**THE COMPETITION TRIBUNAL**

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

**AND IN THE MATTER OF** the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

**AND IN THE MATTER OF** an application by the Commissioner of Competition for an Order pursuant to section 92 of the *Competition Act*.

**BETWEEN:**

**COMMISSIONER OF COMPETITION**

**Applicant**

**and**

**ROGERS COMMUNICATIONS INC.**
**SHAW COMMUNICATIONS INC.**

**Respondents**

**and**

**ATTORNEY GENERAL OF ALBERTA**
**VIDEOTRON LTD.**

**Intervenors**

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# BOOK OF AUTHORITIES

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CT-2022-002

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TAB 1

**Date: 20110331**

**Docket: A-263-10**

**Citation: 2011 FCA 120**

**CORAM:** **EVANS J.A.**
**DAWSON J.A.**
**LAYDEN-STEVENSON J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**LEHIGH CEMENT LIMITED**

**Respondent**

Heard at Vancouver, British Columbia, on March 3, 2011.

Judgment delivered at Ottawa, Ontario, on March 31, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: EVANS J.A.
LAYDEN-STEVENSON J.A.

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**BETWEEN:**

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**Appellant**

**and**

**LEHIGH CEMENT LIMITED**

**Respondent**

## REASONS FOR JUDGMENT

**DAWSON J.A.**

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

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

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

[2] The Judge's reasons in support of the order under appeal are cited as 2010 TCC 366, 2010 DTC 1239.

**The Facts**

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

> 1. In 1995 the Respondent, Lehigh Cement Limited ("Lehigh"), borrowed US$100,000,000 in Canada and contributed the US$100,000,000 as a capital investment in CBR Development NAM LLC ("CBR-LLC"), its wholly-owned U.S. subsidiary. Lehigh deducted the interest paid on the said loan pursuant to s. 20(1)(c) of the *Income Tax Act* (the "Act").
>
> 2. CBR-LLC in turn lent the US$100,000,000 to CBR Cement Corp. ("CBR-US"), a United States operating company, the shares of which were owned by CBR Investment Corporation of America ("CBR-ICA"), also a United States corporation.

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

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

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

[…]

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

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

**The Decision of the Judge**

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

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

[5] The Judge then noted that the principles applicable to the issues before her had recently been discussed by the Tax Court in *HSBC Bank Canada v. Canada*, 2010 TCC 228, 2010 DTC 1159 at paragraphs 13 to 16. The Judge particularly noted that the purpose of discovery is to provide a level of disclosure so as to allow each party to "proceed efficiently, effectively and expeditiously towards a fair hearing, knowing exactly the case each has to meet." The Judge indicated that while fishing expeditions are to be discouraged, "very little relevance need be shown to render a question answerable." No specific challenge is made to the Judge's statement of general principles.

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

> 12. […] It is not in the interests of fairness or efficiency for the respondent to resist answering the question on grounds of principle. The answer will help the appellant know what case it has to meet and is within the broad purposes of examinations for discovery.
>
> 13. The purposes of discovery were summarised in *Motaharian v. Reid*, [1989] OJ No. 1947:
>
> (a) to enable the examining party to know the case he has to meet;
> (b) to procure admissions to enable one to dispense with formal proof;
> (c) to procure admissions which may destroy an opponent's case;
> (d) to facilitate settlement; pre-trial procedure and trial;
> (e) to eliminate or narrow issues;
> (f) to avoid surprise at trial.

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

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

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

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

**The Asserted Errors**

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

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

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

c. ordering the production of internal CRA memoranda; and

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

**Consideration of the Asserted Errors**

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

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

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

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

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

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

[12] The remaining two impugned submissions were made to the Judge by counsel for Lehigh. However, counsel for Lehigh was explicit in his submissions to the Court that "[w]e don't know if there are any documents, to begin with. We are saying, if there are documents that give the context of this assessment we would like to see them." (Transcript of oral argument, Appeal Book page 81 lines 14-19). This makes clear that counsel was not improperly giving evidence about matters

within his knowledge. I read counsel's submissions as being in the nature of supposition as to when any memoranda would have been produced and the number of such memoranda. The Judge's reference to the number of documents reflected counsel's submissions.

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

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

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

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

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

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

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

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

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

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

the Crown's disclosure of the Gulliver memorandum evidenced the Crown's position that it was relevant to Lehigh's appeal.

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

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

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

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

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

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

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

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

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

| | |
|---|---|
| 95. (1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding or to any matter made discoverable by subsection (3) and no question may be objected to on the ground that | 95. (1) La personne interrogée au préalable répond, soit au mieux de sa connaissance directe, soit des renseignements qu'elle tient pour véridiques, aux questions pertinentes à une question en litige ou aux questions qui peuvent, aux termes du paragraphe (3), faire l'objet de l'interrogatoire préalable. Elle ne peut refuser de répondre pour les motifs suivants : |
| (*a*) the information sought is evidence or hearsay, | *a*) le renseignement demandé est un élément de preuve ou du ouï-dire; |
| (*b*) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or | *b*) la question constitue un contre-interrogatoire, à moins qu'elle ne vise uniquement la crédibilité du témoin; |
| (*c*) the question constitutes cross-examination on the affidavit of documents of the party being examined. [emphasis added] | *c*) la question constitue un contre-interrogatoire sur la déclaration sous serment de documents déposée par la partie interrogée. [Non souligné dans l'original.] |

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

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

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

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

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

[31] That the amendment of Rule 95(1) was not intended to effect a change in the scope of permissible questions is supported by the Regulatory Impact Analysis Statement (RIAS) accompanying the *Rules Amending the Tax Court of Canada Rules (General Procedure)*, SOR/2008-303, *Canada Gazette*, Part II, Vol. 142, No. 25 at pages 2330 to 2332. The RIAS

describes the amendment to Rule 95(1) to be a “technical amendment”. Courts are permitted to examine a RIAS to confirm the intention of the regulator. See *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533 at paragraphs 45 to 47 and 155 to 157.

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

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

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

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

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

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

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

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

> information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences. [emphasis in original]

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

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

[39] The Gulliver memorandum makes the following points:

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

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

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

3. Footnote 11 to the above passage stated:

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

[40] In my view, the inference may be drawn from the Gulliver memorandum and the subsequent reassessment of Lehigh on the basis of subsection 95(6) that there may well be subsequent memoranda prepared within the CRA that considered whether subsection 95(6) of the Act could be argued to be a general anti-avoidance provision. Such documents, if they exist, would be reasonably likely to either directly or indirectly advance Lehigh's case or damage the Crown's case.

In my view, the Judge did not err in ordering their production. The trial judge will be the ultimate arbiter of their relevance.

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

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

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

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

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

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

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

**Costs and Conclusion**

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

[47] Lehigh concedes that such an award is commonly made where a party is found to have acted in a reprehensible, scandalous, or outrageous manner. Lehigh acknowledges that no such conduct has occurred in the present case. It submits, however, that such an award is justified in

this case because the discoveries were held on November 11, 2009 and Lehigh has been put to delay and considerable expense “all for no just cause.”

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

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

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

order the appellant to pay costs to Lehigh in the Tax Court and in this Court fixed in the amount of $5,000.00, all-inclusive, in any event of the cause.

"Eleanor R. Dawson"
J.A.

"I agree
John M. Evans J.A."

"I agree
Carolyn Layden-Stevenson J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-263-10 |
| **STYLE OF CAUSE:** | HER MAJESTY THE QUEEN v. LEHIGH CEMENT LIMITED |
| **PLACE OF HEARING:** | Vancouver, British Columbia |
| **DATE OF HEARING:** | March 3, 2011 |
| **REASONS FOR JUDGMENT BY:** | DAWSON J.A. |
| **CONCURRED IN BY:** | EVANS J.A.<br>LAYDEN-STEVENSON J.A. |
| **DATED:** | March 31, 2011 |

**APPEARANCES:**

| | |
|---|---|
| Daniel Bourgeois<br>Geneviève Léveillée | FOR THE APPELLANT |
| Warren J.A. Mitchell, Q.C.<br>Mathew G. Williams<br>Natasha Reid | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Myles J. Kirvan<br>Deputy Attorney General of Canada | FOR THE APPELLANT |
| Thorsteinssons LLP<br>Tax Lawyers<br>Vancouver, British Columbia | FOR THE RESPONDENT |

TAB 2

Competition Tribunal Tribunal de la concurrence

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

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

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

BETWEEN:

**The Commissioner of Competition**
(applicant)

and

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

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

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

## I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

## II. LEGAL PRINCIPLES

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

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

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

> The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary.

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

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

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

## III. CATEGORY 1 QUESTIONS

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

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

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

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

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

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

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

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

## IV. CATEGORY 2 QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:**

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

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

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

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

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

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

**COUNSEL OF RECORD:**

For the applicant:

The Commissioner of Competition

François Joyal
Paul Klippenstein
Ryan Caron
Derek Leschinsky
Katherine Rydel

For the respondents:

Live Nation Entertainment, Inc et al

Mark Opashinov
David W. Kent
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Joshua Chad

TAB 3

Competition Tribunal Tribunal de la concurrence

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

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

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

BETWEEN:

**The Commissioner of Competition**
(applicant)

and

**Vancouver Airport Authority**
(respondent)

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

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

## I. OVERVIEW

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

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

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

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

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

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

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

## II. BACKGROUND

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

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

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

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

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

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

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

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

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

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

## III. ANALYSIS

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

### A. Category A Requests

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

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

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

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

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

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

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

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

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

### a. The questions effectively asked by VAA

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

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

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

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

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

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

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

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

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

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

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

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

### b. The issue of proportionality

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

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

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

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

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

### c. The "reformulated" questions asked by VAA

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

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

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

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

### i. Examinations for discovery

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

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

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

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

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

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

### ii. The "stock answer" of the Commissioner

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### iv. Specific assessment of the "reformulated" questions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Request 96 (access issues raised by VAA);

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

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

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

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

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

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

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

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

## B. Category B Requests

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

**[73]** I disagree.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### C. Category C Requests

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

## IV. CONCLUSION

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

**FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:**

**[90]** The motion is granted in part.

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

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

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

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

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

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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TAB 4

