CT-2022-002

COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

– and –

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

BOOK OF AUTHORITIES

DEPARTMENT OF JUSTICE CANADA
COMPETITION BUREAU LEGAL SERVICES
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9

John S. Tyhurst
Derek Leschinsky
Jonathan Bitran
Kevin Hong

Tel: 613-818-1611
Fax: 819-953-9267

john.tyhurst@cb-bc.gc.ca
derek.leschinsky@cb-bc.gc.ca
jonathan.bitran@cb-bc.gc.ca
kevin.hong@cb-bc.gc.ca
Counsel to the Commissioner of Competition

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INDEX

LEGISLATION **TAB**

TAB 1

1988 CarswellNat 676
Federal Court of Canada — Appeal Division

Canada (Director of Investigation & Research) v. Air Canada

1988 CarswellNat 676, 1988 CarswellNat 743, [1988] F.C.J. No. 1049, [1989] 2 F.C. 88, [1989] C.L.D. 1121, 13 A.C.W.S. (3d) 64, 23 C.P.R. (3d) 178, 33 Admin. L.R. 229, 54 D.L.R. (4th) 741, 89 N.R. 241

AMERICAN AIRLINES INC. v. COMPETITION TRIBUNAL et al.

Iacobucci C.J., Heald and Stone JJ.

Heard: October 25, 1988
Judgment: November 10, 1988
Docket: Doc. No. A-851-88

Counsel: *Colin L. Campbell*, for appellant.
N.J. Shultz and *Janet Yale*, for Consumers' Association of Canada.
C. Marshall and *E. Rothstein*, for respondents Air Canada Ltd., 153333 Canada Ltd. partnership, Air Canada Services Inc.
Jo'Anne Strekaf, for respondents PWA Corp. Canadian Airlines International Ltd., Pacific Western Airlines Ltd., Canadian Pacific Airlines Ltd., 154793 Canada Ltd., 153333 Canada Ltd. partnership, Air Canada Services Inc.
John Rook and *Trevor Whiffen*, for Director of Investigation & Research.
No one appearing for Attorney General of Manitoba or for Wardair Canada Inc.

The judgment of the Court was delivered by *Iacobucci C.J.*:

1 This is an appeal by American Airlines Inc. ("American" or "appellant"), pursuant to s. 13(1) of the *Competition Tribunal Act*, S.C. 1986, c. 26, from the order of Strayer J. of the Competition Tribunal with respect to an application by American to intervene, pursuant to s. 9(3) of the *Competition Tribunal Act*, in a proceeding before the Competition Tribunal.

2 The proceeding in question was instituted by the application of the Director of Investigation and Research ("Director") for, amongst other things, an order under s. 64 of the *Competition Act*, R.S.C. 1970, c. C-23, as amended, and for an interim order under s. 76 of the Competition Act. [1] In effect, the Director has alleged that Air Canada and Canadian Airlines International Limited and other named parties have formed a merger of the computer reservations systems of Air Canada and Canadian Airlines International Limited which prevents or lessens, or is likely to prevent or lessen, competition substantially within the meaning of s. 64 of the *Competition Act*, in the provision of computer reservation system services to airlines, travel agents and consumers in Canada.

1 The Director's application was subsequently amended by order of the Competition Tribunal to include a prayer for relief under ss. 64(1)(e)(iii), 77 and 77(1)(b) of the Competition Act.

3 Requests to intervene in the proceeding were also filed by Wardair Canada Inc. ("Wardair"), and the Consumers' Association of Canada ("CAC"). The order of Strayer J. gave leave to intervene in the proceedings to American, Wardair and CAC and, in particular, allowed them to attend and present argument on all motions and at all pre-hearing conferences and hearings, on any matter affecting them, respectively.

4 American, supported by CAC, appeals because of the limited scope of the intervention afforded by the order of Strayer J. CAC has appealed to this Court by way of cross-appeal pursuant to s. 1203 of the Federal Court Rules. It is noteworthy that the Director supports the arguments of the appellant and other intervenors for an increased role in their intervention.

5 The appellant argues in short that Strayer J. erred in law in his interpretation of s. 9(3) of the *Competition Tribunal Act* which had the effect of preventing the intervenors from participating in examination for discovery, calling evidence, and cross-examining witnesses. [2]

2 Before Strayer J., Wardair apparently did not ask to participate in discovery but wished to call evidence and cross-examine witnesses in addition to presenting argument.

6 I am of the view that the appeal and cross-appeal should be allowed, but before setting out my reasons, I would like to refer to parts of the judgment appealed from because of the importance of the issue to proceedings under the *Competition Act* and because of the admirably comprehensive approach taken by Strayer J. in his reasoning.

7 At the outset I think it appropriate to refer to s. 9 of the *Competition Tribunal Act*, which provides as follows:

> 9. (1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.
>
> (2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.
>
> (3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal to *make representations* relevant to those proceedings in respect of any matter that affects that person.

[Emphasis added].

Judgment appealed from

8 Strayer J. interpreted "representations" in s. 9(3) to mean "arguments" and held that the section could not be taken to include the rights claimed by the intervenors, viz., participating in discovery, calling evidence and cross-examining witnesses. In this connection, he stated:

> Subsection 9(3) of the *Competition Tribunal Act* authorizes any person, with leave of the Tribunal, to 'intervene ... to make representations.'The first point to note is that the authority is given to intervene for a particular purpose only, and one therefore cannot derive any broader authority by reference to other meanings which the term 'intervene'may have in other contexts. The term 'to make representations'in normal English usage would suggest the presentation of argument; that is, persuasion rather than proof. If there is any lingering ambiguity of this term in the English version, it appears to be clarified in the French version which states the purpose of a permitted intervention as 'afin de présenter des observations'. The term 'observations' is most commonly applied to the presentation of comments or argument before a court or tribunal.

[Appeal Book, pages 14-15].

9 Strayer J. said that this interpretation of s. 9(3) was strengthened by reference to ss. 97 and 98 of the *Competition Act* which authorizes the Director to participate before federal and provincial, respectively, boards and agencies. In each of those sections the Director is authorized to "make representations to *and call evidence*" before the Board. A distinction is thus made between representations and the calling of evidence, which is supported in the French version of the two sections: "présenter des observations et des preuves" in s. 97, and "présenter des observations et soumettre des éléments de preuve" in s. 98. Because Strayer J. found the *Competition Tribunal Act* and the *Competition Act* in pari materia he stated that similar language in the two statutes should be given similar meanings. Accordingly, since in ss. 97 and 98 of the *Competition Act* "representations" do not include the presentation of evidence, so it should be in s. 9(3) of the *Competition Tribunal Act*, namely, that "making representations" should not include the calling of evidence.

10 In reaching this conclusion, Strayer J. also noted that to grant the intervenors the role they wished would be tantamount to treating them as parties, and under the *Competition Act* only the Director can apply for orders against specified persons. Thus

the only parties in proceedings under the *Competition Act* are to be the Director and the persons against whom orders are sought. He concluded that the *Competition Act* does not provide any private right of action against the parties to an anti-competitive merger since the only action contemplated is one taken by the Director.

11 Strayer J. also found that the general implied authority of a Court to permit interventions on terms it thinks fit was restricted by the limiting language of s. 9(3) of the *Competition Tribunal Act*. In addition, in looking at the context of the *Competition Act*, Strayer J. was of the view that proceedings before the Competition Tribunal were justiciable in nature which in his view reinforced a narrow interpretation of s. 9(3). In this respect, he said:

> It is quite consistent with the view that Parliament has in effect created a lis between the Director of Investigation and Research and the parties to the merger; a lis which is determined on the basis of the facts and the law for which the proper parties to the proceedings have the prime responsibility of presentation. In such a context it is not inappropriate that the potential role of intervenants be quite limited, nor can an interpretation of subsection 9(3) to this effect be considered absurd or inconsistent with the general purposes of the Act. It was open to Parliament to allow anyone potentially aggrieved by a merger to commence a proceeding before the Tribunal against the merging parties, but Parliament elected not to do so. Instead it obviously saw the commencement of such a proceeding and its direction as a matter involving an important public interest which was to be defined and pursued by the Director, a public officer, as he thinks best in the public interest. In such circumstances it is irrelevant that other persons might take a different view of when or how such proceeding should be conducted. Their assistance will no doubt be welcomed by the Director in the development of evidence supportive of the allegations he has made but it is he who has the carriage of the proceeding. It is he who, together with the respondents, has the ultimate responsibility of shaping the issues and, indeed, of settling the matter (subject to the approval of the Tribunal should a consent order be required).

[Appeal Book, pp. 22-23].

12 Strayer J. also pointed to s. 9(2) which directs the Competition Tribunal to deal with all proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit". In his view allowing intervenors to prolong proceedings through the multiplication of witnesses and cross-examination of witnesses could only lead to delaying the decisions of the Tribunal and discourage use of it. Thus a narrow interpretation of "representations" in s. 9(3) was justified. By way of final comment, Strayer J. referred to the intervention role of provincial and federal Attorneys General in constitutional cases at the appellate level and the fact that they had not been handicapped unduly in their interventions by not having been involved at the trial level in the presentation of evidence and cross-examination of witnesses. He said:

> The role of the Competition Tribunal in merger proceedings is more akin to that of a court than to that of a public inquiry and it is not absurd, illogical, or demeaning that non-parties to such proceedings have only a limited part to play. If they have evidence to provide which would be helpful to one of the authorized parties to these proceedings it is difficult to believe such party will not welcome their assistance. But if they want to raise new issues which neither party is prepared to embrace, they cannot do so because that would be inconsistent with the adversarial system which Parliament has prescribed.

[Appeal Book, p. 28].

Issue before the Court

13 With this background and review of the reasons of Strayer J., the issue before us focusses on the meaning of s. 9(3) of the *Competition Tribunal Act*. Indeed, every party appearing before this Court agrees with the observation made by Strayer J. that, were it not for s. 9(3), the Tribunal would have implied authority to permit intervenors to call evidence and cross-examine witnesses. The issue then is whether s. 9(3) restricts intervenors in the manner held by Strayer J. or whether, as contended by the appellants, s. 9(3) does not prevent the Competition Tribunal from using its discretion to decide the role that intervenors will play.

Reasons for allowing the appeal

14 A useful starting point to answer the issue before us is the principle, which is widely recognized and accepted, that Courts and tribunals are the masters of their own procedures. As a part of this principle, Courts have also been recognized as having an inherent authority or power to permit interventions basically on terms and conditions that they believe are appropriate in the circumstances. This principle was clearly articulated by this Court in the *Fishing Vessel-Owners Association [Fishing Vessel Owners' Assn. of B.C. v. Canada* (1985), 1 C.P.C. (2d) 312 at 319, 57 N.R. 376 at 381 (Fed. C.A.)] case:

> Every tribunal has the fundamental power to control its own procedure in order to ensure that justice is done. *This, however, is subject to any limitations or provisions imposed on it by the law generally, by statute or by the rules of Court*. [Emphasis added].

15 With respect to the Competition Tribunal, it is clearly stated in its statute that the Tribunal is given court-like powers and a concomitant procedural discretion to deal with matters before it: see ss. 8, 9(1), 16 of the *Competition Tribunal Act*.[3] Of particular relevance is section 8(2):

3 Section 8(1) gives the Tribunal jurisdiction to hear applications under Part VII of the Competition Act and related matters and s. 8(3) deals with contempt orders of the Tribunal. Section 9(1) stipulates that the Tribunal is a Court of record and shall have an official seal which shall be judicially noticed. Section 16 gives rule making power to the Tribunal.

> 8. (2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

16 The principle of a Court's authority and discretion over its procedure is so fundamental to the proper functioning of a Court and the interests of justice that, in my view, only clearly expressed language in a Court's constating statute or other applicable law should be employed to take away that authority and discretion. When one looks at the dictionary meaning of the operative words used in s. 9 as well as the context of the section and of the proceedings under the *Competition Act*, I do not think that the wording of s. 9(3) is clearly expressly to eliminate the Tribunal's inherent authority or discretion in the manner found by Strayer J.

17 Section 9(3) allows persons to intervene, with leave of the Competition Tribunal, "to make representations relevant to [the] proceedings in respect of any matter that affects that person". To ascertain the meaning of the words in the section one should look not only at the dictionary definition and the context but also at the nature of the matters being dealt with in the action as well as the overall objectives of the underlying legislation.

18 In the Shorter Oxford Dictionary, "representation" is stated to mean, among other things, the following, which I find applicable to s. 9(3):

> ... a formal and serious statement of *facts, reasons* or *arguments* made with a view to effecting some change, preventing some action, etc ...

[Emphasis added].

19 Strayer J. chose to restrict representations to mean only "argument" in the sense of persuasion and not proof. Under Strayer J.'s reasoning, the *facts* or *reasons* relied on by intervenors to support their arguments would be provided by the Director (or possibly by the party against whom the Director was seeking an order).

20 But it is important to note that s. 9(3) allows persons to intervene to make representations relevant to those proceedings in respect of any matter that *affects* that person. It is expressly recognized that orders of the Tribunal could be made that would affect the intervenors, such as in the case at Bar. If the intervenors can make a statement of facts, reasons or argument on matters that affect them, the question arises whether they should be allowed, at the discretion of the Court in accordance with the general principle discussed above, to call evidence to support the *facts* which would show the manner in which the intervenor was

affected by the proceeding. Similarly, one can question why the intervenors cannot ensure that *their argument or reasons* are supported by facts that *they* have had the chance to prove in evidence.

21 It seems to me that it is not a satisfactory answer to say that the Director must be relied on to establish the facts (or reasons) for the intervenors because only the Director is a party, or only the Director and the persons against whom an order is sought are the parties or have a lis between them, or that the Director must have carriage of the proceedings under the *Competition Act*.

22 I fail to see how allowing intervenors to have an effective and meaningful intervention to ensure they are able to show how they could be affected by an order, all subject to the discretion and supervision of the Tribunal, cannot be reconciled with the adversarial or justiciable nature of proceedings before the Tribunal. Moreover such a role for intervenors will not necessarily displace the status of the parties before the Tribunal, the carriage of the matter by the Director, or the lis nature of the proceedings. I am confident that the presiding members of the Competition Tribunal can deal with the matters to give respect to those concerns if or as needed.

23 My conclusion on this meaning of "representations" for the purpose of s. 9(3) of the *Competition Tribunal Act* is strengthened when one looks to the wider context and nature of the proceedings under the *Competition Act*.

24 The purpose of the *Competition Act* as shown in s. 1.1 thereof is extremely broad:

> 1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumer with competitive prices and product choices.

25 It is evident from the purpose clause that the effects of anti-competitive behaviour, such as a merger that has the result of substantially lessening competition, can be widespread and of great interest to many persons. In these matters, Parliament has provided for the Director to serve as the guardian of the competition ethic and the initiator of Tribunal proceedings under Pt. VII of the *Competition Act*; but Parliament has also provided a means to ensure that those who may be affected can participate in the proceedings in order to inform the Tribunal of the ways in which matters complained of impact on them. I would ascribe to Parliament the intention to permit those intervenors not only to participate but also to do so effectively. A restrictive interpretation of s. 9(3) could in some cases run counter to the effective handling of disputes coming before the Tribunal.

26 At issue in the case before us is, among other things, an order for dissolution, pursuant to s. 64 of the *Competition Act*, of the merger of computer reservation systems in the airline business. Section 65 lists various factors that the Tribunal may consider in deciding whether to issue such an order. These factors are fairly broad and it would seem reasonable to assume that persons attaining intervenor status under s. 9(3) could be well-positioned to provide insights concerning them through argument and reasons based on facts. Moreover they arguably could more effectively and efficiently prove these facts if they have the ability to lead evidence or cross-examine witnesses depending on the issue involved and the circumstances of the particular case.

27 It seems to me that permitting intervenors to play a role wider than simply presenting argument is also a fairer way of treating them. Although the Director is supporting the wider interpretation before us, it is not difficult to envision future situations where the Director and an intervenor might disagree on some matter of fact or evidence of which the Tribunal should be apprised. It is therefore not only logical to give the Tribunal the jurisdiction to decide the issue rather than simply leaving it to the Director to decide in each case, but it is also fair.

28 Fairness is a relevant consideration because s. 9(2) of the *Competition Tribunal Act* expressly requires that the proceedings before the Tribunal be dealt with as informally and as expeditiously as the circumstances and *fairness* allow. This point of fairness also answers the concern raised by Strayer J. that a wider role for intervenors will prolong and complicate proceedings before and thereby delay decisions of the Tribunal. But, if a wider role for intervenors does not lead to longer or more complex proceedings before the Tribunal, surely that is a necessary price to pay in the interests of fairness, which is expressly required under s. 9(2).

29 Finally, I refer to the view of Strayer J. that his conclusion for a narrow interpretation was strengthened when one looked to the wording of ss. 97 and 98 of the *Competition Act*. Those sections, which were found by Strayer J. to be in a statute in pari materia with the *Competition Tribunal Act*, distinguished between making representations and calling evidence; he concluded the same distinction should be made in interpreting s. 9(3) of the *Competition Tribunal Act*.

30 I do not dispute his finding the statutes in pari materia; however, I do not accept that the choice of words in ss. 97 and 98 of the *Competition Act* dictates their meaning in s. 9(3) of the *Competition Tribunal Act*. There are several other sections in both statutes which use the words "representations" or "make representations". Sections 60 and 73 of the *Competition Act* allow interventions by the Attorneys General of provinces "for the purpose of making representations" on behalf of provinces; ss. 22(2) and (3) of the *Competition Act* allows interested persons "to make representations" with respect to proposed regulations relating to certain applications, orders and proceedings; and s. 17 of the *Competition Tribunal Act* which invites interested persons "to make representations ... in writing" with respect to any rules that the Competition Tribunal may make. I do not think that in each section of the two statutes the use of "representation" must necessarily be given the same meaning, especially where the context and purpose of a particular section may dictate otherwise. Sections 97 and 98 of the Competition Act deal with endowing the Director with the authority to appear before federal and provincial agencies or boards which raises different considerations from those raised by s. 9(3) of the *Competition Tribunal Act*. It may be, although I refrain from any formal holding on the matter, that Parliament, out of an abundance of caution, has added the "calling of evidence" in ss. 97 and 98 to ensure that making representations is not interpreted narrowly by the federal or provincial boards and agencies before which the Director is appearing. In any event, I believe the main task of a Court is in each case to ascertain the meaning of a specific section by looking to its wording and context. The fact that Parliament has chosen a formulation of words in another section of a related statute which appears to convey a particular meaning should not of itself displace convincing reasons why the same interpretation should not apply to the section in issue before the Court. The point made about ss. 97 and 98 is, after all, a rule of interpretation that can be rebutted, and in this case has been, by more persuasive arguments.

31 In light of my reasons for allowing the appeal, I do not find it necessary to deal with other arguments of the appellant relating to the judgment of Strayer J. amounting to a denial of natural justice or as being contrary to the Canadian Bill of Rights.

Conclusion

32 Mindful of the ordinary dictionary meaning of "representations" as discussed above, and of the recognition in s. 9(3) itself of intervenors as persons who are affected by competition proceedings, and of the overall purpose and context of the *Competition Act* and proceedings thereunder, I conclude that the meaning of "representations" in s. 9(3) of the *Competition Tribunal Act* is not as restrictive as decided by Strayer J. I would therefore allow the appeal and the cross-appeal, set aside the decision of Strayer J., and refer the matter back to the Tribunal on the following bases:

33 (a) that the Tribunal is not precluded, in exercising its inherent discretion from allowing intervenors to fully participate in the proceedings before it, including, if it so determines, the right to discovery, the calling of evidence and the cross-examination of witnesses; and

34 (b) that the specific role of the intervenors in this proceeding should be left to the Tribunal to decide, in the circumstances of this case, but in accordance with fairness and fundamental justice and subject to the requirements of s. 9(3) that the intervenors' representations must be relevant to this proceeding in respect of any matter affecting those intervenors.

35 The only matter remaining to be considered is the question of costs. Neither the appellant nor any of those supporting it asked for costs either in their memoranda or orally at the hearing of the appeal. On the other hand, counsel for the respondents appearing on the appeal asked, in their memorandum, that the appeal be dismissed with costs. They did not, however, make any oral argument with respect to costs. The position then of the Court is that no argument, written or oral, has been addressed to it in this regard. However, I am of the view that the question of costs should be dealt with.

36 Section 13(1) of the *Competition Tribunal Act* provides that any decision or order of the Tribunal may be appealed to this Court "as if it were a judgment of the Federal Court — Trial Division". Accordingly, it would seem that costs should be disposed

of in an appeal from the Tribunal on a basis similar to that employed in appeals from the Trial Division. Under new r. 344, which came into effect on April 2, 1987, it seems clear that an award of costs is in the complete discretion of the Court. Subsection (3) of r. 344 sets out a number of matters that the Court is entitled to consider when awarding costs. One of the matters enumerated is the result of the proceeding. Since the appellant and those supporting it have been successful in this appeal, I consider this to be a cogent reason, in the circumstances of this case, for awarding costs. A perusal of the various other matters enumerated in subs. (3), when they are related to the circumstances of this appeal, do not persuade me otherwise.

37 I should add that, were it not for the provisions of s. 13(1) of the *Competition Tribunal Act*, the Court's discretion under R. 344(1) would have been displaced by the provisions of R. 1312, which is the general rule applicable to appeals from tribunals other than the Trial Division. That rule provides:

> No costs shall be payable by any party to an appeal under this Division to another unless the Court, in its discretion, for special reasons, so orders.

38 If that rule were otherwise to apply here, I would have had no hesitation in concluding that costs should not be awarded unless special reasons to the contrary had been established on the record. However, in view of the words used in s. 13, supra, I think r. 344(1) and not r. 1312 applies to this appeal and because, if this were an appeal from the Trial Division, I would award costs for the reasons expressed earlier herein, I would allow this appeal and the cross-appeal with costs, if asked for.

Appeal and cross-appeal allowed; matter referred back to the Competition Tribunal to be dealt with on the basis that the Tribunal possessed a discretion to permit participation to the extent requested.

TAB 2

2010 CAF 142, 2010 FCA 142
Federal Court of Appeal

Eurocopter c. Bell Helicopter Textron Canada Ltée

2010 CarswellNat 1596, 2010 CarswellNat 3720, 2010 CAF 142, 2010 FCA 142, [2010] F.C.J. No. 740, 194 A.C.W.S. (3d) 76, 407 N.R. 180

Bell Helicopter Textron Canada Limited, Appellant and Eurocopter (Simplified Joint Stock Company), Respondent

Gilles Létourneau J.A., J.D. Denis Pelletier J.A., Pierre Blais C.J.

Heard: May 17, 2010
Judgment: June 8, 2010
Docket: A-466-09, A-467-09

Proceedings: Reversed (in part), 2009 CarswellNat 3664, 2009 CF 1141 (F.C.); Affirmed, 2009 CF 1142, 2009 CarswellNat 3665 (F.C.)

Counsel: Louis Gratton, Julie Jairon, for Appellant
Marek Nitoslawski, Chloé Latulippe, for Respondent

***Pierre Blais C.J.*:**

Introduction

1 These are two appeals of orders by Madam Justice Tremblay-Lamer (the judge), on November 9, 2009 (2009 FC 1141 and 2009 FC 1142), in which she allowed in part the respondent's appeals of two orders by Prothonotary Morneau (the prothonotary), dated August 8 and October 8, 2009 (2009 CF 836 (F.C.) and 2009 CF 1021 (F.C.)), respectively. The prothonotary allowed the appellant's objections to certain questions asked during the examination for discovery of its representative.

Relevant Facts

2 This appeal is made in the context of a dispute concerning a helicopter skid landing gear assembly for which Eurocopter holds patent 2,207,787 (Patent 787).

3 According to Eurocopter, this landing gear assembly boasts numerous improvements which make it lighter and eliminate certain mechanisms related to the ground resonance phenomenon.

4 On May 9, 2008, Eurocopter commenced an action for infringement of its Patent 787 against Bell Helicopter Textron Canada Limited (hereafter Bell Helicopter or the appellant).

5 In its statement of claim in support of its action, Eurocopter contended, among other things, that Bell Helicopter had committed patent infringement by installing a landing gear assembly identical to the one protected by Eurocopter's patent on a helicopter that Bell Helicopter manufactures and sells in Canada, the Bell 429.

6 It was therefore in the course of proceedings related to that action for infringement that a representative of Bell Helicopter was examined twice, on June 10, 11 and 12 and August 25, 2009, respectively. During the examinations, the appellant objected to the questions asked, which led to the subsequent decisions made by the prothonotary and the judge.

Analysis

7 In his order dated August 18, 2009, the prothonotary set forth the general principles he relied on to reach his conclusions. He relied on those same principles in his subsequent order dated October 8, 2009.

8 Since the prothonotary grounded his reasoning in the principles regarding the relevance of questions set out by Justice McNair in *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* (1988), 24 C.P.R. (3d) 66 (Fed. T.D.) (*Reading & Bates*), it is important to note that Justice McNair first took care, at paragraph 8 of his decision, to clarify the purpose of examinations for discovery, as follows:

> 8 The purpose of discovery, whether oral or by production of documents, is to obtain admissions to facilitate proof of all the matters which are relevant and properly in issue between the parties. The prevailing trend today favours broadening the avenues of fair and full disclosure to enable the party to advance his own case or to damage the case of his adversary. Discovery can serve to bring the issues more clearly into focus, thus avoiding unnecessary proof and additional costs at trial. Discovery can also provide a very useful tool for purposes of cross-examination.

9 At paragraph 8 of the first order, the prothonotary reproduced the six principles set out by Justice McNair regarding the relevance of questions.

