopted it in absolute form. All have found it necessary to specify circumstances in which it will not apply, usually related to the need to get at the truth in vital situations. Partial privilege, in the views of these legislators, can be effective.

36 The view that privilege may exist where the interest in protecting the privacy of the records is compelling and the threat to proper disposition of the litigation either is not apparent or can be offset by partial or conditional discovery is consistent with this Court's view in *R. v. O'Connor*, [1995] 4 S.C.R. 411. The majority there did not deny that privilege in psychotherapeutic records may exist in appropriate circumstances. Without referring directly to privilege, it developed a test for production of third party therapeutic and other records which balances the competing interests by reference to a number of factors including the right of the accused to full answer and defence and the right of the complainant to privacy. Just as justice requires that the accused in a criminal case be permitted to answer the Crown's case, so justice requires that a defendant in a civil suit be permitted to answer the plaintiff's case. In deciding whether he or she is entitled to production of confidential documents, this requirement must be balanced against the privacy interest of the complainant. This said, the interest in disclosure of a defendant in a civil suit may be less compelling than the parallel interest of an accused charged with a crime. The defendant in a civil suit stands to lose money and repute; the accused in a criminal proceeding stands to lose his or her very liberty. As a consequence, the balance between the interest in disclosure and the complainant's interest in privacy may be struck at a different level in the civil and criminal case; documents produced in a criminal case may not always be producible in a civil case, where the privacy interest of the complainant may more easily outweigh the defendant's interest in production.

37 My conclusion is that it is open to a judge to conclude that psychiatrist-patient records are privileged in appropriate circumstances. Once the first three requirements are met and a compelling *prima facie* case for protection is established, the focus will be on the balancing under the fourth head. A document relevant to a defence or claim may be required to be disclosed, notwithstanding the high interest of the plaintiff in keeping it confidential. On the other hand, documents of questionable relevance or which contain information available from other sources may be declared privileged. The result depends on the balance of the competing interests of disclosure and privacy in each case. It must be borne in mind that in most cases, the majority of the communications between a psychiatrist and her patient will have little or no bearing on the case at bar and can safely be excluded from production. Fishing expeditions are not appropriate where there is a compelling privacy interest at stake, even at the discovery stage. Finally, where justice requires that communications be disclosed, the court should consider qualifying the disclosure by imposing limits aimed at permitting the opponent to have the access justice requires while preserving the confidential nature of the documents to the greatest degree possible.

38 It remains to consider the argument that by commencing the proceedings against the respondent Dr. Ryan, the appellant has forfeited her right to confidentiality. I accept that a litigant must accept such intrusions upon her privacy as are necessary to enable the judge or jury to get to the truth and render a just verdict. But I do not accept that by claiming such damages as the law allows, a litigant grants her opponent a licence to delve into private aspects of her life which need not be probed for the proper disposition of the litigation.

VI. Procedure for Ascertaining Privilege

39 In order to determine whether privilege should be accorded to a particular document or class of documents and, if so, what conditions should attach, the judge must consider the circumstances of the privilege alleged, the documents, and the case. While it is not essential in a civil case such as this that the judge examine every document, the court may do so if necessary to the inquiry. On the other hand, a judge does not necessarily err by proceeding on affidavit material indicating the nature of the information and its expected relevance without inspecting each document individually. The requirement that the Court minutely

examine numerous or lengthy documents may prove time-consuming, expensive and delay the resolution of the litigation. Where necessary to the proper determination of the claim for privilege, it must be undertaken. But I would not lay down an absolute rule that as a matter of law, the judge must personally inspect every document at issue in every case. Where the judge is satisfied on reasonable grounds that the interests at stake can properly be balanced without individual examination of each document, failure to do so does not constitute error of law.

VII. Application To This Case

40 The Court of Appeal declined to order production of Dr. Parfitt's notes to herself on the ground that they were unnecessary given that she would not be called to testify. It ordered the production of notes and records of consultations with the appellant, but under stringent conditions. While the Court of Appeal did not proceed on the basis of privilege, its orders are supported by the principles relating to privilege that I have attempted to set forth.

41 The interest in preserving the confidentiality of the communications here at issue was, as discussed, compelling. On the other hand, the communications might be expected to bear on the critical issue of the extent to which the respondent Dr. Ryan's conduct caused the difficulties the appellant was experiencing. A court, in a case such as this, might well consider it best to inspect the records individually to the end of weeding out those which were irrelevant to this defence. However, the alternative chosen by the Court of Appeal in this case of refusing to order production of one group of documents and imposing stringent conditions on who could see the others and what use could be made of them cannot be said to be in error. In the end, the only persons to see the documents in question will be the lawyers for the respondent Dr. Ryan and his expert witnesses. Copies will not be made, and disclosure of the contents to other people will not be permitted. In short, the plaintiff's private disclosures to her psychiatrist will be disclosed only to a small group of trustworthy professionals, much in the fashion that confidential medical records may be disclosed in a hospital setting. I am not persuaded that the order of the Court of Appeal should be disturbed.

VIII. Conclusion

42 I would dismiss the appeal with costs.

L'Heureux-Dubé J. (dissenting):

43 This appeal raises the questions of whether and to what extent a psychiatrist's notes and records, made in the course of treatment, of a plaintiff in a tort action resulting from sexual assault, are protected from disclosure. In the case before us, the civil suit was brought by that plaintiff against the perpetrator of the assault, himself a psychiatrist. He had earlier been convicted of "indecent assault", which was the applicable offence in force at the time the assaults occurred.

44 I have had the advantage of reading the reasons of Justice McLachlin. As my colleague has recounted the facts and proceedings, I need not review them here. In essence, the plaintiff asserts her right to privacy in challenging an order to produce the records of the therapist, whom she saw subsequent to the occurrence of the offence, for the purposes of discovery in her civil claim for damages resulting from the sexual assault. In so doing, the appellant has raised two issues. The first relates to the privileged nature of the communications between her and her psychiatrist. The second concerns her right to privacy in the records kept by that psychiatrist of these communications.

45 In addressing the first issue, McLachlin J. finds that the appellant has in no way waived her claim to privilege. My colleague also holds that the common law rules governing privilege must be updated to reflect both modern circumstances and the values which underlie the *Canadian Charter of Rights and Freedoms*. Accordingly, McLachlin J. concludes that partial privilege, a variation of a case-by-case privilege, is appropriate in such cases. Although I agree in principle, I disagree with the result which my colleague reaches and the process which she approves in order to deal appropriately with this issue. Furthermore, I wish to provide additional reasons and more extensive reference to recent jurisprudence of this Court which has addressed the issue of privileged communications in circumstances similar to those which surround this appeal.

46 As regards the second issue raised by the appellant, McLachlin J. concludes that adapting the common law rules governing privilege is the only appropriate means through which to dispose of this appeal. Where a claim of privilege is unsuccessful, my

colleague concludes that the court should have no further discretion to control the process of discovery so as to protect private records or parts thereof from disclosure. With this conclusion, I firmly disagree. The assertion by a plaintiff of her privacy interests in the records affected by the production order requires a re-evaluation of the approaches to discovery taken by the Master, Chamber judge, and Court of Appeal in this case. We must ensure that their exercise of the discretion to order production conforms with the values underlying the *Charter*.

47 After considering the wording of the British Columbia Rules of Court governing discovery, the history of the procedure, the legislative and regulatory sources of the Rules, and the common law approach to exercising this power, I conclude that whenever a court orders production of documents, it is nonetheless exercising a discretion. While the courts may have developed an approach to this discretion which refrains from unduly limiting the procedures except where required by privilege, this discretion has not been eliminated by the common law. Moreover, I agree with the B.C. Court of Appeal's assertion that, in exercising this discretion, the court may further control the discovery procedures to ensure that they do not cause injustice to one of the parties.

48 The exercise of a judicial discretion, whether common law or statutory in origin, must comport with the values underlying the *Charter*. In applying this principle, this Court has recently held, albeit in the criminal law context, that a court must exercise its discretion to order the production of private records in a manner which comports with the *Charter* values underlying the rights to privacy, equality, and a fair trial. These same values are engaged in the instant appeal in the context of civil proceedings. Keeping in mind the important differences between the criminal and civil contexts, I nonetheless find that the discretion as exercised by the Court of Appeal in the case before us gave insufficient regard to the values of privacy and equality. My colleague has affirmed the process followed by the Court of Appeal in dealing with the psychiatrist's notes and records in this case. On the basis of the conclusion I reach on this issue, I find myself unable to agree with this result.

I. Principles

A. Privilege

49 In *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536 (hereinafter L.L.A.), our Court unanimously found that a complainant in a case involving the criminal offence of sexual assault may obtain protection from disclosure of private records to the defence via a case-by-case privilege. In that case, various institutions which had been involved in providing counselling to the complainant after the alleged assault were ordered to produce the records of this treatment to the defence. The order was appealed to this Court on the ground that the records were privileged.

50 Writing for the Court on this issue, and with reference to the majority reasons in the recent case of *R. v. Fosty*, (sub nom. *R. v. Gruenke*) [1991] 3 S.C.R. 263, I observed, at pp. 562-63, that our Court has recognized two common law categories of privilege, a "class" privilege and a "case-by-case" privilege:

A class privilege entails a *prima facie* presumption that such communications are inadmissible or not subject to disclosure in criminal or civil proceedings and the onus lies on the party seeking disclosure of the information to show that an overriding interest commands disclosure. In order for the privilege to attach, compelling policy reasons must exist, similar to those underlying the privilege for solicitor-client communications, and the relationship must be inextricably linked with the justice system.

In a *case-by-case privilege*, the communications are not privileged unless the party opposing disclosure can show they should be privileged according to the fourfold utilitarian test elaborated by Wigmore (*Evidence in Trials at Common Law* (McNaughton rev. 1961), vol. 8, at § 2285). [Emphasis added.]

51 After reviewing developments in the law of privilege in Canada and other jurisdictions, the Court rejected the notion of a class privilege shielding all such private records from disclosure. This conclusion was reached after a careful weighing of the policy arguments for a class privilege in this context against the detrimental effects of such a privilege on the administration of our justice system. The policy arguments supporting a class privilege included: the need for confidentiality in effective therapy for sexual assault victims, the deterrent effect of potential disclosure on both the seeking of counselling and consequent making

of complaints, the inherent unreliability of such records, and the need to reflect the values enshrined in the *Charter*, particularly those ensuring equality and privacy, in our development of the common law. The following countervailing concerns are also involved: the necessity of relevant information in the truth-finding process which is the foundation of our justice system, the possibility that records will contain highly relevant information, the effects of a blanket protection from disclosure of relevant information on the accused's constitutional right to make full answer and defence, and the difficulty in delimiting this class of relationships.

52 Having weighed these two sets of arguments, the Court held, at p. 580, that while a *class* privilege for private records was not warranted, a *case-by-case* privilege might well be established, provided that the Wigmore criteria were met:

Given the nature of the relationship between counsellors and sexual assault complainants, the first three criteria will easily be met in most cases... The fourth criterion involves the balancing of the relative values which favour finding these records privileged with those which favour production, if, of course, the records are found to be likely relevant either to an issue in the proceedings or to the competence of the witness to testify (see *O'Connor, supra*). This is where the arguments for and against production, which I have discussed earlier, will be examined.