1995 CarswellNat 675
Federal Court of Canada — Appeal Division

Samson Indian Nation and Band v. Canada

1995 CarswellNat 675F, 1995 CarswellNat 675, [1995] 2 F.C. 762, [1995] 3 C.N.L.R. 18, [1995] F.C.J. No. 734, 125 D.L.R. (4th) 294, 184 N.R. 139, 55 A.C.W.S. (3d) 916, 96 F.T.R. 239 (note)

# Chief Victor Buffalo acting on his own behalf and on behalf of the other members of the Samson Indian Nation and Band and the Samson Indian Band and Nation (Plaintiffs) (Respondents) v. Her Majesty the Queen in Right of Canada, The Honourable Pierre Cadieux, Minister of Indian Affairs and Northern Development, The Honourable Michael Wilson, Minister of Finance and Donald Goodwin, Assistant Deputy Minister, Department of Indian Affairs and Northern Development (Defendants) (Appellants)

Chief Jerome Morin acting on his own behalf as well as on behalf of all the members of Enoch's Band of Indians and the Residents thereof on and of Stony Plain Reserve No. 135 (Plaintiffs) (Respondents) v. Her Majesty the Queen in Right of Canada (Defendant) (Appellant)

Chief John Ermineskin, Lawrence Wildcat, Gordon Lee, Art Littlechild, Maurice Wolfe, Curtis Ermineskin, Gerry Ermineskin, Earl Ermineskin, Rick Wolfe, Ken Cutarm, Brian Lee, Lester Fraynn, the elected Chief and Councillors of the Ermineskin Band and Nation suing on their own behalf and on behalf of all the other members of the Ermineskin Indian Band and Nation (Plaintiffs) (Respondents) v. Her Majesty the Queen in Right of Canada, The Honourable Thomas R. Siddon, Minister of Indian Affairs and Northern Development and The Honourable Donald Mazankowski, Minister of Finance (Defendants) (Appellants)

Pratte, MacGuigan and Décary JJ.A.

Heard: April 4, 1995
Judgment: May 12, 1995
Docket: A-472-94; T-1386-90; T-1254-92

Counsel: *Barbara Ritzen* for defendants (appellants).
*Edward H. Molstad, Q.C.* and *Owen Young* for plaintiffs (respondents) (Chief Victor Buffalo and The Samson Indian Band and Nation).
*L. Leighton Decore* for plaintiffs (respondents) (Chief Jerome Morin and members of Enoch's Band of Indians and the Residents therof on and of Stone Plain Reserve No. 135).
*Marvin R.V. Storrow, Q.C.* and *Maria A. Morellato* for plaintiffs (respondents) (Chief John Ermineskin, Lawrence Widcat, Gordon Lee, Art Littlechild, Maurice Wolfe, Curtis Ermineskin, Gerry Ermineskin, Earl Ermineskin, Rick Wolfe, Ken Cutarm, Brian Lee, Lester Fraynn).

Subject: Evidence; Public; Civil Practice and Procedure
**Related Abridgment Classifications**
Aboriginal and Indigenous law
XI Practice and procedure
XI.6 Discovery

  

Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.i Solicitor-client privilege
Evidence
XIV Privilege
XIV.2 Litigation privilege

**Headnote**

Evidence --- Documentary evidence — Privilege as to documents — Solicitor and client privilege
Native Law --- Practice and procedure — Evidence — Discovery
Practice — Privilege — Solicitor-client privilege — Privilege now extending broadly to include any consultation for legal advice, whether litigious or not — Litigation privilege not limited to advice — As to general solicitor-client privilege in case involving alleged trust relationship between Crown, Indians, Crown's responsibility to all Canadians to be taken into account — Privileged documents not ordered disclosed for reasons of equity, openness — No implied waiver of privilege.
Native peoples — Crown asserting solicitor-client privilege for documents in breach of trust actions — Alleged trust relationship between Crown, Indians not superseding privilege claim — Practices covering private trusts not automatically applicable to Crown trusts — Crown acting not only for Indians — Accountable to all Canadians — Solicitor-client privilege not ousted by equity, openness considerations.
Crown — Trusts — Crown asserting solicitor-client privilege for documents in breach of trust actions brought by Indian Bands — Whether alleged trust relationship superseding privilege — Practices relating to private trusts not automatically applicable to Crown trusts — Crown not ordinary "trustee" — Acting in interest of Indians but accountable to all Canadians.
In three actions for breach of trust, the Crown claimed privilege, *inter alia*, with respect to documents a) on the basis of solicitor-client privilege in litigation and b) on the basis of a general solicitor-client privilege, the legal professional privilege. The Motions Judge allowed the Crown's claim with respect to documents for which solicitor-client privilege in litigation was claimed but only to the extent that they were initiated for the "dominant purpose of *advising* in the conduct of *this* litigation". The Motions Judge ordered the production of the documents for which the legal professional privilege was claimed, "subject to objection by [the Crown] to production where [its] concern is more than reliance on general solicitor-client privilege". This was an appeal from that decision.
*Held*, the appeal should be allowed.
The recognition of privileged communications between lawyers and their clients, originally only an exemption from testimonial compulsion, today includes communications exchanged during other litigation, those made in contemplation of litigation, and, ultimately, any consultation for legal advice, whether litigious or not. The privilege has gradually been given a particularly broad scope. Solicitor-client privilege, therefore, is not to be interfered with except to the extent absolutely necessary, and any conflict should be resolved in favour of protecting confidentiality.
With respect to the litigation privilege, the Motions Judge has unduly restricted its scope when he used the words "documents ... initiated for the dominant purpose of *advising* in the conduct of *this* litigation". Privilege in relation to litigation is not limited to advice. And it extends to communications in respect of any litigation, actual or contemplated. The order will therefore be amended to read: "documents ... initiated for the dominant purpose of the conduct of litigation".
With respect to the general solicitor-client privilege or legal advice privilege, the respondents invoked the alleged trust relationship between the Crown and the Indians to argue that this relationship superseded the claim of privilege. The first condition for the application of the trust principle (that the legal advice sought by the trustee belongs to the beneficiaries) at the discovery stage is fulfilled: whatever may be the precise nature of the relationship between the Crown and the Indians, it would *prima facie* qualify as a trust-style relationship for this purpose. However, the rules and practices developed with respect to private trusts do not apply automatically to Crown "trusts". The Crown is no ordinary "trustee". It acts not only on behalf or in the interest of the Indians, but it is also accountable to the whole Canadian population. It is engaged in many regards in continuous litigation. Considering the Crown's many "clients" or "beneficiaries", one cannot assume that all documents at issue concern the respondents.

 

It is preferable to err on the side of caution and protect privilege, particularly since the respondents will have the opportunity before a motions judge to challenge the claim of privilege document by document.

Reasons of equity and openness cannot found an order of disclosure of privileged documents.

There was no basis to the argument that where a fiduciary puts its state of mind at issue by pleading that it had acted honestly and reasonably there is an implied waiver of privilege and all documents relating to the alleged breach of its legal obligations must be disclosed. This is certainly so where, as here, the pleadings do not expressly allege reliance on legal advice.

**Table of Authorities**

**CASES JUDICIALLY CONSIDERED**

*APPLIED:*

*Solosky v. The Queen*, [1980] 1 S.C.R. 821; (1979), 105 D.L.R. (3d) 745, 50 C.C.C. (2d) 495, 16 C.R. (3d) 294, 30 N.R. 380

*Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860; (1982), 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385, 28 C.R. (3d) 289, 1 C.R.R. 318, 44 N.R. 462

*Re Ballard Estate* (1994), 20 O.R. (3d) 350 (Gen. Div.)

*Guerin et al. v. The Queen et al.*, [1984] 2 S.C.R. 335; (1984), 13 D.L.R. (4th) 321, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, [1985] 1 C.N.L.R. 120, 20 E.T.R. 6, 55 N.R. 161, 36 R.P.R. 1

*R. v. Sparrow*, [1990] 1 S.C.R. 1075; (1990), 70 D.L.R. (4th) 385, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 3 C.N.L.R. 160, 111 N.R. 241.

*DISTINGUISHED:*

*R. v. Stinchcombe*, [1991] 3 S.C.R. 326; (1991), 120 A.R. 161, [1992] 1 W.W.R. 97, 83 Alta. L.R. (2d) 93, 68 C.C.C. (3d) 1, 8 C.R. (4th) 277, 130 N.R. 277, 8 W.A.C. 161.

*REFERRED TO:*

*R. v. Littlechild* (1979), 19 A.R. 395, 108 D.L.R. (3d) 340, [1980] 1 W.W.R. 742, 51 C.C.C. (2d) 406, 11 C.R. (3d) 390 (C.A.)

*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, [1969] C.T.C. 353; (1969), 69 DTC 5278

*Weiler v. Canada (Department of Justice)*, [1991] 3 F.C. 617; (1991), 37 C.P.R. (3d) 1, 46 F.T.R. 163 (T.D.)

*Balabel v Air-India*, [1988] 2 All ER 246 (C.A.)

*Crompton (Alfred) Amusement Machines Ltd v Commissioners of Customs and Excise (No 2)*, [1973] 2 All ER 1169 (H.L.)

*Shell Canada Ltd. (In re)*, [1975] F.C. 184; (1975), 55 D.L.R. (3d) 713, 22 C.C.C. (2d) 70, 18 C.P.R. (2d) 155, 29 C.R.N.S. 361 (C.A.)

*IBM Canada Limited-IBM Canada Limitée v. Xerox of Canada Limited*, [1978] 1 F.C. 513; (1977), 32 C.P.R. (2d) 205, 15 N.R. 11 (C.A.)

*Canada (Minister of Industry, Trade and Commerce) v. Central Cartage Company et al.* (1987), 10 F.T.R. 225 (F.C.T.D.).

**STATUTES AND REGULATIONS JUDICIALLY CONSIDERED**

*Canada Evidence Act*, R.S.C., 1985, c. C-5, s. 39.

*Federal Court Rules*, C.R.C., c. 663, RR. 448 (as am. by SOR/90-846, s. 15), 450 (as am. *idem*).

**Words and phrases considered:**

**SOLICITOR AND CLIENT PRIVILEGE**

. . . there are two distinct branches of solicitor and client privilege: the litigation privilege and the legal advice privilege. The litigation privilege protects from disclosure all communications between a solicitor and client, or third parties, which are made in the course of preparation for any existing or contemplated litigation. The legal advice privilege protects all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice; it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.