10 For the purposes of this decision, principles 1, 2 and 3, excerpted from paragraph 11 of *Reading & Bates*, are particularly appropriate:

> 1. The test as to what documents are required to produce is simply relevance. The test of relevance is not a matter for the exercise of the discretion. What documents parties are entitled to is a matter of law, not a matter of discretion. The principle for determining what document properly relates to the matters in issue is that it must be one which might reasonably be supposed to contain information which may directly or indirectly enable the party requiring production to advance his own case or to damage the case of his adversary, or which might fairly lead him to a train of inquiry that could have either of these consequences: *Trigg v. MI Movers International* (1987), 13 C.P.C. (2d) 150 (Ont. H.C.); *Canex Placer Ltd. v. A.-G. B.C.* (1976) 63 D.L.R. (3d) 282 (B.C.S.C.); and *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.).
>
> 2. On an examination for discovery prior to the commencement of a reference that has been directed, the party being examined need only answer questions directed to the actual issues raised by the reference. Conversely, questions relating to information which has already been produced and questions which are too general or ask for an opinion or are outside the scope of the reference need not be answered by a witness: *Algonquin Mercantile Corp. v. Dart Industries Canada Ltd.* (1984), 82 C.P.R. (2d) 36 (F.C.T.D.), aff'd (1984), 1 C.P.R. (3d) 242 (F.C.T.D.).
>
> 3. The propriety of any question on discovery must be determined on the basis of its relevance to the facts pleaded in the statement of claim as constituting the cause of action rather than on its relevance to facts which the plaintiff proposes to prove to establish the facts constituting the cause of action....

11 Quoting from *Faulding (Canada) Inc. v. Pharmacia S.p.A.* (1999), 3 C.P.R. (4th) 126 (Fed. C.A.) and Rule 242 of the *Federal Courts Rules* on objections to questions in an examination for discovery, the prothonotary reiterated the need to maintain a balance between the broadest possible examinations for discovery and the fishing expeditions some parties engage in, particularly in the field of intellectual property, which the Court should not encourage.

12 In addition, the prothonotary relied on *Philips Export B.V. v. Windmere Consumer Products Inc.* (1986), 8 C.P.R. (3d) 505 (Fed. T.D.) to state that [TRANSLATION] "a party cannot be required in an examination for discovery to answer a question that forces the party to express ... an expert opinion, its interpretation of a patent or its beliefs". (Prothonotary's Order, 2009 CF 836 (F.C.), paragraph 13)

13 Although 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.

14 Moreover, I believe it is useful to note the remarks of Justice Hugessen in *Montana Band v. R.*, [2000] 1 F.C. 267 (Fed. T.D.) at paragraph 5:

> [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.

15 In my opinion, the very purpose of examinations for discovery weights in favour of broad flexibility in examination and the production of documents.

16 It is therefore in light of the above that we must consider the prothonotary's orders regarding the questions that are the subject of this appeal and the merits of the judge's subsequent intervention.

17 As mentioned above, the nature of the prothonotary's decisions in those files is not in issue. They are interlocutory, discretionary decisions. Consequently, the judge had to restrict her intervention to the standard set forth in *R. v. Aqua-Gem Investments Ltd.*, 1993 CanLII 2939, [1993] 2 F.C. 425 (Fed. C.A.), and reformulated in *Merck & Co. v. Apotex Inc.*, 2003 CAF 488 (F.C.A.) (*Merck & Co. v. Apotex Inc.*).

18 Therefore, in this case, the judge ought not to disturb the orders unless "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". (according to *Merck & Co. v. Apotex Inc.*)

19 In my opinion, in the circumstances, the judge's intervention was partly warranted.

20 Regarding questions 5 to 10 and 12 to 14 in file A-466-09, the prothonotary deemed them to be questions that forced the witness to [TRANSLATION] "express an opinion, be it an expert opinion, [his] interpretation of a patent or [his] beliefs". (Prothonotary's Order, 2009 FC 836, paragraph 13)

21 The prothonotary agreed with Bell's contentions that the terms used in the questions asked elicited an interpretation of the claims of Patent 787 and required expert evidence.

22 In fact, the questions asked, although dealt out piecemeal, referred specifically and generally to the terms and phrases found in the patent and particularly in its description at page 15.

23 In my opinion, the interpretation and the scope of the patent are questions for the trial judge to decide, who could benefit from expert opinions at that time. Those questions are clearly the domain of experts, and the prothonotary was correct to sustain the objections made.

24 The judge made an error of law in overturning the prothonotary's decision. This Court must therefore intervene and restore his decision.

25 Regarding questions 17, 18 and 19 in file A-466-09, I believe that the judge's intervention was warranted. The purpose of those questions was to verify whether, in using the landing gear configuration claimed in Patent 787, Bell Helicopter had been able to remove the dampers and shock absorbers, two mechanisms designed to eliminate the ground resonance phenomenon. The judge considered those questions to be relevant and, in so doing, was not clearly wrong in setting aside the prothonotary's decision.

26 With regard to the other questions in issue, that is, questions 24 and 25 in file A-466-09 and questions 22, 24, 25 to 27, 28, 61, 64 to 66 and 76 in file A-467-09, all of those questions relate to documentation and belong to two broad categories: the documents provided to Transport Canada and the internal documents related to development and tests carried out on Bell Helicopter's landing gear assemblies.

27 In general, the prothonotary agreed with Bell Helicopter's position on the irrelevance of those questions and the documents that related to them. In particular, he took Bell Helicopter's submissions at face value, that is, primarily that the information was not relevant to the issue of infringement, that the respondent was engaging in a fishing expedition by asking those questions and that the documents sent to Transport Canada could not contain relevant information.

28 In setting aside the prothonotary's decision on those questions, with the exception of question 61, the judge found that [TRANSLATION] "the test information and the correspondence between Bell and Transport Canada are relevant ... to show that the new landing gear of the Bell 429 'would perform substantially the same function in substantially the same way to obtain substantially the same result' as that described by patent '787". (Decision 2009 CF 1141 (F.C.), paragraph 10)

29 Furthermore, she found that the documents related to the development of the landing gear assembly within Bell Helicopter's research program were also relevant because that program had led to the development of the Bell 429. (Decision 2009 CF 1141 (F.C.), paragraphs 46-47)

30 She dismissed Bell Helicopter's argument that the relevance of the documents should be appreciated in relation to the date of publication of the patent, in accordance with the Supreme Court of Canada's decision in *Free World Trust c. Électro Santé Inc.*, [2000] 2 S.C.R. 1024, 194 D.L.R. (4th) 232 (S.C.C.).

31 According to the judge, [TRANSLATION] "although it is necessary to establish that the similarity would have been obvious on the date of publication of the patent, the fact remains that the applicant must, before reaching that step, establish that this similarity does exist". (Decision 2009 CF 1141 (F.C.), paragraph 10)

32 She therefore found that the prothonotary's decision regarding those questions was incorrect and that she had to intervene.

33 Like the judge, I am of the opinion that the questions and documents would directly or indirectly enable the respondent to advance its own case or to damage the case of its adversary. At a hearing, where all of the exhibits, witnesses and relevant documents will have been considered and taken into account, it will be up to the trial judge to establish the degree of relevance that should be applied to the documents that are the subject of this decision.

Conclusion

34 To conclude, I would allow the appeal in part with regard to questions 5 to 10 and 12 to 14 in file A-466-09 in the appellant's favour, set aside the judge's decision on those questions and restore, in their regard, the order made by Prothonotary Morneau. I would dismiss the appeal as to the remainder, and order costs in the cause.

35 With regard to file A-467-09, I would dismiss the appeal with costs.

***Gilles Létourneau J.A.*:**

I agree.

***J.D. Denis Pelletier J.A.*:**

I agree.

Appeal allowed in part.

TAB 3

2013 Comp. Trib. 16
Competition Tribunal

Commissioner of Competition v. Direct Energy Marketing Limited

2013 CarswellNat 6037, 2013 Comp. Trib. 16

In the Matter of the Competition Act, R.S.C. 1985, c. C-34, as amended

In the Matter of an application by the Commissioner of Competition pursuant to section 79 of the Competition Act

In the Matter of certain policies and procedures of Direct Energy Marketing Limited

The Commissioner of Competition, (applicant) and Direct Energy Marketing Limited, (respondent) and National Energy Corporation, (applicant for leave to intervene)

Donald J. Rennie J.

Heard: October 17, 2013
Judgment: November 6, 2013
Docket: CT-2012-003

Counsel: Jonathan Hood, for Applicant, Commissioner of Competition
Donald B. Houston, Helen Burnett, Justin H. Nasseri, for Respondent, Direct Energy Marketing Limited
Adam Fanaki, Derek D. Ricci, for Applicant, for leave to intervene, National Energy Corporation

***Donald J. Rennie J.*:**

I. Introduction

1 National Energy Corporation ("National"), a supplier of natural gas and electric water heaters for rental to Quebec and Ontario homeowners, seeks leave to intervene in these proceedings brought by the Commissioner of Competition (the "Commissioner") pursuant to the abuse of dominance provision (s. 79) of the *Competition Act*, R.S.C. 1985, c. C-34. The Respondent, Direct Energy Marketing Limited ("Direct Energy"), opposes National's request. In the alternative, it contends that the scope of National's intervention ought to be restricted.

II. Analysis

A. The Request for Leave to Intervene

2 National's request for leave to intervene is brought pursuant to subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd suppl.), which provides that any person may, with leave of the Tribunal, intervene in a proceeding to make representations that are relevant to the proceeding in respect of any matter that affects that person.

3 In order to be granted intervener status, the person seeking leave to intervene must meet the following requirements:

(a) The matter alleged to affect the person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate (*Canada (Director of Investigation & Research) v. Air Canada* (1992), 46 C.P.R. (3d) 184 (Competition Trib.), at 187);

(b) The person seeking leave to intervene must be directly affected. The word "affects" has been interpreted in *Air Canada*, *ibid.*, to mean "directly affects";

> (c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (*Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1995), 61 C.P.R. (3d) 528 (Competition Trib.);
>
> (d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (*Washington v. Canada (Director of Investigation & Research)*, [1998] C.C.T.D. No. 4 (Competition Trib.)).
>
> (*Commissioner of Competition v. Visa Canada Corp.*, 2011 Comp. Trib. 2 (Competition Trib.); *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2000 Comp. Trib. 9 (Competition Trib.))

4 Direct Energy conceded at the hearing of National's motion that National is directly affected by the proceeding, but submitted that National would not bring a unique or distinct perspective that would assist the Tribunal in deciding the issues before it. National, relying in particular on the affidavit of Mr. Gord Potter, National's Chief Operating Officer, submitted that it does have such a perspective.

5 Mr. Potter explained in his affidavit that National is a supplier of home services, including the rental of energy efficient water heaters and the supply of HVAC equipment to existing and new homeowners in Ontario and Quebec. He adds that National is one of the largest competitors to Direct Energy for the supply of water heater rental services in the relevant market, but that its attempts to effectively compete and expand in the market have been constrained by the conduct of Direct Energy. It is not contested that National has filed a complaint with the Competition Bureau which led the Bureau to investigate Direct Energy's conduct.

6 Direct Energy submits that the Tribunal should not grant National leave to intervene because National's evidence can be adduced through the Commissioner, making the participation of National unnecessary. As a result, National will not bring a unique or distinct perspective to the Commissioner's proceedings.

7 The parties' dispute has its root in their divergent interpretations of requirement (d) of the above test. Direct Energy submits that this element requires National to establish that it has something "to add as an intervener which cannot be adduced by the Commissioner by calling a representative of National as a witness." National opposes this view and submits that the case law does not support such a restrictive interpretation and that Direct Energy confuses the requirement of a unique or distinct perspective with the adoption of a different legal position.

8 Neither subsection 9(3) of the *Competition Tribunal Act* nor the case law provide that intervener status can only be granted to persons who have established that their evidence and argument cannot be presented by the party whose legal position they support. Direct Energy casts the test too highly when it submits that National must establish that its proposed evidence cannot be adduced by the Commissioner. To accede to the argument would set such a high bar that it is doubtful that it could ever be met and would preclude, in all likelihood, any person, who has filed a complaint with the Bureau, from ever playing the role of an intervener in a Tribunal proceeding.

9 No Competition Tribunal decision has held that such a requirement is necessary and it can certainly not be extrapolated from the Tribunal's decision in *Southam Inc. v. Canada (Director of Investigation & Research)* (1997), 78 C.P.R. (3d) 315 (Competition Trib.), in which the Tribunal held that interveners, by bringing their own and distinct perspective, "...supplement the case of a party...". The Tribunal has often granted complainants or competitors leave to intervene in a proceeding brought by the Commissioner.

10 Direct Energy's interpretation would also run counter to the principles set out by the Federal Court of Appeal in *Canada (Director of Investigation & Research) v. Air Canada* (1988), [1989] 2 F.C. 88 (Fed. C.A.) [hereinafter American Airlines] (aff'd, [1989] 1 S.C.R. 236 (S.C.C.)):

In these matters, Parliament has provided for the Director to serve as the guardian of the competition ethic and the initiator of Tribunal proceedings under Part VII of the *Competition Act*; but Parliament has also provided a means to ensure that those who may be affected can participate in the proceeding in order to inform the Tribunal of the ways in which matters complained of impact on them. I would ascribe to Parliament the intention to permit those interveners not only to participate but also to do so effectively. A restrictive interpretation of section 9(3) could in some cases run counter to the effective handling of disputes coming before the Tribunal.

[emphasis added]

11 The Federal Court of Appeal also held, at page 99, that subsection 9(3) should be examined in light of subsection 9(2):

Fairness is a relevant consideration because subsection 9(2) of the *Competition Tribunal Act* expressly requires that proceedings before the Tribunal be dealt with as informally and as expeditiously as the circumstances and fairness allow.

12 In this case, the affidavit of Mr. Potter contains detailed evidence explaining why National brings a unique or distinct perspective. I accept that National has special knowledge and expertise that may assist the Tribunal and that, although it supports the Commissioner's position generally, its business interests are different from the Commissioner's public interest mandate (*Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1995), 61 C.P.R. (3d) 528 (Competition Trib.)).

13 Direct Energy's submission that National seeks to use the Tribunal as a forum to advance its private litigation agenda against Direct Energy should be dismissed. Direct Energy has not established that National is seeking to intervene for improper purposes and the Tribunal notes that certain safeguards exist to address Direct Energy's concerns (see e.g. Rule 62 of the *Competition Tribunal Rules*, SOR/2008-141) and additional safeguards can be put in place if so necessary. At best, the assertion is premature and remains hypothetical.

14 Subsection 9(3) provides that the intervener may only make representations that are relevant to the proceedings and this means that the representations must be relevant to the proceeding as defined by the pleadings (see *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1995), 61 C.P.R. (3d) 528 (Competition Trib.)). Direct Energy's submission that National seeks to broaden the issues raised in the Commissioner's application shall be dealt with below when examining the topics on which National seeks leave to intervene.

15 In the circumstances, National has established that this is a proper case in which leave to intervene should be granted.

B. The Scope of Intervention

16 Both the Commissioner and Direct Energy oppose some of the terms of National's proposed scope of intervention.

17 It should be noted that National's motion for leave to intervene was heard on the same day that the Tribunal heard National's motion for leave to intervene in the proceeding brought by the Commissioner against Reliance Comfort Limited Partnership ("Reliance") (CT-2012-002). The two proceedings, which were filed on the same day, are similar and National's proposed topics and terms of participation are identical in both proceedings. The Commissioner's position with respect to National's request is identical in both proceedings as well. While Reliance did not oppose National's intervention, it did oppose some of the terms of National's proposed scope of intervention.

18 In the circumstances, it is reasonable for the Tribunal to examine Reliance's objections together with those formulated by Direct Energy.

19 At the hearing of the motions, counsel for National provided the Tribunal with a table setting out the topics on which it sought leave to intervene and the parties' respective positions with respect to each topic.

	Proposed Topic	*Commissioner*	*Reliance*	*Direct Energy*
A	The development of the Ontario rental water heater industry as it relates to National.	Consent	Consent	Oppose
B	The issue of Reliance's/Direct Energy's anti-competitive acts as they relate to National, including the impact of Reliance's/ Direct Energy's exclusionary water heater return policies and procedures and other anti-competitive conduct as alleged in the Commissioner's Application, on the ability of National to effectively compete and expand in the Relevant Market.	Consent	Modify	Consent
C	The impact of Reliance's/Direct Energy's anti-competitive acts on customers or proposed customers of National.	Consent	Modify	Oppose
D	National's interactions with Reliance/Direct Energy with respect to the matters at issue in the proceeding, including dealings with Reliance/Direct Energy regarding the water heater removal and return process.	Consent	Consent	Consent
E	National's perspective as a participant in the industry on the appropriate definition of the product and geographic markets.	Modify	Oppose	Oppose
F	The issue of Reliance's/Direct Energy's dominant position as it affects competition in the Relevant Market generally.	Modify	Oppose	Oppose
G	The issue of the substantial lessening or prevention of competition as it relates to National and competition in the Relevant Market generally.	Modify	Oppose	Oppose
H	Barriers to entry and ease of entry into the Relevant Market, based on National's experience, including whether Reliance's/Direct Energy's conduct creates artificial barriers to entry and expansion for National or raises National's costs.	Consent	Modify	Oppose
I	The statements made and conclusions drawn by Reliance/Direct Energy concerning National in the Response of Reliance/Direct Energy filed in this proceeding.	Modify	Consent	Consent
J	The impact of the Commissioner's proposed remedies on National and on competition in the Relevant Market.	Modify	Modify	Modify

20 With respect to Topic A, I find that it is relevant and that National, given the formulation of the topic, will bring its own distinct or unique perspective. In the circumstances, National shall be allowed to intervene on this topic.

21 Direct Energy does not oppose Topic B whereas Reliance seeks to modify it so as to confine it explicitly to the "impact" on National and to the alleged anti-competitive acts as set out in the Commissioner's application. Given the explicit acknowledgement made by counsel for National at the hearing that the "...anti-competitive conduct, which should be the focus of our intervention, must be the anti-competitive conduct which is at issue in the proceeding and as specifically pled by the Commissioner", the wording of Topic B is acceptable. It cannot be interpreted at a later stage to have broadened the Commissioner's allegations as set out in his pleadings. It is not necessary to replace the word "issue" with the word "impact", as was suggested by Reliance.

22 Direct Energy opposes Topic C and while Reliance, in its written submissions, opposed Topic C, it indicated at the hearing that Topic C would be unnecessary as Topic B already allows National to adduce direct evidence regarding customers. Direct Energy submitted that National seeks to speak on behalf of consumers under this Topic and that it cannot do so.

23 At the hearing, counsel for National indicated that it has no intention to speak for or on behalf of all consumers, generally. Rather, under this proposed topic, National seeks to describe its direct knowledge of how Direct Energy's alleged conduct impacts customers or its efforts to attract potential customers, including National's ability to induce customers to switch suppliers. Given these clarifications made by counsel, this Topic is acceptable and appropriate.

24 With respect to Topic E, Reliance and Direct Energy submit that National seeks to redefine the issues of product market and geographic market in a manner that is different from that defined by the Commissioner in his pleadings. National, as a market participant, brings its own perspective on the relevant product and geographic markets, based on its experience. It is very possible that its perspective and that of the Commissioner, while they may overlap, may not be identical.

25 Direct Energy and Reliance object to National having any view on product or geographic market. They base their objection on fairness, and say that they know the case they have to meet, and that is the case as defined by the Commissioner. I agree. The case is defined by the Commissioner and it cannot be re-cast by an intervener. That said, an intervener may have pertinent information and a useful perspective about these issues as framed by the Commissioner. To exclude the intervener from having a role in respect of the nuances and precise contours of these two issues as framed by the Commissioner would render the right of intervention illusionary. National can give its perspective as a participant in the industry on the definition of the product and geographic markets as framed by the Commissioner.

26 Reliance and Direct Energy oppose Topics F and G and note that National does not bring a unique or distinct perspective when it wishes to speak as to competition in the relevant market generally. They note that these Topics strike at the heart of the alleged restrictive trade practice and that it is for the Commissioner to establish the constituent elements of the practice. Counsel for Reliance indicated at the hearing that Reliance would not object to these Topics if they had been limited to the impact on National. The Commissioner also submits that the Topics should be limited to National.

27 In the circumstances, I find that these are proper topics with respect to which National brings its own distinct perspective, given its experience in the market place. Any evidence to be presented by National in this regard should be limited to that of National alone.

28 Direct Energy opposes National's proposed Topic H and Reliance proposes alternative wording. Whereas Reliance's initial concerns have now been addressed, I see no reason to prevent National from making representations with respect to this Topic given the express reference and limitation to National's experience. National brings a unique or distinct perspective in this regard.

29 Direct Energy and Reliance do not oppose Topic I, but the Commissioner has asked that the Topic be explicitly restricted to National's "conduct" in the responses filed. The addition of the limitation does add useful precision and will therefore be added.

30 With respect to Topic J, Reliance, Direct Energy and the Commissioner seek to remove the reference to "on competition in the Relevant Market". The Tribunal, in previous decisions, has allowed interveners to provide a view of the impact of the proposed remedy (see, e.g., *Commissioner of Competition v. Visa Canada Corp.*, 2011 Comp. Trib. 2 (Competition Trib.), where the Tribunal allowed a bank to make representations regarding the impact of the proposed remedy on the payments system). National does bring a unique or distinct perspective on the impact of the proposed remedies on competition in the market in which it participates.

C. Terms of Participation and Costs

31 National seeks to intervene on the following terms:

A	To review any discovery transcripts and access any documents of the Parties produced on discovery (subject to any Confidentiality Order issued by the Tribunal), but not participate directly in the discovery process.
B	To produce an affidavit of relevant documents and to make a representative of National available for examination for discovery on the topics for which National has been granted leave to intervene.
C	To adduce non-repetitive *viva voce* evidence at the hearing of the Commissioner's Application relating to the topics for which National has been granted leave to intervene.
D	To conduct non-repetitive examinations and cross-examination of witnesses on the topics for which National has been granted leave to intervene.
E	To file expert evidence relating to the topics for which National has been granted leave to intervene within the procedures set out in the *Competition Tribunal Rules*.
F	To attend and make representations at any pre-hearing motions, case conferences or scheduling conferences.

G To make written and oral argument relating to the topics for which National has been granted leave to intervene, including submissions on any proposed remedy.

32 At the hearing, counsel for the Commissioner agreed with the above proposed terms. Both Reliance and Direct Energy object to the wording of some or all of these terms.

33 With respect to the first Term, Direct Energy has stated in its written submissions as follows:

> National should not be permitted to inspect any documents produced by the parties or review discovery transcripts or any exhibits thereto, except in accordance with a confidentiality Order made by the Tribunal that restricts disclosure of such documents and transcripts to: (i) the topics on which National has been permitted to intervene; and (ii) external counsel for National, after having signed an appropriately worded confidentiality agreement, insofar as the information to be disclosed has been determined by the producing party to be competitively sensitive and/or proprietary;

34 I agree that the review of the transcripts and documents should be limited to the topics on which National has been granted leave to intervene. National has not established why a review of all the discovery transcripts and access to all documents are necessary for the purposes of its intervention. If practical difficulties arise, the parties can work together to address those difficulties, failing which the matter can be addressed at a case management conference.

35 Contrary to the submissions made by Direct Energy and Reliance, it is not necessary to include in Term B a reference to all correspondence between National and the Commissioner. Any dispute between the parties with respect to relevance and privilege can be dealt with at a later stage in accordance with the normal Tribunal procedure and Rules 60 and 61 of the *Competition Tribunal Rules*.

36 In the circumstances, it is also appropriate to limit the duration of the examination of discovery of National's representative to three hours. It is not necessary to specify that the questions asked be non-repetitive. The Tribunal proceeds on the assumption that all counsel know, and will abide existing rules of practice.

37 With respect to Term C, Direct Energy asks that National only be permitted to deliver the relevant, non-repetitive evidence of one witness. It is premature to arbitrarily limit the number of lay witnesses. However, the Tribunal reserves the right, as part of a future case management proceeding, to limit the number of witnesses to be called by National.

38 The Tribunal finds that Term D is a proper term and dismisses Direct Energy's submissions that National should not be permitted to cross-examine witnesses at the hearing of the main application. Interveners may have the right to cross-examine witnesses at the hearing and Direct Energy has not provided any convincing reason why National should be precluding from exercising this right (see, e.g., *American Airlines*).

39 Direct Energy further submits that National should not be allowed to lead expert evidence on the basis that the opinion of the expert would not reflect the unique or distinct perspective of National. Reliance submits that National's expert reports should be confined to National's unique perspective (e.g. functional substitutes that may be available to gas or electric water heaters). Counsel for both parties expressed the view at the hearing that it would be improper for National to lead expert evidence with respect to more general topics such as the relevant markets and the effect of the alleged conduct in the market generally.

40 Direct Energy has not provided any decision in support of its position that interveners should not be allowed to lead expert evidence. On the contrary, in various decisions, over the last 20 years, the Tribunal has allowed interveners to do precisely that which Direct Energy opposes (see e.g.: *Commissioner of Competition v. Visa Canada Corp.*, 2011 Comp. Trib. 2 (Competition Trib.); *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2011 Comp. Trib. 22 (Competition Trib.); *Canada (Commissioner of Competition) v. Air Canada*, 2011 Comp. Trib. 21 (Competition Trib.); *Canada (Commissioner of Competition) v. Air Canada*, 2001 Comp. Trib. 4 (Competition Trib.); *Canada (Director of Investigation & Research) v. Canadian Pacific Ltd.* (1997), 74 C.P.R. (3d) 37 (Competition Trib.); *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1995), 61 C.P.R. (3d) 528 (Competition Trib.)).

41 Again, it would be premature to place an arbitrary limit on the type and number of expert witnesses National can bring forward. Counsel for National acknowledged at the hearing that it does not yet know what kind of expert evidence it wishes to adduce, if any. However, I note that with respect to presenting such evidence, National should be guided by the principles set forth in subsection 9(2) of the *Competition Tribunal Act*.

42 With respect to Term F, Reliance submits that it should be confined to instances where National's interests are in issue whereas Direct Energy takes the position that National's representations should be allowed but only to the extent that they are relevant to the issues on which it is permitted to intervene and are not duplicative of the Commissioner's representations.

43 For practical reasons, given the guidelines set out in subsection 9(2) and given the agreement of counsel at the hearing to work together, I find that it is not necessary, at this time, to restrict Term F any further.