The fourth branch of the Wigmore test requires the party claiming privilege to establish that the injury which would inure to the relationship in question is greater than the benefit gained for the correct disposal of the civil or criminal litigation. The decision in *L.L.A., supra*, has thus delineated the various public policy factors which must be weighed in determining whether this criterion has been satisfied. It has also held that the *likely relevance* of the documents must be established by the defence before the court will undertake the balancing required by the fourth Wigmore criterion.

53 Case-by-case privilege was not, however, seen as a desirable source of protection, for its *ad hoc* nature would interfere with the primary policy objective which underlies privilege in this context. Privilege is advocated in these cases on the grounds that its assurance of confidential counselling will encourage complainants to seek therapy and to report the assault. The Court held that the procedural restrictions on disclosure, which are dictated by the *Charter* values underlying the complainant's rights to privacy and equality, would better fulfill these objectives.

54 In the instant appeal, McLachlin J. has developed a form of case-by-case privilege which she terms "partial privilege". It allows the application of the Wigmore test not only to a particular relationship in a specific set of circumstances, which is what was envisioned in *L.L.A., supra*, but also to classes of records, individual documents, or even parts thereof. In applying the fourth part of this test, the judge is called upon to balance the interest served by non-disclosure, that is, the promotion of the confidential relationship in which the records arose, with the interest in the correct disposal of the litigation. In so doing, the judge has the broad discretion to decide whether and to what extent to order the disclosure of certain documents. If the records contain information which is clearly relevant to a defence or claim, and without which a false result may ensue, the judge may order their disclosure. However, it is open to him or her to place limits on the reproduction and dissemination of the records once disclosed, to inspect the documents before releasing them to the defence, and/or to remove irrelevant or unnecessary information from the records.

55 In addition to my colleague's elaboration of the appropriate approach, one must not lose sight of two principles which were established by this Court in *L.L.A., supra*, and which apply *mutatis mutandis* in a civil proceeding as well. First, before a judge may apply the fourth branch of the Wigmore test, the defence must establish the *likely relevance* of the documents, whether to an issue at trial or to the competence of a witness to testify. This threshold will not be overcome by mere speculation as to the contents of the records or biased hypotheses about such plaintiffs. Second, in undertaking the balancing of public policy concerns under the fourth branch of the Wigmore test, factors in addition to those mentioned by my colleague must be considered. These include the inherent unreliability of such records given the purposes for which they are made and the deterrent effect the lack of protection will have on the seeking of civil compensation for the injury sustained.

56 "Partial privilege" was nonetheless found by McLachlin J. to uphold the order of the Court of Appeal in the case before us. This order allowed direct and complete disclosure to the defence of all of the records Dr. Parfitt had made of her interactions with the appellant, albeit subject to certain restrictions on their reproduction and dissemination. Only those notes which Dr. Parfitt had

made to herself for diagnostic purposes were withheld from the defence. In deciding which documents to order produced, the Court of Appeal relied on the affidavits which the parties had submitted in conjunction with the proceedings. Direct disclosure of all of the information shared in the course of therapy to professionals who are assisting the defence, including defence counsel, constitutes a very serious breach of the plaintiff's interests in privacy as regards these communications.

57 Although greatly expanded and updated to comport with both modern circumstances and *Charter* values, as a substantive rule applied on a case-by-case basis, the doctrine of "partial privilege" remains fundamentally *ad hoc* in nature. As such, it fails to provide an adequate means of fulfilling its own primary policy rationale. In this context, the doctrine's policy objectives are to ensure that plaintiffs who are victims of sexual assault not be discouraged from seeking therapy if they may potentially wish to take civil action or, if they have already received counselling, unduly deterred from seeking compensation for the injury sustained. As defendants in such cases will likely challenge the cause and quantum of the injury claimed, it may be relatively easy for them to establish, in certain cases, that some information shared in counselling sessions will be likely relevant to an issue at trial. At the same time, much of the information contained in such private records may be completely irrelevant or of extremely limited probative value and/or highly prejudicial. If the result is that all records, and thus all of the information they contain, are released to the defence, albeit subject to restrictions, many plaintiffs will be deterred from undertaking civil suits and/or therapy to address the assault's effects on them.

58 Moreover, while the doctrine of privilege allows for some balancing of interests, we must not forget that its aim is to balance the *public's* interest in fostering particular relationships with its interest in correctly disposing of legal disputes. The four criteria involved in the Wigmore test reflect this policy rationale. As such, the plaintiff's privacy interests in the records may receive some protection, but only to the degree that they serve the greater purpose of promoting a particular relationship. This relationship must be found to be sufficiently confidential, dependent upon such confidence, and valued by the community to warrant the balancing of its value with potential effects on the trial.

59 Where a judge determines that *any or all* of the first three Wigmore criteria are not fulfilled, the plaintiff's privacy interests are no longer considered. Moreover, while her interests in privacy are balanced under the fourth branch, they are only valued to the degree that they affect the relationship in which the communications arose. This doctrine does nothing to ensure protection of her privacy interests in records which, although containing information of a highly private nature, may not have arisen in the context of a relationship which meets the strict requirements for privilege. For this reason, as the plaintiff has asserted her privacy interest in private records independently of her claim for privilege, we are required to determine whether this interest has received adequate attention.

B. Balancing Charter Values

60 In addition to her privilege claim, the appellant is asserting a right to privacy in the documents. The court order to produce the documents was made on the basis of a regulatory "Rule of Court" — Rule 26 — which grants a broad discretion to the courts to control discovery procedures. This rule is authorized by the executive branch of the British Columbia government through statute and regulation and has the objective of controlling the process of discovery between private parties to civil litigation.

61 As will be explained in more detail, in exercising their powers under this rule, courts have developed two somewhat conflicting common law approaches. While differing in the extent to which a court may control the production of documents, both of these approaches establish a structured discretion on the part of the court in making this determination. Thus, in the context of civil discovery, while the power in the courts has been created by the regulatory rule, common law rules to control and govern this discretion have been developed. The context of discovery may provide a somewhat unique interaction of the common law and procedural rules of court, in that the substantive common law as to what is or is not discoverable has had to develop in response to this fairly modern procedural entitlement. This is different from the procedures in the present rules which govern the determination of the admissibility of evidence, for example.

62 This Court has held that where a provision or regulation or, alternatively, a common law rule establishes discretion in terms which allow judicial action respectful of the *Charter*, the provision or rule will not be struck down: *R. v. Swain*, [1991] 1 S.C.R. 933, *per* L'Heureux-Dubé J., dissenting; *R. v. Beare*, [1988] 2 S.C.R. 387, *per* La Forest J. for the Court, at p. 410; see also

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, *per* Lamer J. (as he then was), at p. 1078. Indeed, a residual discretion may be required in some instances to ensure that a legislative provision or common law rule not violate the *Charter*: *Baron v. R.*, (sub nom. *Baron v. Canada*) [1993] 1 S.C.R. 416. It is rather the *exercise* of discretion that the courts will scrutinize.

63 In many cases, the exercise of discretion, through the making of an order, for example, will not constitute direct state action and therefore cannot be subject to the same constitutional scrutiny as legislation or the acts of state officials. Where this occurs, this Court has nonetheless found that the exercise of discretion must adequately reflect the *values* underlying the *Charter*. In the criminal context, a proportional balance of the effects on *Charter* rights is required: *R. v. O'Connor*, [1995] 4 S.C.R. 411 ; *L.L.A.*, *supra*; see also *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Park*, [1995] 2 S.C.R. 836. In cases of non-criminal law powers exercised in the context of legislation with a public purpose or other such state action, the court must also reflect a balance of *Charter* values when exercising a statutory or common law discretion: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, *per* Lamer C.J., for the majority, at p. 875; *Baron v. Canada*, *supra*; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 558.

64 The fact that the discretion exercised here involves procedural entitlements in a civil dispute between private parties rather than a criminal trial does not fundamentally alter the analysis. There are a number of civil cases involving private parties which found that the discretionary powers granted by statute or a common law rule must be exercised in a manner which comports with the values underlying the *Charter*: *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, (sub nom. *R.W.D.S.U. v. Dolphin Delivery Ltd.*) [1986] 2 S.C.R. 573, *per* McIntyre J. at p. 603, *Young v. Young*, [1993] 4 S.C.R. 3, *per* L'Heureux-Dubé, dissenting, at pp.71 and 92; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130. In such cases, however, the balancing of values may be somewhat more flexible than in those involving the state as a party: *Hill*, *supra*, *per* Cory J., at paras. 94 and 97. In the appeal before us, the appellant is thus entitled to challenge the exercise of discretion by the trial judge and the Court of Appeal on the grounds that they did not reflect an appropriate balance of *Charter* values.

65 A three-step analysis is required to determine whether the appellant can succeed in her claim. First, the court must identify the source of the common law or legislative discretion that has been exercised. Second, it must identify the *Charter* values that are engaged in or affected by the exercise of this discretion. Finally, it must determine whether and in what manner the exercise of discretion needs to be altered to reflect an appropriate balance of these *Charter* values. In the instant appeal, we are aided greatly in the second and third tasks by the analysis already undertaken by this Court in *O'Connor*, *supra*, which addressed a similar procedural discretion, albeit in the context of a criminal prosecution.

(i) *Discretion*

66 The traditional common law approach to the power conferred upon courts to order the production of documents for discovery in civil proceedings holds that "all relevant documents which are not privileged must be produced": Beverley M. McLachlin and James P. Taylor, *British Columbia Practice* (2nd ed. 1996 (loose-leaf)), vol. 1, at p. 26-1. In British Columbia, there has nonetheless been some dispute as to the scope of this judicial discretion:

R 26(10) provides that the court "may" order the production of documents for inspection and copying by any party or by the court "at a time and place and in the manner it thinks just". One interpretation of "may" is that the order will go, subject to terms, if the documents are shown to be relevant and no claim to privilege is established. Another interpretation would be that "may" confers a wider discretion.(McLachlin and Taylor, *supra*, at p. 26-115.)

Madame Justice McLachlin and Professor Taylor refer to the Court of Appeal decision in the case before us, (1994), 98 B.C.L.R. (2d) 1, as an indication that the second approach is gaining favour, although that decision was based on Rule 26(11), which deals with orders for documents in the hands of a third party, and did not specifically consider the scope of the discretion encompassed in the term "may" in either Rule 26(10) or Rule 26(11). I agree with their view, for the Court of Appeal in this case spoke of a broader discretion which applied regardless of whether the guardian of the documents was a party to the litigation or a third party.

67 My colleague has chosen the first or traditional approach to the powers of the court to control the discovery of documents. In so doing, she rejects the Court of Appeal's method while affirming their result. I prefer to affirm the Court of Appeal's

characterization of its powers, for reasons which I will delineate, and then to determine whether the discretion as exercised by the trial judge and the Court of Appeal adequately comports with *Charter* values. In this latter task I am guided by recent jurisprudence of this Court. However we choose to characterize their powers, the Master, Chambers judge and Court of Appeal clearly exercised a discretion to order the production of documents for discovery. The guidance they sought as to the appropriate exercise of these powers arises from the approach defined in the case law applying the discretionary Rules of Court. As such, the task of assessing whether the exercise of the discretion complies with *Charter* values cannot be avoided. I see no reason to distinguish between this case and others where this Court has held that discretionary judicial procedures developed at common law or in a statute must comport with *Charter* values. The discretion exercised by the Master, Chambers judge, and the Court of Appeal is open to the challenge asserted by the appellant.