The principles relating to solicitor and client privilege apply in both civil and criminal cases, and they apply regardless of whether the solicitor is in private practice or is a salaried or government solicitor.

  

Appeal from an order of the Motions Judge (Samson Indian Band v. Canada, [1994] F.C.J. No. 1448 (T.D.) (QL)) on claims of solicitor-client privi lege with respect to documents which the Bands wanted the Crown to produce at the discovery stage of actions for breach of duty in the administration of a trust.

**The following are the reasons for judgment rendered in English by *MacGuigan and Décary J.J.A.*:**

1 This appeal relates to three actions, T-2022-89, T-1386-90, T-1254-92, in which the statements of claim are very similar and the issues at law and of fact are the same. The actions are to be tried together on common evidence.

2 The various respondents in these proceedings ("Samson Band", "Enoch Band", and "Ermineskin Band", respectively) commenced action against the various appellants (hereinafter referred to as "the Crown") on the basis of a breach by the Crown of trust, trust-like, fiduciary or other equitable obligations owed to the respondents in respect of natural resources of and royalties from Indian reserves, moneys paid in trust to the Crown in relation to royalties, and moneys for programs and services.

3 As required by subsection 448(1) of the *Federal Court Rules* [C.R.C., c. 663 (as am. by SOR/90-846, s. 15)] the Crown filed affidavits of documents in respect of the respondents' actions. Pursuant to subsection 448(2) [as am. *idem*], the Crown identified, in a separate list, all those documents which are or were in the possession, power or control of the Crown and for which privilege is claimed.

4 By notice of motion the respondents sought an order requiring production of 1,000 or more documents over which the Crown had claimed privilege. The Motions Judge [[1994] F.C.J. Nº 1448 (T.D.) (QL)] ordered the Crown to file an amended affidavit of documents, pursuant to *Federal Court Rules*, Rules 448 and 450 [as am. *idem*], identifying in separate lists the following five categories of documents in respect of which privilege had originally been claimed by the Crown: (A) those already produced or agreed to be produced to the respondents; (B) those to be certified by production of a certificate pursuant to section 39 of the *Canada Evidence Act*[1] ; (C) those claimed to be privileged on the basis of solicitor-client privilege in litigation; (D) those which the Crown claims are irrelevant to these actions; (E) those which the Crown claims are subject to a general solicitor and client privilege, the legal professional privilege.

5 No order was made by the Motions Judge with respect to group A. With respect to group B he held that the Crown had not complied with section 39 of the *Canada Evidence Act*, and gave directions as to compliance, which have not been appealed. With respect to class D, he held that the Court would not order the production of irrelevant documents, but that the onus was on the Crown to establish irrelevance, and that the Court would review the documents if necessary. The Crown's appeal to this order relates to classes C and E, which read as follows (Appeal Book, Vol. III, at pages 415-416):

> Schedule IIC — Documents for which solicitor and client privilege is claimed on the ground they were initiated for the dominant purpose of advising in the conduct of this litigation. If there is any question or dispute the Court will examine the documents and rule in each case whether it is privileged or is to be produced.
>
> . . . . .
>
> Schedule IIE — Documents, which are relevant, for which the defendants claim solicitor and client privilege. These documents shall be produced forthwith to the plaintiffs, subject to objection by defendants to production where the defendants' concern is more than reliance on general solicitor and client privilege. If objection not be resolved by agreement, any party may apply for disposition of the matter by the Court.

6 It should be noted that the parties have signed a confidentiality document which restricts the use of all documents to the purposes of this litigation only.

**Solicitor and client privilege: description**

7 The recognition of privileged communications between lawyers and their clients, as fundamental to the due administration of justice, dates back some four centuries, and originally was only an exemption from testimonial compulsion. The privilege

  

has gradually been extended to include communications exchanged during other litigation, those made in contemplation of litigation, and, ultimately, any consultation for legal advice, whether litigious or not.

8 Today, it is generally recognized that there are two distinct branches of solicitor and client privilege: the litigation privilege and the legal advice privilege. The litigation privilege protects from disclosure all communications between a solicitor and client, or third parties, which are made in the course of preparation for any existing or contemplated litigation. The legal advice privilege protects all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice; it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.

9 The principles relating to solicitor and client privilege apply in both civil and criminal cases, and they apply regardless of whether the solicitor is in private practice or is a salaried or government solicitor. [2]

10 In recent years the privilege has been given a particularly broad scope. In *Solosky v. The Queen*, Dickson J. (as he then was) stated: [3]

> Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits.

In the subsequent case of *Descôteaux et al. v. Mierzwinski*, the Supreme Court, *per* Lamer J. (as he then was), went on to say: [4]

> It is quite apparent that the Court in that case [*Solosky*] applied a standard that has nothing to do with the rule of evidence, the privilege, since there was never any question of testimony before a tribunal or court. The Court in fact, in my view, applied a substantive rule, without actually formulating it, and, consequently, recognized implicitly that the right to confidentiality, which had long ago given rise to a rule of evidence, had also since given rise to a substantive rule.
>
> It would, I think, be useful for us to formulate this substantive rule, as the judges formerly did with the rule of evidence; it could, in my view, be stated as follows:
>
> > 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
> >
> > 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
> >
> > 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
> >
> > 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

Contrary to the contention of the respondent Samson Band, solicitor-client privilege, therefore, is not to be interfered with except to the extent absolutely neces sary, and any conflict should be resolved in favour of protecting confidentiality. [5]

**Appeal with respect to class C (the litigation privilege)**

  

11 With respect to the third class (the litigation privilege, Schedule IIC of the order), the Crown's contention is that the privilege was unduly restricted by the Motions Judge when he used the words "documents ... initiated for the dominant purpose of *advising* in the conduct of *this* litigation" (our emphasis).

12 We accept that contention. On the one hand, privilege in relation to litigation is not limited to advice. On the other hand, it extends to communications in respect of any litigation, actual or contemplated. [6] It would therefore seem more accurate to amend the Motions Judge's statement in the first sentence of Schedule IIC to read: "documents ... initiated for the dominant purpose of the conduct of litigation".

13 The Crown appears to have been particularly concerned about the revelation of documents from this case in other similar pending cases and from related completed cases in this case. Counsel for the Enoch Band, which appears to be the only respondent having such an issue, disclaimed before us any intention to challenge the Crown on this point, so that it may be regarded here as a non-issue. In any event the amendment above should take care of that problem, if it arises.

**Appeal with respect to class E (the legal advice privilege)**

14 It is settled law that where there is a trust relationship, no privilege attaches to communications between a solicitor and the trustee as against the beneficiaries who have a joint interest with the trustee in the subject-matter of the communications. The matter was recently canvassed by Lederman J. in *Re Ballard Estate*, where it was said: [7]

> Both counsel recognized the principle that communications passing between an executor or trustee and a solicitor are not privileged as against beneficiaries who are claiming under the will or trust. The rationale was set out in the classic statement of Lord Wrenbury in *O'Rourke v. Darbishire*, [1920] A.C. 581 at pp. 626-27, [1920] All E.R. Rep. 1 (H.L.), as follows:
>
> > If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestuis que trust, and the beneficiaries are entitled to see them because they are beneficiaries.

Lederman J. added that (at page 353):

> When Lord Wrenbury used the phrase "proprietary right" he was saying no more than the documents in question are in a sense the beneficiary's and is therefore entitled to access them. They are said to belong to the beneficiary not because he or she literally has an ownership interest in them but, rather, because the very reason that the solicitor was engaged and advice taken by the trustees was for the due administration of the estate and for the benefit of all beneficiaries who take or may take under the will or trust.

The Court continued (at page 356):

> Moreover, the cases have stated that, whatever approach to the claim of privilege is taken, in actions where the beneficiary is alleging lack of good faith or breach of fiduciary duty, this information is to be made available to him or her. In *Froese v. Montreal Trust Co. of Canada*, [1993] B.C.J. No. 1529 (B.C. Master), leave to appeal refused [1993] B.C.J. No. 1847, the Master put it this way at para. 27:
>
> I am of the opinion that in the context of litigation in which the plaintiff alleges breach of duty in the administration of a trust and the documents which are sought to be examined are relevant to that issue the plaintiff may succeed on the basis of proprietary right if he makes out a *prima facie* case that he is a beneficiary of the trust and establishes that the documents

  

> are documents obtained or prepared by the trustee in the administration of the trust and in the course of the trustee carrying out his duties as trustee. In my view, to require the plaintiff to pursue and complete an action to determine this preliminary issue before documents relevant to the issue of the breach of the alleged trust can be produced would not promote the economical and expeditious resolution of disputes and would not be in the interests of justice.

15 The respondents rely on what we shall refer to as the "trust principle" to argue that the alleged trust relationship between the Crown and the respondents, if established on a *prima facie* basis, supersedes the claim of privilege. The Motions Judge refused to decide the issue on that basis for the following reason (at pages 14-15):

> Determination of the relationship between the parties, and the responsibilities arising in that relationship, is a key to resolution of these actions by the plaintiffs. As noted by counsel for the plaintiffs there are references in relevant statutes that support the concept of a trust relationship of the Crown to aboriginal peoples or to their bands, but ultimately determination of the relationship and attendant responsibilities in this case, in my opinion, must await the hearing of evidence and argument by the trial judge. At this stage there is inadequate basis for that relationship to be determined, or for a decision on production of documents to be based upon a presumption of that relationship.

16 He nevertheless decided in favour of the respondents on what were, essentially, reasons of equity and openness which cannot, in our respectful view, found an order of disclosure of privileged documents. Indeed, before us, the respondents, while obviously supporting the order of the Motions Judge, did so essentially on the basis of the "trust principle".

17 In order for the trust principle to apply at the discovery stage of an action for breach of duty in the administration of a trust, two conditions, in our view, must be fulfilled: the alleged trust relationship must be established on a *prima facie* basis, and the docu ments allegedly belonging to the beneficiaries must be documents obtained or prepared by the trustee in the administration of the trust and in the course of the trustee carrying out his duties as trustee. We have here little concern with respect to the first condition. Our concern is, rather, with the second one.

18 We are prepared, because of the very special relationship between the Crown and the Indians [8] and because the Crown is to be held to "a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin et al. v. The Queen et al.*" [9] , to accept that whatever may be the precise nature of the relationship between the Crown and the Indians, it would *prima facie* qualify as a trust-type relationship for the purposes of the application of the trust principle at the discovery stage.