44 Counsel for National indicated at the hearing that it is willing to include a reference in Term G, so as to confine it to non-repetitive argument, as long as National has the opportunity to review the Commissioner's filing in advance. Counsel for the Commissioner no longer insisted, at the hearing, on the inclusion of the word "non-repetitive", but Direct Energy, in its written submissions asked that National's argument not be duplicative of that of the Commissioner's.

45 The Tribunal will not engage in micro-managing the content of National's factum. As a practical matter, there must be some repetition in order for the intervener to frame its distinct or unique perspective.

46 Finally, National has indicated that if leave to intervene is granted, it would not seek costs and requests that it not be made liable for the costs of any party or other intervener.

47 Direct Energy submits that National should be subject to the costs provisions in section 8.1 of the *Competition Tribunal Act* and Reliance argues that it would be premature to order that National will not be liable for costs as this is a decision that should be left to the panel hearing this matter. I agree. I will not fetter the discretion of the panel hearing this matter to award costs as it sees appropriate: *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2011 Comp. Trib. 22 (Competition Trib.), para. 43.

Therefore, the Tribunal Orders as Follows:

48 National is granted leave to intervene on the following topics (hereinafter, the "National Energy Topics"):

a) The development of the Ontario rental water heater industry as it relates to National.

b) The issue of Direct Energy's anti-competitive acts as they relate to National, including the impact of Direct Energy's exclusionary water heater return policies and procedures and other anti-competitive conduct as alleged in the Commissioner's Application, on the ability of National to effectively compete and expand in the Relevant Market.

c) The impact of Direct Energy's anti-competitive acts on customers or proposed customers of National.

d) National's interactions with Direct Energy with respect to the matters at issue in the proceeding, including dealings with Direct Energy regarding the water heater removal and return process.

e) National's perspective as a participant in the industry on the definition of the product and geographic markets as framed by the Commissioner.

f) The issue of Direct Energy's dominant position as it affects National.

g) The issue of the substantial lessening or prevention of competition as it relates to National.

h) Barriers to entry and ease of entry into the Relevant Market, based on National's experience, including whether Direct Energy's conduct creates artificial barriers to entry and expansion for National or raises National's costs.

i) The statements made and conclusions drawn by Direct Energy concerning National's conduct in the Response of Direct Energy filed in this proceeding.

j) The impact of the Commissioner's proposed remedies on National and on competition in the Relevant Market.

49 National shall be allowed to participate in the proceedings and be permitted:

a) To review any discovery transcripts and access any documents of the Parties produced on discovery (subject to any Confidentiality Order issued by the Tribunal), as they relate to the National Energy Topics, but not participate directly in the discovery process.

b) To produce an affidavit of relevant documents and to make a representative of National available for examination for discovery on the National Energy Topics. The discovery shall be limited in time to three (3) hours for Direct Energy.

c) To adduce *viva voce* evidence at the hearing of the Commissioner's Application relating to the National Energy Topics.

d) To conduct examinations and cross-examination of witnesses on the National Energy Topics.

e) To file expert evidence relating to the National Energy Topics within the procedures set out in the *Competition Tribunal Rules*.

f) To attend and make representations at any pre-hearing motions, case conferences or scheduling conferences.

g) To make written and oral argument relating to the National Energy Topics, including submissions on any proposed remedy.

50 When exercising the above rights, National shall follow the guidelines found in subsection 9(2) of the *Competition Tribunal Act*.

51 The number of lay or expert witnesses to be called by National may be limited at a future case management proceeding.

52 The parties shall file a proposed timetable for the disposition of the application on or before Wednesday, November 13, 2013. If the parties cannot agree on a timetable, they shall each serve and file a proposed timetable on or before November 13, 2013. The parties shall consult with National in establishing the timelines.

TAB 4

Competition Tribunal Tribunal de la Concurrence

CT - 1994 / 001 – Doc # 82

IN THE MATTER OF an application by the Director of Investigation and Research under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain practices by A.C. Nielsen Company of Canada Limited.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

A.C. Nielsen Company of Canada Limited

Respondent

- and -

Information Resources, Inc.

Intervenor

REASONS AND ORDER REGARDING MATTERS CONSIDERED AT PRE-HEARING CONFERENCE ON SEPTEMBER 14, 1994: AMENDMENT TO NOTICE OF APPLICATION, EXAMINATION FOR DISCOVERY, AND PRODUCTION OF DOCUMENTS

Date of Pre-hearing Conference:

September 14, 1994

Presiding Member:

The Honourable Mr. Justice William P. McKeown

Lay Member:

Dr. Frank Roseman

Counsel for the Applicant:

Director of Investigation and Research

Donald B. Houston
Bruce C. Caughill

Counsel for the Respondent:

A.C. Nielsen Company of Canada Limited

John F. Rook, Q.C.
Randal T. Hughes
Lawrence E. Ritchie

Counsel for the Intervenor:

Information Resources, Inc.

Gavin MacKenzie
Geoffrey P. Cornish

COMPETITION TRIBUNAL

REASONS AND ORDER REGARDING MATTERS CONSIDERED AT PRE-HEARING CONFERENCE ON SEPTEMBER 14, 1994: AMENDMENT TO NOTICE OF APPLICATION, EXAMINATION FOR DISCOVERY, AND PRODUCTION OF DOCUMENTS

The Director of Investigation and Research

v.

A.C. Nielsen Company of Canada Limited

The Director of Investigation and Research ("Director") brings a motion for an order compelling Stephen Churchill, the representative of the respondent A.C. Nielsen Company of Canada Limited ("Nielsen") to re-attend on his examination for discovery to answer the undertakings and refusals given on his examination for discovery taken on August 16 to 19, 1994. At the same time, Nielsen has brought a motion for an order *inter alia* compelling the Director's representative, Brian Chambers, to re-attend on his examination for discovery to answer proper questions arising out of the answers to the undertakings given at his examination for discovery on July 26 and 27, 1994. As counsel for the parties were able to reach agreement on the majority of issues raised by these motions, the motions have been adjourned *sine die*.

There remain outstanding four issues. The first is a motion by the Director seeking leave to amend the notice of application filed on April 5, 1994 by changing the name of the respondent to The D & B Companies of Canada Ltd. Counsel for the respondent having agreed to the amendment, leave will be granted as requested.

The other three issues argued arise from the rest of Nielsen's motion and will be dealt with *seriatim.*

I. EXAMINATION FOR DISCOVERY OF REPRESENTATIVES

Counsel for Nielsen pointed out that he had examined the Director's representative in accordance with the order of the Tribunal dated June 24, 1994. In response to the questions asked of him, the Director's representative gave approximately 106 undertakings ("the undertakings"). Approximately 90% of the undertakings required the Director's representative to go to Information Resources, Inc. ("IRI") for the information sought. Counsel pointed to various documents of which, as the transcripts of the examination for discovery indicated, the Director's representative had little or no knowledge. Counsel for Nielsen argued that the Director's representative had no personal knowledge of the facts of the case and had never been involved in the industry. He had never interviewed anyone about the case, nor taken witness statements. All of the information obtained during the examination for discovery was second, third or fourth hand. Although it is not unusual for an individual being examined for discovery to make undertakings to produce information which was not in his immediate knowledge, counsel for Nielsen argued that in the present case, the complainant is a direct competitor that will in all likelihood enter the market immediately on the completion of this application in the event that the application succeeds, and is therefore in a good position to provide information. He further submitted that, based on the documents submitted to date, there was reason to question the veracity of aspects of the complaint made by IRI. The only way to ensure that the respondent obtains a complete knowledge of the case it has to meet is to allow Nielsen to examine for discovery a representative of IRI.

Counsel for the Director responded that when the Director's representative is being examined, it is understood that the individual does not have firsthand knowledge and is basically passing on information received in the context of the investigation. When the Director's

representative was asked for undertakings, they were given and have been fulfilled. There was no indication from Nielsen to the Director's counsel that the answers provided were in any way deficient.

The Tribunal is persuaded that counsel for Nielsen has had full opportunity to discover the Director's representative. The fact that he had to rely on undertakings rather than direct answers is not unusual. A different situation exists with respect to the request to discover a representative of IRI. The attention of the Tribunal was directed to certain IRI documents that on their face raise questions relevant to Nielsen's defense. Some of these questions have apparently already been put to the Director's representative who obtained the answers from IRI. Counsel for the respondent would like to examine a representative of IRI on the grounds that the documents in question contain information sufficiently important to the defense of Nielsen that the answers should be provided directly so that they can be tested through cross-examination. The Tribunal grants this motion, but recognizes that it is acting out of an excess of caution since Nielsen has already had its opportunity for discovery.

However, the subject matter of the discovery and, by implication, the time spent must be limited. The broad issue of the conditions required for entry into the Canadian market or markets in question in the instant proceedings is raised by the documents to which the Tribunal was referred. Accordingly, questions may be put relating to specific IRI documents concerning the possible entry of that company into the relevant market or markets. Sub-headings that can legitimately be addressed are: the need for historical data; regional entry vs. entry at a national level; and the types of services that could be made available to clients depending on the type or level of entry. The Tribunal is not trying to substitute its judgment for that of counsel in setting out the foregoing headings. It has done so to make clear that the discovery is not to be open-ended and that the questions put must be tied in a clearly identifiable way to the IRI documents relating to entry. Other

sub-headings may be acceptable as long as there is an unambiguous connection between them and the issue of entry.

II. PRODUCTION OF DOCUMENTS BY THE DIRECTOR

We turn now to the second issue in Nielsen's motion which seeks the production, for inspection and copying, by the Director of the following documents over which the Director claims public interest or litigation privilege:

> (i) the complaint by IRI or its counsel and any further correspondence, memoranda or submissions from IRI or its counsel to the Director, his staff or his counsel,
>
> (ii) notes, materials and statements obtained or prepared by the Director, his staff or his counsel from meetings and discussions with IRI or its counsel, and
>
> (iii) statements, notes, material and correspondence obtained or prepared by the Director, his staff or his counsel from meetings and discussions with Canadian and U.S. packaged goods retailers, manufacturers and market research companies;[1]

Nielsen relies for this motion on the decision of the Supreme Court of Canada in *R.* v. *Stinchcombe*,[2] which requires the Crown to disclose all of the "fruits of the investigation" to the defense. He noted that the standard of disclosure established in *Stinchcombe* has already been applied to non-criminal matters in *Human Rights Commission (Ont.) v. House*,[3] and was discussed in Laskin J.A.'s dissenting opinion in *Michael Norman Howe v. The Professional Conduct Committee and the Discipline Committee of the Institute of Chartered Accountants of Ontario*.[4]

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[1] Notice of Motion, para. (c) at 3.

[2] [1991] 3 S.C.R. 326.

[3] (1993), 67 O.A.C. 72 (Ont. Div. Ct.), leave to appeal denied without reasons 31 January 1994.

[4] (23 August 1994), (Ont. C.A.) [unreported].

He further submitted that in the past public interest privilege and litigation privilege were assigned to materials by the Tribunal on an *ad hoc* basis, and that no general principles of privilege were established. In the case at bar, the particular circumstances require full disclosure of the documents requested to allow Nielsen to present a full defence.

It is clear from the civil cases cited by the parties that how the principles of *Stinchcombe* are applied depends greatly on the circumstances. In both *House* and in Laskin J.A.'s dissent in *Howe*, stress is laid on the dire personal consequences that could result from an adverse decision. In *House* the Court quotes Beetz J. in *Singh* v. *Minister of Employment and Immigration*: "The most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal rights at issue and the severity of the consequences to the individuals concerned."[5] The Court then continues:

> There is no dispute in these proceedings that the allegations made by the complainants are indeed extremely serious. Any racial discrimination strikes at the very heart of a democratic pluralistic society. It is, of course, of the utmost seriousness if any such racial discrimination exists or has existed in an important public institution such as a major hospital. The consequences attendant on a negative finding by a Board of Inquiry would be most severe for the respondents as any such findings could and should seriously damage the reputation of any such individual.[6]

And in *Howe* Laskin J.A. says:

> Discipline proceedings are near the judicial end of the spectrum of administrative decision-making. Therefore they call for disclosure that exceeds the minimum requirements of s.8 of the *Statutory Powers Procedure Act* and that approaches the kind of disclosure applicable in court proceedings. To use Dickson J.'s phrase in *Kane v. Board of Governors of the University of British Columbia, supra*, at p. 1113, discipline proceedings require "a high standard of justice". The reason is obvious. Discipline proceedings may have serious consequences on a person's livelihood, reputation and professional career. For some professionals, a finding of professional misconduct is more serious than a criminal conviction.[7]

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[5] [1985] 1 S.C.R. 177 at 229.

[6] *Supra* note 3 at 78.

[7] *Supra* note 4 at 10.

The Court in *House* noted that proceedings before the Human Rights Commission of Ontario could not be equated with civil proceedings since there was no documentary or oral discovery in the Commission's proceedings.[8] The absence of discovery was also stressed by Laskin J.A. in *Howe*: "The desirability of ensuring proper disclosure is especially important in proceedings before tribunals like the Discipline Committee of the ICAO, which do not provide for the discovery and production of documents."[9]

In *Ciba-Geigy Canada Ltd.* v. *Patented Medicine Prices Review Board*, McKeown J. reviews *Stinchcombe* and then states:

> In my view, in the case at bar, I must examine the statutory scheme pursuant to which the Patented Medicine Prices Review Board was created, and construe it as a whole to determine the degree to which Parliament intended the principle of fairness to apply.[10]

He then distinguishes *House* from the case before him and continues:

> Finally, the nature of the rights the Ontario Human Rights Code is designed to protect are very personal individual characteristics. Tribunals charged with regulating economic activity have not had placed on them the same high standards as tribunals dealing with personal individual rights.[11]

This decision was upheld by the Federal Court of Appeal.[12] Writing for the Court, MacGuigan J.A. distinguished *House* from the case before the Court by noting that "[t]he Court in *House* analogized the proceedings in question to criminal proceedings and the role of Commission

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[8] *Supra* note 3 at 76.

[9] *Supra* note 4 at 11.

[10] (3 May 1994), T-375-94 (F.C.T.D.) at 10.

[11] *Ibid.* at 13.

[12] *Ciba-Geigy Canada Ltd.* v. *Patented Medicine Prices Review Board* (7 June 1994), A-209-94 (F.C.A.) [unreported].

counsel to that of the Crown in criminal proceedings."[13] After quoting *House* on the seriousness of the allegations, the Court went on to say:

> This is where any criminal analogy to the proceedings in the case at bar breaks down. There are admittedly extremely serious economic consequences for an unsuccessful patentee at a s. 83 hearing, and a possible effect on a corporation's reputation in the market place. But as McKeown J. found, the administrative Tribunal here has economic regulatory functions and has no power to affect human rights in a way akin to criminal proceedings.[14]

The Court concluded: "We are all agreed with McKeown J. that `law and policy require that some leeway be given an administrative tribunal with economic regulatory functions ... in pursuing its mandate.'"[15] While the Competition Tribunal is clearly not a regulatory body, it is equally clear and relevant to the point at issue that the *Competition Act* encompasses a broad scheme of economic regulation.

It is clear in these decisions that the requirements for procedural fairness and natural justice must be considered in the light of the legislative scheme and the way in which that scheme has been implemented. The issue is whether the scheme now in place in applications before the Tribunal affords respondents with both information to know the case that they have to meet and with information that they can use in their defense.

We consider first Nielsen's view that the previous decisions of the Tribunal and the decision of the Federal Court of Appeal upholding one of these decisions did not establish privilege for a class of documents.[16] We cannot agree with this view. The decisions do establish privilege for a class of documents.

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[13] *Ibid.* at 4.

[14] *Ibid.*

[15] *Ibid.* at 5.

[16] *Director of Investigation and Research v. The NutraSweet Company* (29 November 1989), CT-8902/79, Order Regarding Questions on Discovery, [1989] C.C.T.D. No. 54 (Q.L.) (Comp. Trib.); *Director of Investigation and*

In order to better understand the context within which Nielsen's request for further disclosure has been made, we will review what information is available to the respondent in the present instance, and what it is that the respondent still seeks. Nielsen has had both documentary and oral discovery of the Director. The Tribunal granted the respondent documentary discovery of a third party, IRI, because there were few documents in the Director's possession and there were good reasons for believing that there were documents in the possession of IRI that could be useful in the defense of the respondent. Under procedures established by the Tribunal in previous cases, the respondent has been provided with summaries of the documents sought by the respondent for which a claim of public interest or litigation privilege has been advanced by the Director. These include more than 30 summaries of the information that the Director received from industry participants. Furthermore, the Director has agreed to supply lists of witness names and summaries of the evidence to be presented through these witnesses three weeks prior to their appearance at the hearing of the application. There has been no suggestion by counsel for Nielsen that the summaries provided by the Director are incomplete save that the names of firms whose representatives supplied information have been deleted, as has information that could lead to the firms being identified. In the event that Nielsen were of the view that the information was otherwise incomplete, the Tribunal would agree to have a judicial member of the Tribunal who will not sit on the panel that eventually hears the application determine whether the suspicion was well founded.

The possible importance of the missing information to the defense of the respondent (or of any respondent, save for circumstances unforeseeable at this time) has to be evaluated in the light of the types of cases heard by the Tribunal. Prior to the amendment of the *Combines Investigation Act* in 1975 all areas were dealt with under criminal law. In 1986 there was the transfer of the very

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Research v. Hillsdown Holdings (Canada) Limited (11 July 1991), CT-9101/51, Order Regarding Scope of Discovery to be Provided by The Director of Investigation and Research [1991] C.C.T.D. No. 20 (Q.L.) (Comp. Trib.); *Director of Investigation and Research v. Southam Inc.* (1991), 38 C.P.R. (3d) 68, [1991] C.C.T.D. No. 16 (Q.L.) (Comp. Trib.); *Hillsdown Holdings (Canada) Limited v. Director of Investigation and Research* (10 October 1991), (F.C.A.) [unreported].

important areas of mergers and monopoly from criminal to civil law. What is characteristic of these and other matters heard by the Tribunal is that there is rarely an issue about what was done, about the actions taken. The dispute typically revolves around the effects of the conduct such as a merger or, as in this case, about the effects of contracts entered into by the respondent. Thus the nature of the case that the respondent has to meet does not involve allegations of particular conduct related to specific times and places. While it might be useful for the respondent to know what every individual that the Director spoke to had to say, because it would probably reduce the length of case preparation, whether or not such information is made available is primarily a matter of convenience; the nature of the issues are not such that a case depends on the views of a few industry participants. Should this ever be so, the respondent would undoubtedly know who the participants in question were.

The Director starts a case in virtual ignorance of the industry unless there has been a recent case concerning it. He must depend on the co-operation of industry participants to gain general background information as well as to evaluate a complaint or complaints. There are good reasons for ensuring that the Director is able to obtain such co-operation by ensuring that, unless they are called as witnesses, individuals called upon by the Director are protected from having their names divulged which could result in an unnecessary possible souring of commercial relations with the respondent. There is no reason to doubt the importance to the Director of voluntary co-operation by industry participants.

Enforcement of the *Competition Act* depends on the willingness of complainants to come forward. It is true that once an application has been filed the identity of the complainant is known. However, the same cannot be said about examples or allegations made that introduce the names of other firms or individuals. For the reasons already stated, this type of information is not what determines cases before the Tribunal. However, should representatives from the firms in question be called as witnesses, the respondent is informed of their identity and the content of their evidence in good time.

Respondents, on the other hand, start with a knowledge of the industry, including the participants therein. This fact does not change the requirement that respondents must fully know the case that they have to meet and that they must be afforded full opportunity to defend themselves. The discovery procedures in place are designed to ensure that this occurs. There is no reason for re-evaluating the grounds on which privilege was accorded to various documents and to some information contained therein unless there is good reason to believe that either the documents themselves or the excluded information are important to the defense of the respondent.

There is one further matter that needs to be addressed and that is the position put forward by counsel for Nielsen that there are special issues in this case that justify a departure from the practice of the Tribunal in previous cases. It is argued that IRI is a sophisticated litigant who is using the machinery of the Director towards its own ends and some of the IRI documents tend to confirm this. However, all complainants undoubtedly seek to convince the Director to adopt their view and to thereby improve their circumstances. It is up to the Director to take adequate measures to ensure that he is not taken in, since he has responsibility for the carriage of a case. Ironically, yielding to Nielsen's request could jeopardize the Director's ability to adequately evaluate complaints in the future since he would face greater difficulty in obtaining the willingly-given and candid views of industry participants. In any event, it is the Director's case that the respondent must meet, and not the complaint of IRI.

Given the above, and particularly given the amount of disclosure already afforded Nielsen and the fact that the respondent has been given the opportunity to examine a representative of IRI, although admittedly restricted to narrowly defined issues, it is our view that Nielsen should not be entitled to production of the documents requested. As stated above, if Nielsen feels that the

summaries of the documents supplied are incomplete, a review of the documents and summaries by a judicial member of the Tribunal who is not part of this case can be arranged.

III. PRODUCTION OF IRI DOCUMENTS TO REPRESENTATIVES OF NIELSEN

The third issue in Nielsen's motion concerns a request for access by two representatives of Nielsen to virtually all of IRI's documents provisionally protected under the highest level of confidentiality, "Level A".[17] The term "provisional" applies because an evaluation of the claims for confidentiality and objections thereto is the subject of a pre-hearing conference on October 3, 1994. In responding to Nielsen's motion, counsel for IRI stated that some of the documents with a recent date were highly confidential and that providing them to Nielsen could have severe repercussions for IRI since the documents deal with recent plans.

While as a general rule it is always preferable for counsel to be able to share information with a client, this general preference has to be tempered when the information is confidential. The standard for confidentiality set out in the *Competition Tribunal Rules* is that of "direct commercial harm".[18]

It is relevant in considering Nielsen's motion to recognize that Nielsen's documents are protected from the kind of disclosure sought of IRI's documents. While counsel for the Director may consult with his client, i.e., the Director and his staff, this does not pose any danger of commercial harm to Nielsen. Counsel for the Director is not able to seek the views of industry participants or other knowledgeable individuals unless they are to be consulted as experts. Counsel for IRI, an intervenor, is foreclosed from showing any confidential material to his client. While the

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[17] (26 July 94), CT9401/56, Confidentiality (Protective) Order, [1994] C.C.T.D. No. 10 (QL) (Comp. Trib.).

[18] *Competition Tribunal Rules*, SOR/94-290, s.16(3).

role of an intervenor is necessarily smaller than that of the parties, the intervenor does have the right to present argument and to call evidence where it is not duplicative of that called by the Director.

While the rights of Nielsen are somewhat greater by reason of being a defendant, they must be considered in the light of the needs of all counsel and in relation to the harm that could be caused to IRI. Nielsen is repeating a request made at the pre-hearing conference held on July 14, 1994. The Tribunal stated at that time that it could not consider a blanket request for disclosure of confidential documents unless it had an explanation of the particular need to disclose an entire document or part of a document. Counsel for Nielsen is in effect repeating his request without providing the detail requested by the Tribunal save for discussion of a particular document. The Tribunal cannot accede to such a blanket request. All counsel are sophisticated in the types of matters before the Tribunal. Where documents contain difficult technical information counsel are free to seek the input of experts. They are able to explore and illuminate documents during oral discovery. There can be no question of their ability generally to carry on without detailed input from industry participants. However, there may be exceptions, and the Tribunal is willing to consider them. But in doing so it must balance the harm to the party whose documents are being disclosed. To disclose recent marketing and business plans of IRI to a Vice-President of Marketing of the respondent, as counsel for Nielsen proposes, could clearly be very harmful to IRI and, as claimed by the Director, potentially to the competitive process as well, since IRI is the most likely entrant into the industry.

It is possible that a number of documents which IRI claims are highly confidential may not retain that status. They might then become available to agreed upon representatives of Nielsen. Any disclosure of documents to Nielsen representatives beyond these documents would only be entertained if there were good reasons in support of such disclosure.

Nielsen has withdrawn part of its motion since it no longer seeks disclosure of documents 2, 3, 4, 5, 6, 7, 8, 9, 10, 103, 104, 105, 115, 116, 117, 119, 141, 144, 147 and 152 to Nielsen representatives. The Tribunal will not permit disclosure of documents 139, 140, 142, 143, 145, 148, 149, 150 and 151 to Nielsen representatives. Documents 106, 107, 108, 120, 121, 122, 123, 124, 125, 126, 127, 128 and 131 will be released to Nielsen representatives after the pre-hearing conference on October 3, 1994 unless IRI, at that time, provides the Tribunal with further information why they should not be released. The Tribunal is not deciding whether any of the documents are confidential or not since it was agreed that this was to be settled at the pre-hearing conference on October 3, 1994. The issue as to which representatives of Nielsen should be permitted to review any documents in this latter group may be raised at the pre-hearing conference on October 3, 1994.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

1. Leave is granted to the Director to amend the notice of application filed on April 5, 1994 by changing the name of the respondent A.C. Nielsen Company of Canada Limited to The D & B Companies of Canada Ltd. and the name of the respondent is hereby amended.

2. A representative of IRI shall attend at an examination for discovery to answer to the best of his or her knowledge, information and belief any proper questions relating to specific IRI documents concerning the possible entry by IRI into the relevant market or markets. More specifically, questions may address the following sub-headings: the need for historical data, regional entry vs. entry at a national level, and the types of services that could be made available to clients depending on the type or level of entry. Other sub-headings may be addressed provided that there is a clear and unambiguous connection between them and the issue of entry.

3. The motion by Nielsen (now known as The D & B Companies of Canada Ltd.) that the Director produce for inspection and copying by Nielsen privileged documents as set out in paragraph (c) of the respondent's notice of motion, is dismissed.

4. The motion by Nielsen to permit its representatives to inspect "Level A" documents of IRI is dismissed with respect to documents 139, 140, 142, 143, 145, 148, 149, 150 and 151. Nielsen has withdrawn the motion with respect to documents 2, 3, 4, 5, 6, 7, 8, 9, 10, 103, 104, 105, 115, 116, 117, 119, 141, 144, 147 and 152. Regarding the balance of the "Level A" documents, in accordance with the reasons herein the motion is adjourned to the pre-hearing conference on October 3, 1994.