68 An examination of the sources of the modern procedures governing discovery supports this finding. These procedures have their earliest roots in equity. The English Courts of Chancery developed rudimentary procedures for mutual disclosure in response to the problem in the common law courts of one party unfairly using the trial procedures to the detriment of the other party. The goal of discovery was, and has continued to be, the achievement of a more efficacious and accessible justice for the parties to an action. In Canadian provinces, including British Columbia, the procedures which we use today are not simply a reproduction of those available in equity, but have been largely expanded and developed through either statutory or regulatory reform. Canadian provinces have generally followed the example of the United Kingdom in this respect. There are differences among the provinces, most particularly British Columbia and Nova Scotia where the discovery procedures were more recently instituted; nonetheless, all contain similar elements which expand upon the original equitable procedures. See G. Cudmore, *Choate on Discovery* (2nd ed. 1993 (loose-leaf)), at pp. 1-1-1-6.

69 In interpreting the regulatory rules governing discovery, the courts have tended to allow a "wide latitude" in exercising the discretionary powers they have been granted, in the aim of best serving the overall policy objectives of the procedural reforms. These include, *inter alia*, the clarification of issues and the strength of the case faced by each party, the shortening of trials through avoiding "ambush" or surprise, and the encouragement of out-of-court settlement. In view of these goals, while the rules may establish a broad discretion for the courts to control the process of discovery of documents, the courts have been careful to avoid unduly circumscribing the procedures. See Cudmore, *supra*, at pp. 1-6-1-9.

70 An alternative approach to the discretion created by the British Columbia Rules is one which places an outer limit on this discretion, a limit which ensures that the discovery procedures not work injustice, even where a claim in privilege has not been successful and it appears that information in the documents is relevant to an issue at trial. This is the principle upon which the Court of Appeal relied in the instant appeal. The court held, *per* Southin J.A. for the court, at p. 19, that in exercising the discretion to order production of a document for the purposes of discovery, whether in the hands of a party or a non-party, it should:

ask itself whether the particular invasion of privacy is necessary to the proper administration of justice and, if so, whether some terms are appropriate to limit that invasion.

71 In my view, this common law approach is more consistent with the wording of the British Columbia Rules governing discovery, the origins of the procedures, the common law discretionary rules governing information regarding non-parties, and the effect of the *Charter* on the exercise of common law and statutory discretion in civil proceedings. As has already been stated, the discretion to order production of documents which is envisaged in Rules 26(10) and 26(11) is a broad one. In essence, the wording of these rules indicates that the courts may control the production and inspection of documents in whatever manner they think just.

72 This reference to justice is highly consistent with the historical source of the procedures. Rudimentary discovery procedures constituted a response by the courts of equity to the injustice which was being occasioned by some parties' use of the procedures in the common law courts. Given its origins in equity and its longstanding purpose of facilitating rather than impeding justice, it is fitting that the courts maintain an overarching discretion to ensure that discovery proceed in a just manner. While giving as broad a leeway as possible to the party seeking production of particular documents, the courts must remain cognizant of the possibility of the procedure working to the unfair detriment of one of the parties.

73 That the courts should tailor the procedures to protect against oppressive consequences is further supported by the approach which has developed in the British Columbia courts as regards documents in the hands of third parties. In *Dufault v. Stevens* (1978), 6 B.C.L.R. 199, at p. 204, for example, the British Columbia Court of Appeal held that, in making an order pursuant to Rule 26(11), the judge should compel the production of possibly relevant documents, "unless there are compelling reasons why he should not make it", giving, as examples, privileged documents or those where production would be of such an adverse effect as to be unjust. It is partly on the basis of this decision that the Court of Appeal in the instant appeal made its order. In *Métropolitaine, Cie d'assurance-vie c. Frenette*, (sub nom. *Frenette v. Metropolitan Life Insurance Co.*) [1992] 1 S.C.R. 647, at p. 686, this Court described a similar approach to the discretion granted through equivalent procedural provisions in Quebec.

74 Finally, given that an exercise of common law discretion, even in the context of civil proceedings, can be scrutinized to ensure that it comports with the values underlying the *Charter*, the outer limits on the discretion in this case are justified provided that they ensure adequate compliance with these values.

75 The principle that the process by which a judge orders the production and inspection of documents may be adapted to avoid injustice to one of the parties is reflected to some degree in the reasons of my colleague. The power of a judge to place restrictions on the reproduction and dissemination of documents once produced relies on such a rationale. McLachlin J. nonetheless maintains the substance of the traditional approach to the discretion in her conclusion that documents or parts thereof which are not considered privileged cannot be withheld from the defence, regardless of the effects their production may have on the privacy interests of the plaintiff. In any event, the issue before this Court is whether the discretion as exercised by the Master, Chambers judge, and the Court of Appeal in this case complies with the values underlying the *Charter*.

76 My colleague has described my approach to this issue as "wholly inappropriate" on the grounds that a procedural rule could be found to trump the common law. I disagree. First of all, the exercise of discretion which is subject to scrutiny in discussing this issue is not the privilege doctrine, but rather the discretionary common law rule for determining which documents should be ordered produced for discovery. If the doctrine of privilege did not exist, and the common law discretionary rule simply stated that all documents shown to contain material information will be ordered produced, could the appellant in this case not argue that this did not reflect an adequate balance of the *Charter* values of privacy, equality, and trial fairness? All that has been added to the traditional approach is that privilege will also prevent a court from ordering production.

77 As I have stated, privilege only considers the privacy interests of plaintiffs in civil litigation as they relate to relationships which are considered to be of adequate public importance. In my view, where a plaintiff is unsuccessful in her privilege claim, she may still suffer a serious incursion upon her privacy which is unwarranted given the potentially limited or non-existent benefit to the fairness of the trial of some of the disclosed information. Given this result, this Court is required to examine the common law approach to this discretion to ensure that it effects an appropriate balance of the *Charter* values engaged in this context. This process will in no way interfere with a plaintiff's claim to privilege as it only concerns those documents which have not been found to be protected by privilege.

78 While I have referred to the source of Rules 26(10) and 26(11), and its reflection in their wording, this reference is meant to demonstrate the purpose of the discovery process, viz. to render the trial process more expeditious and fair. My primary focus is not the Rules of Court, however, but rather the discretionary approach or rule developed by the courts to govern the judicial exercise of the powers relating to discovery of documents. In my view, if we determine that the discretion as exercised by the Court of Appeal does not provide an adequate reflection of *Charter* values, it is incumbent upon this Court to alter that approach. Moreover, if the doctrine of privilege, while updated to reflect *Charter* values, provides an inadequate consideration of privacy interests asserted by the plaintiff, the traditional approach to discretion as exercised by the Master and Chambers judge must also be changed. Not only would such a result be appropriate, justice in these circumstances would require nothing less.

ii) *Charter Values: Privacy, Trial Fairness, and Equality*

79 In the recent decision of *O'Connor, supra*, this Court was asked to determine whether the *Charter* protected the privacy interests which a complainant in a criminal sexual assault case would have in private records. The Court held that s. 7 of the

Charter did include a right to privacy in such documents. At p. 477, they were referred to as "private records", which were taken to mean any records "in which a reasonable expectation of privacy lies", and could include, *inter alia*, medical or therapeutic records, school records, private diaries, and the activity logs prepared by social workers.

80 Writing for the Court on this issue, I concluded that the rights to individual liberty and security of the person as enshrined in s. 7 of the *Charter* encompassed a right to privacy. This finding was based on a number of developments in the jurisprudence of this Court. In its s. 7 jurisprudence, it has expressed great sympathy with the notion that liberty and security of the person involve privacy interests. That privacy is essential to human dignity, a basic value underlying the *Charter*, has also been recognized. Our right to security of the person under s. 7 has been found to include protection from psychological trauma which can be occasioned by an invasion of our privacy. Certainly, the breach of the privacy of a sexual assault plaintiff constitutes a severe assault on her psychological well-being. Section 8 also reveals that the *Charter* is clearly premised on a respect for the interests of individuals in their privacy. Finally, the common law torts of defamation and trespass further recognize the validity of an individual's claim to fundamental privacy interests.

81 This Court also established that such a right is not absolute and "must be balanced against legitimate societal needs" (*O'Connor*, *supra*, at p. 485). The Court affirmed the principle that such a balancing should be effected through an assessment of the individual's *reasonable expectation of privacy* and a weighing of that expectation against the state's legitimate needs to interfere therein: *per* L'Heureux-Dubé J., for the Court on this issue, at p. 485, citing *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145. The records at issue in *O'Connor* were found clearly to disclose a reasonable expectation of privacy, worthy of protection under s. 7 of the *Charter*. This conclusion was not drawn on the basis of a strong public interest in the relationships through which these records arose, but rather on the nature of the records, the information contained therein, and the effects of disclosure on the person asserting her expectation of privacy. The concern or value underlying the *Charter*-based right to privacy thus differs significantly from that which founds the doctrine of privilege.

82 As the nature of privacy dictates that once violated it cannot be regained, it was held that the reasonable expectations of privacy should be protected at the point of disclosure. The Court thus found, at p. 487, that:

s. 7 of the *Charter* requires a reasonable system of "pre-authorization" to justify court-sanctioned intrusions into the private records of witnesses in legal proceedings.

83 As the records at issue in this appeal are of the same nature as those mentioned in *O'Connor*, I conclude that the appellant has established a reasonable expectation of privacy in these documents. The respondent has argued that the appellant waived her right to privacy by putting her psychological well-being at issue in a trial. I do not agree. As my colleague McLachlin J. has found, her privacy is not waived by the mere fact that an action was instituted. Rather, the appellant has engaged a process where the reasonable expectation of privacy must be balanced against society's need to ensure that such litigation be conducted fairly and effectively. This may mean that a respect for *Charter* values in the discovery procedures would tolerate greater access to certain information, but it will not mean that her reasonable expectation of privacy has in any way been relinquished. In my view, the appellant has established such an expectation. As such, it must be balanced with the other interests which arise in the discovery aspect of civil litigation.

84 In *O'Connor*, the complainant's privacy interests were balanced against the accused's *Charter* right to make full answer and defence. This right is an essential element of the principles of fundamental justice which are to govern criminal proceedings. In civil proceedings, while the defendant does not have a direct *Charter* right to exercise, that is, while his liberty or security are in no way endangered, similar values are at stake. A miscarriage of justice could occur if a lack of necessary relevant information might enable a trial judge or a jury to reach a false result. The *Charter*-related value of a fair trial for all litigants, as a fundamental principle of justice, is affected in such cases and may be balanced with the privacy interests of the appellant. As was the case with the accused's rights in *O'Connor*, however, these interests are no more absolute than those of the plaintiff. My statement at p. 480 applies equally in these circumstances:

There is no question that the right to make full answer and defence cannot be so broad as to grant the defence a fishing licence into the personal and private lives of others.

85 That decision also discussed the requirement that any procedural discretion in sexual assault cases reflect the value of equality, given that (at p. 487):

[u]nlike virtually every other offence in the *Criminal Code*, sexual assault is a crime which overwhelmingly affects women, children and the disabled.

The same observation can be made for the tort represented by sexual assault. In view of the unique nature of such cases, the possibility of biased assumptions based on the age or gender of the plaintiff must not be allowed to taint the procedure. Indeed, there may be a greater danger of such an effect, as it is monetary compensation for the injury which is sought. Biased inferences may well be made that this injury is not as great or as worthy of compensation as that caused by other forms of assault which have traditionally received greater attention in both the criminal and civil law domains.