19 That being said, however, it does not necessarily flow that the rules and practices developed with respect to private trusts apply automatically to Crown "trusts" such as those alleged in the present proceedings.

20 The basis of the trust principle, as appears from Mr. Justice Lederman's reasons in *Re Ballard Estate*, is the assumption, in cases of private trusts, that legal advice sought by the trustee belongs to the beneficiaries "because the very reason that the solicitor was engaged and advice taken by the trustees was for the due administration of the estate and for the benefit of all beneficiaries who take or may take under the will or trust" [10] .

21 That assumption cannot be applied to Crown "trusts". The Crown can be no ordinary "trustee". It wears many hats and represents many interests, some of which cannot but be conflicting. It acts not only on behalf or in the interest of the Indians, but it is also accountable to the whole Canadian population. It is engaged in many regards in continuous litigation. It has always to think in terms of present and future legal and constitutional negotiations, be they with the Indians or with the provincial governments, which negotiations, it might be argued, can be equated in these days and ages with continuous litigation. Legal advice may well not have been sought or obtained for the exclusive or dominant benefit of the Indians, let alone that of the three bands involved in these proceedings. Legal advice may well relate to policy decisions in a wide variety of areas which have nothing or little to do with the administration of the "trusts". It is doubtful that payment of the legal opinions given to the Crown is made out of the "private" funds of the "trusts" it administers....

  

22 There being many possible "clients" or "beneficiaries", there being many possible reasons for which the Crown sought legal advice, there being many possible effects in a wide variety of areas deriving from the legal advice sought, it is simply not possible at this stage to assume in a general way that all documents at issue, in whole and in part, are documents which were obtained or prepared by the Crown in the administration of the specific "trusts" alleged by the respondents and in the course of the Crown carrying out its duties as "trustee" for the respondents.

23 As noted by Dickson J. (as he then was) in *Solosky* [11] , "privilege can only be claimed document by document". We have not seen the documents at issue; we do not know what argument nor what line of argument, if any, may be developed by the parties with respect to each of the documents and, eventually, to a class of them. Furthermore, we cannot rely on any practical precedent in the case law, for this is an approach to the law of privilege which is peculiar to the yet unsettled relationship between the Crown and the Indians. It is not possible in the abstract to resolve the conflict between the alleged right of the Crown to privilege and the alleged right of the respondents to disclosure otherwise than in the man ner suggested by the Supreme Court in *Descôteaux* [12] , i.e. in favour of protecting privilege.

24 It would be ill-advised for a court of appeal, in the circumstances, to blindly order the production by the Crown of the documents listed in class E, albeit in the presence of a confidentiality order. We would rather err on the side of caution, particularly so when one considers that the respondents will have the opportunity before a motions judge to challenge the claim of privilege document by document.

25 By the same token, and unfortunately for the motions judge, we are not prepared, so early in these proceedings and so early in this type of litigation, to set out specific guidelines without having seen the documents, without knowing what line of argument will be developed with respect to each document or with respect to classes of documents and without learning from the motions judge's experience and reasoning in dealing with the issue on a document by document basis.

26 We would therefore rephrase as follows the Motions Judge's order with respect to Schedule IIE: Documents for which the defendants claim solicitor and client privilege on the ground that they are protected by the legal advice privilege. If there is any question or dispute the Court will examine the documents and rule in each case, in light of the unique status of the Crown as "trustee" and in light of the unique relationship between the Crown and the Indians, whether it is privileged or is to be produced.

**Implied waiver**

27 A word, in closing, on the argument of implied waiver of privilege raised by the respondents. Counsel argue that where a fiduciary puts its state of mind at issue by pleading, in effect, that it has acted honestly and reasonably, all documents relating to the alleged breach of its legal obligations must be dis closed. That may be so where the pleadings expressly allege reliance on legal advice, but certainly is not so in the absence of any such express pleading. Counsel has cited no authority, and we know of none, to the effect that by simply alleging good faith a party waives the privilege which attaches to its communications with its solicitor.

28 We would allow the appeal and replace Schedules IIC and IIE of the Motions Judge's Order by the following: Schedule IIC: Documents for which solicitor and client privilege is claimed on the ground they were initiated for the dominant purpose of the conduct of litigation. If there is any question or dispute the Court will examine the documents and rule in each case whether it is privileged or is to be produced. Schedule IIE: Documents for which the defendants claim solicitor and client privilege on the ground that they are protected by the legal advice privilege. If there is any question or dispute the Court will examine the documents and rule in each case, in light of the unique status of the Crown as "trustee" and in light of the unique relationship between the Crown and the Indians, whether it is privileged or is to be produced.

29 We would make no order as to costs.

***Pratte J.A.*:**

30 I agree.

  

Solicitors of record:
*Deputy Attorney General of Canada* for defendants (appellants).
*Molstad, Gilbert*, Edmonton for plaintiffs (respondents) (Chief Victor Buffalo and The Samson Indian Band and Nation).
*Biamonte, Cairo & Shortreed*, Edmonton, for plaintiffs (respondents) (Chief Jerome Morin and members of Enoch's Band of Indians and the Residents thereof on and of Stone Plain Reserve No. 135).
*Blake, Cassels & Graydon*, Vancouver, for plaintiffs (respondents) (Chief John Ermineskin, Lawrence Widcat, Gordon Lee, Art Littlechild, Maurice Wolfe, Curtis Ermineskin, Gerry Ermineskin, Earl Ermineskin, Rick Wolfe, Ken Cutarm, Brian Lee, Lester Fraynn).

Footnotes

1 R.S.C., 1985, c. C-5.

2 See: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 836; *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. Littlechild* (1979), 19 A.R. 395 (C.A.); *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27; *Weiler v. Canada (Department of Justice)*, [1991] 3 F.C. 617 (T.D.); *Balabel v Air-India*, [1988] 2 All ER 246 (C.A.); *Shell Canada Ltd. (In re)*, [1975] F.C. 184 (C.A.); *Crompton (Alfred) Amusement Machines Ltd v Commissioners of Customs and Excise (No 2)*, [1973] 2 All ER 1169 (H.L.); *IBM Canada Limited-IBM Canada Limitée v. Xerox of Canada Limited*, [1978] 1 F.C. 513 (C.A.); *Canada (Minister of Industry, Trade and Commerce) v. Central Cartage Company et al.* (1987), 10 F.T.R. 225 (F.C.T.D.).

3 *Supra*, note 2, at p. 836.

4 *Supra*, note 2, at p. 875.

5 We do not find *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, the relevance of which was urged on us by the Crown, helpful in this context, because of its relating so exclusively to criminal procedure.

6 See: *Solosky, supra* note 2, at p. 834.

7 (1994), 20 O.R. (3d) 350 (Gen. Div.), at pp. 351-352.

8 See: *Guerin et al. v. The Queen et al.*, [1984] 2 S.C.R. 335.

9 See: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1109.

10 *Supra*, note 7, at p. 353.

11 *Supra*, note 2, at p. 837.

12 *Supra*, note 2.

TAB 5

Federal Court of Appeal  Cour d'appel fédérale

**Date: 20130417**

**Docket: A-375-12**

**Citation: 2013 FCA 104**

**CORAM:** **EVANS J.A.**
**STRATAS J.A.**
**NEAR J.A.**

**BETWEEN:**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS and THE MINISTER OF JUSTICE OF CANADA**

**Appellants**

**and**

**THE INFORMATION COMMISSIONER OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on April 9, 2013.

Judgment delivered at Toronto, Ontario, on April 17, 2013.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: EVANS AND NEAR JJ.A.

Federal Court of Appeal  Cour d'appel fédérale

**Date: 20130417**

**Docket: A-375-12**

**Citation: 2013 FCA 104**

**CORAM:** **EVANS J.A.**
**STRATAS J.A.**
**NEAR J.A.**

**BETWEEN:**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS and THE MINISTER OF JUSTICE CANADA**

**Appellants**

**and**

**THE INFORMATION COMMISSIONER OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT**

**STRATAS J.A.**

[1] The Ministers appeal from a decision of the Federal Court (*per* Justice Gleason) dated July 12, 2012: 2012 FC 877.

[2] Acting under the *Access to Information Act*, R.S.C. 1985, c. A-1, the Federal Court ordered that all of a particular protocol should be disclosed to a person seeking access to it. The Protocol sets

out the procedures to be followed by the Department of Justice and the RCMP when RCMP documents are sought in civil litigation against the federal Crown.

[3] In this Court, the appellant Ministers submit that none of the Protocol should be disclosed. All is covered by the solicitor-client exemption under the Act. The respondent Information Commissioner says that all of the Protocol should be disclosed. None of it is covered by the solicitor-client exemption under the Act.

[4] For the reasons set out below, I largely agree with the Information Commissioner. All but a small portion of the Protocol should be disclosed. That small portion is covered by the exemption for solicitor-client privilege. Accordingly, I would allow the appeal in part.

[5] As a matter of discretion, the access coordinators of the Department of Justice and the RCMP could decide to disclose the small portion covered by solicitor-client privilege. Accordingly, I would remit the small portion to the access coordinators for their reconsideration.

**A. The request for the Protocol**

[6] The RCMP and the Department of Justice received a request under the Act for the Protocol. They disclosed it, but excised everything except its title and the signatories to the document.

[7] The Protocol is entitled "Principles to Implement Legal Advice on the Listing and Inspection of RCMP Documents in Civil Litigation." It is available to relevant personnel in the

RCMP and the Department of Justice. The Protocol sets out the roles of the RCMP and the Attorney General and the procedures to be followed when the RCMP possesses documents relevant to civil litigation against the federal Crown. The signatories are Assistant Commissioner William Lenton, RCMP Director of Federal Services, and James D. Bissell, Assistant Deputy Attorney General.

[8] In resisting disclosure under the Act, the RCMP and the Department of Justice invoked two exemptions: "solicitor-client privilege" (section 23) and "advice or recommendations developed by or for a government institution or a minister of the Crown" (paragraph 21(1)(*a*)).

**B. Proceedings before the Information Commissioner of Canada**

[9] Faced with the refusal of the RCMP and the Department of Justice to disclose the substance of the Protocol, the requester complained to the Information Commissioner under section 30 of the Act, alleging that the Protocol does not fall within any exemptions to disclosure under the Act.