DATED at Ottawa, this 22nd day of September, 1994.

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

(s) W.P. McKeown
W.P. McKeown

TAB 5

1997 CarswellNat 3117
Competition Tribunal

Canada (Director of Investigation & Research) v. Canadian Pacific Ltd.

1997 CarswellNat 3117, [1997] C.C.T.D. No. 14, 74 C.P.R. (3d) 37

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

In the Matter of the merger whereby CP Containers (Bermuda) Limited acquired certain assets held by The Cast Group Limited and of the acquisition by 3041123 Canada Inc. of all the shares of Cast North America Inc. by way of agreements entered into between or among Royal Bank of Canada, The Cast Group Limited, 3041123 Canada Inc., CP Containers (Bermuda) Limited and Canadian Pacific Limited

The Director of Investigation and Research, Applicant and Canadian Pacific Limited Canada Maritime Limited CP Containers (Bermuda) Limited 3041123 Canada Inc. Cast North America Inc. Royal Bank of Canada, Respondents and Newfoundland Capital Corporation Limited Société du port de Montréal, Applicants for Leave to Intervene

Noël Member

Heard: March 13, 1997
Judgment: March 21, 1997
Docket: CT-96/2

Counsel: *Robert S. Russell*, *André Brantz* and *Adam F. Fanaki*, for applicant, Director of Investigation and Research
Neil R. Finkelstein, for respondents, Candaian Pacific Ltd., Canada Maritime Ltd., CP Containers (Bermuda) Ltd., 3041123 Canada Inc. and Cast North America Inc.
Peter L. Roy and *Annie M. Finn*, for respondent, Royal Bank of Canada
Donald S. Affleck, Q.C., for Newfoundland Capital Corporation Ltd., applicants for leave to intervene
Gil Rémillard, *Luc Giroux* and *Sébastien Grammond*, for Société du Port de Montréal, applicants for leave to intervene

***Noël Member*:**

1 Two requests for leave to intervene have been filed in these proceedings. In brief, the proceedings involve the challenge by the Director of Investigation and Research ("Director") of the 1995 merger which resulted in Canadian Pacific Limited, through various subsidiaries, acquiring assets of The Cast Group Limited and shares of Cast North America Inc. (together "Cast"). The Director alleges that the merger has led to, or is likely to lead to, a substantial lessening or prevention of competition in the provision of intermodal non-refrigerated containerized shipping services through the Port of Montreal between Northern Continental Europe and the United Kingdom and Ontario and Quebec.

2 The first applicant for leave to intervene, Newfoundland Capital Corporation Limited ("NCC"), has its head office in Dartmouth, Nova Scotia and describes itself in its request as engaged in marine transportation, the management of container handling terminal facilities in Nova Scotia and Newfoundland and the provision of trucking and freight forwarding services. The other applicant for intervenor status is the Montreal Port Corporation ("the Port"). The Director supports the request to intervene of NCC and does not oppose the request of the Port, although he submits that the participation of the Port should be limited beyond what the Port itself asks for. The respondents Canadian Pacific Limited et al. (collectively "CP") and the Royal Bank of Canada ("RBC") oppose the intervention of NCC and support broad participation by the Port.

3 Subsection 9(3) of the *Competition Tribunal Act* provides that:

> Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal to make representations relevant to those proceedings in respect of any matter that affects that person.

In deciding whether to grant leave to intervene, the Tribunal must consider whether the person applying for leave is "affected" by the proceedings. Previous decisions have established that "affected" means "directly affected". Further, the Tribunal must also be convinced that the representations that the intervenor will make, if leave is granted, will be relevant to and will assist the Tribunal in deciding the issues before it. If leave to intervene is granted, the intervenor is automatically accorded the right to present argument. Any further participation rights, for example, the right to call evidence, must be expressly granted by the Tribunal in the exercise of its discretion.

Newfoundland Capital Corporation Limited ("NCC")

4 With respect to the request for leave to intervene of NCC, it is necessary to provide some detail as to how the matter has so far unfolded. On December 20, 1996, the Director filed the application challenging the merger. Notice of the application was published in several newspapers on January 8 and 15, 1997, and in the *Canada Gazette* on January 11, 1997. As prescribed by the *Competition Tribunal Rules* ("Rules"), the notices stated that requests for leave to intervene had to be filed by February 10, 1997, a delay of 30 days from the date of publication in the *Canada Gazette*. Responses to the application were to have been filed by January 20, 1997. On that date, the respondents brought a motion for an extension of time to file their responses. On January 24, 1997, the Tribunal granted an extension to February 7, 1997.

5 NCC filed its request for leave to intervene on February 10, 1997. The Rules prescribe the contents of a request for leave to intervene. In addition to the name and address of the applicant for leave, the title of the proceedings, the applicant's preferred official language and the degree of participation requested, the request must set out:

> (c) a concise statement of the matters in issue that affect that person [the applicant];
>
> (d) a concise statement of the competitive consequences arising from the matters referred to in paragraph (c) with respect to which that person wishes to make representations;
>
> (e) the name of the party whose position that person intends to support. ...

An affidavit setting out the facts on which the request is based must also be filed.

6 In its request for leave to intervene, NCC stated that the matters that affect it and that it wishes to demonstrate to the Tribunal are as follows: NCC is willing and able to purchase and manage Cast as an effective competitor; NCC "is a competitively preferable purchaser" of the assets and shares that are the subject of the merger. In his supporting affidavit, Roy Rideout, the President and Chief Operating Officer of NCC, affirmed NCC's interest in purchasing the assets or shares and that NCC is a competitively preferable purchaser and added that, in his view, Cast was not a failing firm at the time of the merger. In addition to presenting argument, NCC requested the right to attend discoveries, obtain discovery transcripts and copies of documents produced by the parties.

7 The parties delivered their responses to the request for leave to intervene of NCC on February 24, 1997. The respondents opposed the request; the Director supported the request. The Director's response is somewhat unusual in that it states that NCC is affected for reasons over and beyond those stated by NCC in its request, and provides affidavit evidence to support those grounds upon which the Director says that NCC would be additionally affected. Specifically, the Director's response states that NCC is also directly affected as: a major customer of Canada Maritime Limited (another respondent owned by CP); a supplier of inland transportation of containerized cargo to the merged parties and other industry participants through its trucking subsidiaries; a supplier of domestic containerized transportation through the Port of Montreal; and an operator of an international container handling terminal at the Port of Halifax. Filed with the response is copious affidavit material regarding NCC and its operations sworn by a law clerk with the firm representing the Director. The facts sworn to by the affiant are all within the direct knowledge of NCC and most have as their source material published by it.

8 On March 7, 1997, NCC filed a memorandum of argument which states that "the record of these proceedings to date demonstrates that NCC would be directly affected by the matters in issue." The "direct affects" listed are: NCC's commercial interest as a customer of Canada Maritime Limited; its commercial interest as a supplier of inland transportation for containerized cargo; the fact that it provides containerized transportation through the Port of Montreal as part of a joint venture; the fact that it operates a container-handling terminal in the Port of Halifax; its interest in purchasing Cast; and its desire to demonstrate that it is a competitively preferable purchaser of Cast. In support of the first four "direct affects", the memorandum refers to the affidavits filed by the Director in his response. NCC further submits that it can make a useful contribution to the Tribunal's consideration of the issues of market definition, substantial lessening of competition and whether Cast was a failing firm. NCC repeats its request to attend discoveries, receive documentary productions and present argument and adds a request to adduce factual evidence and cross-examine witnesses.

9 The respondents who oppose the intervention of NCC say that it is the proposed intervenor which must state its interest and say how it is affected and, therefore, the Tribunal must focus on the request for leave to intervene of NCC and the Rideout affidavit, not the affidavits filed by the Director. The Director argues that the apparent insufficiency of the request for leave to intervene is an irregularity of little significance and that fairness requires that NCC be able to put all facts before the Tribunal, no matter what their source. He adds that no one was surprised by the expanded intervention which NCC now seeks.

10 I expressed during the hearing my concern with regard to the limited scope of NCC's request for intervention. I pointed out to counsel that according to the Rules, NCC was to state its interest and how it was affected, and that on the face of the request, the matters affecting NCC were limited to those stated. I also pointed out that to the extent that NCC wanted to expand its request, the appropriate amendment could have been sought with supporting material. Counsel for NCC reacted by asking, at the end of his reply, for leave to amend the request by incorporating thereto NCC's memorandum of March 7, 1997, wherein it essentially adopts the expanded scope of intervention which had been propounded, presumably on its behalf, by the Director.

11 This request is too late in the making and, in any event, I do not believe that such an amendment would be of assistance to NCC. Assuming for present purposes that evidence for which a prospective intervenor is the best source but which is not introduced by it can, upon being introduced by someone else, [1] be relied upon by the prospective intervenor, it remains that in this instance there is nothing from NCC indicating how it is affected by reference to this evidence.

1 In this instance the Director, who supports the intervention.

12 I accept that a customer, supplier or other industry participant *can*, in appropriate circumstances, be directly affected by matters in issue before the Tribunal, and on that ground, be granted intervenor status. However, once it is established that a proposed intervenor acts in one (or more) of those capacities, it remains incumbent upon it to state how it is affected qua customer, supplier or other industry participant as this is essential to the delineation of the scope of the intervention. Here, I have no assertion from NCC, either in its original request or its subsequent memorandum of argument, as to how it is affected by issues relating to the merger in its capacity as supplier, customer or other industry participant. To put the matter in the words of the Rules, I have no statement from NCC of the "competitive consequences" as they arise from the matters which affect it qua customer, supplier or other such capacity, and indeed, no evidence from it as to whether and how it is so affected. It follows that there is no legal or factual framework within which the intervention of NCC could be granted on the expanded grounds.

13 I now turn to the grounds for intervention which NCC does assert in its request to intervene, namely: its expression of interest in purchasing Cast and its statements that it is a competitively preferable purchaser and that Cast was not a failing firm. The link between the issues before the Tribunal when it evaluates the competitive consequences of the merger and NCC's desire to be considered as a potential "competitively preferable" purchaser of the assets and shares of Cast, *if* divestiture were ordered, is tenuous. Should the Director succeed in this application, it will be incumbent upon him to demonstrate to the Tribunal that if it were to order a remedy involving divestiture, the order would not be in vain. NCC's evidence might be relevant on this point. Other evidence may also be relevant; NCC may not be the only person who might be interested in purchasing the assets and

shares should an order issue. While it is apparent that NCC could provide useful evidence in this regard, if called upon to do so, there seems to be little, if anything, that NCC could contribute as an intervenor.

14 With respect to Mr. Rideout's assertion on behalf of NCC that Cast was not a failing firm, it is not clear to me how an expression of opinion on one of the issues that will be before the Tribunal establishes that NCC is directly affected by the merger and its competitive consequences. The Tribunal itself will decide ultimately whether Cast was or was not a failing firm. Evidence from NCC or Mr. Rideout that goes to this issue, including Mr. Rideout's expert opinion on the question should he be so qualified in the course of the hearing, might be relevant and the Director is free to introduce evidence of his choice on this point. Beyond that, it is difficult to see how NCC could assist the Tribunal. I therefore come to the conclusion that the request for intervention by NCC should be dismissed.

Montreal Port Corporation ("the Port")

15 There is no dispute between the parties that the Port should be allowed to intervene. The controversial question is the scope of the participation to be accorded to it. As part of determining the scope of participation, the Tribunal must also indicate with some degree of precision the specific matters regarding which the Port may make "representations".

16 The Port's statement of the matters in issue that directly affect it is found at paragraph 2 of its request for leave to intervene. According to subparagraph (a), the Port is directly affected by the issues in the proceeding relating to its efficiency and its competitiveness in relation to other ports such as the Port of Halifax and the ports on the United States east coast. I accept that this is valid and that the Port can assist the Tribunal in determining the issue of efficiencies arising from the merger.

17 Subparagraph 2(c) of the request refers to the market definition advanced by the Director, which the respondents (and the Port) challenge as being too narrowly drawn. The Director alleges that the relevant geographic market should be restricted to shipments through the Port of Montreal. The respondents submit that the Port of Montreal is part of a larger relevant market including other ports. The view of the Port itself will be of assistance to the Tribunal in determining this critical issue.

18 Subparagraph 2(b) of the request is relevant only insofar as it can be linked to the issues raised in subparagraphs (a) or (c). The possible financial losses to the Port, and to the Montreal region, are, in and of themselves, irrelevant to the issues that the Tribunal must determine. It is only as they relate to efficiency or competitiveness of the Port that these considerations can be of relevance. The Port will thus be granted leave to intervene and make representations only with respect to the issues stated in subparagraphs 2(a) and 2(c) of its request for leave to intervene.

19 The parties disagree on the extent to which the Port should be allowed to participate on those issues beyond the presentation of argument. The Port, with the support of CP and RBC, requested very broad participation rights comprising the right to participate in oral discovery, the right to call evidence (factual and expert), the right to cross-examine witnesses at the hearing and the right to receive copies of documents produced by the parties. The Director opposes giving the Port a role in oral discovery but would allow it to call factual evidence at the hearing, subject to certain conditions including discovery by the Director. The Director also opposes giving the Port the right to call expert evidence or to cross-examine witnesses.

20 As the Tribunal has stated on previous occasions, participation by intervenors in the discovery process is exceptional. [2] Intervenors are usually admitted because they are at the time of their admission in a position to offer additional insight to the Tribunal; as a general rule, they should not require discovery of the parties to make their contribution. In this case, discovery will be vigorously pursued by the parties and no case for allowing the exceptional measure of participation by an intervenor in that process has been made.

2 *Director of Investigation and Research v. Air Canada* (1992), 46 C.P.R. (3d) 184, [1992] C.C.T.D. No. 24 (QL); *Director of Investigation and Research v. Tele-Direct (Publications) Inc.* (1 March 1995), CT9403/52, Reasons and Order Granting Requests for Leave to Intervene, [1995] C.C.T.D. No. 5 (QL).

21 The Port may file expert evidence in accordance with the Rules. The Director argues that intervenors should have something unique to offer to the Tribunal and should not have to resort to expert evidence to make their contribution. A contradiction of sort is said to arise from the request by the Port to be authorized to adduce expert evidence. In the circumstances before me, I do not find anything contradictory or inconsistent in recognizing that the Port has a unique perspective relating to the issues of market definition and efficiency gains while allowing it to bring forward expert evidence to support its intervention. The Port is not required to have personal expertise in the economics of competition law in relation to issues which affect it.

22 The Director's position with respect to the Port's request that it be allowed to present factual evidence is a reasonable one. The Port may adduce evidence, upon requesting leave to do so from the Tribunal panel hearing the application, on the following conditions: the evidence is relevant to the issues and relates to a matter affecting the Port; the respondents have been requested to adduce the evidence and have refused; the evidence is not repetitive; and the Port has provided documentary and oral discovery to the Director on the issues to which the evidence relates.

23 Discovery of a representative of the Port is granted to the Director to avoid surprises at the hearing and the consequent delays and disruptions. In this case, given the centrality and fundamental nature of the issues on which the Port has been permitted to intervene, there would be a strong potential for disruption if the Director was not allowed to discover the Port. The Port as an intervenor is in a different position and, for the reasons set out above, its entitlement to discovery has not been demonstrated.

24 The Port may cross-examine witnesses called by the Director at the hearing to the extent that the cross-examination is non-repetitive of previous cross-examination by the respondents. Finally, the Port shall be entitled to receive copies of the documents produced by the parties on discovery, attend at the examinations for discovery of the parties and receive transcripts of those examinations. The Director requested that the Port's access to documents be restricted to those documents which are relevant to the issues on which the Port has been granted leave to intervene. While this request is logical, it is not easily implemented; questions of relevancy are matters of judgment and debate. There will, therefore, be no restriction in the order on the class of documents which the Port is entitled to receive, subject to any order regarding confidentiality. The Port is nevertheless expected to use its best efforts to limit its entitlement to copies of documents which bear on the issues with respect to which it has been granted to leave.

25 It was argued vigorously on behalf of the Port that because it is a state-owned corporation with a public interest mandate, it should be allowed to introduce evidence separately and generally act independently of the respondents. Particular emphasis was placed on the fact that the Port has a statutory obligation to treat all users of the Port's facilities in an even-handed fashion and that it was important that it not be perceived as being too closely associated with any of the parties.

26 In its request for leave to intervene the Port clearly identified itself as a supporter of the position of the respondents. I have no doubt that the Port authorities, prior to intervening, satisfied themselves that such an intervention would be consistent with the statutory mandate of the Port. Quite obviously, the Port has determined that its own interests in this matter coincide with those of the respondents and that its statutory mandate will be better served if the merger in issue is allowed to stand despite the challenge by the Director. Keeping this in mind, I do not believe that marshalling the evidence through the respondents in the usual fashion in order to avoid duplication and allow for a co-ordinated presentation of the evidence by those who support the merger can be objected to on the grounds raised by the Port.

27 FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

1. NCC's request for leave to intervene in these proceedings is denied.

2. The Port is granted leave to intervene in these proceedings and is granted the participation rights set out in subsection 32(1) of the Rules in respect of those matters which directly affect it as set out in subparagraphs 2(a) and (c) of its request for leave to intervene.

3. In addition, the Port shall be permitted:

(a) To adduce factual evidence at the hearing, provided that it first demonstrates to the satisfaction of the Tribunal that such evidence is relevant and within the scope of the intervention, is not repetitive, that the respondents have been asked to adduce the evidence and have refused and that the Port has provided documentary and oral discovery to the Director on the issues to which the evidence relates;

(b) To introduce relevant expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Rules;

(c) To cross-examine witnesses after the respondents have conducted their cross-examination of witnesses, provided that it first demonstrates to the satisfaction of the Tribunal that it has questions pertinent to their intervention which the respondents were not willing to ask;

(d) To have access to the transcripts of the examinations for discovery conducted by the parties, and its counsel may attend the examinations for discovery, subject to any order that may be issued by the Tribunal regarding confidentiality;

(e) To inspect and make copies of the documents listed in the affidavits of documents of the parties, other than those documents subject to a claim for privilege or which are not within the party's possession, control or power, subject to the same restriction regarding confidentiality.

Appendix

ORDER GRANTING EXTENSION FOR AFFIDAVITS OF DOCUMENTS

FURTHER TO paragraph 2 of the Order Regarding Case Management Matters dated February 21,1997;

AND FURTHER TO the notices of motion filed by Canadian Pacific Limited, Canada Maritime Limited, C.P. Containers (Bermuda) Limited, 3041123 Canada Inc. and Cast North America Inc. (collectively "CP") and by the Royal Bank of Canada ("RBC") for an extension of time to file further affidavits of documents;

AND UPON HEARING the submissions of counsel and noting that the Director of Investigation and Research does not oppose the extension;

THE TRIBUNAL ORDERS THAT the motions are granted and CP and RBC shall serve and file further affidavits of documents by April 1, 1997.

TAB 6

2008 SCC 8
Supreme Court of Canada

Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.

2008 CarswellBC 411, 2008 CarswellBC 412, 2008 SCC 8, [2008] 1 S.C.R. 157, [2008] 4 W.W.R. 1, [2008] B.C.W.L.D. 1749, [2008] B.C.W.L.D. 1750, [2008] B.C.W.L.D. 1767, [2008] S.C.J. No. 8, 164 A.C.W.S. (3d) 765, 252 B.C.A.C. 1, 290 D.L.R. (4th) 193, 372 N.R. 95, 422 W.A.C. 1, 50 C.P.C. (6th) 207, 75 B.C.L.R. (4th) 1, J.E. 2008-501

Suzette F. Juman also known as Suzette McKenzie (Appellant) v. Jade Kathleen Ledenko Doucette, by her litigation guardian Greg Bertram, Chief Constable of the Vancouver Police Department, Attorney General of Canada and Attorney General of British Columbia (Respondents)

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

Heard: November 15, 2007
Judgment: March 6, 2008
Docket: 31590

Proceedings: reversing *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.* (2006), 55 B.C.L.R. (4th) 66, [2006] 9 W.W.R. 687, *(*sub nom. *Doucette v. Wee Watch Day Care Systems Inc.)* 227 B.C.A.C. 140, *(*sub nom. *Doucette v. Wee Watch Day Care Systems Inc.)* 374 W.A.C. 140, 2006 BCCA 262, 2006 CarswellBC 1275, 31 C.P.C. (6th) 149, 269 D.L.R. (4th) 654 (B.C. C.A.); reversed in part *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.* (2005), 2005 CarswellBC 621, 45 B.C.L.R. (4th) 108, 2005 BCSC 400, [2005] 11 W.W.R. 539, 15 C.P.C. (6th) 211, 129 C.R.R. (2d) 109 (B.C. S.C.)

Counsel: Brian T. Ross, Karen L. Weslowski for Appellant
No one for Respondent, Jade Kathleen Ledenko Doucette, by her litigation guardian Greg Bertram
Karen F.W. Liang for Respondent, Chief Constable of the Vancouver Police Department
Michael H. Morris for Respondent, Attorney General of Canada
J. Edward Gouge, Q.C., Natalie Hepburn Barnes for Respondent, Attorney General of British Columbia

***Binnie J.*:**

1 The principal issue raised on this appeal is the scope of the "implied undertaking rule" under which evidence compelled during pre-trial discovery from a party to civil litigation can be used by the parties only for the purpose of the litigation in which it was obtained. The issue arises in the context of alleged child abuse, a matter of great importance and concern in our society. The Attorney General of British Columbia rejects the existence of an implied undertaking rule in British Columbia (factum, at para. 4). Alternatively, if there is such a rule, he says it does not extend to *bona fide* disclosures of criminal activity. In his view the parties may, without court order, share with the police any discovery documents or oral testimony that tend to show criminal misconduct.

2 In the further alternative, the Attorney General argues that the existence of an implied undertaking would not in any way inhibit the ability of the authorities, who are not parties to it, to obtain a subpoena *duces tecum* or to seize documents or a discovery transcript pursuant to a search warrant issued under s. 487 of the *Criminal Code*, R.S.C. 1985, c. C-46.

3 The British Columbia Court of Appeal held that the implied undertaking rule "does not extend to *bona fide* disclosure of criminal conduct" ((2006), 55 B.C.L.R. (4th) 66, 2006 BCCA 262 (B.C. C.A.), at para. 56). This ruling is stated too broadly, in my opinion. The rationale of the implied undertaking rule rests on the statutory compulsion that requires a party to make

documentary and oral discovery regardless of privacy concerns and whether or not it tends to self-incriminate. The more serious the criminality, the greater would be the reluctance of a party to make disclosure fully and candidly, and the greater is the need for broad protection to facilitate his or her cooperation in civil litigation. It is true, as the chambers judge acknowledged, that there is an "immediate and serious danger" exception to the usual requirement for a court order prior to disclosure ((2005), 45 B.C.L.R. (4th) 108, 2005 BCSC 400 (B.C. S.C.), at paras. 28-29), but the exception is much narrower than is suggested by the *dictum* of the Court of Appeal, and it does not cover the facts of this case. In my view a party is not in general free to go without a court order to the police or any non-party with what it may view as "criminal conduct", which is a label that covers many shades of suspicion or rumour or belief about many different offences from the mundane to the most serious. The qualification added by the Court of Appeal, namely that the whistle blower must act *bona fides*, does not alleviate the difficulty. Many a tip to the police is tinged with self-interest. At what point does the hope of private advantage rob the communication of its *bona fides*? The lines need to be clear because, as the Court of Appeal itself noted, "*non-bona fide* disclosure of alleged criminal conduct would attract serious civil sanctions for contempt" (para. 56).

4 Thus the rule is that both documentary and oral information obtained on discovery, including information thought by one of the parties to disclose some sort of criminal conduct, *is* subject to the implied undertaking. It is not to be used *by the other parties* except for the purpose of that litigation, unless and until the scope of the undertaking is varied by a court order or other judicial order or a situation of immediate and serious danger emerges.

5 Here, because of the facts, much of the appellant's argument focussed on her right to protection against self-incrimination, but the implied undertaking rule is broader than that. It includes the wrongdoing of persons other than the examinee and covers innocuous information that is neither confidential nor discloses any wrongdoing at all. Here, if the parents of the victim or other party wished to disclose the appellant's transcript to the police, he or she or they could have made an application to the B.C. Supreme Court for permission to make disclosure, but none of them did so, and none of them is party to the current proceeding. The applicants are the Vancouver Police Department and the Attorney General of British Columbia supported by the Attorney General of Canada. None of these authorities is party to the undertaking. They have available to them the usual remedies of subpoena *duces tecum* or a search warrant under the *Criminal Code*. If at this stage they do not have the grounds to obtain a search warrant, it is not open to them to build their case on the compelled testimony of the appellant. Further, even if the authorities were thereby to obtain access to this compelled material, it would still be up to the court at the proceedings (if any) where it is sought to be introduced to determine its admissibility.

6 I agree with the chambers judge that the balance of interests relevant to whether disclosure should be made by a party of alleged criminality is better evaluated by a court than by one of the litigants who will generally be self-interested. Discoveries (both oral and documentary) are likely to run more smoothly if none of the disputants are in a position to go without a court order to the police, or regulators or other authorities with their suspicions of wrongdoing, or to use the material obtained for any other purpose collateral or ulterior to the action in which the discovery is obtained. Of course the implied undertaking does not bind the Attorney General and the police (who are not parties to it) from seeking a search warrant in the ordinary way to obtain the discovery transcripts if they have the grounds to do so. Apparently, no such application has been made. At this stage the matter has proceeded only to the point of determining whether or not the implied undertaking permits "the *bona fide* disclosure of criminal conduct" without court order (B.C.C.A., at para. 56). In my view it does not do so in the circumstances disclosed here. I would allow the appeal.

I. Facts

7 The appellant, a childcare worker, provided day services in her home. A 16-month-old child, Jade Doucette, suffered a seizure while in the appellant's care. The child was later determined to have suffered a brain injury. She and her parents sued the owners and operators of the day-care centre for damages, alleging that Jade's injury resulted from its negligence and that of the appellant.