86 This Court was asked in *O'Connor*, to determine whether the judge's discretion to order the production of private records to the defence in advance of the criminal trial was exercised in a manner which comported with the *Charter* values of privacy, fair trial, and equality. As in the instant appeal, direct state action was not involved. Although the prosecution of a criminal offence formed the context for the exercise of discretion, the common law did not dictate that the court act in a certain way. At pp. 479-80, the following principles from *Dagenais, supra*, were found to be applicable:

... [t]he nature, scope and breadth of the production order will ultimately depend upon a balancing of *Charter* rights which seeks to ensure that any adverse effects upon one right is proportionate to the salutary effects of the constitutional objective being furthered: *Dagenais*, at p. 890.

Following this approach, the Court developed a number of procedural safeguards to guide any order for production of private records, a matter to which I will now turn as, in my view, these principles also apply to a civil trial where the production of private records is in issue.

II. Process

87 On the basis of the principles in *Dagenais, supra*, and with the goal of achieving an appropriate balance of the *Charter* values of privacy, fair trial, and equality, the Court in *O'Connor* developed a number of procedural safeguards to guide any order for production of private records. These involve a two-stage test which can be undertaken once the defence has notified all parties with an interest in the confidentiality of the documents. The first stage of the judge's determination requires that the defence establish the *likely relevance* of the documents. More than mere speculation or biased inferences about sexual assault complainants is required. A minority of the Court particularly emphasized the danger of biased assumptions and required that the defence establish independent grounds via affidavit evidence for asserting that information in the documents was likely relevant to issues at trial or the competence of a witness to testify.

88 If the initial threshold of likely relevance is overcome, the court will order the production of those documents which were found to be likely relevant, but only to the court and for the purpose of the court's inspection. At this stage, the court is asked to decide which documents or parts of documents contain information which is likely relevant, and to weigh the effects of production on the complainant with those on the accused. A number of factors to be considered were enumerated. I further note that in both *O'Connor, supra*, and *L.L.A., supra*, the possibility of claiming privilege with respect to these documents was not foreclosed. Where a claim of privilege is unsuccessful, the court would nonetheless be required to exercise its discretion in compliance with *Charter* values through the preceding procedures.

89 The present case requires that we determine whether and how the discretion exercised by a court in civil as opposed to criminal proceedings should be altered to comply with *Charter* values. While there are some key differences between the two contexts, the most significant factors which governed the development of the *O'Connor* procedure remain present in the

context of a civil suit. Through an examination of these distinctions and commonalities, procedures for governing discovery which comport with the *Charter* values engaged in this appeal can be identified.

90 A significant difference between discovery in the civil context and disclosure in a criminal prosecution lies in the control a plaintiff has in a civil suit over whether she takes part in the proceedings. A further distinction relates to the benefit which may be derived by the plaintiff from the discovery process. Indeed, she may have a very strong interest in settling the case to avoid the traumatic experience of the trial process. A third difference is that, given the circumstances, it may be easier, in certain cases, to establish the likely relevance of the records to issues at trial. In the case before us, Dr. Parfitt was the only therapist who treated the appellant after the assault and, thus, the only professional with in-depth knowledge of the extent of the injury claimed, viz. psychological harm and its consequences for the appellant. Such circumstances may be taken into account when a judge makes an initial determination of the likely relevance of the records. A final distinction is that the state is not a party in the action where the order for production arose.

91 We must also recognize that, given the nature of discovery and the special context of civil litigation involving sexual assault, the discovery process has the potential to allow a far more serious incursion upon these plaintiffs' reasonable expectation of privacy than on plaintiffs in other types of tort cases. These circumstances are somewhat unique. As was observed in *O'Connor*, *supra*, at pp. 487-88, the wrong involved here, sexual assault, may create a need for a therapeutic response if the victim is to restore herself to a state of healthy functioning. As Dr. Parfitt's affidavits attest, effective counselling requires that the most intimate details of a patient's life and her innermost thoughts, fears, and feelings be freely shared with the therapist. At the same time, it often requires that the counsellor keep records of what has transpired during her sessions with the plaintiff. A plaintiff may also maintain a private diary of these experiences, thoughts, and feelings.

92 Thus, by its very nature, this civil wrong creates a situation where a written record will be made of the most intimate details of the plaintiff's life. These documents may also provide a unique record of the injury which was allegedly caused. At the same time, as McLachlin J. observes, much of such information in the records will be of very limited value to the trial process. The same can be said of any private record of the plaintiff's thoughts, feelings, and experiences regarding the assault. Given this context, the traditional approach to discovery, the one where the plaintiff must rely upon the *ad hoc* protection privilege provides, will serve as a strong disincentive to plaintiffs to attempt to recover compensation for the injury caused. The mutual exchange of information for the shared purpose of expediting the search for justice is turned into a process which may prevent a plaintiff from seeking compensation in the courts or may encourage a premature and unfair settlement to avoid excessive disclosure of the private documents. Such a result cannot comport with our sense of justice, particularly as it is informed by the *Charter* values of privacy and equality. Clearly, a more predictable procedure is in order, one which addresses the unique difficulties faced by plaintiffs in these circumstances.

93 While the procedures established in *O'Connor* are not entirely appropriate in the context of civil litigation, a number of their features are equally applicable in such proceedings. The most important aspect is the "pre-authorization" element of the process. This is required by the essential nature of privacy interests. An adequate protection of privacy requires that meaningful controls be exercised at the disclosure stage. In *O'Connor*, writing for the Court on this issue, I concluded that the prevention of a breach of privacy is the best means of protecting these interests, as once breached, privacy cannot be regained. In the context of a criminal prosecution, this factor necessitated the "likely relevance" threshold and the obligation on the court to screen the documents before releasing them to the defence. Certainly, this aspect of privacy is as pertinent in the context of civil proceedings as it is in a criminal prosecution.

94 A further reason for screening the documents is the finding that much of the information in private records will, more often than not, be irrelevant to the defence or of very limited probative value given the context in which it is gathered. These considerations, too, are present in the case of civil litigation. The balancing undertaken in the *O'Connor* procedures is also warranted in the instant appeal, as the parties' *Charter*-based interests must be weighed. Furthermore, the factors which are to be considered by the judge when screening the documents under the *O'Connor* test are similarly significant in civil proceedings, with the exception that it is the defendant's as well as society's interest in a fair trial which should be weighed as opposed to an accused's *Charter* right to full answer and defence.

95 As the likely relevance of the records may, in certain cases, be more easy to establish initially under these procedures, screening the documents becomes all the more necessary in a civil suit. This is due in part to the nature of the injury. Psychological harm is a very broad notion. Almost anything a plaintiff experiences in her life could, in the abstract, be argued to be a contributing factor in any diminishment of her psychological well-being. Many of these potential contributors might also be of a very private nature. At the same time, a perusal of the documents may well reveal a lack of a logical link to the harm alleged. In such cases, this information should not be turned over to the defence.

96 By way of example, a plaintiff might share with her therapist that, for medical reasons, she and her husband are unable to have children. This is information of a highly private nature, which may, in the abstract, appear relevant to marital troubles alleged by the plaintiff. Upon reviewing the documents, it may well become evident that this issue was only briefly mentioned to the therapist, that the couple had never had any intention of having children, or that this was simply not a concern for them in their marriage. In such circumstances, a judge may wish to delete any mention of this fact in the records.

97 Given the foregoing distinguishing and shared features of the criminal and civil contexts for production of private records, the following procedure seems to me the appropriate one in the context of civil discovery. The party seeking production must notify those with an interest in the confidentiality of the records. Before a court may order production of private records to the defence for the purposes of discovery, it must first ascertain what documents are likely relevant to an issue at trial. In order to complete this task, the court must have before it the information necessary for this determination. In civil cases, the required information will be provided by the affidavit of the party seeking the order, in which he or she makes out the necessary grounds for obtaining production of the documents in question. The court must then order production of the likely relevant documents to the court for screening and removal of any information which the court deems is not likely relevant or otherwise exempt from production given a balancing of the interests involved.

98 In this process, the factors delineated by this Court in the context of a criminal prosecution are equally applicable, although with slight modifications to meet the requirements of civil proceedings. The court should be guided by the following considerations: the necessity of the record to ensure a fair trial, the probative value of the record, the nature and extent of the reasonable expectation of privacy in the record, whether the production of the record would be premised on any discriminatory belief, and the potential prejudice created by disclosure to the plaintiff's dignity, privacy and security of the person. The additional factors of the potential benefit both parties will gain from a fair discovery process, the control the plaintiff has over whether she undertakes civil litigation, and the potential deterrent effect of this process on plaintiffs in civil litigation of sexual assault cases must also be considered.

99 In my view, in weighing these considerations, the judge should seek to achieve a discovery process which is what it is meant to be: a fair and mutual exchange. Both parties should be empowered to access those documents or parts thereof which will allow an appropriate narrowing of the issues, the avoidance of surprise at trial, and the potential for a fair out-of-court settlement.

100 As the state is not involved as a party to such cases, the balancing may be somewhat more flexible than that described in *Dagenais, supra*. The focus on proportionality of effects in that case was to give effect to the substance of s. 1 of the *Charter: Dagenais, supra, per* Lamer C.J. for the majority, at p. 878. This method of balancing is arguably not strictly applicable in private disputes: *Hill, supra, per* Cory J. for the Court in the result, at paras. 94 and 97. Nonetheless, a hierarchy of values cannot be created. Privacy and equality values cannot be assumed to be of lesser importance than the value of a fair trial in determining whether and to what extent to order the production of private documents. Any flexibility should be with the aim of ensuring that a mutually beneficial discovery process take place.

101 Also, a judge may ask the guardian of the documents for an "inventory" of those in his or her possession to assist in the screening process. This is consistent with the procedures developed in *O'Connor* and *L.L.A.* In my opinion, as part of this inventory, it would also be open to the judge to request a general indication of the contents of the individual records, a grouping of the documents by contents, or other assistance in sorting the documents. Such an inventory should not be given to the other party to the action at that stage.

102 My colleague has stated that these additional procedures will confuse trial judges. I do not agree. Nothing in the context of civil litigation should prevent the two separate claims from being asserted and addressed. In many cases, such as the one before us, the privilege claim will be settled by the judge on the basis of affidavit evidence. Some documents will be found privileged and others not. It is only the latter group which will be subject to the screening process. Where a judge determines that vetting the documents could be necessary to fulfill the fourth criterion of the Wigmore test, confusion could arise, however. In such cases, as the procedures I have described provide a more direct and consistent consideration of the plaintiff's privacy interests, I would recommend applying the fourth branch of Wigmore to the entire group of documents, as a whole, either with or without the benefit of inspection. Once the privilege claim has been settled, the judge would then undertake the screening procedures described above to those documents which are not protected, provided that their likely relevance has been established.

III. Application to the Case

103 The Master who originally heard the motion for disclosure ordered all of the notes and records kept by Dr. Parfitt produced to the defence as these communications had failed to satisfy the first criterion of the Wigmore test, and were therefore not privileged. He refused to undertake any balancing of the interests asserted by the plaintiff as he held that this was not permitted by the law as it stood at that time. The Chambers judge affirmed the decision and order of Master Bolton, similarly finding that privilege had not been successfully claimed, although for different reasons. Again, no further balancing of the plaintiff's interests in equality or privacy was undertaken.