[10] The Information Commissioner conducted an investigation, examined the Protocol and a number of documents leading up to it, and concluded that the Protocol did not fall within the exemptions.

[11] Having reached that conclusion, the Information Commissioner applied to the Federal Court under section 42 of the Act, seeking disclosure of the Protocol.

**C. Proceedings in the Federal Court**

[12] The Federal Court granted the Information Commissioner's application, agreeing with her that the Protocol did not fall within the exemptions.

[13] First, on the issue of solicitor-client privilege, the Federal Court noted that certain formal matters worked against the existence of the privilege (at paragraph 25):

> …the Protocol was negotiated; legal advice is not the subject of negotiation between solicitor and his or her client. In addition, the Protocol is signed by both the putative lawyer (the DOJ) and the putative client (the RCMP); a communication providing or seeking legal advice is not typically signed by both the client and the lawyer.

[14] However, in the core of its decision, the Federal Court concluded that the Protocol does not contain legal advice, nor is it concerned with providing legal advice. Instead (at paragraph 25),

> …it is an agreement [in which]…the parties have moved past the stage of seeking or providing advice and have entered into a document that reflects their understanding as to their respective roles and obligations regarding the way in which they will operate when the RCMP is in possession of documents, obtained through its criminal investigative powers, that might be relevant in civil litigation against the federal Crown.

[15] The Federal Court concluded that the Protocol was no different from other memoranda of understanding or agreements that the Department of Justice has entered into with other departments.

[16] Next, on the issue of the exemption for advice, the Federal Court found that the Protocol was not, in itself, advice but rather an agreement setting out respective roles and responsibilities. Further, the Federal Court noted that it could not tell from the text of the Protocol whether it

reflected earlier legal advice obtained by the DOJ. Accordingly, in the Court's view, disclosing the Protocol would "in no way harm the interests that the exemption…is designed to protect" (at paragraph 32).

[17] The Ministers appeal to this Court. They submit that the solicitor-client exemption applies. Further, they submit that the access to information coordinators properly exercised their discretion not to disclose the Protocol.

## D. Analysis

### (1) The standard of review

[18] The parties agree on the standard of review. The question whether the exemptions apply is reviewed on the basis of correctness. The question whether the discretion was properly exercised is reviewed on the basis of reasonableness. See, for example, *Canada (Information Commissioner) v. Canada (Minister of Industry)*, 2001 FCA 254 at paragraph 47.

[19] In this Court, the parties agreed that the Federal Court's characterizations of the Protocol, to the extent they are suffused by matters of fact, can only be set aside on the basis of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401.

**(2) The solicitor-client privilege exemption (section 23)**

**(a) A preliminary consideration**

[20] In their memorandum of fact and law, the Ministers addressed the issue of solicitor-client privilege as an all-or-nothing matter: either the whole Protocol is privileged or none of it is privileged.

[21] This overlooks the fact that sometimes only part of a document is privileged. Further, the Act does not regard disclosure as an all-or nothing matter. Indeed, under section 25 of the Act, a head of a government institution must sever any part of a record that does not contain exempt material if it can be reasonably severed. If only part of the Protocol is privileged, the issue of severance must be addressed.

**(b) General principles**

[22] The parties broadly agree on the general principles to be applied. Indeed, the Ministers conceded that at paragraphs 15-22 of its reasons the Federal Court correctly stated the general principles.

[23] Throughout their submissions in this Court, the Ministers stressed the importance of solicitor-client privilege, relying upon broad statements in cases such as *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, *Pritchard v. Ontario (Human*

*Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574.

[24] However "fundamental," "all-encompassing" and "nearly absolute" the privilege may be, these cases confirm that not everything uttered by a lawyer to a client is privileged: see, *e.g.*, *Pritchard*, *supra*, at paragraph 20; *Blood Tribe*, *supra*, at paragraph 10. Before us, counsel for the Ministers quite properly conceded that comments by lawyers to clients about matters wholly unrelated to their solicitor-client relationship are not privileged.

[25] Rather, communications must be viewed in light of the context surrounding the solicitor-client relationship and the relationship itself: *Pritchard*, *supra* at paragraph 20; *Miranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193 at paragraph 32. In particular, heed must be paid to the nature of the relationship, the subject-matter of what is said to be advice, and the circumstances of the document in issue: *R. v. Campbell*, [1999] 1 S.C.R. 565 at paragraph 50.

[26] All communications between a solicitor and a client directly related to the seeking, formulating or giving of legal advice are privileged, along with communications within the continuum in which the solicitor tenders advice. See *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 at paragraph 8.

[27] Part of the continuum protected by privilege includes "matters great and small at various stages…includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context" and other matters "directly related to the performance by the solicitor of his professional

duty as legal advisor to the client." See *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at page 1046 *per* Taylor L.J.; *Three Rivers District Council v. Governor and Company of the Bank of England*, [2004] UKHL 48 at paragraph 111.

[28] In determining where the protected continuum ends, one good question is whether a communication forms "part of that necessary exchange of information of which the object is the giving of legal advice": *Balabel*, *supra* at page 1048. If so, it is within the protected continuum. Put another way, does the disclosure of the communication have the potential to undercut the purpose behind the privilege – namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?

[29] For example, where a Director of a government department receives legal advice on how certain proceedings should be conducted and the director so instructs those conducting proceedings, the instructions, essentially cribbed from the legal advice, form part of the continuum and are protected: *Minister of Community and Social Services v. Cropley* (2004), 70 O.R. (3d) 680 (Div. Ct.). Disclosing such a communication would undercut the ability of the director to freely and candidly seek legal advice.

[30] In some circumstances, however, the end products of legal advice do not fall within the continuum and are not privileged. For example, many organizations develop document management and document retention policies and circulate them to personnel within the organization. Often these are shaped by the advice of counsel. However, such policies are usually disclosed, without

objection, because they do not form part of an exchange of information with the object of giving legal advice. Rather, they are operational in nature and relate to the conduct of the general business of the organization.

[31] Similarly, an organization might receive plenty of legal advice about how to draft a policy against sexual harassment in the workplace. But the operational implementation of that advice – the policy and its circulation to personnel within the organization for the purpose of ensuring the organization functions in an acceptable, professional and business-like manner – is not privileged, except to the extent that the policy communicates the very legal advice given by counsel.

[32] In argument before us, counsel for the Ministers quite properly conceded that policies of these sorts are not covered by the privilege.

[33] It follows, then, that I agree with the Federal Court's suggestion (at paragraph 25) that documents and actions shaped by legal advice are not necessarily themselves legal advice and do not necessarily form part of the protected continuum of communication. There are occasions where parties have moved "past the stage of seeking or providing advice," *i.e.*, beyond the protected continuum, and start to act on the advice for the purposes of conducting their regular business.

**(c) The Federal Court's application of these principles**

[34] As previously mentioned, the Federal Court characterized the Protocol not as legal advice or within the continuum of legal advice but rather as a statement of the respective roles of the RCMP

and the Department of Justice and the procedures they will follow when RCMP documents may be relevant in civil litigation.

[35] For the purposes of this appeal, I would divide the seventeen paragraph Protocol into two parts: the first three paragraphs and the last fourteen paragraphs. In my view, there is no ground to interfere with the Federal Court's characterization of the last fourteen paragraphs of the Protocol. That characterization is founded upon a number of factual findings made by the Federal Court (at paragraphs 25-26) that stand absent any demonstration of palpable and overriding error. The Ministers have not demonstrated any such error. However, the first three paragraphs embody legal advice and are covered by solicitor-client privilege.

*The last fourteen paragraphs of the Protocol*

[36] The last fourteen paragraphs of the Protocol are a negotiated and agreed-upon operational policy formulated after any legal advice has been given and after any continuum of communication that is necessary to be protected in light of the purposes behind the privilege. They resemble the sort of document management policy seen in many organizations. As the Federal Court found, the fourteen paragraphs define the respective roles of the RCMP and the Department of Justice and set out procedures they should follow concerning documents held by the RCMP. The fourteen paragraphs guide personnel in the RCMP and the Department of Justice who are engaged in the day-to-day, operational business of locating RCMP documents for the purpose of disclosing them in litigation. Nothing is said about any legal obligations.

[37] The Protocol itself is an agreement. This is not just an insignificant matter of form. Rather, it affects how one characterizes the substance of the communication: the roles and procedures defined in the Protocol are a product of negotiation and compromise. They do not necessarily embody or reflect any advice previously given.

[38] On this, the Federal Court noted that it impossible to say whether the matters set out are consistent with or conflict with any earlier legal advice. I agree. Indeed, it is impossible to tell whether or not they are based on any earlier legal advice. Thus, disclosing this policy discloses nothing about the content of any earlier legal advice or related communications and does not in any way undercut the purposes served by solicitor-client privilege.

[39] In this regard, the case at bar differs from *Cropley*, *supra*. In *Cropley*, the instructions disseminated by the Director embodied the legal advice and were not the product of negotiation and compromise. I agree and adopt the Federal Court's conclusion on this point (at paragraph 27):

> [*Cropley*] involved requests for disclosure of standing instructions and advice to counsel regarding the way in which litigation was to be conducted, which were drafted by in-house counsel for the Ministry and were intended to be provided to counsel retained to act on behalf of the Ministry. Here, on the other hand, the Protocol does not provide advice or instructions, but, as noted, reflects an agreement between the DOJ and the RCMP regarding their respective roles and responsibilities.

[40] The Ministers submitted that the Federal Court fastened only on whether the Protocol gave legal advice and not whether the Protocol was part of the continuum of communication associated with the giving and receiving of legal advice. I disagree. The Federal Court was alive to the fact that there is a protected continuum of communication, as is well-seen by its consideration of the *Cropley* case.

[41] Were the Ministers' submissions on the scope of the protected continuum accepted, all acts and communications taking place after legal advice is dispensed and relating to any subject-matters covered by the legal advice would be confidential. As a result, many departments' operational policies and memoranda of agreement between departments – currently public – might suddenly become confidential even though they do not disclose advice or other communications essential to the purposes served by the privilege.

[42] In my view, that would overshoot the mark. The scope of confidentiality would be extended beyond any of the purposes served by solicitor-client privilege – there would simply be secrecy for secrecy's sake.

[43] Accordingly, like the Federal Court, and for many of its reasons, I find the last fourteen paragraphs of the Protocol are not privileged.