8 The appellant's defence alleges, in part, that Jade suffered a number of serious mishaps, including a bicycle accident while riding as a passenger with her father, none of which involved the appellant, and none of which were disclosed to the appellant when the child was delivered into her care (Statement of Defence, at para. 3).

9 The Vancouver Police have for several years been conducting an investigation, which is still ongoing. In May 2004, the Vancouver police arrested the appellant. She was questioned in the absence of her counsel (A.R., at p. 179). She was later released. In August 2004, the appellant and her husband received notices that their private communications had been intercepted by the police pursuant to s. 196 of the *Criminal Code*. To date, no criminal charges have been laid. In furtherance of that investigation, the authorities seek access to the appellant's discovery transcript.

10 In November 2004, the appellant brought an interlocutory motion to prohibit the parties to the civil proceeding from providing the transcripts of discovery (which had not yet been held) to the police. She also sought to prevent the release of information from the transcripts to the police or the Attorney General of British Columbia and a third motion to prohibit the Attorney General of British Columbia, the police and the RCMP from obtaining and using copies of the transcripts and solicitor's notes without further court order. She relied upon the implied undertaking rule.

11 The Attorney General of British Columbia opposed the appellant's motions and brought his own cross-motion for an order (if necessary) varying the legal undertaking to permit release of the transcripts to police. He also brought a second motion for an order permitting the police to apply for the transcripts by v/ay of search warrant, subpoena or other investigative means in the usual way.

12 The appellant was examined for discovery for four days between June 2005 and September 2006. She claimed the protection of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, the British Columbia *Evidence Act*, R.S.B.C. 1996, c. 124, and (though an explicit claim was not necessary) of the *Canadian Charter of Rights and Freedoms*, and says that she answered all the appropriate questions put to her. The transcripts are now in the possession of the parties and/or their counsel.

13 In 2006, the underlying claim was settled. The appellant's discovery was never entered into evidence at a trial nor its contents disclosed in open court.

II. Judicial History

A. Supreme Court of British Columbia (Shaw J.) (2005), 45 B.C.L.R. (4th) 108, 2005 BCSC 400 (B.C. S.C.)

14 The chambers judge observed that an examination for discovery is statutorily compelled testimony by rule 27 of the B.C. *Rules of Court*, B.C. Reg. 221/90. As a general rule, there exists in British Columbia an implied undertaking in civil actions that the parties and their lawyers will use discovery evidence strictly for the purposes of the court case. Discovery exists because getting at the truth in the pursuit of justice is an important social goal, but so (he held) is limiting the invasion of the examinee's privacy. Evidence taken on oral discovery comes within the scope of the undertaking. He noted that the court has the discretionary power to grant exemptions from or variations to the undertaking, and that in the exercise of that discretion courts must balance the need for disclosure against the right to privacy.

15 The chambers judge rejected the contention that the implied undertaking does not apply to evidence of crimes. Considerations of practicality supported keeping evidence of crimes within the scope of the undertaking because such evidence could vary from mere suspicion to blatant admissions and from minor to the most serious offences. It was better to leave the discretionary power of relief to the courts.

16 As to the various arguments asserted by the appellant under ss. 7, 11(*c*) and 13 of the *Charter*, the chambers judge concluded that "[t]he state is forbidden to use its investigatory powers to violate the confidentiality requirement of solicitor-client privilege; so too, in my view, should the state be forbidden to violate the confidentiality protected by discovery privilege" (para. 62). In his view, it was not open to the police to seize the transcript under a search warrant.

B. Court of Appeal for British Columbia (Newbury, Low and Kirkpatrick JJ.A.) (2006), 55 B.C.L.R. (4th) 66, 2006 BCCA 262 (B.C. C.A.)

17 The Court of Appeal allowed the appeal. In its view, the parties were at liberty to disclose the appellant's discovery evidence to the police to assist in the criminal investigation. Further, the authorities could obtain the discovery evidence by lawful investigative means such as subpoenas and search warrants.

18 Kirkpatrick J.A., speaking for a unanimous court, noted the English law on the implied undertaking of confidentiality had been applied in British Columbia only in recent years. See *Hunt v. T & N plc* (1995), 4 B.C.L.R. (3d) 110 (B.C. C.A.). In that case, however, the British Columbia Court of Appeal had held that "[t]he obligation the law imposes is one of confidentiality from improper publication. It does not supersede all other legal, social or moral duties" (para. 65; quoted at para. 32). Thus, in Kirkpatrick J.A.'s opinion, "the undertaking in the action cannot form a shield from the detection and prosecution of crimes in which the public has an overriding interest" (para. 48).

19 Kirkpatrick J.A. then turned to the *Charter* issues in the case. She noted that no charges had been laid against the appellant and therefore that ss. 11(*c*) (which applies to persons "charged with an offence") and 13 (which provides use immunity) were not engaged. The appellant was not in any imminent danger of deprivation of her right to liberty or security, and therefore any s. 7 claim was premature. Kirkpatrick J.A. declared that an implied undertaking, being just a rule of civil procedure, should not be given "constitutional status". Discovery material is not immune to search or seizure. The appeal was therefore allowed.

III. Analysis

20 The root of the implied undertaking is the statutory compulsion to participate fully in pre-trial oral and documentary discovery. If the opposing party seeks information that is relevant and is not protected by privilege, it must be disclosed even if it tends to self-incrimination. See B.C. *Rules of Court*, rules 27(2), 44, 60(41), 60(42) and 64(1); *Ross v. Henriques*, [2007] B.C.J. No. 2023, 2007 BCSC 1381 (B.C. S.C.), at paras. 180-81. In Quebec, see *Lac d'Amiante du Québec ltée c. 2858-0702 Québec inc.*, [2001] 2 S.C.R. 743, 2001 SCC 51 (S.C.C.), at para. 42. In Ontario, see *Stickney v. Trusz* (1973), 2 O.R. (2d) 469 (Ont. H.C.), aff'd (1974), 3 O.R. (2d) 538 (Ont. Div. Ct.), at p. 539, aff'd (1974), 3 O.R. (2d) 538 (Ont. Div. Ct.) (p. 539), leave to appeal ref d, [1974] S.C.R. xii (S.C.C.). The rule in common law jurisdictions was affirmed post-*Charter* in *Tricontinental Investments Co. v. Guarantee Co. of North America* (1982), 39 O.R. (2d) 614 (Ont. H.C.), and has been applied to public inquiries, *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.).

21 The Attorney General of British Columbia submits that *Lac d'Amiante*, which was based on the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25, "was wrongly decided" (factum, at para. 16). An implied undertaking not to disclose pretrial documentary and oral discovery for purposes other than the litigation in which it was obtained is, he argues, contrary to the "open court" principle stated in *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), and *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.) (factum, at para. 6). The Vancouver Police support this position (factum, at para. 48). The argument is based on a misconception. Pre-trial discovery does not take place in open court. The vast majority of civil cases never go to trial. Documents are inspected or exchanged by counsel at a place of their own choosing. In general, oral discovery is not conducted in front of a judge. The only point at which the "open court" principle is engaged is when, if at all, the case goes to trial and the discovered party's documents or answers from the discovery transcripts are introduced as part of the case at trial.

22 In *MacIntyre v. Nova Scotia (Attorney General)*, relied on by the Vancouver Police as well as by the Attorney General of British Columbia, the contents of the affidavit in support of the search warrant application were made public, but not until after the search warrant had been executed, and "the purposes of the policy of secrecy are largely, if not entirely, accomplished" (p. 188). At that point the need for public access and public scrutiny prevail. Here the action has been settled but the policies reflected in the implied undertaking (privacy and the efficient conduct of civil litigation generally) remain undiminished. Nor is *Edmonton Journal* helpful to the respondents. In that case the court struck down a "sweeping" Alberta prohibition against publication of matrimonial proceedings, including publication of the "comments of counsel and the presiding judge". In the face of such prohibition, the court asked, "how then is the community to know if judges conduct themselves properly" (p. 1341). No such questions of state accountability arise in pre-trial discoveries. The situations are simply not analogous.

A. The Rationale for the Implied Undertaking

23 Quite apart from the cases of exceptional prejudice, as in disputes about trade secrets or intellectual property, which have traditionally given rise to express confidentiality orders, there are good reasons to support the existence of an implied (or, in reality, a court-imposed) undertaking.

24 In the first place, pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable. Thus, rule 27(22) of the B.C. *Rules of Court* compels a litigant to answer all relevant questions posed on an examination for discovery. Failure to do so can result in punishment by way of imprisonment or fine pursuant to rules 56(1), 56(4) and 2(5). In some provinces, the rules of practice provide that individuals who are not even parties can be ordered to submit to examination for discovery on issues relevant to a dispute in which they may have no direct interest. It is not uncommon for plaintiff's counsel aggressively to "sue everyone in sight" not with any realistic hope of recovery but to "get discovery". Thus, for the out-of-pocket cost of issuing a statement of claim or other process, the gate is swung open to investigate the private information and perhaps highly confidential documents of the examinee in pursuit of allegations that might in the end be found to be without any merit at all.

25 The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych v. Baker* (1975), [1976] 1 S.C.R. 254 (S.C.C.). The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.

26 There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery. This is of particular interest in an era where documentary production is of a magnitude ("litigation by avalanche") as often to preclude careful pre-screening by the individuals or corporations making production. See *Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.* (1986), 5 B.C.L.R. (2d) 1 (B.C. C.A.), *per* Esson J.A. dissenting, at pp. 10-11.

27 For good reason, therefore, the law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature). See *Home Office v. Harman* (1982), [1983] 1 A.C. 280 (U.K. H.L.); *Lac d'Amiante*; *Hunt v. T & N plc*; *Shaw Estate v. Oldroyd*, [2007] B.C.J. No. 1310, 2007 BCSC 866 (B.C. S.C.), at para. 21; *Rayman Investments & Management Inc. v. Canada Mortgage & Housing Corp.*, [2007] B.C.J. No. 628, 2007 BCSC 384 (B.C. S.C.), *Wilson v. McCoy* (2006), 59 B.C.L.R. (4th) 1, 2006 BCSC 1011 (B.C. S.C.); *Laxton Holdings Ltd. v. Madill*, [1987] 3 W.W.R. 570 (Sask. C.A.); *Blake v. Governor & Co. of Adventurers of England Trading into Hudson's Bay* (1987), [1988] 1 W.W.R. 176 (Man. Q.B.); *755568 Ontario Ltd. v. Linchris Homes Ltd.* (1990), 1 O.R. (3d) 649 (Ont. Gen. Div.); *Rocca Enterprises Ltd. v. University Press of New Brunswick Ltd.* (1989), 103 N.B.R. (2d) 224 (N.B. Q.B.); *Eli Lilly & Co. v. Interpharm Inc.* (1993), 161 N.R. 137 (Fed. C.A.). Anumber of other decisions are helpfully referenced in W. A. Stevenson and J. E. Côté, *Civil Procedure Encyclopedia* (2003), Vol. 2, at pp. 42-36 *et seq.*; and C. Papile, "The Implied Undertaking Revisited" (2006), 32 *Adv. Q.* 190, at pp. 194-96.

28 The need to protect the privacy of the pre-trial discovery is recognized even in common law jurisdictions where there is no implied undertaking. See J. B. Laskin, "The Implied Undertaking" (a paper presented to the CBA-Ontario, CLE Conference on *Privilege and Confidential Information in Litigation — Current Developments and Future Trends*, October 19, 1991), at pp.

36-40. Rule 26(c) of the United States *Federal Rules of Civil Procedure* provides that a court may, upon a showing of "good cause", grant a protective order to maintain the confidentiality of information disclosed during discovery. The practical effect is that the courts routinely make confidentiality orders limited to pre-trial disclosure to protect a party or person being discovered "from annoyance, embarrassment, oppression, or undue burden or expense". See, e.g., *Cipollone v. Liggett Group Inc.*, 785 F.2d 1108 (U.S. C.A. 3rd Cir. 1986).

B. Remedies for Breach of the Implied Undertaking

29 Breach of the undertaking may be remedied by a variety of means including a stay or dismissal of the proceeding, or striking a defence, or, in the absence of a less drastic remedy, contempt proceedings for breach of the undertaking owed to the court. See *Lac d'Amiante*, at para. 64, and *Goodman v. Rossi* (1995), 125 D.L.R. (4th) 613 (Ont. C.A.), at p. 624.

C. Exceptional Circumstances May Trump the Implied Undertaking

30 The undertaking is imposed in recognition of the examinee's privacy interest, and the public interest in the efficient conduct of civil litigation, but those values are not, of course, absolute. They may, in turn, be trumped by a more compelling public interest. Thus, where the party being discovered does not consent, a party bound by the undertaking may apply to the court for leave to use the information or documents otherwise than in the action, as described in *Lac d'Amiante*, at para. 77:

> Before using information, however, the party in question will have to apply for leave, specifying the purposes of using the information and the reasons why it is justified, and both sides will have to be heard on the application.

In such an application the judge would have access to the documents or transcripts at issue.

D. Applications Should Be Dealt with Expeditiously

31 The injury to Jade Doucette occurred on November 19, 2001. The police investigation was launched shortly thereafter. Almost four years ago the appellant was (briefly) arrested. Three and a half years ago the present court applications were launched. Over two years ago the appellant was examined for discovery. It is apparent that in many of these cases delay will defeat the purpose of the application. It is important that they proceed expeditiously.

E. Criteria on the Application for a Modification or Variance of the Implied Undertaking

32 An application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation. In a case like the present, of course, there weighs heavily in the balance the right of a suspect to remain silent in the face of a police investigation, and the right not to be compelled to incriminate herself. The chambers judge took the view (I think correctly) that in this case that factor was decisive. In other cases the mix of competing values may be different. What is important in each case is to recognize that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose.

33 Reference was made to *Crest Homes plc v. Marks*, [1987] 2 All E.R. 1074 (U.K. H.L.), where Lord Oliver said, on behalf of the House of Lords, that the authorities "illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery" (p. 1083). I would prefer to rest the discretion on a careful weighing of the public interest asserted by the applicant (here the prosecution of a serious crime) against the public interest in protecting the right against self-incrimination as well as upholding a litigant's privacy and promoting an efficient civil justice process. What is important is the identification of the competing values, and the weighing of one in the light of the others, rather than setting up an absolute barrier to occasioning any "injustice to the person giving discovery". Prejudice, possibly amounting to injustice, to a particular litigant may exceptionally be held justified by a higher public interest, as in the case of the accused whose solicitor-client confidences were handed over to the police in *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.), a case referred to in the courts

below, and discussed hereafter. Of course any perceived prejudice to the examinee is a factor that will always weigh heavily in the balance. It may be argued that disclosure to the police of the evil secrets of the psychopath at issue in *Smith v. Jones* may have been prejudicial to him but was not an "injustice" in the overall scheme of things, but such a gloss would have given cold comfort to an accused who made his disclosures in the expectation of confidentiality. If public safety trumps solicitor-client privilege despite a measure of injustice to the (unsympathetic) accused in *Smith v. Jones*, it can hardly be disputed in this jurisdiction that the implied undertaking rule would yield to such a higher public interest as well.

34 Three Canadian provinces have enacted rules governing when relief should be given against such implied or "deemed" undertakings, (see *Queen's Bench Rules*, M.R. 553/88, r. 30.1 (Manitoba), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 30.1 (Ontario), and *Rules of Civil Procedure*, r. 30.1 (Prince Edward Island)). I believe the test formulated therein (in identical terms) is apt as a reflection of the common law more generally, namely:

> If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that [the implied or "deemed" undertaking] does not apply to the evidence or to information obtained from it, and may impose such terms and give such direction as are just.

35 The case law provides some guidance to the exercise of the court's discretion. For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted. See *LAC Minerals Ltd. v. New Cinch Uranium Ltd.* (1985), 50 O.R. (2d) 260 (Ont. H.C.), at pp. 265-66; *Crest Homes*, at p. 1083; *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (Alta. C.A.); *Harris v. Sweet*, [2005] B.C.J. No. 1520, 2005 BCSC 998 (B.C. Master); *Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd.* (1998), 27 C.P.C. (4th) 252 (B.C. S.C.).

36 On the other hand, courts have generally not favoured attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest. See, e.g., *Lubrizol Corp. v. Imperial Oil Ltd.* (1990), 33 C.P.R. (3d) 49 (Fed. T.D.), at p. 51. In *Livent Inc. v. Drabinsky* (2001), 53 O.R. (3d) 126 (Ont. S.C.J. [Commercial List]), the court held that a non-party to the implied undertaking could in unusual circumstances apply to have the undertaking varied, but that relief in such cases would virtually never be given (p. 130).

37 Some applications have been refused on the basis that they demonstrate precisely the sort of mischief the implied undertaking rule was designed to avoid. In *755568 Ontario Ltd.*, for example, the plaintiff sought leave to send the defendant's discovery transcripts to the police. The court concluded that the plaintiff's strategy was to enlist the aid of the police to discover further evidence in support of the plaintiff's claim and/or to pressure the defendant to settle (p. 655).

(i) The Balancing of Interests

38 As stated, the onus in each case will be on the applicant to demonstrate a superior public interest in disclosure, and the court will be mindful that an undertaking should only be set aside in exceptional circumstances. In what follows I do not mean to suggest that the categories of superior public interest are fixed. My purpose is illustrative rather than exhaustive. However, to repeat, an undertaking designed in part to encourage open and generous discovery by assuring parties being discovered of confidentiality will not achieve its objective if the confidentiality is seen by reluctant litigants to be too readily set aside.

(ii) Statutory Exceptions

39 The implied undertaking rule at common law, and in those jurisdictions which have enacted rules, more or less codifying the common law, is subject to legislative override. In the present case for example, the Attorney General of British Columbia and the Vancouver Police rely on s. 14 of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, which provides that:

> (1) A person who has reason to believe that a child needs protection under section 13 must promptly report the matter to a director or a person designated by a director.

(2) Subsection (1) applies even if the information on which the belief is based

(a) is privileged, except as a result of a solicitor-client relationship, or

(b) is confidential and its disclosure is prohibited under another Act.

It is apparent from the extensive police investigation to date and the appearance of the Attorneys General and the Vancouver Police in these proceedings that a report was made to the authorities. We do not know the details. Undoubtedly, a report could have been made without reference to anything said or produced at discovery. At this point the matter has proceeded beyond a mere "report" and involves the collection of evidence. This will require, in the ordinary way laid down by Parliament in s. 487 of the *Criminal Code*, the application for a search warrant or a subpoena *duces tecum* at trial, if there is a trial.

(iii) Public Safety Concerns

40 One important public interest flagged by the chambers judge was the "public safety" issue raised by way of analogy to *Smith v. Jones*, a case dealing with solicitor-client privilege. While solicitor-client privilege constitutes an interest higher than the privacy interest at issue here, the chambers judge used the case to illustrate the relevant balancing of interests. There, a psychiatrist was retained by defence counsel to prepare an assessment of the accused for purposes of the defence generally, including potential submissions on sentencing in the event of a conviction. During his interview with the psychiatrist, the accused described in considerable detail his plan to kidnap, rape and kill prostitutes. The psychiatrist concluded the accused was a dangerous individual who would, more likely than not, commit future offences unless he received immediate psychiatric treatment. The psychiatrist wished to take his concerns to the police and applied to the court for leave to do so notwithstanding that the psychiatrist's only access to the accused was under the umbrella of solicitor-client privilege. In such a case the accused/client would undoubtedly consider himself to be the victim of an injustice, but our Court held that the privilege yielded to "clear and imminent threat of serious bodily harm to an identifiable group ... if this threat is made in such a manner that a sense of urgency is created" (para. 84). Further, in circumstances of "immediate and serious danger", the police may be contacted without leave of the court (paras. 96-97). If a comparable situation arose in the context of an implied undertaking, the proper procedure would be for the concerned party to make application to a chambers judge but if, as discussed in *Smith v. Jones* there existed a situation of "immediate and serious danger", the applicant would be justified in going directly to the police, in my opinion, without a court order.

(iv) Impeaching Inconsistent Testimony

41 Another situation where the deponent's privacy interest will yield to a higher public interest is where the deponent has given contradictory testimony about the same matters in successive or different proceedings. If the contradiction is discovered, the implied undertaking rule would afford no shield to its use for purposes of impeachment. In provinces where the implied undertaking rule has been codified, there is a specific provision that the undertaking "does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding", see Manitoba r. 30.1(6), Ontario r. 30.1.01(6), Prince Edward Island r. 30.1.01(6). While statutory, this provision, in my view, also reflects the general common law in Canada. An undertaking implied by the court (or imposed by the legislature) to make civil litigation more effective should not permit a witness to play games with the administration of justice: *R. v. Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76 (S.C.C.). Any other outcome would allow a person accused of an offence "[w]ith impunity [to] tailor his evidence to suit his needs in each particular proceeding" (*R. v. Nedelcu* (2007), 41 C.P.C. (6th) 357 (Ont. S.C.J.), at paras. 49-51).

(v) The Suggested "Crimes" Exception

42 As stated, Kirkpatrick J.A. concluded that "the undertaking in the action cannot form a shield from the detection and prosecution of crimes in which the public has an overriding interest" (para. 48). In her view,

> a party obtaining production of documents or transcriptions of oral examination of discovery is under a general obligation, in most cases, to keep such document confidential. A party seeking to use the discovery evidence other than in the proceedings in which it is produced must obtain the permission of the disclosing party or leave of the court. However, the obligation of confidentiality does not extend to *bona fide* disclosure of criminal conduct. On the other hand, non-*bona fide* disclosure of alleged criminal conduct would attract serious civil sanctions for contempt. [para. 56]

43 The chambers judge put his finger on one of the serious difficulties with such an exception. He wrote:

> ... considerations of practicality support keeping evidence of crimes within the scope of the undertaking. In this regard, it should be understood that evidence relating to a crime may vary from mere suspicion to blatant admissions, from peripheral clues to direct evidence, from minor offences to the most heinous. There are also many shades and variations in between these extremes. [para. 27]

This difficulty is compounded by the fact that parties to civil litigation are often quick to see the supposed criminality in what their opponents are up to, or at least to appreciate the tactical advantage that threats to go to the police might achieve, and to pose questions to the examinee to lay the basis for such an approach: see *755568 Ontario Ltd.*, at p. 656. The rules of discovery were not intended to constitute litigants as private attorneys general.

44 The chambers judge took the view that "leaving the discretionary power of exemption or variation with the courts is preferable to giving litigants the power to report to the police, without a court order, anything that might relate to a criminal offence" (para. 27). I agree. On such an application the court will be able to weigh against the examinee's privacy interest the seriousness of the offence alleged, the "evidence" or admissions said to be revealed in the discovery process, the use to which the applicant or police may put this material, whether there is evidence of malice or spite on the part of the applicant, and such other factors as appear to the court to be relevant to the exercise of its discretion. This will include recognition of the potential adverse effects if the protection of the implied undertaking is seen to be diluted or diminished.

45 Kirkpatrick J.A. noted that in some circumstances

> neither party has an interest in or is willing to seek court ordered relief from the disclosure of information under the undertaking or otherwise. Nor does it [the chambers judge's approach] contemplate non-exigent circumstances of disclosed criminal conduct. It is easy to imagine a situation in which criminal conduct is disclosed in the discovery process, but no one apprehends that immediate harm is likely to result. [para. 55]

This is true, but it presupposes that the police are entitled to be handed a transcript of statutorily compelled answers which they themselves have no authority to compel, thereby using the civil discovery process to obtain indirectly what the police have no right to obtain directly. Such a rule, if accepted, would undermine the freedom of a suspect to cooperate or refuse to cooperate with the police, which is an important element of our criminal law.

46 In reaching her decision, Kirkpatrick J.A. relied on *dicta* of the House of Lords in *Rank Film Distributors Ltd. v. Video Information Centre* (1981), [1982] A.C. 380 (U.K. H.L.) (p. 425). Lord Fraser said:

> If a defendant's answers to interrogatories tend to show that he has been guilty of a serious offence I cannot think that there would be anything improper in his opponent reporting the matter to the criminal authorities with a view to prosecution, certainly if he had first obtained leave from the court which ordered the interrogatories, and probably without such leave. ... [p. 447]

These observations, however, must be read in light of the fact that in England, unlike British Columbia, there existed at the time (since amended) "a privilege against compulsory self-incrimination by discovery or by answering interrogatories" (p. 446). There was thus absent from the English procedure the very foundation of the appellant's case, namely that she had *no* right to refuse to answer questions on discovery that might incriminate her, because she was obliged by statute to give the truth, the whole truth and nothing but the truth.

47 It is true that solicitor-client privilege includes a "crime" exception, but here again there is no proper analogy to an implied undertaking. In *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), Dickson J. observed at p. 835:

> ... if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant.

See also *R. v. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.). Abuse of solicitor-client privilege to facilitate criminality is contrary to its purpose. Adoption of the implied undertaking to facilitate full disclosure on discovery *even by crooks* is of the very essence of its purpose.

In England, the weight of authority now seems to favour requiring leave of the court where the protected material relates to alleged criminality. See *Attorney General of Gibraltar v. May* (1998), [1999] 1 W.L.R. 998 (Eng. C.A.), at pp. 1007-8; *Bank of Crete S.A. v. Koskotas (No. 2)*, [1992] 1 W.L.R. 919 (Eng. Ch. Div.), at p. 922; *Sybron Corp. v. Barclays Bank PLC* (1984), [1985] 1 Ch. 299 (Eng. Ch. Div.), at p. 326. The same practice prevails in Australia: *Bailey v. Australian Broadcasting Corp.*, [1995] 1 Qd.R. 476 (Queensland S.C.); *Commonwealth v. Temwood Holdings Pty. Ltd.* (2001), 25 W.A.R. 31, [2001] WASC 282 (Western Australia S.C.).