104 The Court of Appeal in the present case allowed the appeal in part. It did so after attempting some balancing of the privacy interests of the plaintiff and the interests in a fair trial. Consequently, it withheld the notes made for diagnostic purposes and restricted the dissemination and reproduction of the records once produced. Nonetheless, it did not review the documents before ordering their production. In my view, such a process does not give due consideration to the appropriate balance of the *Charter* values engaged by the discovery procedures.

105 Indeed, in these particular circumstances, and given the nature of the damages claimed and the information sought by the defence, very little meaningful protection has been accorded to these private records. If plaintiffs in such cases know that the entire contents of their discussion with their therapists or any other private records may be revealed to the lawyers and expert witnesses of the defendant, they may very well be deterred from seeking civil remedies. Without anyone reviewing the documents to remove information which is private, irrelevant or of very limited probative value, an order of production constitutes a serious breach of privacy while affording potentially limited benefit to the defence. A hierarchy of *Charter* values has been created, one where the defence is greatly advantaged while the effect on the plaintiff may be highly detrimental. In striking an appropriate balance of *Charter* values, such a hierarchy is impermissible. The Court of Appeal's decision must, therefore, be revisited. While the Court of Appeal's general approach was correct and while it did not have the benefit of our judgments in *O'Connor* and *L.L.A.*, at the time its decision was rendered, the process it adopted is infirm.

IV. Conclusion and Disposition

106 As regards the first issue, that relating to the privileged nature of the communications between the appellant and Dr. Parfitt, I agree with McLachlin J. that a successful claim of privilege has clearly been established for the records which were exempt from disclosure. I also affirm the Court of Appeal's general conclusion that it had a broader discretion to control the process of discovery for the remaining documents to ensure that it not affect one of the parties unjustly.

107 The exercise of discretion upon which the order was based did not effect an appropriate balance of the *Charter* values of privacy, equality, and fair trial. By failing to screen private records in such cases, the court creates a hierarchy of *Charter* values, where interests in privacy and equality may be seriously affected for records or parts thereof which may provide very little if any benefit to the defence or be unnecessary to ensure the fairness of the proceedings. Procedures adapted to the context of discovery in civil proceedings from the principles developed by this Court in *O'Connor* are in order.

108 I would allow the appeal with costs. The decision of the Court of Appeal should be set aside, except as regards the notes which were not disclosed, and the matter remitted back to the Master for determination in a manner consistent with the foregoing reasons.

Appeal dismissed.

TAB 6

1999 CarswellNat 1290
Federal Court of Canada — Trial Division

Montana Band v. R.

1999 CarswellNat 1290, 1999 CarswellNat 3012, [1999] 4 C.N.L.R.
65, [1999] F.C.J. No. 1088, [2000] 1 F.C. 267, 172 F.T.R. 46

Montana Band, Chief Leo Cattleman, Marvin Buffalo, Rema Rabbit, Carl Rabbit and Darrell Strongman, suing on their own behalf and on behalf of all other members of the Montana Indian Band, all of whom reside on the Montana Reserve No. 139, in the Province of Alberta, Plaintiffs and Her Majesty the Queen, Defendant and Samson Band, Chief Victor Buffalo, and Larron Northwest, Roland Littlepoplar, Dolphus Buffalo, Frank Buffalo, Raymond Lightning, Stan Crane, Lawrence Saddleback, Todd (Chester) Buffalo, Arnup Louis, Lester B. Nepoose, Jim Omeasoo, and Robert Swampy, Councillors of the Samson Band, sued on their own behalf and on behalf of the members of the Samson Band of Indians, Third Parties and Ermineskin Band, Chief Eddie Littlechild and Ken Cutarm, Gerry Ermineskin, John Ermineskin, Lester Fraynn, Brian Lee, Arthur Littlechild, Richard Littlechild, Emily Minde, Lawrence Rattlesnake, Curtis Ermineskin and Maurice Wolfe, Councillors of the Ermineskin Band, sued on their own behalf and on behalf of the members of the Ermineskin Band of Indians, Third Parties

Chief Florence Buffalo acting on her own behalf and on behalf of all the members of the Samson Cree Nation and Band and The Samson Cree Nation and Indian Band, Plaintiffs and Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development Parliament Buildings, Ottawa, Ontario, Defendants

Ermineskin Cree Nation and Chief Gerald Ermineskin, Earl Ted Ermineskin, Maurice Wolfe, Richard Leonard Lightening, Carol Margaret Wildcat, Carol Elizabeth Roasting, Glenda Rae White, Craig Alton Makinaw, Councillors of the Ermineskin Cree Nation, suing on their own behalf and on behalf of the Ermineskin Cree Nation, Plaintiffs and Her Majesty the Queen and The Attorney General of Canada, Defendants

Hugessen J.

Judgment: July 7, 1999
Heard: May 26, 1999 - June 17, 1999
Docket: T-617-85, T-782-97, T-2804-97

Counsel: *Mr. Alain J. Dubuc, Ms. Sylvie M. Molgat and Mr. Michael Bailey*, for Plaintiff, Montana Band.
Ms. Priscilla Kennedy, for Plaintiff, Samson Band.
Ms. Barbara Fischer, for Plaintiff, Ermineskin Band.
Mr. James A. MacDonald and Mr. D. Titosky, for Defendant.

Hugessen J.:

Reasons for Order

1 These actions, which have been joined, deal with matters arising from the adherence of Chief Bobtail and his people to Treaty 6 in 1877, the creation of reserves as a result thereof, certain alleged surrenders of those reserves, and certain other alleged activities on the part of the Crown and its agents, the descendants of Chief Bobtail and the three Plaintiff Bands over a period extending generally through to about 1909, the date of the alleged surrender of the Bobtail reserve. The validity and effects of that surrender are the central issues.

2 The actions are at the discovery stage and there has been an agreement by counsel that the Plaintiff Bands will conduct their discoveries of the Crown by means of written interrogatories.

3 The Crown now moves to strike out virtually all of the interrogatories filed by the Plaintiffs Samson and Ermineskin and a very substantial proportion of those filed by the Plaintiff Montana. Objection is taken on nine separate grounds, many of which overlap so that a large number of interrogatories are the object of several grounds of objection.

4 I start my consideration of the matter with some reflections upon the nature and scope of examinations for discovery and interrogatories in modern civil procedure, and in particular under the *Federal Court Rules, 1998*.

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

6 Of course, there is another side to the coin: in this time of justifiable concern about delays in the litigation process, discoveries must not be permitted to go on endlessly and the Court will be vigilant in the exercise of its discretionary powers to prevent abuses of its process by either party, discoveror or discoveree.

7 Subject to certain special exceptions such as claims to privilege, the key to the propriety of any question on discovery is relevance; that, in its turn, is determined by the pleadings (Rule 240).

8 While the usual practice is for examinations on discovery to be conducted orally, the Rules make provision for examination by means of written interrogatories and it seems to me that the Court should, as a matter of policy, encourage the use of such interrogatories in appropriate cases. They are likely to be far less time consuming and should do away entirely with any necessity for adjourning the discovery to allow the witness to inform him or herself of the appropriate facts.

9 The Court has to be aware, however, that interrogatories can pose something of a problem for the party drafting the questions: there is no opportunity to clarify a question which is deliberately or even honestly misunderstood; it may be difficult to foresee an unclear or evasive answer; it may sometimes be necessary to put a large number of questions of a "follow-up" nature based upon supposition or hypothesis as to what the answer to an earlier question will be.

10 Where these sorts of difficulties arise it is my view that the Court, as a part of its policy of encouraging the use of written interrogatories, should attempt to view questions in the best possible light. Thus, for example, where a question is susceptible of two interpretations, one of which is clearly improper (for instance asking the witness to give a conclusion of law), the Court should prefer the interpretation which would make the question legitimate and admissible. Deponents, for their part, have a duty to make an honest and open attempt to answer. Thus where a deponent demonstrates an obtuseness in understanding a question or produces an answer which has little or no bearing on the facts in issue, the Court will require him or her to answer the question properly in the light of the pleadings and may well attach heavy costs penalties to the party being discovered.

11 Since it is clear that the answers to interrogatories will almost always be prepared by or with the very active assistance of counsel, evasive, unresponsive or ambiguous answers are not to be tolerated. By the same token, questions whose answers may require some element of law over and above their primarily factual basis may be allowed a somewhat greater latitude.

12 There is one final comment of a general nature which is related to the particular circumstances of this action. It is, as I have said, an action by three Indian Bands against the Crown. It alleges breaches of the Crown's fiduciary duty towards the plaintiffs and their predecessors over a period of time approximately 100 years ago. It is common knowledge that Indian Bands have few or no written records relating to their past and must, apart from tradition and oral history, rely to a large extent upon the records of the government itself. This casts upon the Crown, in its past and continuing capacity as protector and fiduciary of the Bands, a particular duty to be open and frank in its disclosures. Even within the adversarial relationship created by litigation between them, the Crown continues to owe an historic fiduciary duty to deal fairly and openly with first nations. This is not to say that there are special rules for aboriginal claims, but simply that the nature of any claim is part of the context in which any objection to interrogatories is to be decided and that where a claim is in respect of alleged historical injustice by the Crown, that context may be determining.

13 I turn now to the specific objections raised by the Crown to the interrogatories in these cases. They are, as I have said, nine in number as follows:

1. Historical questions beyond the memory of any living person;
2. Questions relating to the interpretation of documents;
3. Questions requiring the expression of an opinion;
4. Questions requiring the deponent to state the Crown's legal position or apply principles of law;
5. Questions which ask for arguments or evidence;
6. Questions which are unreasonable or unnecessary;
7. Questions which are irrelevant or overly broad;
8. Questions which are vague and ambiguous;
9. Questions which ask for privileged information.

As indicated earlier, many of these grounds of objection overlap in the sense that more than one of them may be invoked in support of an objection to any particular question. Many others, notably numbers 6 to 9 above, do not raise any issue of principle but simply require the application of well known rules of law to particular questions. However, items 1-3 (which are virtually always invoked simultaneously) and 4 and 5 (which are frequently pleaded as additional grounds) raise some important issues which go to the very heart of the nature of discovery in actions of this sort and require more detailed analysis. I turn to them first.

1-3 Historical questions, Questions requiring interpretation of documents, Questions requiring an opinion.

14 The Crown's objection on these grounds is based primarily upon two British Columbia cases¹. In those cases it was held that it is not appropriate at discovery to ask deponents historical facts of which neither they nor any living persons to whom they have access have any memory and which can only be ascertained by reliance upon documentary records. Since the answers will of necessity be based on a reading of the documents, such questions should only be answered by expert historians as a matter of opinion.

15 This case law has not been followed in this Court. The late and much respected Addy J. in *Roberts v. R.*² led the way. He distinguished the British Columbia jurisprudence and to the extent that he could not do so he disagreed with it. He drew a

line between simple historical facts and conclusions or inferences which could be drawn from those facts; the latter were the proper field of detailed study or examination by an expert but the former were every bit as much within the competence of an ordinary witness as any other facts and could properly be the subject of questions on discovery. He described as unacceptable the conclusion that where a claim is based on matters which are beyond living memory, only expert historians could be admitted to testify as to the facts.

16 In *Dick v. R.*³, Jerome ACJ cited and followed Addy J.'s decision. He held that questions relating to the circumstances in which a reserve had been allotted to a Band were properly the subject matter of discovery and should be answered. Mere production of the underlying documents was not enough and the Crown was obliged to answer questions of fact central to the issues between the parties.