*The first three paragraphs of the Protocol*

[44] The first three paragraphs of the Protocol are different. They memorialize, as background, the content of certain legal obligations of the federal Crown for the benefit of the RCMP and the Department of Justice and their personnel engaged in document management.

[45] This is legal advice falling under the exemption in section 23 of the Act. Accordingly, the first three paragraphs of the Protocol are privileged and can be kept confidential.

**(3) The access coordinators' discretion not to disclose the Protocol**

[46] I have found that the last fourteen paragraphs of the Protocol are not exempt and should be released to the requester. However, the first three paragraphs remain exempt. That is not the end of the matter – as a matter of discretion, the access coordinators could still release those three paragraphs.

[47] As previously mentioned, the access coordinators exercised their discretion earlier against disclosing the whole Protocol, a document they viewed as wholly exempt. Now, in light of these reasons, the vast majority of the document is not exempt and must be disclosed.

[48] Certain new questions for the consideration of the access coordinators now arise. Given these reasons, might they now release the first three paragraphs? Might the disclosure of the first three paragraphs bolster in the eyes of the public the credibility and soundness of the documentary procedures the RCMP and Department of Justice are following? Might there now be a greater public interest in disclosing the paragraphs? Or are there still important considerations that warrant keeping the first three paragraphs confidential?

[49] These questions are for the access coordinators to decide afresh. That discretion is to be exercised mindful of all of the relevant circumstances of this case, the purposes of the Act, and the principles set out in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 at paragraph 66.

**E. Proposed disposition**

[50] For the foregoing reasons, I would allow the appeal in part. In paragraph 2 of the Federal Court's judgment, after the words "[t]he respondents shall disclose," I would add the words "the last fourteen paragraphs of."

[51] I would remit to the access coordinators of the RCMP and Department of Justice the question whether, as a matter of discretion, the first three paragraphs of the Protocol should be disclosed even though they are exempt from disclosure under the Act under section 23 of the Act as privileged solicitor-client communications.

[52] The respondent Information Commissioner has not sought her costs and so none shall be awarded.

"David Stratas"

J.A.

"I agree.
John M. Evans J.A."

"I agree.
D.G. Near J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-375-12 |
| **APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE GLEASON DATED JULY 12, 2012, NOS. T-146-11 AND T-147-11** | |
| **STYLE OF CAUSE:** | The Minister of Public Safety and Emergency Preparedness and the Minister of Justice of Canada v. The Information Commissioner of Canada |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | April 9, 2013 |
| **REASONS FOR JUDGMENT BY:** | Stratas J.A. |
| **CONCURRED IN BY:** | Evans and Near JJ.A. |
| **DATED:** | April 17, 2013 |

**APPEARANCES:**

| | |
|---|---|
| Brian Harvey | FOR THE APPELLANTS |
| Jill Copeland<br>Allison Knight | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
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TAB 6

**Most Negative Treatment:** Check subsequent history and related treatments.

2016 SCC 52, 2016 CSC 52
Supreme Court of Canada

Lizotte c. Aviva Cie d'assurance du Canada

2016 CarswellQue 10692, 2016 CarswellQue 10693, 2016 SCC 52, 2016 CSC 52, [2016] 2 S.C.R. 521, [2016] S.C.J. No. 52, 272 A.C.W.S. (3d) 331, 404 D.L.R. (4th) 389, 62 C.C.L.I. (5th) 31, J.E. 2016-2030

# Karine Lizotte, in her capacity as assistant syndic of the Chambre de l'assurance de dommages (Appellant) and Aviva Insurance Company of Canada and Traders General Insurance Company (Respondents) and Canadian Bar Association, Advocates' Society and Barreau du Québec (Interveners)

McLachlin C.J.C., Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown JJ.

Heard: March 24, 2016
Judgment: November 25, 2016
Docket: 36373

Proceedings: confirming *Lizotte c. Aviva, Cie d'assurances du Canada* (2015), EYB 2015-247424, 2015 QCCA 152, [2015] J.Q. No. 383, 2015 CarswellQue 384, Bich J.C.A., Gagnon J.C.A., St-Pierre J.C.A. (C.A. Que.) [Quebec]

Counsel: Claude G. Leduc, Olivier Charbonneau-Saulnier, for appellant
Éric Azran, Patrick Girard, for respondents
Mahmud Jamal, Alexandre Fallon, W. David Rankin, for intervener, Canadian Bar Association
Douglas C. Mitchell, Audrey Boctor, for intervener, Advocates' Society
François LeBel, Jean-Benoît Pouliot, Sylvie Champagne, for intervener, Barreau du Québec

Subject: Civil Practice and Procedure; Constitutional; Corporate and Commercial; Evidence; Insurance; Public; Torts

**Related Abridgment Classifications**

Evidence
XIV Privilege
XIV.2 Litigation privilege

**Headnote**

Evidence --- Privilege — Litigation privilege

Litigation privilege — Fire damaged residence and one of insurer's claims adjusters investigated claim — Syndic of Chambre de l'assurance de dommages later received information to effect that adjuster had made certain errors in managing file — In course of her inquiry, syndic asked insurer to send her complete copy of its claim file — Insurer refused to do so on basis that some of requested documents were protected by litigation privilege — Syndic filed motion for declaratory judgment, arguing that s. 337 of Act Respecting the Distribution of Financial Products and Services created obligation to produce "any [ . . . ] document" concerning activities of representative whose professional conduct was being investigated — Syndic further argued that litigation privilege should be applied more flexibly than solicitor-client privilege as it was less important — Trial judge concluded that litigation privilege could not be abrogated absent express provision and syndic appealed — Court of Appeal upheld trial judge's judgment — Syndic appealed before Supreme Court of Canada — Appeal dismissed — Litigation privilege is fundamental principle of administration of justice — It is class privilege that exempts communications and documents that fall within its scope from compulsory disclosure, except where one of limited exceptions to non-disclosure applies — Any legislative provision capable of interfering with litigation privilege should be read narrowly — Legislature may not abrogate that privilege by inference, but may only do so using clear, explicit and unequivocal language — Because s. 337 of Act provided only for production of "any [ . . . ] document" without further precision, it did not have effect of abrogating privilege — It

 

followed that insurer was entitled to assert litigation privilege in this case and to refuse to provide syndic with documents that fell within scope of litigation privilege — None of exceptions to its application justified lifting privilege in this case — Therefore, courts below were right to hold that litigation privilege invoked by insurer could be asserted against syndic Act respecting the distribution of financial products and services, CQLR, c. D-9.2, s 337.

Preuve --- Privilège — Litigation privilege

Privilège relatif au litige — Incendie a ravagé une résidence et un des experts en sinistre de l'assureur a enquêté le sinistre — Syndique de la Chambre de l'assurance de dommages a, par la suite, reçu une information reprochant certains manquements à l'expert en sinistre dans sa gestion du dossier — Dans le cadre de son enquête, la syndique a demandé à l'assureur de lui faire parvenir une copie complète de son dossier de réclamation — Assureur a refusé de donner suite à la demande au motif que certains des documents recherchés étaient visés par le privilège relatif au litige — Syndique a déposé une requête en jugement déclaratoire, faisant valoir que l'art. 337 de la Loi sur la distribution de produits et services financiers prévoyait l'obligation de fournir « tout document » sur les activités d'un représentant soumis à supervision déontologique — Syndique a également fait valoir que le privilège relatif au litige devrait être appliqué de façon plus souple que le secret professionnel de l'avocat car il était moins important — Juge de première instance a conclu que le privilège relatif au litige ne pouvait être abrogé que par une disposition expresse et la syndique a interjeté appel — Cour d'appel a confirmé le jugement du juge de première instance — Syndique a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Privilège relatif au litige est une règle fondamentale pour l'administration de la justice — Il s'agit d'un privilège générique qui empêche la divulgation forcée des communications ou documents qu'il couvre, sauf si l'une des exceptions restreintes à leur non-divulgation s'applique — Toute disposition législative susceptible de porter atteinte au privilège relatif au litige doit être interprétée restrictivement — Législateur ne peut abroger ce privilège par inférence, mais uniquement au moyen de termes clairs, explicites et non équivoques — Puisque l'art. 337 de la Loi ne prévoit que la communication de « tout document » sans plus de précision, il n'a pas pour effet d'écarter ce privilège — Il s'ensuit que l'assureur pouvait invoquer ici le privilège relatif au litige et refuser de fournir à la syndique les documents visés par celui-ci — Aucune des exceptions à son application ne justifiait d'y passer outre ici — Par conséquent, les instances inférieures ont jugé à bon droit que le privilège relatif au litige invoqué par l'assureur était opposable à la syndique.

A fire damaged a residence and one of the insurer's claims adjusters investigated the claim. The syndic of the Chambre de l'assurance de dommages, a self-regulatory organization, later received information to the effect that the adjuster had made certain errors in managing the file and the syndic opened an inquiry. In the course of this inquiry, the syndic of the Chambre asked the insurer to send her a complete copy of its claim file with respect to the insured. The insurer refused to do so on the basis that some of the requested documents were protected by litigation privilege. The syndic filed a motion for a declaratory judgment, arguing that s. 337 of the Act Respecting the Distribution of Financial Products and Services created an obligation to produce "any [ . . . ] document" concerning the activities of a representative whose professional conduct was being investigated by the Chamber and that litigation privilege should be applied more flexibly than solicitor-client privilege as it was less important.

The trial judge concluded that litigation privilege could not be abrogated absent an express provision and the syndic appealed. The Court of Appeal upheld the trial judge's judgment, holding that even though litigation privilege was distinguishable from solicitor-client privilege, it was, to the same extent, a fundamentally important principle that could not be overridden without express language.

The syndic appealed before the Supreme Court of Canada.

**Held:** The appeal was dismissed.

Per Gascon J. (McLachlin C.J.C., Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Côté, Brown JJ. concurring): Although there are differences between solicitor-client privilege and litigation privilege, the latter is nonetheless a fundamental principle of the administration of justice that is central to the justice system both in Quebec and in the other provinces. It is a class privilege that exempts the communications and documents that fall within its scope from compulsory disclosure, except where one of the limited exceptions to non-disclosure applies.