48 In reaching her conclusion, Kirkpatrick J.A. rejected the view expressed in *755568 Ontario Ltd.* and *Perrin v. Beninger*, [2004] O.J. No. 2353 (Ont. Master), that the public interest in investigating possible crimes is *not* in all cases sufficient to relieve against the undertaking. It is inherent in any balancing exercise that one interest will not always and in every circumstance prevail over other interests. It will depend on the facts. In *Tyler v. Minister of National Revenue* (1990), [1991] 2 F.C. 68 (Fed. C.A.), in a somewhat analogous situation of statutory compulsion, the appellant was charged with narcotics offences. Revenue Canada, on reading about the charges in a newspaper, began to investigate the possibility that the appellant had not reported all of his income in earlier years. The Minister invoked his statutory powers to compel information from the appellant, who sought to prevent the Minister from communicating any information thereby obtained to the RCMP. Stone J.A., speaking for an unanimous Federal Court of Appeal, agreed that the Minister should be permitted to continue using his compulsory audit for *Income Tax Act* purposes but prohibited the Minister from sharing the information compulsorily obtained from the appellant with the RCMP. Stone J.A. was of the view that the prosecution of crime did not necessarily trump a citizen's privacy interest in the disclosure of statutorily compelled information and I agree with him.

49 The B.C. Court of Appeal qualified its "crimes" exception by the requirement that the communication to the police be made in good faith. Aside from the difficulties in applying such a requirement, as previously mentioned, I do not see how a "good faith" requirement is consistent with the court's rationale for granting relief against the undertaking. If, as the hypothesis requires, it is determined in a particular case that the public interest in investigating a crime and bringing the perpetrators to justice is paramount to the examinee's privacy interest, the good faith of the communication should no more be an issue here than in the case of any other informant. Informants are valued for what they can tell not for their worthy motives.

50 Finally, Kirkpatrick J.A. feared that

> if an application to court is required before a party may disclose the alleged conduct, the perpetrator of the crime may be notified of the disclosure and afforded the opportunity to destroy or hide evidence or otherwise conceal his or her involvement in the alleged crime. [para. 55]

This concern is largely remedied by permitting the party wishing to be relieved of the obligation of confidentiality to apply to the court *ex parte*. It would be up to the chambers judge to determine whether the circumstances justify proceeding *ex parte*, or whether the deponent and other parties to the proceeding should be notified of the application.

F. Continuing Nature of the Implied Undertaking

51 As mentioned earlier, the lawsuit against the appellant and others was settled in 2006. As a result the appellant was not required to give evidence at a civil trial; nor were her examination for discovery transcripts ever read into evidence. The

transcripts remain in the hands of the parties and their lawyer. Nevertheless, the implied undertaking continues. The fact that the settlement has rendered the discovery moot does not mean the appellant's privacy interest is also moot. The undertaking continues to bind. When an adverse party incorporates the answers or documents obtained on discovery as part of the court record at trial the undertaking is spent, but not otherwise, except by consent or court order. See *Lac d'Amiante*, at paras. 70 and 76; *Shaw Estate v. Oldroyd*, at paras. 20-22. It follows that decisions to the contrary, such as the decision of the House of Lords in *Home Office v. Harman* (where a narrow majority held that the implied undertaking not to disclose documents obtained on discovery continued even after the documents in question had been read aloud in open court), should not be followed in this country. The effect of the *Harman* decision has been reversed by a rule change in its country of origin.

G. Who Is Entitled to Notice of an Application to Modify or Vary the Implied Undertaking

52 While the issue of notice will be for the chambers judge to decide on the facts of any particular case, I do not think that in general the police are entitled to notice of such an application. Nor are the media. The only parties with a direct interest, other than the applicant, are the deponent and the other parties to the litigation.

H. Application to Modify or Vary an Implied Undertaking by Strangers to It

53 I would not preclude an application to vary an undertaking by a non-party on the basis of standing, although I agree with *Livent Inc. v. Drabinsky* that success on such an application would be unusual. What has already been said provides some illustrations of potential third party applicants. In this case the Attorney General of British Columbia, supported by the Vancouver Police, demonstrated a sufficient interest in the appellant's transcripts to be given standing to apply. Their objective was to obtain evidence that would help explain the events under investigation, and possibly to incriminate the appellant. I think it would be quite wrong for the police to be able to take advantage of statutorily compelled testimony in civil litigation to undermine the appellant's right to silence and the protection against self-incrimination afforded him by the criminal law. Accordingly, in my view, the present application was rightly dismissed by the chambers judge. On the other hand, a non-party engaged in *other* litigation with an examinee, who learns of potentially contradicting testimony by the examinee in a discovery to which that other person is not a party, would have standing to seek to obtain a modification of the implied undertaking and for the reasons given above may well succeed. Of course if the undertaking is respected by the parties to it, then non-parties will be unlikely to possess enough information to make an application for a variance in the first place that is other than a fishing expedition. But the possibility of third party applications exists, and where duly made the competing interests will have to be weighed, keeping in mind that an undertaking too readily set aside sends the message that such undertakings are unsafe to be relied upon, and will therefore not achieve their broader purpose.

I. Use Immunity

54 Reference was earlier made to the fact that at her discovery the appellant claimed the benefit of s. 5 of the *Canada Evidence Act* which eliminates the right formerly enjoyed by a witness to refuse to answer "any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person" (s. 5(1)). Answers given under objection, however, "shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury" (s. 5(2)). Similar protection is provided under s. 4 of the British Columbia *Evidence Act*. Section 13 of the *Charter* applies without need of objection. Derivative use immunity is a question for the criminal court at any trial that may be held: *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451 (S.C.C.), at paras. 191-92 and 204. The appellant's statutory or *Charter* rights are not in peril in the present appeal and her claims to *Charter* relief at this stage were properly dismissed.

J. Implied Undertaking Is No Bar to Persons Not a Party to It

55 None of the parties to the original civil litigation applied to vary the undertaking. Neither the Attorneys General nor the police are parties to the implied undertaking and they are not bound by its terms. If the police, as strangers to the undertaking, have grounds, they can apply for a search warrant under s. 487 of the *Criminal Code* in the ordinary way.

56 The appellant's discovery transcript and documents, while protected by an implied undertaking of the parties to the court, are not themselves privileged, and are not exempt from seizure: *R. v. Serendip Physiotherapy Clinic* (2004), 189 C.C.C. (3d) 417 (Ont. C.A.), at para. 35. A search warrant, where available, only gives the police access to the material. It does not authorize its use of the material in any proceedings that may be initiated.

57 If criminal charges are brought, the prosecution may also compel a witness to produce a copy of the documents or transcripts in question from his or her possession by a subpoena *duces tecum*. The trial judge would then determine what, if any use could be made of the material, having regard to the appellant's *Charter* rights and any other relevant considerations. None of these issues arise for decision on the present appeal.

K. Disposition of the Present Appeal

58 As stated, none of the parties bound by the implied undertaking made application to the court to be relieved from its obligations. The application is made solely by the Attorney General of British Columbia to permit

> any person in lawful possession of the transcript to provide a copy to the police or to the Attorney-General to assist in the investigation and/or prosecution of any criminal offence which may have occurred.... [B.C.S.C., at para. 6]

While I would not deny the Attorney General standing to seek to vary an implied undertaking to which he is not a party, I agree with the chambers judge that his application should be rejected on the facts of this case. The purpose of the application was to sidestep the appellant's silence in the face of police investigation of her conduct. The authorities should not be able to obtain indirectly a transcript which they are unable to obtain directly through a search warrant in the ordinary way because they lack the grounds to justify it.

IV. Disposition

59 I would allow the appeal with costs to the appellant both here and in the courts below.

Appeal allowed.

Pourvoi accueilli.

TAB 7

1994 CarswellOnt 473
Ontario Court of Justice (General Division)

M. v. H.

1994 CarswellOnt 473, [1994] W.D.F.L. 1541, [1994] O.J. No. 2000, 20 O.R. (3d) 70, 33 C.P.C. (3d) 337, 50 A.C.W.S. (3d) 28, 5 W.D.C.P. (2d) 484, 9 R.F.L. (4th) 94

M. v. H.

Epstein J. [in Chambers]

Heard: September 7 and 8, 1994
Judgment: September 13, 1994
Docket: Doc. 93-FC-804

Counsel: *Martha A. McCarthy*, for plaintiff M.
Mary Eberts, for defendant H.
Nicole Tellier, for proposed intervenor Adeline Gailling.
Robert M. Halpern, for proposed intervenor R.S., plaintiff in action 94-CQ-51180CM.
Gary Joseph, for defendant R.H. in action 94-CQ-51180CM.

***Epstein J.* [In Chambers]:**

1 In two separate motions, Adeline Gailling and R.S. seek leave to intervene in these proceedings. What is actually sought is leave to intervene in a motion under Rule 21 that is pending in the within action.

2 The motions now before me were heard together as they involve common questions for consideration as to the manner in which the court's discretion should be exercised in dealing with motions to intervene. Because there were no considerations unique to either motion, I have combined in one document these reasons as they relate to each motion.

The Action

3 In the action before the court, the plaintiff M. and the individual defendant H. are two women who were involved in a same sex relationship.

4 This action started by notice of application dated April 14, 1992, in which M. sought, amongst other things, an order for partition and sale and a declaration that she is the owner of certain property. By cross-application, H. advanced a claim for relief, including slander of title and repayment of loans. On April 27, 1993, M. amended her application to include a claim for support pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3 (the "FLA").

5 Shortly thereafter the plaintiff served a notice of constitutional question concerning the definition of "spouse" contained in PartIII, section 29, of the FLA.

6 Factually, it is common ground that M. and H. enjoyed a relationship in which they lived together for a number of years. Neither the plaintiff nor the defendant had children prior to the relationship. Both are educated and able-bodied women who worked during the relationship and, based on the evidence before me at this point in the proceedings, appear to be working now.

7 On February 2, 1994, I ordered that the constitutional question be determined by way of motion under Rule 21: see *M. v. H.* (1994), 1 R.F.L. (4th) 413 (Gen. Div.). The date for the hearing was originally set for three days, starting September 19,

1994. By agreement of counsel for all concerned, including the Ministry of the Attorney General, the constitutional question is now scheduled to be heard at the end of November.

8 During the last half of August, M. delivered six (now seven) volumes containing the plaintiff's factual record for the constitutional question, at least four of which contain extrinsic evidence. Other volumes include affidavits, some containing alleged adjudicative facts and others which contain legislative facts in the form of expert reports appended as exhibits to the affidavits.

9 On September 1, 1994, the Attorney General gave notice that she will be intervening on behalf of the province of Ontario. At the hearing of these motions, I was advised that the Attorney General would not be attempting to support the legislation in question but would be delivering affidavit material containing certain expert evidence.

10 The parties have recently agreed to a very specific agenda leading up to the hearing of the constitutional question, including strict deadlines for the filing of further material and cross-examinations.

The Gailling Action

11 The pleadings in the Gailling action suggest that Ms Gailling is a woman who was in a same sex relationship with Mary Dickson for a period of approximately 20 years. The two women each brought a son to the relationship, from a previous union. The primary burden for home care was assumed by Ms Gailling. Ms Dickson was the main wage-earner. There is evidence before me that Ms Gailling suffers from health problems that leave her unemployable. She is apparently on family benefits.

12 The women separated in August of 1990. In November of 1993, Ms Gailling issued a statement of claim against Mary Dickson, in which she claimed division of property and support. Ms Dickson defends these claims on various bases, including a limitation defence and the fact that the FLA does not give the courts jurisdiction to impose support obligations based on same sex relationships.

The R.S. Action

13 R.S. is a man who was in a same sex relationship with R.H. for approximately 13 years. R.S. alleges that, during the relationship, he was primarily responsible for the domestic services, which allowed R.H. to pursue a lucrative professional career. R.S. alleges that due to this assumption of roles he sacrificed his own personal financial advancement.

14 The two men separated in July 1993. By statement of claim issued May 6, 1994, R.S. advanced a claim against R.H. for division of property and support. Although the claim does not specifically identify the FLA as being the basis of the claim for support, it does contain a paragraph indicating an intention to seek leave to intervene in the *M. v. H.* action.

The Motions To Intervene

15 On August 29, 1994, Ms Gailling served her notice of this motion to intervene as an added party in *M. v. H.* and particularly to make submissions at the hearing of the constitutional question then scheduled to start on September 19, 1994. On the same day, Ms Gailling's notice of constitutional question was served.

16 Similarly, on August 30, 1994, R.S. served his notice of this motion for an order for leave to intervene as an added party in *M. v. H.* and to make submissions at the hearing of the constitutional question. On the same day, R.S. served his notice of constitutional question.

17 The grounds for both motions for leave to intervene are identical:

1. As a party in a factually similar proceeding, the moving party has an interest in the subject matter of this proceeding.

2. The moving party may be adversely affected by the decision made at the hearing of the constitutional question.

3. The action in which [the proposed intervenor] is a party has a question of law in common with the question in issue in this proceeding.

4. The intervention of the moving party will not unduly delay or prejudice the determination of the rights of the parties to the proceeding.

5. Rule 13.01 of the *Rules of Civil Procedure*.

18 The reasons of Ms Gailling and R.S. for seeking intervention are also identical. They are set out in the affidavits which were sworn by these two individuals and filed in support of the motions. The following paragraph is taken from Ms Gailling's affidavit. The affidavit of R.S. contains essentially the same paragraph.

7. I am aware that this court will be hearing a case similar to mine on September 19th, 20th, and 21st, 1994 and that the legal issue in that case is whether the definition of spouse in section [29] of the *Family Law Act* violates the equality provisions of the *Charter*. The ruling on that issue will have a direct impact on my case and will determine whether my case can proceed to determine an entitlement based on my individual circumstances or whether I will be prohibited from proceeding on the basis of my sexual orientation. Accordingly, the ruling is of the utmost important [sic] to me and will essentially determine whether I shall be forced to continue to live on Social Assistance or whether my former partner, Mary Dickson, will have any legal obligations towards me. For that reason, I have a direct interest in the case and wish my counsel, Nicole Tellier to be able to make submissions at the hearing.

Each of the proposed intervenors goes on, in the paragraph following, to say that a ruling in *M. v. H.* on the support issue will have a significant impact on each of their cases as a whole.

19 The defendants in the *Gailling v. Dickson* and the *R.S. v. R.H.* cases take no position on these matters.

The Analysis

20 The two motions have primarily been brought under rule 13.01. However, both moving parties appeared to have argued under rules 13.01 and 13.02.

21 There is an issue as to whether or not Rule 13 contemplates intervention on a motion, as it is not a proceeding.

22 Though this issue was not raised in the arguments before me, I have reviewed the relevant authorities.

23 One of the leading cases on this point is the decision of Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (H.C.). In that case, the motion to intervene was dismissed for several reasons, one of which was that Rule 13 does not apply to an interlocutory motion.

24 However, in the *Rosenberg* decision, Anderson J. referred to such a finding as "technical" and acknowledged the relevance of rule 1.04 in deciding whether or not Rule 13 should apply to a motion. Rule 1.04 provides that the rules must be liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits.

25 As indicated earlier, I ordered the constitutional question to proceed to be determined by way of a motion under Rule 21. The very nature of Rule 21 is to provide for a determination of issues that may dispose of a proceeding before trial. Rule 13 should be construed liberally when intervention is sought in a motion under Rule 21. In all material respects such a motion is a proceeding within a proceeding, and typically a judgment is rendered. Such an interpretation clearly allows for a just, expeditious, and inexpensive determination of the merits of the matters before the court.

26 Therefore, I am persuaded that the fact that the moving parties seek leave to intervene in the Rule 21 motion, rather than in the action as a whole, should not be a bar to an intervention order.

27 There is a difference between rules 13.01 and 13.02 in terms of the basis upon which the court will exercise its discretion and allow intervention.

28 Rule 13.01 provides for the intervention of a non-party who essentially has an interest in the subject matter of the proceeding or its outcome. The non-party becomes a party and may well become involved in the fact-finding process.

29 Under rule 13.02 a person may apply to participate as a friend of the court for the purpose of rendering assistance in argument, without becoming a party. The intervenor cannot adduce evidence but is confined to making argument on the parties' record before the court.

30 Rule 13 as a whole, and particularly rule 13.01, has been interpreted narrowly in conventional, non-*Charter* litigation. I think this has been for two main reasons.

31 One is practical in nature. Proceedings run the risk of becoming onerous and unwieldy by the admission of parties or of additional non-party participants in the process.

32 These obvious practical consequences could present difficulties for the court in its attempt to address the issues in the case clearly and fairly. They also can unnecessarily delay the proceedings and other wise cause prejudice to the parties to the original litigation by requiring them to deal with more material, new facts, different perspectives on issues, additional counsel, and greater costs.

33 The second reason, in my opinion, that the discretion to add parties has been exercised cautiously has to do with the very basis upon which the common law is built. It is built upon an incremental system of developing the law. An issue is determined between parties and then, subsequently, an individual who has a case with the same issue pending asks the court hearing his or her matter to decide whether or not the precedent set is applicable. If the courts had previously interpreted, or were to interpret, Rule 13 as giving intervention rights to individuals who might be affected, adversely or otherwise, solely by the legal precedent which the first case creates, then, as Ms Eberts so aptly put it, there would be no principled way of excluding the second or the fiftieth case. The common law system would implode upon itself.

34 On the other hand, it is clear that this cautioned approach to intervention has been relaxed somewhat in constitutional cases. In *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (C.A.), intervention was sought in a pending appeal from a judgment that held an Act of the Ontario legislature to be unconstitutional. It is significant that the motion in that case was to intervene as an added party under rule 13.01 *or* as a friend of the court under rule 13.02.

35 The chief justice concluded that intervention as a friend of the court was appropriate.

36 In his consideration of Rule 13, the chief justice made some instructive observations as to how the discretion of the court should be exercised in motions of this nature. In constitutional cases, the judgment affects not only the immediate parties but others as well. Accordingly, a relaxation of the rules governing the disposition of intervention applications is warranted. The matters to be considered in the exercise of the court's discretion on intervention motions are (1) the nature of the case, (2) the issues that arise, and (3) the likelihood of the applicant being able to make a useful contribution to the proceeding without causing injustice to the immediate parties.

37 With all due respect to the detailed analyses contained in other decisions concerning proposed intervenors, I agree with this decision of the chief justice. Regardless of whether the proposed intervention is sought under rule 13.01 or rule 13.02, the court's focus should be on determining whether the contribution that might be made by the intervenors is sufficient to counterbalance the disruption caused by the increase in the magnitude, timing, complexity, and costs of the original action.

38 Using this test, I will now proceed to examine the case for intervention made by the moving parties. Their position is that their right to intervene under rule 13.01(1) is based on the possibility of their being adversely affected by the decision on the constitutional question and, more importantly, that they have an interest in the subject matter of the *M. v. H.* Rule 21 motion given the common legal question critical to all three actions — the constitutional validity of section 29 of the FLA.

39 Turning to the requirement that the court examine and try to balance the possible advantage of intervention with the disruption that may be caused, the moving parties submit that they can provide different perspectives to the constitutional argument that arise from the particular facts of their cases. These perspectives would be those of dependent lesbians with children and those of gay men. To attempt to quell any concerns about added complexity, costs, and further delay, the proposed intervenors agree to certain limitations, including the amount of material they could file and the time permitted to argue. They further say that they would not interfere with the schedule agreed upon by counsel.

40 There was a concern as to how the adjudicative facts pertinent to the intervenors' individual cases would be presented to the court on the Rule 21 motion. Counsel for the intervenors proposed either an agreed-upon statement of facts or affidavits on which their clients could be cross-examined, presumably by the defendants in their respective actions and by counsel for H.

41 M. supports the intervention for several reasons. Counsel for M. submits that it would be helpful to have the additional assistance. Further, the different facts relating to the unique personal circumstances of the other two relationships would assist the court in understanding the views of other segments of the gay and lesbian community.

42 The Attorney General takes no position on these motions. Accordingly, the intervention is only resisted by the defendant H.

43 The main submission of counsel for H. is that the proposed intervenors do not have a sufficient "interest" in the subject matter of the proceedings within the meaning of Rule 13. She submits that, in the cases relied on by the moving parties, the proposed intervenors showed a clear and compelling legal and factual nexus to the main action. In *Hansen v. Royal Insurance Co.* (1985), 52 O.R. (2d) 755 (H.C.), affirmed 58 O.R. (2d) 52 (note) (Div. Ct.), the proposed intervenor was a tavern owner who was added as a party to the plaintiff's separate action against the plaintiff's insurer for no-fault benefits. The issue of availability of no-fault benefits directly affected the proposed intervenor's liability and it would not cause undue inconvenience to the parties: see also *Ontario (Securities Commission) v. Electra Investments (Can.) Ltd.* (1983), 44 O.R. (2d) 61 (C.A.).

44 I would agree that the intervention sought cannot possibly be based on any factual nexus. Given the very personal nature of this litigation, it is unlikely that there would be sufficient factual nexus between personal proceedings to warrant intervention.

45 However, the argument advanced by the moving parties was based primarily on a question of law in common as provided for in rule 13.01(1)(*c*). Typically, questions of law would also be personal to each individual action. However, as was recognized by the chief justice in *Peel*, supra, constitutional cases are different. By definition, the legal determination of the constitutional question affects an entire segment of society.

46 The moving parties therefore do qualify as potential intervenors on the Rule 21 motion, as there is a question of law in common between their proceedings, and the case at bar is of substantial importance to them.

47 I must now turn to whether, in this case, I should exercise my discretion and grant leave to intervene having regard to the test articulated earlier in these reasons, that being one of essentially weighing the advantages of intervention against the disadvantages, and ultimately balancing fairly the interests of the parties.

48 The onus is on the proposed intervenors to demonstrate that the court's ability to determine the issue, in this case the constitutional question, would be enhanced by the intervention: see *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 32 (Gen. Div.).

49 It is clear from the submissions of the moving parties themselves that they are not in a position to satisfy that onus. Both counsel admit that they have not reviewed the seven volumes comprising the record prepared by the plaintiff for the purposes of arguing the constitutional question. Accordingly, they cannot comment on any deficiency in the case prepared by the plaintiff, let alone how they propose to correct it. It is clear that the intervenor's contribution must go beyond the repetition of another party's arguments: see *Klachefsky v. Brown* (1987), [1988] 1 W.W.R. 755 (Man. C.A.).

50 This is really the pivotal point of these motions. Typically, when intervention is sought, the nature of the interest and potential contribution of the proposed intervenors is put forward to enable the court to have some idea how they would fit into the case.

51 In the matter at bar, the proposed intervenors have not done this. What they have done is promise not to overlap or duplicate any of the arguments or materials of the original parties. However, the onus is on them to persuade the court of the significance of what they would be doing rather than the significance of what they would not be doing. The moving parties have presented the court with no information as to what contribution they can make to the legal argument in this proceeding, over and above that which will be made by the parties.

52 Even if I were to assume that the proposed intervenors might have something to say based on their slightly different perspectives as gay men or dependent lesbian mothers, given the depth and breadth of the seven volumes of material the plaintiff has filed, I cannot imagine what useful contribution these parties could make other than to locate legislative facts that the plaintiff may have overlooked. This is clearly not the purpose of the rule.

53 This only area of contribution, tenuous at best and unsubstantiated by the evidence before me, must be compared with the disruption to the original action that would be caused by the intervention.

54 Even with promises of being bound by limitations as to the extent and timing of the intervention, the prejudice in this case to the original parties, particularly H., having regard to the position being taken by the Attorney General of Ontario, would be very significant indeed. The clearest example is the impact of including additional adjudicative facts upon which the moving parties base their argument of having differing perspectives. There is no manageable way of getting the relevant facts into evidence so that they can properly be tested by the parties and proven to the satisfaction of the court. This is particularly the case when the defendants in the two other actions are not before me and have not agreed to participate in any fact-finding process within the *M. v. H.* case. As well, under the circumstances, H. should be able to challenge any such evidence. However, immersing H. into the quagmire of the facts of two other actions of such a personal nature is a position the detriments of which cannot be compensated by costs.

55 The intervention of third parties into a private dispute, particularly such a personal one, should not be lightly entertained. An intervention adds to the costs and complexity of the litigation, regardless of agreements to restrict submissions. It always constitutes an inconvenience that ought not to be imposed on the parties except under compelling circumstances, which do not exist in this case.

56 The motions for leave to intervene are therefore dismissed.

57 Counsel may contact my secretary to make arrangements for the submission of arguments as to costs.

Motions dismissed.

TAB 8

2013 Comp. Trib. 17
Competition Tribunal

Commissioner of Competition v. Reliance Comfort Limited Partnership

2013 CarswellNat 6038, 2013 Comp. Trib. 17

In the Matter of the Competition Act, R.S.C. 1985, c. C-34, as amended

In the Matter of an application by the Commissioner of Competition pursuant to section 79 of the Competition Act

In the Matter of certain policies and procedures of Reliance Comfort Limited Partnership

The Commissioner of Competition, (applicant) and Reliance Comfort Limited Partnership, (respondent) and National Energy Corporation, (applicant for leave to intervene)

Donald J. Rennie J.

Heard: October 17, 2013
Judgment: November 6, 2013
Docket: CT-2012-002

Counsel: Jonathan Hood, for Applicant, Commissioner of Competition
Robert S. Russell, Brendan Wong, for Respondent, Reliance Comfort Limited Partnership
Adam Fanaki, Derek D. Ricci, for Applicant, for leave to intervene, National Energy Corporation

***Donald J. Rennie J.*:**

1 National Energy ("National"), a supplier of natural gas and electric water heaters for rental to Quebec and Ontario homeowners, seeks leave to intervene in these proceedings brought by the Commissioner of Competition (the "Commissioner") pursuant to the abuse of dominance provision (s. 79) of the *Competition Act*, R.S.C. 1985, c. C-34, against the Respondent, Reliance Comfort Limited Partnership ("Reliance").

2 At the hearing of National's motion for leave to intervene, counsel for Reliance stated that it does not oppose National's intervention but that it does take issue with National's proposed scope of intervention.

3 National's motion for leave to intervene was heard on the same day that the Tribunal heard National's motion for leave to intervene in the proceeding brought by the Commissioner against Direct Energy Marketing Limited (CT-2012-003). The two proceedings, which were filed on the same day, are similar in nature and National's proposed scope of intervention is identical in both proceedings. The Commissioner's position with respect to National's request is identical in both proceedings as well.