17 Finally in *Enoch Band of the Stony Plain Indians v. R.*⁴ Mr. Prothonotary Hargrave, following the earlier jurisprudence, held that questions regarding the circumstances surrounding a surrender poll and the execution of surrender documents could properly be put and should be answered. This aspect of his decision was left undisturbed both on appeal to this division and on further appeal to the Court of Appeal.

18 In my view this jurisprudence is sound. The objection that the facts in issue which form the subject of the interrogatories are beyond living memory seems, with respect, to be specious. Especially where matters of aboriginal rights are concerned, tradition custom and oral history may be valid sources of historical fact. The deponent on discovery is not a simple witness but is the representative of and speaks for a party *qua* party. Furthermore, institutions may also have memories and the Crown is quintessentially one such institution. To say that the Crown can have no factual information about anything which goes beyond living memory (as a practical matter, some time after the first world war) seems to me to be absurd. Governments, more than most institutions, are notorious for keeping records of what they do and such records may be constantly referred to and relied upon as a source of current practice even today. While most such records will be in documentary form it is by no means inconceivable that institutional memory may manifest itself in other forms such as practices and traditions. If these are the source of factual allegations by or against the Crown, they may surely be made the proper object of discovery.

19 I also find unconvincing the objection that a deponent to historical facts is being asked to interpret documents or to give an opinion. The rule against requiring a deponent to interpret documents is most properly applied where the document in question is a contract and the witness is asked what he or she thinks it means. Documents, however, can and do serve as the basis of a great deal of factual information and a deponent who is asked to give such information is not being asked to interpret the document or to give an opinion but rather to state on behalf of the party he or she represents, that party's understanding of the facts represented therein. Even in a wholly modern context, records are often expressed in some form of code, overt or covert; a corporate party, or even an individual, may surely be asked to give the true meaning of such records.

20 It is nothing new to say that the border between fact and opinion, like that between fact and law, is easy to assert but hard to draw on the ground. It is better to have the deponent answer any marginal questions and if the answer turn out to be simply the expression of a personal point of view the trial judge can deal with the matter appropriately if necessary.

21 Finally, it seems to me that many of the questions objected to under this rubric are essential for the purpose of understanding the Crown's position and tying it down to the facts as pleaded. That is an essential part of the defining of the issues and while such definition is, in the first instance, done by the pleadings, discovery is often an essential second step in order to make clear what exactly it is that separates the parties. The Statement of Defence in these actions contains many detailed assertions of fact as to the activities both of the Crown and its agents and of the plaintiffs and their predecessors. If the Crown has no knowledge of those facts, the plaintiffs are entitled to know that. If on the other hand the Crown's knowledge of certain historical facts is based upon and limited to statements contained in certain documents the plaintiffs are entitled to know that as well. Neither the plaintiffs nor the Crown should be obliged to go to trial not knowing exactly what it is that the other side knows and relies upon as a provable fact, and what is mere hopeful guesswork.

22 For the foregoing reasons I reject each of these objections.

4-5 Questions requiring the deponent to state the Crown's legal position or seeking argument or evidence

23 There is of course no question that examination on discovery is designed to deal with matters of fact. "Pure" questions of law are obviously an improper matter to put to a deponent. It is likewise with argumentative questions and questions which ask a party to state what evidence it proposes to lead at trial. But the line is rarely clear or easy to draw. Questions may mix fact and law or fact and argument; they may require the deponent to name a witness; they may still be proper. So too, questions relating to facts which may have legal consequences or which may themselves be the consequence of the adoption of a certain view of the law are nonetheless questions of fact and may be put on discovery.

24 The jurisprudence is divided as to "compendious" or "reliance" questions; in *Can-Air Services Ltd. v. British Aviation Insurance Co.*⁵, it was said to be improper to ask a witness what evidence he had in support of an allegation or how it was to be proved at trial. Such reliance questions do not ask for facts that the witness knows or can learn but rather require the witness to play the part of a lawyer and to select which facts can be relied on to prove a given allegation.

25 On the other hand, many experienced trial judges take a broader view. Thus in *Rubinoff v. Newton*⁶ Haines J. said:

The line of demarcation between disclosure of facts on which a party relies and the evidence in support of the fact may at times be very fine, and when it occurs, the resolution must be fact disclosure. And I can think of no more a simple and direct question than, "On what facts do you rely?"

(...) The opposite party is entitled to know the facts on which the acts of negligence or recovery are alleged but not the evidence to support it. To deny such facts would be to refuse the very purpose of discovery which is to learn the facts, or often equally more important, the absence of facts, pertaining to each and every allegation in the pleadings.

26 Likewise in *Brennan v. J. Posluns & Co.*⁷, McRuer C.J. ordered a witness to state the facts relied on in support of an allegation. In his view a question of this sort asks not so much for a conclusion of law by a witness as for the facts behind such conclusion. Where the witness is a party who is asserting that conclusion it is reasonable to ask for the facts supporting it.

27 In my view, the proper approach is to be flexible. Clearly the kinds of questions which were aptly criticized in *Can-Air, supra* note 5 can easily become abusive. On the other hand, a too rigid adherence to the rules therein laid down is likely to frustrate the very purpose of examination on discovery. While it is not proper to ask a witness what evidence he or she has to support an allegation, it seems to me to be quite a different thing to ask what facts are known to the party being discovered which underlie a particular allegation in the pleadings. While the answer may have a certain element of law in it, it remains in essence a question of fact. Questions of this sort may be essential to a discovery for the purposes of properly defining the issues and avoiding surprise; if the pleadings do not state the facts upon which an allegation is based then the party in whose name that pleading is filed may be required to do so.

28 Likewise, while the jurisprudence is divided on the point, it is my 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; questions of this sort on discovery are essential for the purposes of properly defining the issues and avoiding surprise. Again, it is central to remember that the deponent speaks not for him or herself but for the party.

29 Accordingly, I find almost all of the objections taken by the Crown under these two headings to be without foundation. Thus, questions asking by what authority something was done should, in accordance with the principle earlier outlined, be read as seeking the factual basis (eg. a letter, superior instructions, etc.) for the actions rather than a strictly legal answer. Likewise questions as to eligibility to vote in surrender polls should be taken as going to the factual basis upon which persons were in fact allowed to vote, such as the presence of their names on the Band list, residence, or otherwise. The same is true of questions relating to membership transfers which relate to the fact of such transfers and not to whether or not they were properly made. Finally questions which ask what facts the Crown relies upon in support of certain of its particular allegations (most of which have in any event been tailored so as to comply with the decision in *Can-Air, supra* note 5) should properly be answered.

30 Notwithstanding the foregoing, however, there are a very small number of interrogatories which were drawn to my attention by counsel at the hearing which do ask questions of pure law and which should therefore be struck out. The following are the examples that were given by counsel:

a) Montana question 21(d): this question clearly asks what legal authority the government had to establish a pay list for Little Bear's Band.

b) Samson question 125: here again the question asks for the legal authority under the *Indian Act* for making certain *per capita* payments.

c) Ermineskin question 17: while the introductory part of this question is limited to facts and is unexceptionable, the follow-up questions contained in paragraphs (a) and following all seek admissions of law from the Crown and are improper.

31 I conclude this section by reiterating that it is only in a very limited number of cases that I view the Crown's objections as being of any substance whatsoever. Questions relating to how, why and when Bands and or reserves were established, Band memberships determined, as well as to the loss of interests in reserves are essentially factual matters and should be answered.

6-8 Questions which are unreasonable, irrelevant overly broad or ambiguous.

32 As earlier stated, there is no dispute that the law requires that questions that fall into these categories should not be answered. However counsel have made very few submissions under these categories and in most of them I find the objection to be without foundation. Thus, questions relating to government policy with respect to the establishment and surrender of reserve lands are clearly relevant in so far as they relate to the reserve lands here in question; to the extent that a question may appear over-broad the answer may be limited to the matters actually in issue.

33 Most of all the questions asked are tied directly to allegations in either the Statement of Claim or the Statement of Defence and thus meet the primary test of relevance. The Crown's plea that it would be unduly burdensome to answer some of the questions seems to me to miss the mark; this is a large complicated case and 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. Thus, while Samson questions 146 and 148 (particularly the latter) will apparently call for the production of a large number of documents, they are documents dealing with transfers made by the Crown and its agents of rights in the surrendered lands and are thus relevant. In any event, there is no evidence to support the plea of burdensomeness⁸.

34 That said, however, one question has been drawn to my attention which I find unduly vague and ambiguous; Samson question 2 asks for the production of "all versions" of Bobtail's adhesion to Treaty 6; since I cannot understand the question, I think it not unreasonable that the Crown should take the same position.

9 Questions which ask for privileged information.

35 Counsel made no submissions of substance on this category. No questions were drawn to my attention which would require the Crown to reveal information which would be privileged as against the Bands towards whom the Crown has a fiduciary relationship⁹. The submission that one Band may not know what payments have been made to another lacks substance, especially in view of the fact that the cases will be tried on common evidence. The objection is dismissed.

Conclusion

36 I conclude that for the most part the Crown's objections are without foundation. A very few questions have been brought to my attention which appear to me to be improper and I have identified them above. There may well be a few others falling into the same category which I have not been able to identify simply because of the huge number of questions involved. Accordingly it is my intention to issue an order in which, apart from allowing the objections to the specified questions, I shall dismiss the motion and extend the time under Rule 397 (1) for the Crown to move to review the terms of my Order for any matter overlooked;

such motion, if any, shall be served by 15 August 1999 and made presentable at the next case-management conference on 25 August 1999 in Edmonton.

Costs

37 The Crown has been unsuccessful on virtually all of its submissions. On those very few questions where the Crown has had success on this motion, the matter has been one which in my view could have been settled by a simple discussion between counsel or, at worst, on a short motion heard by telephone conference. As it is the hearing of this motion has taken more than 2 days of Court time in both Ottawa and Calgary together with a number of telephone conferences; all parties have also produced voluminous written submissions and supporting materials. It is my view that this motion ought not to have been brought or, if brought, ought to have been of very much less duration and complexity. No attempt has been made by the Crown to facilitate written discovery even though it was agreed upon. Many of the objections verge on the frivolous; it was for example argued, apparently seriously, that a question as to how many members had "left" a reserve by a certain date required the Crown to indicate which members had gone on hunting trips off the reserve during the period. Such submissions are scarcely evidence of an honest effort to understand the interrogatories and to answer them in good faith. Indeed, if the Crown had not enjoyed some very minor measure of success on the motion, I would not have hesitated to impose costs on a solicitor and client basis. As it is, the Crown will pay the costs of each plaintiff Band forthwith and in any event of the cause, such costs being fixed in the amount of \$5,000.00 for each Band.

Motion granted in part.

Footnotes

- 1 *Martin v. British Columbia* (1986), 3 B.C.L.R. (2d) 60 (B.C. S.C.); *Chingee v. British Columbia* (1989), 38 C.P.C. (2d) 301 (B.C. S.C.)
- 2 [1991] 3 F.C. 420 (Fed. T.D.).
- 3 (1992), [1993] 1 C.N.L.R. 50 (Fed. T.D.).
- 4 (1996), 110 F.T.R. 241 (Fed. T.D.); aff'd (1996), 118 F.T.R. 114 (Fed. T.D.); aff'd (1998), 222 N.R. 218 (Fed. C.A.).
- 5 (1988), 91 A.R. 258 (Alta. C.A.).
- 6 [1967] 1 O.R. 402 (Ont. H.C.).
- 7 (1958), [1959] O.R. 22 (Ont. S.C.).
- 8 *Smith, Kline & French Laboratories Ltd. v. Canada (Attorney General)* (1984), 1 C.P.R. (3d) 268 (Fed. T.D.).
- 9 See *Samson Indian Nation & Band v. Canada* (1997), [1998] 2 C.N.L.R. 199 (Fed. C.A.).