The Court rendered a previous decision on solicitor-client privilege and it has since been settled law that any legislative provision capable of interfering with solicitor-client privilege should be read narrowly and that a legislature may not abrogate that privilege by inference, but may only do so using clear, explicit and unequivocal language. This principle applies to litigation privilege.

Given its importance, litigation privilege could not be abrogated by inference and could not be lifted absent a clear, explicit and unequivocal provision to that effect. Because s. 337 of the Act provided only for the production of "any [ . . . ] document"

  

without further precision, it did not have the effect of abrogating the privilege. It followed that the insurer was entitled to assert litigation privilege in this case and to refuse to provide the syndic with the documents that fell within the scope of litigation privilege. None of the exceptions to its application justified lifting the privilege in this case. Therefore, the courts below were right to hold that the litigation privilege invoked by the insurer could be asserted against the syndic.

Un incendie a ravagé une résidence et un des experts en sinistre de l'assureur a enquêté le sinistre. La syndique de la Chambre de l'assurance de dommages, un organisme d'autoréglementation, a, par la suite, reçu une information reprochant certains manquements à l'expert en sinistre dans sa gestion du dossier et la syndique a ouvert une enquête. Dans le cadre de cette enquête, la syndique a demandé à l'assureur de lui faire parvenir une copie complète de son dossier de réclamation relativement à l'assurée. L'assureur a refusé de donner suite à la demande au motif que certains des documents recherchés étaient visés par le privilège relatif au litige. La syndique a déposé une requête en jugement déclaratoire, faisant valoir que l'art. 337 de la Loi sur la distribution de produits et services financiers prévoyait l'obligation de fournir « tout document » sur les activités d'un représentant soumis à la supervision déontologique de la Chambre et que le privilège relatif au litige devrait être appliqué de façon plus souple que le secret professionnel de l'avocat car il est moins important.

Le juge de première instance a conclu que le privilège relatif au litige ne pouvait être abrogé que par une disposition expresse et la syndique a interjeté appel. La Cour d'appel a confirmé la décision du juge de première instance, estimant que même si le privilège relatif au litige se distinguait du secret professionnel de l'avocat, il s'agissait d'une règle d'importance tout aussi fondamentale qui ne pouvait être écartée que par des termes exprès.

La syndique a formé un pourvoi devant la Cour suprême du Canada.

**Arrêt:** Le pourvoi a été rejeté.

Gascon, J. (McLachlin, J.C.C., Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Côté, Brown, JJ., souscrivant à son opinion) : Bien que des distinctions s'imposent entre le secret professionnel de l'avocat et le privilège relatif au litige, ce dernier demeure une règle fondamentale pour l'administration de la justice qui se situe au coeur du système judiciaire, tant au Québec que dans les autres provinces. Il s'agit d'un privilège générique qui empêche la divulgation forcée des communications ou documents qu'il couvre, sauf si l'une des exceptions restreintes à leur non-divulgation s'applique.

La Cour a rendu une décision précédemment sur le secret professionnel de l'avocat et il est depuis lors établi en droit que toute disposition législative susceptible de porter atteinte au secret professionnel de l'avocat doit être interprétée restrictivement et qu'un législateur ne peut abroger ce secret par inférence, mais uniquement au moyen de termes clairs, explicites et non équivoques. Ce principe s'applique au privilège relatif au litige.

Vu son importance, le privilège relatif au litige ne peut être abrogé par inférence et ne peut être mis à l'écart que par une disposition claire, explicite et non équivoque à cet effet. Puisque l'art. 337 de la Loi ne prévoit que la communication de « tout document » sans plus de précision, il n'a pas pour effet d'écarter ce privilège. Il s'ensuit que l'assureur pouvait invoquer ici le privilège relatif au litige et refuser de fournir à la syndique les documents visés par celui-ci. Aucune des exceptions à son application ne justifiait d'y passer outre ici. Par conséquent, les instances inférieures ont jugé à bon droit que le privilège relatif au litige invoqué par l'assureur était opposable à la syndique.

**Table of Authorities**

**Cases considered by *Gascon J.*:**

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**Words and phrases considered:**

**class privilege**

There are two types of privileges in our law: class privileges and case-by-case privileges. A class privilege entails a presumption of non-disclosure once the conditions for its application are met. It is "more rigid than a privilege constituted on a case-by-

  

case basis", which means that it "does not lend itself to the same extent to be tailored to fit the circumstances": *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 46. On the other hand, "[t]he scope of [a] case-by-case privilege", as the name suggests, "will depend, as does its very existence, on a case-by-case analysis, and may be total or partial" (*National Post*, at para. 52).

**litigation privilege**

Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts (...).

Litigation privilege is a common law rule of English origin (...). It was introduced to Canada, including Quebec, in the 20th century as a privilege linked to solicitor-client privilege (...).

Because of these origins, litigation privilege has sometimes been confused with solicitor-client privilege, both at common law and in Quebec law (...).

However, [the Supreme Court of Canada, in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319,] identified the following differences between them:

• The purpose of solicitor-client privilege is to protect a *relationship*, while that of litigation privilege is to ensure the efficacy of the adversarial *process* (para. 27);

• Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);

• Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);

• Litigation privilege applies to non-confidential documents (para. 28, quoting R. J. Sharpe, "Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65);

• Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).

The Court also stated that litigation privilege, "unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration" (*Blank*, at para. 37). Moreover, the Court confirmed that only those documents whose "dominant purpose" is litigation (and not those for which litigation is a "substantial purpose") are covered by the privilege (para. 60). It noted that the concept of "related litigation", which concerns different proceedings that are brought after the litigation that gave rise to the privilege, may extend the privilege's effect (paras. 38-41).

(...)

Although litigation privilege is distinguishable from solicitor-client privilege, the fact remains that (1) it is a class privilege, (2) it is subject to clearly defined exceptions, not to a case-by-case balancing test, and (3) it can be asserted against third parties, including third party investigators who have a duty of confidentiality.

(...)

[L]itigation privilege is a class privilege.

**Termes et locutions cités:**

**privilège relatif au litige**

  

Le privilège relatif au litige crée une immunité de divulgation pour les documents et communications dont l'objet principal est la préparation d'un litige. Les exemples classiques d'éléments couverts par ce privilège sont le dossier de l'avocat et les communications verbales ou écrites entre un avocat et des tiers, par exemple des témoins ou des experts (...)

Le privilège relatif au litige est une règle de common law d'origine anglaise (...). Au cours du 20e siècle, cette règle a été introduite au Canada, y compris au Québec, comme un privilège lié au secret professionnel de l'avocat (...).

En raison de ces origines, le privilège relatif au litige a parfois été confondu avec le secret professionnel de l'avocat, tant en common law qu'en droit québécois (...).

Toutefois, [la Cour suprême du Canada, dans l'arrêt *Blank c. Canada (Ministre de la Justice)*, 2006 CSC 39, [2006] 2 R.C.S. 319,] identifie les distinctions suivantes qui existent entre les deux :

• Le secret professionnel de l'avocat vise à préserver une *relation* alors que le privilège relatif au litige vise à assurer l'efficacité du *processus* contradictoire (par. 27);

• Le secret professionnel est permanent, alors que le privilège relatif au litige est temporaire et s'éteint avec le litige (par. 34 et 36);

• Le privilège relatif au litige s'applique à des parties non représentées, alors même qu'il n'y a aucun besoin de protéger l'accès à des services juridiques (par. 32);

• Le privilège relatif au litige couvre des documents non confidentiels (par. 28, citant R. J. Sharpe, « Claiming Privilege in the Discovery Process », dans *Special Lectures of the Law Society of Upper Canada* (1984), 163, p. 164-165);

• Le privilège relatif au litige n'a pas pour cible les communications entre un avocat et son client en tant que telles (par. 27).

La Cour précise également que le privilège relatif au litige, « contrairement au secret professionnel de l'avocat, n'est ni absolu quant à sa portée, ni illimité quant à sa durée » (*Blank*, par. 37). La Cour confirme en outre que seuls les documents dont « l'objet principal » (et non tous les documents dont un « objet important ») est la préparation du litige sont couverts par le privilège (par. 60). Elle note que la notion de « litige connexe », qui concerne un autre litige survenu après celui ayant donné lieu au privilège, peut prolonger l'application de celui-ci (par. 38- 41).

(...)

S'il se distingue du secret professionnel de l'avocat, le privilège relatif au litige demeure 1) un privilège générique, 2) sujet à des exceptions clairement définies, et non à une mise en balance au cas par cas, et 3) opposable aux tiers, y compris aux tiers enquêteurs ayant une obligation de confidentialité.

(...)

[L]e privilège relatif au litige se qualifie de privilège générique.

**privilèges génériques**

Notre droit reconnaît deux types de privilèges : les privilèges génériques et les privilèges reconnus au cas par cas. Un privilège générique comporte une présomption de non-divulgation une fois que ses conditions d'application sont établies. Il se veut « plus rigide qu'un privilège reconnu au cas par cas », de sorte qu'il « n'est pas possible de le redéfinir aussi librement pour l'adapter aux circonstances » : *R. c. National Post*, 2010 CSC 16, [2010] 1 R.C.S. 477, par. 46. À l'opposé, un privilège reconnu au cas par cas, comme son nom l'indique, « peut être absolu ou partiel et sa portée dépend, comme son existence même, d'une analyse effectuée au cas par cas » (*National Post*, par. 52).

  

APPEAL by syndic of self-regulatory organization from decision reported at *Lizotte c. Aviva, Cie d'assurances du Canada* (2015), 2015 QCCA 152, EYB 2015-247424, 2015 CarswellQue 384, [2015] J.Q. No. 383 (C.A. Que.), confirming decision dismissing syndic's motion seeking disclosure of insurer's claim file.

POURVOI formé par la syndique d'un organisme d'autoréglementation à l'encontre d'une décision publiée à *Lizotte c. Aviva, Cie d'assurances du Canada* (2015), 2015 QCCA 152, EYB 2015-247424, 2015 CarswellQue 384, [2015] J.Q. No. 383 (C.A. Que.), ayant confirmé une décision rejetant la requête de la syndique recherchant la communication du dossier de réclamation d'un assureur.