4 In the circumstances, the Tribunal has examined Reliance's objections together with those formulated by Direct Energy Marketing Limited and the Tribunal's analysis in that regard can be found in paragraphs 18 to 47 of its decision granting National leave to intervene in the proceeding filed by the Commissioner against Direct Energy (*Commissioner of Competition v. Direct Energy Marketing Limited*, 2013 Comp. Trib. 16 (Competition Trib.)). That analysis forms part of this decision and is reproduced in Schedule A to this Order.

Now Therefore the Tribunal Orders That:

5 National is granted leave to intervene on the following topics (the "National Energy Topics"):

a) The development of the Ontario rental water heater industry as it relates to National.

b) The issue of Reliance's anti-competitive acts as they relate to National, including the impact of Reliance's exclusionary water heater return policies and procedures and other anti-competitive conduct as alleged in the Commissioner's Application, on the ability of National to effectively compete and expand in the Relevant Market.

c) The impact of Reliance's anti-competitive acts on customers or proposed customers of National.

d) National's interactions with Reliance with respect to the matters at issue in the proceeding, including dealings with Reliance regarding the water heater removal and return process.

e) National's perspective as a participant in the industry on the definition of the product and geographic markets as framed by the Commissioner.

f) The issue of Reliance's dominant position as it affects National.

g) The issue of the substantial lessening or prevention of competition as it relates to National.

h) Barriers to entry and ease of entry into the Relevant Market, based on National's experience, including whether Reliance's conduct creates artificial barriers to entry and expansion for National or raises National's costs.

i) The statements made and conclusions drawn by Reliance concerning National's conduct in the Response of Reliance filed in this proceeding.

j) The impact of the Commissioner's proposed remedies on National and on competition in the Relevant Market.

6 National shall be allowed to participate in the proceedings and be permitted:

a) To review any discovery transcripts and access any documents of the Parties produced on discovery (subject to any Confidentiality Order issued by the Tribunal), as they relate to the National Energy Topics, but not participate directly in the discovery process.

b) To produce an affidavit of relevant documents and to make a representative of National available for examination for discovery on National Energy Topics. The discovery shall be limited in time to three (3) hours for Reliance.

c) To adduce *viva voce* evidence at the hearing of the Commissioner's Application relating to the National Energy Topics.

d) To conduct examinations and cross-examination of witnesses on the National Energy Topics.

e) To file expert evidence relating to the National Energy Topics within the procedures set out in the *Competition Tribunal Rules*.

f) To attend and make representations at any pre-hearing motions, case conferences or scheduling conferences.

g) To make written and oral argument relating to the National Energy Topics, including submissions on any proposed remedy.

7 When exercising the above rights, National shall follow the guidelines found in subsection 9(2) of the *Competition Tribunal Act*.

8 The number of lay or expert witnesses to be called by National may be limited at a future case management proceeding.

9 The parties shall file a proposed timetable for the disposition of the application on or before Wednesday, November 13, 2013. If the parties cannot agree on a timetable, they shall each serve and file a proposed timetable on or before November 13, 2013. The parties shall consult with National in establishing the timelines.

***Donald J. Rennie J.*:**

10 Schedule A: Paragraphs 18 to 47 of *Commissioner of Competition v. Direct Energy Marketing Limited*, 2013 Comp. Trib. 16 (Competition Trib.).

[18] In the circumstances, it is reasonable for the Tribunal to examine Reliance's objections together with those formulated by Direct Energy.

[19] At the hearing of the motions, counsel for National provided the Tribunal with a table setting out the topics on which it sought leave to intervene and the parties' respective positions with respect to each topic.

	Proposed Topic	**Commissioner**	**Reliance**	**Direct Energy**
A	The development of the Ontario rental water heater industry as it relates to National.	Consent	Consent	Oppose
B	The issue of Reliance's/Direct Energy's anti-competitive acts as they relate to National, including the impact of Reliance's/Direct Energy's exclusionary water heater return policies and procedures and other anti-competitive conduct as alleged in the Commissioner's Application, on the ability of National to effectively compete and expand in the Relevant Market.	Consent	Modify	Consent
C	The impact of Reliance's/Direct Energy's anti-competitive acts on customers or proposed customers of National.	Consent	Modify	Oppose
D	National's interactions with Reliance/Direct Energy with respect to the matters at issue in the proceeding, including dealings with Reliance/Direct Energy regarding the water heater removal and return process.	Consent	Consent	Consent
E	National's perspective as a participant in the industry on the appropriate definition of the product and geographic markets.	Modify	Oppose	Oppose
F	The issue of Reliance's/Direct Energy's dominant position as it affects competition in the Relevant Market generally.	Modify	Oppose	Oppose
G	The issue of the substantial lessening or prevention of competition as it relates to National and competition in the Relevant Market generally.	Modify	Oppose	Oppose
H	Barriers to entry and ease of entry into the Relevant Market, based on National's experience, including whether Reliance's/Direct Energy's conduct creates artificial barriers to entry and expansion for National or raises National's costs.	Consent	Modify	Oppose
I	The statements made and conclusions drawn by Reliance/ Direct Energy concerning National in the Response of Reliance/Direct Energy filed in this proceeding.	Modify	Consent	Consent
J	The impact of the Commissioner's proposed remedies on National and on competition in the Relevant Market.	Modify	Modify	Modify

[20] With respect to Topic A, I find that it is relevant and that National, given the formulation of the topic, will bring its own distinct or unique perspective. In the circumstances, National shall be allowed to intervene on this topic.

[21] Direct Energy does not oppose Topic B whereas Reliance seeks to modify it so as to confine it explicitly to the "impact" on National and to the alleged anti-competitive acts as set out in the Commissioner's application. Given the explicit acknowledgement made by counsel for National at the hearing that the "...anti-competitive conduct, which should be the focus of our intervention, must be the anti-competitive conduct which is at issue in the proceeding and as specifically

pled by the Commissioner", the wording of Topic B is acceptable. It cannot be interpreted at a later stage to have broadened the Commissioner's allegations as set out in his pleadings. It is not necessary to replace the word "issue" with the word "impact", as was suggested by Reliance.

[22] Direct Energy opposes Topic C and while Reliance, in its written submissions, opposed Topic C, it indicated at the hearing that Topic C would be unnecessary as Topic B already allows National to adduce direct evidence regarding customers. Direct Energy submitted that National seeks to speak on behalf of consumers under this Topic and that it cannot do so.

[23] At the hearing, counsel for National indicated that it has no intention to speak for or on behalf of all consumers, generally. Rather, under this proposed topic, National seeks to describe its direct knowledge of how Direct Energy's alleged conduct impacts customers or its efforts to attract potential customers, including National's ability to induce customers to switch suppliers. Given these clarifications made by counsel, this Topic is acceptable and appropriate.

[24] With respect to Topic E, Reliance and Direct Energy submit that National seeks to redefine the issues of product market and geographic market in a manner that is different from that defined by the Commissioner in his pleadings. National, as a market participant, brings its own perspective on the relevant product and geographic markets, based on its experience. It is very possible that its perspective and that of the Commissioner, while they may overlap, may not be identical.

[25] Direct Energy and Reliance object to National having any view on product or geographic market. They base their objection on fairness, and say that they know the case they have to meet, and that is the case as defined by the Commissioner. I agree. The case is defined by the Commissioner and it cannot be re-cast by an intervener. That said, an intervener may have pertinent information and a useful perspective about these issues as framed by the Commissioner. To exclude the intervener from having a role in respect of the nuances and precise contours of these two issues as framed by the Commissioner would render the right of intervention illusionary. National can give its perspective as a participant in the industry on the definition of the product and geographic markets as framed by the Commissioner.

[26] Reliance and Direct Energy oppose Topics F and G and note that National does not bring a unique or distinct perspective when it wishes to speak as to competition in the relevant market generally. They note that these Topics strike at the heart of the alleged restrictive trade practice and that it is for the Commissioner to establish the constituent elements of the practice. Counsel for Reliance indicated at the hearing that Reliance would not object to these Topics if they had been limited to the impact on National. The Commissioner also submits that the Topics should be limited to National.

[27] In the circumstances, I find that these are proper topics with respect to which National brings its own distinct perspective, given its experience in the market place. Any evidence to be presented by National in this regard should be limited to that of National alone.

[28] Direct Energy opposes National's proposed Topic H and Reliance proposes alternative wording. Whereas Reliance's initial concerns have now been addressed, I see no reason to prevent National from making representations with respect to this Topic given the express reference and limitation to National's experience. National brings a unique or distinct perspective in this regard.

[29] Direct Energy and Reliance do not oppose Topic I, but the Commissioner has asked that the Topic be explicitly restricted to National's "conduct" in the responses filed. The addition of the limitation does add useful precision and will therefore be added.

[30] With respect to Topic J, Reliance, Direct Energy and the Commissioner seek to remove the reference to "on competition in the Relevant Market". The Tribunal, in previous decisions, has allowed interveners to provide a view of the impact of the proposed remedy (see, e.g., *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2011 Comp. Trib. 2, where the Tribunal allowed a bank to make representations regarding the impact of the proposed remedy on the payments system). National does bring a unique or distinct perspective on the impact of the proposed remedies on competition in the market in which it participates.

C. Terms of Participation and Costs

[31] National seeks to intervene on the following terms:

A	To review any discovery transcripts and access any documents of the Parties produced on discovery (subject to any Confidentiality Order issued by the Tribunal), but not participate directly in the discovery process.
B	To produce an affidavit of relevant documents and to make a representative of National available for examination for discovery on the topics for which National has been granted leave to intervene.
C	To adduce non-repetitive *viva voce* evidence at the hearing of the Commissioner's Application relating to the topics for which National has been granted leave to intervene.
D	To conduct non-repetitive examinations and cross-examination of witnesses on the topics for which National has been granted leave to intervene.
E	To file expert evidence relating to the topics for which National has been granted leave to intervene within the procedures set out in the *Competition Tribunal Rules*.
F	To attend and make representations at any pre-hearing motions, case conferences or scheduling conferences.
G	To make written and oral argument relating to the topics for which National has been granted leave to intervene, including submissions on any proposed remedy.

[32] At the hearing, counsel for the Commissioner agreed with the above proposed terms. Both Reliance and Direct Energy object to the wording of some or all of these terms.

[33] With respect to the first Term, Direct Energy has stated in its written submissions as follows:

> National should not be permitted to inspect any documents produced by the parties or review discovery transcripts or any exhibits thereto, except in accordance with a confidentiality Order made by the Tribunal that restricts disclosure of such documents and transcripts to: (i) the topics on which National has been permitted to intervene; and (ii) external counsel for National, after having signed an appropriately worded confidentiality agreement, insofar as the information to be disclosed has been determined by the producing party to be competitively sensitive and/or proprietary;

[34] I agree that the review of the transcripts and documents should be limited to the topics on which National has been granted leave to intervene. National has not established why a review of all the discovery transcripts and access to all documents are necessary for the purposes of its intervention. If practical difficulties arise, the parties can work together to address those difficulties, failing which the matter can be addressed at a case management conference.

[35] Contrary to the submissions made by Direct Energy and Reliance, it is not necessary to include in Term B a reference to all correspondence between National and the Commissioner. Any dispute between the parties with respect to relevance and privilege can be dealt with at a later stage in accordance with the normal Tribunal procedure and Rules 60 and 61 of the *Competition Tribunal Rules*.

[36] In the circumstances, it is also appropriate to limit the duration of the examination of discovery of National's representative to three hours. It is not necessary to specify that the questions asked be non-repetitive. The Tribunal proceeds on the assumption that all counsel know, and will abide existing rules of practice.

[37] With respect to Term C, Direct Energy asks that National only be permitted to deliver the relevant, non-repetitive evidence of one witness. It is premature to arbitrarily limit the number of lay witnesses. However, the Tribunal reserves the right, as part of a future case management proceeding, to limit the number of witnesses to be called by National.

[38] The Tribunal finds that Term D is a proper term and dismisses Direct Energy's submissions that National should not be permitted to cross-examine witnesses at the hearing of the main application. Interveners may have the right to cross-examine witnesses at the hearing and Direct Energy has not provided any convincing reason why National should be precluding from exercising this right (see, e.g., *American Airlines*).

[39] Direct Energy further submits that National should not be allowed to lead expert evidence on the basis that the opinion of the expert would not reflect the unique or distinct perspective of National. Reliance submits that National's expert reports should be confined to National's unique perspective (e.g. functional substitutes that may be available to gas or electric water heaters). Counsel for both parties expressed the view at the hearing that it would be improper for National to lead expert evidence with respect to more general topics such as the relevant markets and the effect of the alleged conduct in the market generally.

[40] Direct Energy has not provided any decision in support of its position that interveners should not be allowed to lead expert evidence. On the contrary, in various decisions, over the last 20 years, the Tribunal has allowed interveners to do precisely that which Direct Energy opposes (see e.g.: *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2011 Comp. Trib. 2; *Commissioner of Competition v. Toronto Real Estate Board*, 2011 Comp. Trib. 22; *Commissioner of Competition v. Air Canada*, 2011 Comp. Trib. 21; *Commissioner of Competition v. Air Canada*, 2001 Comp. Trib. 4; *Director of Investigation and Research v. Canadian Pacific Ltd*. (1997), 74 C.P.R. (3d) 37; *Director of Investigations and Research v. Tele-Direct (Publications) Inc.* (1995), 61 C.P.R. (3d) 528).

[41] Again, it would be premature to place an arbitrary limit on the type and number of expert witnesses National can bring forward. Counsel for National acknowledged at the hearing that it does not yet know what kind of expert evidence it wishes to adduce, if any. However, I note that with respect to presenting such evidence, National should be guided by the principles set forth in subsection 9(2) of the *Competition Tribunal Act*.

[42] With respect to Term F, Reliance submits that it should be confined to instances where National's interests are in issue whereas Direct Energy takes the position that National's representations should be allowed but only to the extent that they are relevant to the issues on which it is permitted to intervene and are not duplicative of the Commissioner's representations.

[43] For practical reasons, given the guidelines set out in subsection 9(2) and given the agreement of counsel at the hearing to work together, I find that it is not necessary, at this time, to restrict Term F any further.

[44] Counsel for National indicated at the hearing that it is willing to include a reference in Term G, so as to confine it to non-repetitive argument, as long as National has the opportunity to review the Commissioner's filing in advance. Counsel for the Commissioner no longer insisted, at the hearing, on the inclusion of the word "non-repetitive", but Direct Energy, in its written submissions asked that National's argument not be duplicative of that of the Commissioner's.

[45] The Tribunal will not engage in micro-managing the content of National's factum. As a practical matter, there must be some repetition in order for the intervener to frame its distinct or unique perspective.

[46] Finally, National has indicated that if leave to intervene is granted, it would not seek costs and requests that it not be made liable for the costs of any party or other intervener.

[47] Direct Energy submits that National should be subject to the costs provisions in section 8.1 of the *Competition Tribunal Act* and Reliance argues that it would be premature to order that National will not be liable for costs as this is a decision that should be left to the panel hearing this matter. I agree. I will not fetter the discretion of the panel hearing this matter to award costs as it sees appropriate: *Commissioner of Competition v. Toronto Real Estate Board*, 2011 Comp. Trib. 22, para. 43.

TAB 9

2017 Comp. Trib. 18
Competition Tribunal

The Commissioner of Competition v. Vancouver Airport Authority

2017 CarswellNat 7019, 2017 Comp. Trib. 18

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 case management conference and a motion by Vancouver Airport Authority seeking orders allowing it to conduct examination for discovery and amending the timetable of the application

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

Denis Gascon Chair

Judgment: December 6, 2017
Docket: CT-2016-015

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

***Denis Gascon Chair*:**

I. OVERVIEW

1 This order deals with a debate that keeps arising before the Tribunal in many applications brought by the Commissioner of Competition ("*Commissioner*"), namely the continuous tension between the public interest privilege claimed by the Commissioner to protect against the compulsory disclosure of documents obtained or prepared by the Commissioner in the course of his investigations, and the adverse impact that the use and application of this privilege can have on the fairness of the Tribunal's proceedings and on a respondent's right and ability to make a full answer and defence in response to the Commissioner's case.

2 On November 22, 2017, the Vancouver Airport Authority ("*VAA*") requested a Case Management Conference ("*CMC*") to discuss the Commissioner's alleged non-compliance with his disclosure obligations pursuant to the scheduling and confidentiality orders issued by the Tribunal in this matter. The Tribunal held a CMC on November 23, 2017, followed by a second one on November 30, 2017. In the meantime, further to a Direction issued by the Tribunal on November 24, 2017 ("*November Direction*"), VAA opted to file a formal motion before the Tribunal, seeking *inter alia* an order compelling the Commissioner to produce his representative for a further examination for discovery and amending the scheduling order currently in place in this matter ("*Motion*").

3 In essence, VAA argues that, in light of the documents over which the Commissioner has now waived his claim of public interest privilege and which he has only provided to VAA on November 24, 2017 ("*Waived Documents*"), VAA is entitled to examine for discovery the Commissioner's representative on those Waived Documents. VAA further asks that the timetable for the disposition of this matter be amended and extended in order to give it sufficient time to conduct such examination, to review the Waived Documents and to prepare its case in response. On both fronts, VAA claims that considerations of fairness and VAA's right to be able to make a full answer and defence against the Commissioner's case dictate that the reliefs be granted. VAA brought its requests and the Motion in the context of the application made against VAA by the Commissioner under the abuse of dominance provisions of the *Competition Act*, RSC 1985, c C-34 ("*Application*").

4 VAA's requests and Motion raise two issues. First, whether VAA has a right, in the present circumstances and at this stage of the proceedings, to conduct a further examination for discovery of the Commissioner's representative on the Waived Documents. Second, whether VAA is entitled to have additional time to review the Waived Documents and prepare its case in response, including its documents relied upon, witness statements and expert reports.

5 For the reasons that follow, VAA's requests and Motion will be granted in part, in terms of a circumscribed right to further examine the Commissioner's representative and of an adjustment to the timetable for the disposition of the Application. I take note of the Commissioner's agreement to produce his representative for one additional day of examination for discovery, in relation to the Waived Documents. Upon reviewing the materials filed by VAA and the most recent correspondence from counsel for both parties, and after hearing them at the November 30, 2017 CMC, I am thus ready to order the further examination for discovery of the Commissioner's representative, within the parameters set out in this order. In addition, I agree with VAA that, given the late disclosure of the Waived Documents by the Commissioner, coupled with the magnitude of the number of documents at stake, considerations of fairness command that VAA be given more time to review and digest the information in order to be able to adequately prepare its case in response. This, in my view, can be done in a fair and balanced way by adjusting the remaining pre-hearing disclosure steps in the July 21, 2017 scheduling order ("*July Scheduling Order*") and by slightly modifying the hearing dates already set aside for this matter.

II. BACKGROUND

6 The relevant procedural background can be summarized as follows.

7 The Commissioner filed his Notice of Application on September 29, 2016, seeking relief against VAA under section 79 of the Act. In accordance with the initial scheduling order issued by the Tribunal in this matter, the Commissioner served VAA with his affidavit of documents and supplemental affidavits of documents (collectively "*AODs*"), listing all records relevant to this Application which were in the Commissioner's possession, power or control. The Commissioner's AODs divided these records 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.

8 The Commissioner has stated that, through the productions contained in his AODs, he has provided to VAA all relevant, non-privileged documents in his possession, power or control ("*Documentary Productions*").

9 In March 2017, VAA challenged the Commissioner's claim of public interest privilege over documents contained in Schedule C of the AODs. 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, I upheld the Commissioner's claim of public interest privilege over approximately 1,185 documents. According to VAA, these documents included over 475 affidavits, emails, interview notes, letters, memos, notebooks and presentations. VAA has appealed the VAA Privilege Decision, and the Federal Court of Appeal currently has the matter under reserve.

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 and contained in the Schedule C records for which the Commissioner 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 challenging 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, which totalled 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 in the Summaries, even in a limited form or under limited access.

12 On July 21, 2017, further to the representations made by the parties, the Tribunal issued the July Scheduling Order reflecting the agreement of the parties on the remaining discovery and pre-hearing disclosure steps, and moving the commencement of the hearing from mid-November 2017 to January 29, 2018.

13 On August 23 and 24, 2017, the Commissioner's representative, Mr. Rushton, was examined for discovery by VAA for two full days, on the basis of the information and materials disclosed in the Documentary Productions and in the Summaries.

14 In September 2017, VAA brought another motion before the Tribunal, seeking to compel the Commissioner to answer several questions that were refused during the examination for discovery of the Commissioner's representative. On October 26, 2017, the Tribunal released its decision on VAA's refusals motion (*The Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 16 (Competition Trib.) ("*VAA Refusals Decision*"), granting it in part and ordering some questions to be answered by the Commissioner's representative along the lines developed in that decision. The Tribunal was recently informed that, further to the additional responses provided by the Commissioner following the VAA Refusals Decision, VAA elected not to conduct a further examination for discovery of the Commissioner's representative, initially planned for early November 2017.

15 On November 15, 2017, in accordance with the July Scheduling Order, the Commissioner served VAA with eight witness statements, one expert report and his documents relied upon. The total number of documents attached to the Commissioner's witness statements added up to approximately 100. However, in terms of documents for which the Commissioner was waiving the public interest privilege, the Commissioner solely provided those *documents he intended to rely upon*. In other words, the Commissioner initially did not provide VAA with all relevant documents from a particular witness but only the subset of relevant documents that he chose to rely on.

16 On November 21, 2017, the Commissioner advised VAA that, "upon further consideration of the particular circumstances of this case, and in the interests of expeditiously bringing this matter to trial in accordance with the Scheduling Order", the Commissioner would be waiving his public interest privilege on *all relevant documents relating to the testimony of the various witnesses*, even if some of this information had not been "relied on" by the Commissioner.

17 On November 24, 2017, the Commissioner thus provided to VAA's counsel a USB key containing the Waived Documents, consisting of 1,011 records that were in the Commissioner's power or control as of August 31, 2017, over which the Commissioner had initially claimed public interest privilege and for which that privilege was now being been waived. The Commissioner also provided the confidentiality designation (i.e., Confidential Level A or Confidential Level B) of the Waived Documents on November 29, 2017. The Commissioner further confirmed that, as of November 15, 2017, he had produced to VAA, as attachments to the Commissioner's witness statements, 104 records that were produced to the Commissioner after August 31, 2017, over which the Commissioner had claimed public interest privilege and for which that privilege has now been waived.

18 The Tribunal understands that, by providing the Waived Documents, the Commissioner has now effectively waived his public interest privilege on all relevant information provided by the witnesses appearing on his behalf, both helpful and unhelpful to the Commissioner, including information not relied on by the Commissioner.

19 In correspondence dated December 4, 2017 received from both counsel to VAA and counsel to the Commissioner, as per the Tribunal's directions, the parties set out the areas of agreement and disagreement between them with respect to the issues raised by VAA in the Motion and discussed at the November 30, 2017 CMC. The parties were able to agree in respect of the alternative relief sought by VAA in the Motion, namely a revised schedule for the remaining pre-hearing disclosure steps in this matter and for the hearing, but areas of disagreement remain with respect to the further examination for discovery of the Commissioner's representative and the rulings to be issued by the Tribunal on the different reliefs sought by VAA in its Motion.

III. ANALYSIS

A. VAA's Right to Conduct Further Examination for Discovery

20 VAA first claims that considerations of fairness entitle it to examine for discovery the Commissioner's representative on the Waived Documents. VAA argues that a further examination is warranted given that the Commissioner has waived his right to public interest privilege regarding a significant number of documents relevant for the trial. VAA posits that it deserves the right to resume the discovery process and to have additional time to prepare its response, given the amount of documents for which privilege was revoked, and the proximity of trial.

21 While he is of the view that a further examination for discovery of his representative is not warranted or appropriate, the Commissioner is however prepared, in the interests of expeditiously advancing this matter, to produce his representative for one day of additional discovery in December. The Commissioner submits that such further examination should be restricted to matters that do not arise from the Commissioner's witness statements or expert report and on which VAA could not have previously examined the Commissioner. In addition, the Commissioner takes the position that any consequential steps from such discovery (e.g., a refusals motion) shall also be dealt with on an expeditious basis so as to preserve the revised schedule and the hearing of this matter within the five-week period provided for in the July Scheduling Order.

22 Before turning to the limited further examination for discovery agreed to by the Commissioner, the following remarks are in order.

23 In the VAA Privilege Decision, I confirmed that the Commissioner's public interest privilege is a class-based privilege. While this decision is currently being appealed by VAA, this Application has proceeded on the basis of the Commissioner's recognized public interest privilege. In both the VAA Privilege Decision and the VAA Refusals Decision, I discussed the "unique way" in which the Commissioner's public interest privilege has developed, and I referred to the three "safeguard mechanisms" put in place by the Tribunal and affirmed by the Courts to temper the adverse impact of the limited disclosure, as well as to the high threshold (e.g., compelling circumstances or compelling competing interest) required to authorize lifting the privilege (*VAA Privilege Decision* at para 81; *VAA Refusals Decision* at para 79). Through these safeguard mechanisms, the Tribunal and the Courts have developed a "disclosure regime designed to balance public interest privilege with fairness" (*VAA Summaries Decision* at para 15).

24 In this Application, documentary and oral discovery has already taken place, in line with the particular regime developed by the Tribunal and the Courts. The Summaries prepared by the Commissioner were found to be adequate by the Tribunal in the VAA Summaries Decision, that decision has not been appealed by VAA, and VAA has indeed proceeded to the examination for discovery of the Commissioner's representative on the basis of the Documentary Productions and the Summaries, over a period of two days.

25 When the Commissioner served his documents relied upon and his witness statements on November 15, 2017 (as mandated by the July Scheduling Order), the so-called third safeguard mechanism required the Commissioner to waive his public interest privilege on documents and communications from witnesses providing will-say statements, if he wanted to rely on that information at trial (*VAA Refusals Motion* at para 86). This is what the Commissioner did. As I indicated in the VAA Refusals Decision, the Commissioner could also be required, depending on the circumstances, to waive his public interest privilege on *all relevant information* provided by a witness appearing on his behalf, both helpful and unhelpful to the Commissioner and including information not relied on by the Commissioner, if circumstances and considerations of fairness dictated it (*VAA Refusals Motion* at para 87; November Direction at 3). This is what the Commissioner elected to do when he provided the Waived Documents to VAA.