TAB 7

2018 Comp. Trib. 20
Competition Tribunal

The Commissioner of Competition v. Hudson's Bay Company

2018 CarswellNat 7955, 2018 Comp. Trib. 20

IN THE MATTER OF the Competition Act, RSC 1985, c C-34, as amended

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

The Commissioner of Competition (Applicant) and Hudson's Bay Company (Respondent)

Jocelyne Gagné Presiding Member

Heard: November 20, 2018

Judgment: November 28, 2018

Docket: CT-2017-008

Counsel: Derek Leschinsky, Alexander Gay, Katherine Rydel, for Applicant, Commissioner of Competition
Eliot Kolers, Mark Walli, Patricia Joseph, for Respondent, Hudson's Bay Company

Jocelyne Gagné Presiding Member:

I. OVERVIEW

1 The Tribunal is seized with two motions brought by the parties to compel the opposite party's representative to answer several questions that were refused during examinations for discovery. Christine Jelley, Hudson's Bay Company's ("HBC") representative, was examined on August 23-24, 2018 and Adam Zimmerman, the Commissioner of Competition's representative, was examined on September 6-7, 2018.

2 These examinations were conducted in relation with the Commissioner's application made pursuant to section 74.1 of the *Competition Act*, RSC 1985, c C-34 ("*Act*"), wherein he alleges that HBC has engaged in and continues to engage in two types of reviewable conduct. First, the Commissioner alleges that HBC has engaged in deceptive marketing practices by offering sleep sets at grossly inflated regular prices, and then advertising deep discounts of these deceptive regular prices in order to promote the sale of sleep sets to the public, thus engaging in reviewable conduct pursuant to subsection 74.01(3) of the Act (ordinary selling price ("*OSP*") representations). Second, the Commissioner alleges that HBC engages in reviewable conduct under paragraph 74.01(1)(a) of the Act by offering sleep sets as part of inventory "clearance" or "end of line" promotions, implying that the price has been permanently lowered in order to sell remaining inventory. Despite such advertisements, the Commissioner alleges that HBC continues to replenish its stock by ordering new sleep sets from manufacturers during these sales.

3 The relief sought by the Commissioner includes a prohibition order and administrative monetary penalties pursuant to section 74.1 of the Act.

4 In the Commissioner's initial application, the OSP representations concerned four specific sleep sets and were said to have been made from July 19, 2013, to October 30, 2014.

5 Having failed to obtain the production of documents relating to sleep sets other than the four identified in the initial application, and to post-January 2015 compliance practices and policies (*The Commissioner of Competition v. Hudson's Bay*

Company, 2017 Comp. Trib. 19 (Competition Trib.) ("*AOD decision*"), the Commissioner amended its application, generally extending it to all of HBC's sleep sets and adding that the reviewable conduct was ongoing.

6 In its amended response, HBC argues that it has exercised due diligence in preventing the alleged reviewable conduct from occurring by having a strict and comprehensive advertising compliance program in place at all relevant times and by requiring that all of its employees in its marketing and buying groups take an online course on advertising compliance annually and attend a session with HBC's legal counsel on advertising law. HBC further argues that the Tribunal must consider the "landscape" and competitiveness of the relevant market in assessing its good faith, as contemplated in paragraph 74.01(3)(b) of the Act, and in determining the appropriate remedy, should it make a finding of reviewable conduct in application of subsection 74.1(5) of the Act.

II. THE COMMISSIONER'S MOTION

7 At the hearing before the Tribunal, only five refusals to questions given during the Jelley examination remained at issue and they all concerned, directly or indirectly, HBC's compliance efforts and policies with respect to sleep sets and also any other product sold by HBC in Canada.

8 The Commissioner argues that he should be permitted to ask questions about HBC's compliance program as it applies to any product sold in Canada because:

- a) the remedy sought in his amended application not only applies to HBC's sleep sets but extends to "substantially similar reviewable conduct for any product supplied by HBC"; and
- b) HBC's compliance program applies broadly to all products sold.

9 HBC replies that those questions are not relevant to the issues raised by the Commissioner's amended application and that, in any event, they are overbroad. HBC adds that the Commissioner is also attempting to re-argue issues that were settled by the Tribunal's AOD decision.

10 In *Lehigh Cement Ltd. v. R.*, 2011 FCA 120 (F.C.A.) at para 34, the Federal Court of Appeal noted the broad scope of relevance on examination 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.

(1) Request 1: Certifications for HBC's Code of Business Conduct

11 Ms. Jelley was asked to produce the records relating to certifications for all persons responsible for mattresses and each of their supervisors, level by level. The certifications attest that a person has read and understood HBC's Code of Business Conduct. The Commissioner argues that this request is relevant to the due diligence defense, the compliance issue and the scope of remedy.

12 Since HBC's Code of Business Conduct is not even part of the advertising compliance program which HBC relies on for its due diligence defence in this proceeding, I am of the view that it is not relevant to the issues raised by this case. HBC's Code of Business Conduct is very general and covers broad ethical principles such as conflicts of interests, the treatment of confidential information, corporate opportunities, insider information, etc. In addition to being irrelevant, the scope of the information sought would be overbroad.

13 HBC does not have to respond to Request 1.

(2) Request 3: Discipline for non-compliance with Advertising Manual

14 Ms. Jelley was asked to advise whether any employees of HBC have been disciplined for failing to comply with the rules in the Advertising Compliance Manual since March 2013.

15 HBC argues that on its face, this question (i) would apply to any product offered for sale by HBC and (ii) would apply to advertising "rules" in HBC's advertising compliance manual that are unrelated to reviewable conduct under section 74.01 of the Act, as alleged by the Commissioner in this proceeding. As such, the question runs afoul of the Tribunal's AOD decision which limited the scope of relevant evidence to that concerning HBC's sleep sets.

16 The Commissioner replies that this question needs to be general since (i) HBC does not have a distinct manual that would apply specifically to the advertising of sleep sets; and (ii) HBC does not identify "failures in compliance" with respect to the representations concerning mattresses challenged by the Commissioner in this proceeding.

17 In my view, the only relevant information pertains to disciplinary measures for non-compliance with HBC's Advertising Compliance Manual related to any reviewable conduct under section 74.01 of the Act in the advertising of sleep sets.

18 As formulated, HBC does not have to respond to Request 3.

(3) Request 4: Documents sent and received by HBC's audit committee

19 Ms. Jelley was asked to produce all documents sent and received by HBC's audit committee relating to the Commissioner's investigation.

20 HBC states that this request is not limited to advertising compliance and that in any event, the responsibility for advertising compliance has been delegated to HBC's EVP General Counsel, and to his delegates in HBC's legal department.

21 I find the above reference to the Commissioner's investigation to be a reference to the investigation that led to his amended application, which is an investigation of HBC's advertising compliance.

22 With this in mind, I am of the view that the question is relevant, irrespective of the delegation of authority in favour of HBC's legal department and irrespective of any broader role HBC's audit committee might have.

23 HBC will respond to Request 4.

(4) Request 11: Reports to Board of Directors

24 Ms. Jelley was asked to advise whether reports have been made to the Board of Directors respecting advertising compliance, and if so, what the content of that reporting is.

25 Just as it did for Request 3, HBC argues that on its face, this question (i) would apply to any product offered for sale by HBC and (ii) would apply to advertising compliance issues that are unrelated to the alleged reviewable conduct under section 74.01 of the Act, in this proceeding. The Tribunal's AOD decision has limited the scope of relevant evidence to that concerning HBC's sleep sets.

26 Just as I found with respect to Request 3, HBC does not have to respond to Request 11 as formulated.

(5) Request 14: HBC's marketing Expenses

27 Lastly, Ms. Jelley was asked about HBC's total marketing expenses for each year from 2013 to 2017.

28 The Commissioner argues this information is relevant to the aggravating factors the Tribunal considers in awarding an administrative monetary penalty in application of paragraph 74.1(5)(1) of the Act, which states that the Tribunal shall take into account "any other relevant factor".

29 First, it is not clear to the Tribunal in what way HBC's total marketing expenses would be relevant to the awarding of a penalty.

30 Second, the Commissioner suggests that he could calculate HBC's approximate spending on advertising sleep sets by multiplying its total marketing expenses by the proportion of total revenue and profits derived from selling sleep sets. In my view, it would be reckless to use speculative mathematical calculations to assess HBC's marketing expenses for sleep sets. The presumed and suppositional results could not reasonably have any bearing on the appropriate quantum for an administrative monetary penalty.

31 HBC does not have to respond to Request 14.

III. HBC'S MOTION

32 The 30 outstanding refusals to questions from the Zimmerman examination were still live issues at the hearing. HBC grouped them in three categories: (1) The documents and information produced by Sears in response to section 11 orders and the Commissioner's actions in relation to Sears, [CONFIDENTIAL - LEVEL C]; (2) any information the Commissioner might have concerning the volume of mattress sales at regular price made by the competitors identified in HBC's amended response, along with an acknowledgement by the Commissioner that HBC is a relatively small player in the market with no power to set or move market prices for mattresses; and (3) any information the Commissioner might have regarding the practices of HBC's competitors with respect to "clearance" sales, "end of line", or mix and match promotions.

33 In my view, all of these questions can be regrouped into a single category as they relate to third-party information obtained by the Commissioner in the exercise of the broad mandate conferred to him by the Act.

34 HBC argues that all of the requested information is highly relevant since the Tribunal will have to consider the "landscape" and competitiveness of the relevant market in assessing HBC's good faith (paragraph 74.01(3)(b) of the Act), assessing the "general impression" left by the "clearance" and "end of line" representations (paragraph 74.01(1)(a) of the Act), and determining the appropriate remedy should it make a finding of reviewable conduct (section 74.1 of the Act).

35 First, the Commissioner replies that given HBC's good faith is to be determined on a subjective basis (*Canada (Commissioner of Competition) v. Sears Canada Inc.*, 2005 Comp. Trib. 2 (Competition Trib.), at para 239), any information regarding the landscape or competitiveness of the market that was not known to HBC at the time of the alleged conduct is irrelevant.

36 Second, the Commissioner states that a competitor's conduct has no bearing on the general impression left by any given representation. The legislation requires the Tribunal to consider whether the general impression the representation conveys, as well as its literal meaning, is false or misleading in a material respect. What is not of "much consequence or important or pertinent or germane or essential to the matter", such as a competitor's conduct, cannot be said to be material (*Sears*, above, at paras 333-336).

37 Finally, the Commissioner notes that "whether a competitor also engaged in similar reviewable conduct" is not one of the relevant factors chosen by the legislator under subsection 74.1(5) of the Act to help decision-makers in the assessment of a proper administrative monetary penalty.

38 I agree with the Commissioner. HBC has not referred me to any authority supporting its proposition that third-party information, unknown to a party at the time of the impugned conduct, that is collected by the Commissioner in the exercise of his broad and extensive investigation powers would be relevant to that party's defense in cases such as the one before me.

39 I do not agree with HBC that as a consequence of a negative finding on this issue, it would have to defend its case in a factual and contextual vacuum. The "landscape" and the level of competitiveness of the market can be established with the information available to HBC at the time of the alleged conduct.