26 In acting as he did, the Commissioner therefore waived his privilege at the stage where, according to the regime developed by the Tribunal and affirmed by the Courts, the Commissioner was directed and entitled to do so.

27 I am satisfied that the special safeguard mechanisms put in place by the Tribunal to address the concerns for the right to a fair hearing raised by the limit imposed by the Commissioner's public interest privilege on the full disclosure of relevant documents and communications have worked properly in this case. I note that, in its Motion, VAA has not adduced evidence to the contrary.

28 The fact that the Commissioner has now waived his public interest privilege in accordance with the safeguard mechanisms developed by the Tribunal does not, in my view, imply that the discovery process already completed can automatically be re-opened at this late stage of the proceedings. If that was the case, it would in fact tend to render meaningless both the Commissioner's public interest privilege and the process developed by the Tribunal to ensure an adequate balance between the protection of such privilege and a respondent's right to a fair hearing. The current state of the law sets that the Commissioner's public interest privilege has been recognized, and that the Commissioner does not have to disclose, until the time he files his witness statements, the documents over which the privilege is asserted. This entails that he does not have to make the privileged documents available for discovery, though he is required to provide adequate and accurate summaries about their contents. The rationale being that, in order to properly protect the identity of the sources of information covered by the privilege, the waiver is only granted at the later stage of the proceedings, close to the trial date.

29 In that context, I agree with the Commissioner that the Waived Documents cannot be considered as constituting "new information" as such. Instead, they contain information covered in the Summaries which were found to be adequate for purposes of discovery by the Tribunal. The Commissioner's representative was indeed examined for discovery for two days on the basis of the Documentary Productions and the Summaries.

30 I accept and acknowledge that there could be situations where a respondent could satisfy the Tribunal that a further examination for discovery of the Commissioner's representative is required or necessary following the waiver of public interest privilege by the Commissioner, even at the late stage of filing his witness statements. This would be the case, for example, where the production of the actual documents shows that the underlying summaries were inadequate or inaccurate. However, in order for the Tribunal to come to such a conclusion and to re-open the examination for discovery process already completed, it takes more than a general statement about a potential breach of procedural fairness. The Tribunal needs to be persuaded by appropriate and adequate evidence.

31 In other words, evidence would be required in order for me to conclude that the failure to conduct a further examination for discovery on the Waived Documents would be procedurally unfair and prejudicial to VAA's ability to make a full answer and defence in response to the Commissioner's underlying Application. This is especially the case in a context where, like here, a motion challenging the adequacy of the Summaries has been filed and dismissed by the Tribunal. I indeed note that counsel for VAA has been unable to direct me to any precedent supporting a general right to conduct a further examination for discovery of the Commissioner's representative in circumstances where the Commissioner has waived his public interest privilege at the time his witness statements are served and where adequate Summaries have been provided in accordance with the safeguard mechanisms developed by the Tribunal and affirmed by the Courts.

32 I find that, in this case, VAA has not put forward evidence on the existence of special circumstances which would support the issuance of an order that the Commissioner's representative re-attend an examination for discovery to answer questions with respect to the Waived Documents. In a situation where VAA has already conducted oral discovery on the basis of Summaries found to be fair and adequate by the Tribunal, it was VAA's burden to demonstrate the necessity to have a further examination for discovery of the Commissioner's representative and why a further examination for discovery on the Waived Documents would be justified. VAA has not satisfied that burden. No evidence has been provided to show how and where the Summaries were inadequate or inaccurate, nor to support VAA's claim that the production of the Waived Documents at this stage of the proceedings undermines VAA's ability to prepare its responding case and renders the proceeding fundamentally unfair. In my view, even if the Waived Documents are large in volume and are arguably significant, probative and highly material, VAA did not point to some specific facts nor demonstrated how and in what respect it would suffer prejudice by the absence of a further examination for discovery on the Waived Documents.

33 Moreover, I underline that, even outside a process as unique as this one where public interest privilege is involved and special safeguard mechanisms exist, re-opening discovery on the eve of a scheduled trial is exceptional. Once a case is set for trial and the trial date has been assigned, "the pre-trial proceedings are not to be reopened in the absence of an applicant establishing that a significant and unexpected change in circumstance has occurred, or that a manifest injustice is likely to

occur if the pre-trial proceedings are not reopened" (*Vigoren v. Nystuen*, 2006 SKCA 47 (Sask. C.A.) at paras 41-42; *Dufour v. Saskatoon StarPhoenix Group Inc.*, 2007 SKQB 293 (Sask. Q.B.) at paras 21-22).

34 In Federal Court proceedings, the general rule is that discovery is "not a never ending process that knows no boundaries" (*John Labatt Ltd. v. Molson Breweries, A Partnership* (1996), 69 C.P.R. (3d) 126 (Fed. T.D.) ("*John Labatt*") at para 8). Discovery is rather a tool enabling a party to better prepare for trial but, like any other tool, it has to be properly used to give the best results, and the Court should not allow it to unduly delay an action (*John Labatt* at para 8). When deciding to re-open the discovery process, the courts are called on to consider whether there has been delay in bringing the request or motion, whether extensive discovery has already taken place and whether new issues are raised (*Taylor v. R.* (1991), [1992] 1 F.C. 316 (Fed. T.D.) ("*Taylor*") at para 22). As such, re-opening the discovery phase is an "exceptional remedy" that should be justified by "special reasons" in order to better serve the "ends of justice" (*Taylor* at para 22). Nothing in the case law submitted by VAA in support of its Motion contradicts these principles.

35 I would add that, by waiving his privilege over the Waived Documents only at the time of service of his witness statements, the Commissioner cannot be said to have used the privilege to gain a tactical advantage in the litigation or in a way that would be fundamentally incompatible with the role of the Commissioner to act in accordance with the public interest. The Commissioner was in fact following the safeguard mechanisms process put in place by the Tribunal and affirmed by the Courts. There is no evidence to support an allegation that the Commissioner's actions in the run-up to trial be qualified as being "motivated by tactical considerations" or amounting to trial by ambush (*R. v. Gordon*, [1999] O.J. No. 1425 (Ont. Gen. Div.) at paras 35-37).

36 That being said, in view of the Commissioner's specific agreement, I agree that a further examination for discovery of the Commissioner's representative may be ordered in the circumstances of this case, on the following terms. Since VAA has already examined the Commissioner's representative for discovery over two full days, and considering that the number of Waived Documents, while not insignificant, nonetheless represents only a fraction of the Documentary Productions made by the Commissioner in this matter, I am satisfied that one additional day of further discovery of the Commissioner's representative is sufficient and reasonable to cover issues raised in the Waived Documents.

37 In addition, since examinations for discovery are meant to be completed before a party has the benefit of the other side's witness statements or expert reports, I also agree that the further examination for discovery of the Commissioner's representative shall not deal with matters arising from the Commissioner's witness statements or expert report. I underline that only information that is within the Commissioner's possession and control may be sought on discovery, as opposed to asking the Commissioner's representative to speculate as to what a particular third party may have meant to state during an interview with the Bureau.

38 Finally, considering the remaining pre-hearing disclosure steps to be completed and the revised timetable ordered below, I determine that this further one-day examination for discovery of the Commissioner's representative shall be held before December 15, 2017, and that any motions arising from such additional discovery shall be filed by December 18 at the latest and heard by the Tribunal before December 21. I am persuaded that, with good faith efforts by the parties, convenient dates can be agreed to by counsel to meet these tight deadlines.

39 It is well-accepted that the Tribunal resides very close to, if not at, the "judicial end of the spectrum", where the functions and processes more closely resemble courts and attract the highest level of procedural fairness. And the right to a fair hearing means the right to know the case against it and the right to a meaningful opportunity to present evidence supporting its own case (*Commissioner of Competition v. Direct Energy Marketing Limited*, 2014 Comp. Trib. 17 (Competition Trib.) at para 16; *VAA Privilege Decision* at para 169). In addition, 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; *VAA Refusals Decision* at para 44).

40 I am satisfied that, with the discovery already conducted and by providing for this additional day of further examination for discovery of the Commissioner's representative on the Waived Documents, as well as additional time to prepare its response, VAA's right to a fair hearing and to a full and complete defense will be amply met and that no breach of procedural fairness

will result from the delayed production of the Waived Documents by the Commissioner. Furthermore, VAA will have the opportunity, at trial, to cross-examine the Commissioner's witnesses on the contents of the Waived Documents.

B. Adjustments to the Scheduling Order

41 I now turn to VAA's request for an extension of time to prepare its response and for an amendment to the July Scheduling Order.

42 I agree with VAA that, in the circumstances of this case, the rules of procedural fairness and the interests of justice require that VAA be given a reasonable amount of time to review the Waived Documents and to prepare its case in response. This dictates that the deadline for VAA to serve its list of documents relied upon and witness statements and to serve and file expert reports be extended in order to allow VAA (including not only VAA's counsel, but also VAA's representatives and any experts that may have been retained by it) to review the documents and consider the manner in which their contents may affect VAA's case and its broader trial strategy.

43 The Commissioner served his witness statements accompanied by all documents relied upon by him on November 15, 2017, but he only decided to waive his public interest privilege over more than 1,000 documents in the following week, produced the Waived Documents nine days later and determined the confidentiality designation on November 29, 2017, thus causing delays for VAA in the pre-hearing disclosure process and in the receipt of information relevant to the preparation of its case. Given the issues that VAA had raised in its refusals motion, and in particular VAA's Request 117, and in light of the VAA Refusals Decision, I am of the view that that the Commissioner should have known or anticipated that VAA would be asking for *all relevant information* coming from the Commissioner's witnesses. Furthermore, in my opinion, the Commissioner should have known that it would have to identify in a timely manner the Level A or Level B confidential designation of any documents over which his public interest privilege would be waived.

44 I recognize that the Commissioner eventually decided to voluntarily waive his public interest privilege over all relevant documents and thus did not require VAA to seek an order of the Tribunal to obtain such relief. However, the fact remains that, because of the Commissioner's delayed response, VAA only got a late access to the waived information. This calls for an extension of time to serve its case in response.

45 I am also persuaded that this additional time is also justified in this case by the volume and nature of the Waived Documents at stake.

46 I do not dispute that, when the Commissioner served his witness statements to VAA on November 15, 2017, he was only required to provide all documents *he intended to rely upon* and to waive his public interest privilege on such documents, if any (November Direction at 3). This is what he did. But the Commissioner was aware that he *could* also be required, depending on the circumstances, to waive his public interest privilege on *all relevant information* provided by a witness appearing on his behalf, both helpful and unhelpful to the Commissioner. It was up to VAA to raise this issue with the Commissioner and the Tribunal if it believed that the Commissioner did not comply with his obligations when he served his materials, which VAA did through correspondence with the Commissioner and through its requests to the Tribunal.

47 In the context of this case, considerations of fairness clearly command that more time be given to VAA to review and digest the information contained in the Waived Documents and to prepare its case, as the disclosure process has been truncated to VAA's detriment. How much time should be granted is up to the Tribunal to determine in the exercise of its discretion and in light of each set of circumstances. No magic formula exists to determine how this balancing exercise shall be conducted or to measure the impact of a late disclosure on a respondent's right to a fair hearing. But the Tribunal will typically err on the side of caution and ensure that considerations of procedural fairness are not sacrificed for the sake of trial efficiency and expeditiousness.

48 Having reviewed the written and oral submissions made by counsel for both parties, I am satisfied that compelling reasons exist to revise the July Scheduling Order with respect to the remaining pre-hearing disclosure steps and the hearing dates fixed in this matter, and that an extension of time of four weeks until January 12, 2018 is required and reasonable in order to give VAA sufficient time to adequately prepare its response.

49 I point out that, in July 2017, VAA had agreed to the revised timetable set out in the July Scheduling Order. At that time, the Tribunal had issued its VAA Privilege Decision upholding the Commissioner's class-based public interest privilege, and VAA had filed its appeal against that decision before the Federal Court of Appeal. VAA was aware that there were about 1,200 documents over which the Commissioner was claiming public interest privilege, and knew about the safeguard mechanisms described by the Tribunal in the VAA Privilege Decision. Indeed, the Commissioner had used the first safeguard mechanism by providing the Summaries, and VAA had used the second one by challenging the adequacy of these Summaries. Furthermore, the Tribunal had dismissed VAA's motion challenging the adequacy of the Summaries in its VAA Summaries Decision. VAA was also aware that it would benefit from the third safeguard mechanism (namely, the waiving of privilege by the Commissioner at the time the Commissioner's witness statements would be served), that it could then raise with the Tribunal any alleged failure by the Commissioner to comply with its disclosure obligations, and that it had the possibility of raising the compelling circumstances argument to challenge and override the Commissioner's claims of privilege. With that information at hand, VAA had agreed, in the July Scheduling Order, to a strict 30-day timeframe to respond to the Commissioner's case in chief. In that context, I am persuaded that granting VAA an additional period of four weeks to prepare its response following the delayed receipt of the Waived Documents is both fair and equitable.

50 Pursuant to Rule 139 of the *Competition Tribunal Rules*, SOR/2008-141, the dates and other requirements established by case management orders like the July Scheduling Order are firm, and "compelling reasons" must exist to justify a change in such orders. This is such a situation. I am further convinced that, after balancing the opposing interests at stake, an extension of time can be given to VAA while remaining within the five-week window currently set aside for the trial in this matter, by compressing the remaining pre-hearing disclosure steps, notably the time for reply of the Commissioner, and by slightly rearranging the hearing schedule.

51 I make the following additional observation. Throughout the discovery process in this matter, it is not the first time that actions or positions taken by the Commissioner have translated into delays in the disclosure of information to VAA. First, further to the concerns raised by VAA and to the filing of its motion challenging the adequacy of the Summaries, the Commissioner revised and expanded his first iteration of the Summaries. This led to some delay in the provision of adequate Summaries to VAA. However, I acknowledge that any alleged breach of procedural fairness resulting from this late provision of the Summaries was cured by the extension of time for the discovery and pre-hearing disclosure steps reflected in the revised July Scheduling Order.

52 Second, the examination for discovery of the Commissioner's representative led to VAA's motion challenging the refusals and to the Tribunal's VAA Refusals Decision finding that the Commissioner's "stock answer" was not "enough to meet the requirements of fairness, expeditiousness and efficiency of trial that should generally govern the examination for discovery process in Tribunal proceedings" (*VAA Refusals Decision* at para 48), and that further responses ought to be given by the Commissioner. The Commissioner's incomplete disclosure at the oral discovery stage thus also led to some delays for VAA's receipt of relevant information to which it was entitled.

53 And now, there is this delayed disclosure of the Waived Documents.

54 Procedural fairness imposes obligations on all parties, including the Commissioner, and the expeditiousness of the Tribunal's proceedings has to be balanced against the right to fairness (*VAA Refusals Decision* at para 45). Parties should always remain mindful of that, and the Tribunal will not hesitate to intervene and revisit the schedule of its proceedings if circumstances call for it. In the current case, I am satisfied that the measures contained in this order are sufficient to protect VAA's procedural rights. But there could be situations where the accumulation of delays in the disclosure process may force the Tribunal to more materially modify the hearing schedules if it comes to the conclusion that considerations of fairness require it to give more ample time to a respondent to prepare its case in response and to have a full and complete defence.

C. Other matters

55 In its December 4, 2017 correspondence, counsel for VAA argued that the Tribunal should hold off ruling on some issues raised in its Motion. I disagree. I instead find that it would not be in the interests of the proper and orderly administration of

justice to keep any issues raised by VAA in its Motion in abeyance or to defer the Tribunal's decision on the various reliefs sought by VAA, given the imminence of the hearing on the merits in this matter and the tight schedule remaining for the final pre-hearing disclosure steps. It would therefore not be in the interests of justice and of the fair conduct of the Tribunal's proceeding to adjourn any issues raised in VAA's Motion *sine die*.

56 The amended trial schedule proposed on consent by the parties illustrates that VAA's request for an extension of time can be accommodated within the five-week framework already set aside for the hearing of this matter.

57 I conclude that, with the four-week extension of time provided to VAA for its response, the revised trial schedule, and the opportunity given to VAA to further examine the Commissioner's representative for discovery for one additional day within the parameters set forth in this order, a proper balance has been reached. In my opinion, this adequately responds to the concerns raised by VAA with respect to a potential breach of procedural fairness caused by the delayed disclosure of the Waived Documents, and it grants VAA sufficient time to prepare for and complete the remaining pre-hearing steps. At this juncture, there is no ground to suggest that a further adjournment of the hearing dates could likely be contemplated.

58 Finally, I observe that, in the context of this order, I do not have to determine what relief VAA might be able to seek upon the outcome of its appeal of the VAA Privilege Decision currently pending before the Federal Court of Appeal.

IV. CONCLUSION

59 For the reasons detailed above, VAA's requests and Motion are granted in part, in terms of a circumscribed right to further examine the Commissioner's representative and of an adjustment to the timetable for the disposition of the Application. I take note of the Commissioner's agreement to produce his representative for one additional day of examination for discovery, in relation to the Waived Documents. Upon reviewing the materials filed by VAA and the most recent correspondence from counsel for both parties, and after hearing them at the November 30, 2017 CMC, I am ready to order the further examination for discovery of the Commissioner's representative, within the parameters set out in this order. In addition, I agree with VAA that, given the late disclosure of the Waived Documents by the Commissioner, coupled with the magnitude of the number of documents at stake, considerations of fairness command that VAA be given more time to review and digest the information in order to be able to adequately prepare its case in response. This, in my view, can be done by adjusting the remaining pre-hearing disclosure steps in the July Scheduling Order and by slightly modifying the hearing dates already set aside for this matter, along the line set out in the revised timetable agreed to by the parties.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS AS FOLLOWS:

60 VAA's Motion is granted in part.

61 VAA is authorized to conduct a further examination for discovery of the Commissioner's representative, for a maximum duration of one additional day and within the parameters set out in this order. The parties are directed to complete this examination by December 15, 2017 at the latest.

62 Any motions arising from such additional discovery shall be filed by 4:00 p.m. on December 18, 2017, and will be heard by the Tribunal before December 21.

63 The July Scheduling Order is hereby amended, and the revised schedule for the remaining pre-hearing steps in this Application shall now be as follows:

January 12, 2018	Respondent to serve documents relied upon and witness statements, and to serve and file expert reports, if any
January 29, 2018	Deadline for delivering any Requests for Admissions
January 29, 2018	Applicant to serve list of reply documents and witness statements, and to serve and file reply expert reports, if any
January 31, 2018	Last day to file motions related to the evidence

January 31, 2018	Deadline to provide to the Tribunal documents for use at the hearing (e.g., Briefs of Authorities, witness statements and Agreed Books of Documents)
February 2, 2018	Deadline for responding to any Requests for Admissions
February 2, 2018	Hearing of any motions related to the evidence;

64 The hearing of this Application shall commence at 9:30 a.m. on February 6, 2017 in the Hearing Room of the Competition Tribunal located at 600-90 Sparks Street, Ottawa. The schedule for the hearing shall be as follows:

February 6-9, 2018	First week of hearing (4 days in Ottawa), with the understanding that the Commissioner's experts will not testify until the second week
February 13-16, 2018	Second week of hearing (4 days in Ottawa)
February 20-23, 2018	Third week of hearing (4 days in Vancouver)
February 28-March 2, 2018	Oral argument (3 days in Ottawa)

65 The other reliefs sought by VAA in its Motion are dismissed.

66 As success on VAA's requests and Motion has been divided, costs shall be in the cause.

TAB 10

CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Act

Loi sur le Tribunal de la concurrence

R.S.C. 1985, c. 19 (2nd Supp.)

S.R.C. 1985, ch. 19 (2e suppl.)

NOTE

[*1986, c. 26, assented to 17th June, 1986*]

NOTE

[*1986, ch. 26, sanctionné le 17 juin 1986*]

Current to June 20, 2022

Last amended on November 1, 2014

À jour au 20 juin 2022

Dernière modification le 1 novembre 2014

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Her Majesty in right of Canada in respect of the services so rendered.

Amounts to Receiver General

(5) Any money or costs awarded to Her Majesty in right of Canada in a proceeding in respect of which this section applies shall be paid to the Receiver General.

2002, c. 16, s. 17.

pour toute autre raison, admis à recouvrer de Sa Majesté du chef du Canada les frais pour les services ainsi rendus.

Versement au receveur général

(5) Les sommes d'argent ou frais accordés à Sa Majesté du chef du Canada sont versés au receveur général.

2002, ch. 16, art. 17.

Court of record

9 (1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

Cour d'archives

9 (1) Le Tribunal est une cour d'archives et il a un sceau officiel dont l'authenticité est admise d'office.

Proceedings

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

Procédures

(2) Dans la mesure où les circonstances et l'équité le permettent, il appartient au Tribunal d'agir sans formalisme, en procédure expéditive.

Interventions by persons affected

(3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person.

Intervention des personnes touchées

(3) Toute personne peut, avec l'autorisation du Tribunal, intervenir dans les procédures se déroulant devant celui-ci, sauf celles intentées en vertu de la partie VII.1 de la *Loi sur la concurrence*, afin de présenter toutes observations la concernant à l'égard de ces procédures.

Summary dispositions

(4) On a motion from a party to an application made under Part VII.1 or VIII of the *Competition Act*, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions.

Procédure sommaire

(4) Sur requête d'une partie à une demande présentée en vertu des parties VII.1 ou VIII de la *Loi sur la concurrence* et en conformité avec les règles sur la procédure sommaire, un juge peut entendre la demande et rendre une décision à son égard selon cette procédure.

Decision

(5) The judicial member may dismiss the application in whole or in part if the member finds that there is no genuine basis for it. The member may allow the application in whole or in part if satisfied that there is no genuine basis for the response to it.

R.S., 1985, c. 19 (2nd Supp.), s. 9; 1999, c. 2, s. 42; 2002, c. 16, s. 18.

Pouvoirs du juge

(5) Le juge saisi de la requête peut rejeter ou accueillir, en totalité ou en partie, la demande s'il est convaincu que, soit la demande, soit la réponse, n'est pas véritablement fondée.

L.R. (1985), ch. 19 (2e suppl.), art. 9; 1999, ch. 2, art. 42; 2002, ch. 16, art. 18.

Organization of Work

Sittings of Tribunal

10 (1) Subject to section 11, every application to the Tribunal shall be heard before not less than three or more than five members sitting together, at least one of whom is a judicial member and at least one of whom is a lay member.

Judicial member to preside at hearings

(2) The Chairman shall designate a judicial member to preside at any hearing or, if the Chairman is present at a hearing, may preside himself.

Organisation du Tribunal

Séances du Tribunal

10 (1) Sous réserve de l'article 11, toute demande présentée au Tribunal est entendue par au moins trois mais au plus cinq membres siégeant ensemble et, parmi lesquels il doit y avoir au moins un juge et un autre membre.

Président de séance

(2) Le président désigne, pour chaque séance du Tribunal, un juge à titre de président, mais s'il est présent, il peut lui-même la présider.

TAB 11

CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Rules

Règles du Tribunal de la concurrence

SOR/2008-141

DORS/2008-141

Current to June 20, 2022

À jour au 20 juin 2022

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(l) all matters related to expert witnesses, including the possibility of experts meeting before a hearing to answer questions posed by the Tribunal;

(m) any amendments to the pleadings;

(n) the advisability of a pre-hearing reference or determination of a question of law;

(o) any requirement for a notice of a constitutional question;

(p) a timetable for the subsequent case management conferences; and

(q) any other matters that may aid in the disposition of the application.

k) le calendrier que devront suivre les intervenants;

l) toutes les questions liées aux témoins experts, y compris la possibilité pour les experts de se rencontrer avant l'audience pour répondre aux questions du Tribunal;

m) toute modification des actes de procédure;

n) l'opportunité d'entendre un renvoi ou de trancher une question de droit avant la tenue de l'audience;

o) toute exigence visant l'avis de question constitutionnelle;

p) le calendrier des conférences de gestion de l'instance subséquentes;

q) toute autre question qui pourrait faciliter le règlement de la demande.

Order

138 After a case management conference, the Tribunal shall issue an order stating any rulings by the Tribunal relating to the matters considered at the case management conference.

Ordonnance

138 Après la conférence de gestion de l'instance, le Tribunal rend une ordonnance qui fait état des décisions qu'il a prises relativement aux questions discutées à la conférence.

Firm requirements

139 (1) The dates set and other requirements established by case management orders are firm.

Respect des exigences

139 (1) Les dates fixées et les exigences prévues par ordonnance dans le cadre de la gestion de l'instance doivent être rigoureusement respectées.

Variation

(2) A request for a variation must be made by motion showing that compelling reasons exist for a change in the order.

Demande de modification

(2) Toute demande de modification de l'ordonnance se fait par voie de requête et comporte des motifs sérieux à l'appui.

Tribunal may amend

(3) If the Tribunal is satisfied that compelling reasons exist for a change in the order, it may amend it.

Pouvoirs du Tribunal

(3) Le Tribunal peut modifier l'ordonnance s'il est convaincu qu'il existe des motifs sérieux de le faire.

PART 11

Transitional Provision and Repeal

Transitional Provision

Proceeding already commenced

140 These Rules apply only to proceedings commenced after these Rules come into effect.

PARTIE 11

Disposition transitoire et abrogation

Disposition transitoire

Application

140 Les présentes règles ne s'appliquent qu'aux instances entamées après leur entrée en vigueur.

CT-2022-002

COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

BOOK OF AUTHORITIES

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I 50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9

John S. Tyhurst
Derek Leschinsky
Jonathan Bitran
Kevin Hong

Tel: 613-818-1611
Fax: 819-953-9267

john.tyhurst@cb-bc.gc.ca
derek.leschinsky@cb-bc.gc.ca
jonathan.bitran@cb-bc.gc.ca
kevin.hong@cb-bc.gc.ca
Counsel to the Commissioner of Competition