40 In my view, HBC's request to have access to the third-party information and documents obtained in the course of investigating [CONFIDENTIAL - LEVEL C] is so broad that it would amount, in my view, to a fishing expedition.

41 As I am of the view that none of the third-party information unknown to HBC at the time of the alleged reviewable conduct is relevant, I do not need to examine the Commissioner's refusals based on litigation privilege.

42 Finally, two specific requests call for further comment.

43 Mr. Zimmerman was asked (i) whether the Commissioner accepts that HBC had and has no market power in respect of the sale of mattresses, and (ii) whether the Commissioner would agree with the statement that HBC is a price-taker or price-follower when it comes to mattresses.

44 I agree with the Commissioner that, as formulated, these questions seek opinion evidence. My view might have been different had the question been whether HBC was considered so during the Commissioner's investigation, and whether this had an impact on the Commissioner's actions or decisions.

45 For the above reasons, the Commissioner does not have to respond to HBC's requests.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

46 The Commissioner's motion is granted in part;

47 The Commissioner's Request 4 will be answered;

48 HBC's motion is dismissed;

49 As the results of these motions have been mainly unsuccessful for both parties, costs shall be in the cause.

TAB 8

2019 Trib. conc. 3, 2019 Comp. Trib. 3
Competition Tribunal

The Commissioner of Competition v. Live Nation Entertainment, Inc et al

2019 CarswellNat 1079, 2019 CarswellNat 9514, 2019 Trib. conc. 3, 2019 Comp. Trib. 3

**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**

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

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)

Denis Gascon Chair

Heard: April 2, 2019

Judgment: April 5, 2019

Docket: CT-2018-005

Counsel: François Joyal, Paul Klippenstein, Ryan Caron, Derek Leschinsky, Katherine Rydel, for Applicant, Commissioner of Competition

Mark Opashinov, David W. Kent, Guy Pinsonnault, Adam D.H. Chisholm, Joshua Chad, for Respondents, Live Nation Entertainment, Inc et al

Denis Gascon Chair:

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 (*Lehigh Cement Ltd. v. R.*, 2011 FCA 120 (F.C.A.) ("*Lehigh*") at para 30; *Commissioner of Competition v. Direct Energy Marketing Limited*, 2014 Comp. Trib. 17 (Competition Trib.) 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 (Competition Trib.) ("*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 Canada Inc.*, 2011 FC 52 (F.C.) 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. R.*, [2000] 1 F.C. 267 (Fed. T.D.) ("*Montana Band*") at para 27; *Can-Air Services Ltd. v. British Aviation Insurance Co.*, 1988 ABCA 341 (Alta. C.A.) at para 19). In *Apotex Inc. v. Pharmascience Inc.*, 2004 FC 1198 (F.C.), aff'd 2005 FCA 144 (F.C.A.) ("*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 (F.C.) 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 & Research) v. Southam Inc.*, [1991] C.C.T.D. No. 16, 38 C.P.R. (3d) 68 (Competition Trib.), 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)* (1999), 174 F.T.R. 270 (Fed. T.D.), 1999 CanLII 8722 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 "*said to make* the price representations" or "*said to permit* 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 unacceptable 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.

TAB 9

2017 Trib. conc. 16, 2017 Comp. Trib. 16
Competition Tribunal

The Commissioner of Competition v. Vancouver Airport Authority

2017 CarswellNat 6366, 2017 CarswellNat 9308, 2017 Trib. conc. 16, 2017 Comp. Trib. 16

**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**

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

The Commissioner of Competition (Applicant) and Vancouver Airport Authority (Respondent)

Denis Gascon Chair

Heard: October 13, 2017

Judgment: October 26, 2017

Docket: CT-2016-015

Counsel: Antonio Di Domenico, Jonathan Hood, Katherine Rydel, Ryan Caron, for Applicant
Calvin S. Goldman, Q.C., Michael Koch, Julie Rosenthal, Ryan Cookson, Rebecca Olscher, for Respondent

Denis Gascon Chair:

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 (*Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6 (Competition Trib.)) ("*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 (Competition Trib.) ("*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, disproportionately 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. R.* (1999), [2000] 1 F.C. 267 (Fed. T.D.) ("*Montana Band*") at para 27; *Can-Air Services Ltd. v. British Aviation Insurance Co.*, 1988 ABCA 341 (Alta. C.A.)¹ 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 Ltd.*, 2007 FC 236 (F.C.) 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 & Research) v. Southam Inc.*, [1991] C.C.T.D. No. 16 (Competition Trib.) ("*Southam*") at paras 17-18; *Canada (Director of Investigation & Research) v. NutraSweet Co.*, [1989] C.C.T.D. No. 54 (Competition Trib.) ("*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 Corp.* (1977), 18 O.R. (2d) 276 (Ont. S.C.) ("*Rule-Bilt*") at paras 27-28; *International Minerals & Chemical Corp. (Canada) Ltd. v. Commonwealth Insurance Co.* [1991 CarswellSask 129 (Sask. Q.B.)], 1991 CanLII 7792 ("*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 (*Commissioner of Competition v. Reliance Comfort Limited Partnership*, 2014 Comp. Trib. 9 (Competition Trib.) ("*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 v. Alberta*, 2013 ABQB 344 (Alta. Q.B.) 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 *Commissioner of Competition v. Air Canada*, 2012 Comp. Trib. 20 (Competition Trib.) ("*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 (*C. (R.) v. McDougall*, 2008 SCC 53 (S.C.C.) 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 (*Lehigh Cement Ltd. v. R.*, 2011 FCA 120 (F.C.A.) ("*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 (*Eurocopter c. Bell Helicopter Textron Canada Ltée*, 2010 FCA 142 (F.C.A.) 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 C.P.R. (3d) 232 (Fed. T.D.) 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 & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) 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 discovery¹. 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 (*Canada (Commissioner of Competition) v. United Grain Growers Ltd.*, 2002 Comp. Trib. 35 (Competition Trib.) ("*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 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 (*Commissioner of Competition v. Direct Energy Marketing Limited*, 2014 Comp. Trib. 17 (Competition Trib.) ("*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);
- 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 *not* 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" (*Canada (Commissioner of Competition) v. Sears Canada Inc.*, 2003 Comp. Trib. 19 (Competition Trib.) 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.

Footnotes

- 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.
- 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.

TAB 10



CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Rules

Règles du Tribunal de la concurrence

SOR/2008-141

DORS/2008-141

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Technology

(2) The Tribunal may give directions requiring the use of any electronic or digital means of communication, storage or retrieval of information, or any other technology it considers appropriate to facilitate the conduct of a hearing or case management conference.

Questions as to practice or procedure

34 (1) If, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the *Federal Courts Rules* may be followed.

Tribunal may direct

(2) If a person is uncertain as to the practice or procedure to be followed, the Tribunal may give directions about how to proceed.

PART 2

Contested Proceedings

Application

Application of Part

35 This Part applies to all applications to the Tribunal, except applications for interim or temporary orders (Part 4), applications for specialization agreements (Part 5), applications for leave under section 103.1 of the Act (Part 8) and applications for a loan order (Part 9).

Notice of application

36 (1) An application shall be made by filing a notice of application.

Form and content

(2) A notice of application shall be signed by or on behalf of the applicant and shall set out, in numbered paragraphs,

- (a) the sections of the Act under which the application is made;
- (b) the name and address of each person against whom an order is sought;
- (c) a concise statement of the grounds for the application and of the material facts on which the applicant relies;

Directives sur la technologie

(2) Il peut donner des directives qui exigent l'utilisation de moyens électroniques ou numériques de communication, de stockage ou d'extraction de renseignements, ou de tout autre moyen technique qu'il juge indiqué, afin de faciliter la tenue d'une audience ou d'une conférence de gestion d'instance.

Questions concernant la pratique ou la procédure

34 (1) Les *Règles des Cours fédérales* peuvent s'appliquer aux questions qui se posent au cours de l'instance quant à la pratique ou à la procédure à suivre dans les cas non prévus par les présentes règles.

Directives du Tribunal

(2) En cas d'incertitude quant à la pratique ou à la procédure à suivre, le Tribunal peut donner des directives sur la façon de procéder.

PARTIE 2

Instances contestées

Demandes

Application de la présente partie

35 La présente partie s'applique à toutes les demandes présentées au Tribunal, à l'exception des demandes d'ordonnance provisoire ou temporaire (partie 4), des demandes relatives aux accords de spécialisation (partie 5), des demandes de permission présentées en vertu de l'article 103.1 de la Loi (partie 8) et des demandes d'ordonnance de prêt de pièces (partie 9).

Avis de demande

36 (1) La demande est introduite par dépôt d'un avis de demande.

Forme et contenu

(2) L'avis de demande est signé par le demandeur ou en son nom, est divisé en paragraphes numérotés et comporte les renseignements suivants :

- a) les dispositions de la Loi en vertu desquelles la demande est présentée;
- b) les nom et adresse de chacune des personnes contre lesquelles une ordonnance est demandée;
- c) le résumé des motifs de la demande et des faits importants sur lesquels se fonde le demandeur;

TAB 11



CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to January 12, 2022

À jour au 12 janvier 2022

Last amended on June 17, 2021

Dernière modification le 17 juin 2021

Scope of examination

240 A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that

- (a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or
- (b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.

Obligation to inform self

241 Subject to paragraph 242(1)(d), a person who is to be examined for discovery, other than a person examined under rule 238, shall, before the examination, become informed by making inquiries of any present or former officer, servant, agent or employee of the party, including any who are outside Canada, who might be expected to have knowledge relating to any matter in question in the action.

Objections permitted

242 (1) A person may object to a question asked in an examination for discovery on the ground that

- (a) the answer is privileged;
- (b) the question is not relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party;
- (c) the question is unreasonable or unnecessary; or
- (d) it would be unduly onerous to require the person to make the inquiries referred to in rule 241.

Objections not permitted

(2) A person other than a person examined under rule 238 may not object to a question asked in an examination for discovery on the ground that

- (a) the answer would be evidence or hearsay;
- (b) the question constitutes cross-examination.

Étendue de l'interrogatoire

240 La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui :

- a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge;
- b) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action.

L'obligation de se renseigner

241 Sous réserve de l'alinéa 242(1)d), la personne soumise à un interrogatoire préalable, autre que celle interrogée aux termes de la règle 238, se renseigne, avant celui-ci, auprès des dirigeants, fonctionnaires, agents ou employés actuels ou antérieurs de la partie, y compris ceux qui se trouvent à l'extérieur du Canada, dont il est raisonnable de croire qu'ils pourraient détenir des renseignements au sujet de toute question en litige dans l'action.

Objection permise

242 (1) Une personne peut soulever une objection au sujet de toute question posée lors d'un interrogatoire préalable au motif que, selon le cas :

- a) la réponse est protégée par un privilège de non-divulgation;
- b) la question ne se rapporte pas à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire ou par la partie qui l'interroge;
- c) la question est déraisonnable ou inutile;
- d) il serait trop onéreux de se renseigner auprès d'une personne visée à la règle 241.

Objection interdite

(2) À l'exception d'une personne interrogée aux termes de la règle 238, nul ne peut s'opposer à une question posée lors d'un interrogatoire préalable au motif que, selon le cas :

- a) la réponse constituerait un élément de preuve ou du oui-dire;
- b) la question constitue un contre-interrogatoire.