***Gascon J.*** **(McLachlin C.J.C. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Côté and Brown JJ. concurring):**

**I. Overview**

1 Litigation privilege protects against the compulsory disclosure of communications and documents whose dominant purpose is preparation for litigation. Although it differs from the professional secrecy of lawyers (solicitor-client privilege) in several respects, the two concepts do overlap to some extent. Since *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, it has been settled law that any legislative provision capable of interfering with solicitor-client privilege must be read narrowly and that a legislature may not abrogate that privilege by inference, but may only do so using clear, explicit and unequivocal language. The issue in this appeal is whether this principle also applies to litigation privilege.

2 In the course of an inquiry into a claims adjuster, the appellant, the assistant syndic (the "syndic") of the Chambre de l'assurance de dommages (the" Chamber"), asked an insurer, the respondent Aviva Insurance Company of Canada, to send her a complete copy of its claim file with respect to one of its insured. Aviva refused to do so on the basis that some of the requested documents were protected by litigation privilege. In response to this refusal, the syndic filed a motion for a declaratory judgment, arguing that the relevant statutory provision created an obligation to produce "any ... document" concerning the activities of a representative whose professional conduct is being investigated by the Chamber, and that this was sufficient to lift the privilege. In the syndic's opinion, litigation privilege can be distinguished from solicitor-client privilege; it is less important and is not absolute, and should therefore be applied more flexibly.

3 The Superior Court concluded that litigation privilege cannot be abrogated absent an express provision. The Court of Appeal upheld the Superior Court's judgment, holding that even though litigation privilege is distinguishable from solicitor-client privilege, it is, to the same extent, a fundamentally important principle that cannot be overridden without express language.

4 I would dismiss the appeal. Although there are differences between solicitor-client privilege and litigation privilege, the latter is nonetheless a fundamental principle of the administration of justice that is central to the justice system both in Quebec and in the other provinces. It is a class privilege that exempts the communications and documents that fall within its scope from compulsory disclosure, except where one of the limited exceptions to non-disclosure applies.

5 The requirements established in *Blood Tribe* apply to litigation privilege. Given its importance, this privilege cannot be abrogated by inference and cannot be lifted absent a clear, explicit and unequivocal provision to that effect. Because the section at issue provides only for the production of "any ... document" without further precision, it does not have the effect of abrogating the privilege. It follows that Aviva was entitled to assert litigation privilege in this case and to refuse to provide the syndic with the documents that fall within the scope of that privilege.

**II. Background**

6 The Chamber is a self-regulatory organization established by s. 284 of the Act *respecting the distribution of financial products and services*, CQLR, c. D-9.2 ("*ADFPS*"). It is responsible for overseeing the professional conduct of a number of representatives working in the insurance field, including claims adjusters, damage insurance agents and damage insurance brokers (ss. 289 and 312 *ADFPS*). In this regard, the Chamber has a role similar to that of a professional order governed by

  

the Professional Code, CQLR, c. C-26, although it is not such an order. Its "mission [is] to ensure the protection of the public by maintaining discipline among and supervising the training and ethics of its members" (s. 312 *ADFPS*). For this purpose, the syndic of the Chamber inquires into any offences under the *ADFPS* or its regulations (s. 329 *ADFPS*). She may bring a complaint against a representative before the Chamber's discipline committee, and the complaint may result in a fine (ss. 352, 353 and 376 *ADFPS*).

7 In July 2008, a fire damaged the residence of a person insured by Aviva. Aviva assigned one of its claims adjusters, M.B., to investigate the claim. The syndic of the Chamber later received information to the effect that M.B. had made certain errors in managing the file. On January 24, 2011, the syndic opened an inquiry with respect to M.B. In the course of that inquiry, a member of the syndic's team sent Aviva a request for a [TRANSLATION] "complete copy of [its] file, both physical and electronic, for this claim", and for a list that would enable her "to identify the employees who worked on the file" (emphasis deleted). The syndic based this request on s. 337 *ADFPS*, which reads as follows:

> **337.** Insurers, firms, independent partnerships and mutual fund dealers and scholarship plan dealers registered in accordance with Title V of the Securities Act (chapter V-1.1) must, at the request of a syndic, forward any required document or information concerning the activities of a representative.

8 In response, Aviva produced a number of documents, but explained that it had withheld some on the basis that they were covered either by solicitor-client privilege or by litigation privilege. The syndic insisted, however, and made several subsequent requests for the complete claim file, explaining that she could not conduct her inquiry without it.

9 On June 30, 2011, the insured person in question brought legal proceedings against Aviva to obtain compensation. While that action was still pending in court, the syndic applied in June 2012 for a declaratory judgment against Aviva in order to obtain the documents it sought. On June 26, 2013, Aviva and the insured person reached an out-of-court settlement, and on October 17, 2013, Aviva finally sent the syndic the entire file regarding the insured person's claim.

10 Although that settled the dispute between the parties with respect to the production of the required documents, the syndic nevertheless proceeded with her motion for a declaratory judgment. As agreed by the parties, that motion raised the following question:

> [TRANSLATION] The parties agree that at the time when the ChaD (Chambre de l'assurance de dommages) made its request to the defendant on January 24, 2011, some of the documents included in the claim file of the insured person N.F. were not produced by the defendant on the basis of litigation privilege or of professional secrecy (solicitor-client privilege). Accordingly, was the defendant entitled to assert those privileges against the ChaD and to refuse on that basis to produce the documents covered by them?

11 The Superior Court judge who heard the motion held that it raised a [TRANSLATION] "genuine problem", because other insurers and claims adjusters had raised the same question in response to requests for documents from the Chamber's syndics. At the hearing of the motion, the syndic conceded that solicitor-client privilege could be asserted against her and that the issue before the court was therefore limited to litigation privilege. As well, Aviva abandoned its argument that some of the requested documents did not relate to "the activities of a representative" within the meaning of s. 337 *ADFPS*. As a result, no facts were at issue before the motion judge.

## III. Judicial History

### *A. Quebec Superior Court (2013 QCCS 6397)*

12 The Superior Court ruled in Aviva's favour. The motion judge began by observing that s. 9 of the Charter *of human rights and freedoms*, CQLR, c. C-12 (the "Quebec Charter"), grants quasi-constitutional protection to professional secrecy of lawyers, which is closely linked to [TRANSLATION] the "democratic values" (paras. 46 and 50-51 (CanLII)). Although claims adjusters are not bound to professional secrecy by law, counsel retained by a claims adjuster or an insurer is so bound (paras. 47-48). In *Blood Tribe*, it was held that an authority may not "pierce" solicitor-client privilege absent express words in the applicable

  

legislation. Because the *ADFPS* (and s. 337 thereof) contains no express abrogation of solicitor-client privilege, the latter may be asserted against the syndic (paras. 53-56).

13 The motion judge then considered the syndic's argument that litigation privilege can be distinguished from solicitor-client privilege, in particular in that it is not protected by s. 9 of the Quebec Charter. In the motion judge's view, this argument represented a [TRANSLATION] "departure from the position taken by the Supreme Court in *Foster Wheeler*" (para. 63). In that case, LeBel J. had written that litigation privilege "is now being absorbed into the Quebec civil law concept of professional secrecy" (*Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*2004 SCC 18[2004] 1 S.C.R. 456, at para. 44). The motion judge also noted that the Federal Court had held, in two cases originating in common law provinces, that the principles applicable to solicitor-client privilege in the context of the statute at issue in Blood Tribe (the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 ("PIPEDA")) also applied to litigation privilege (paras. 64-67).

14 In light of the decision in *Foster Wheeler*, the motion judge considered himself bound to apply these principles to Quebec law and to find that, in the absence of express language, the *ADFPS* does not abrogate litigation privilege, which can therefore be asserted against the syndic (para. 68). He accordingly declared that both solicitor-client privilege and litigation privilege can be asserted against the syndic of the Chamber [TRANSLATION] "by anybody who receives a request for information" (para. 83).

***B. Quebec Court of Appeal (2015 QCCA 152)***

15 The Court of Appeal upheld the judgment on the motion, concluding that litigation privilege could be asserted against the syndic. In its view, the syndic had been right to concede that solicitor-client privilege could be asserted against her, since the legislature is required to use express language to abrogate that privilege, which it had not done in this case. The court also noted that, by way of comparison, express language had been used in ss. 14.3, 60.4 and 192 of the Professional Code (which does not apply to claims adjusters) in the context of disciplinary inquiries (paras. 23 and 30 (CanLII)).

16 Although solicitor-client privilege and litigation privilege must be viewed as being conceptually distinct, the Court of Appeal noted that in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, this Court had written that the two rules "serve a common cause: The secure and effective administration of justice according to law" (para. 25, quoting Blank, at para. 31). As well, the Federal Court, the Ontario Court of Appeal and the Alberta Court of Appeal had held that litigation and/or settlement privilege cannot be abrogated without clear and explicit language (paras. 31-32). In the Court of Appeal's view, the same reasoning applies to the instant case.

17 The Court of Appeal added that this Court had also stated in *Blank* that the Access to Information Act, R.S.C. 1985, c. A-1, had been enacted in a context in which the term "solicitor-client privilege" was understood to include litigation privilege (para. 29). Yet the same context had also applied when the *ADFPS* was enacted in 1998, and when the legislature made amendments to that Act after *Blank* was decided, it did not add anything to abrogate solicitor-client privilege or litigation privilege even though it had done so in the *Professional Code* with respect to professional secrecy (para. 30). The Court of Appeal concluded from this that litigation privilege could be asserted against the syndic. The court allowed the appeal, but solely to amend the motion judge's conclusion such that it would apply to [TRANSLATION] "the respondents" rather than to "any person" (para. 37).

**IV. Issue**

18 In this Court, the syndic rightly admits that solicitor-client privilege can be asserted against her in the context of a request for documents relating to a claim file. The central issue of the appeal is therefore whether Aviva could also assert litigation privilege against the syndic in the same context. To resolve it, I will have to determine whether litigation privilege may be abrogated using general rather than clear, explicit and unequivocal language and, accordingly, whether s. 337 *ADFPS* can be interpreted as establishing a valid abrogation of the privilege. Before doing so, however, I must first review the characteristics of litigation privilege.

**V. Analysis**

  

### *A. Characteristics of Litigation Privilege*

19 Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at pp. 1009-10.

20 Litigation privilege is a common law rule of English origin: Lyell v. Kennedy (No. 2) (1883), 9 App. Cas. 81 (H.L.). It was introduced to Canada, including Quebec, in the 20th century as a privilege linked to solicitor-client privilege, which at the time was considered to be a rule of evidence that was necessary to ensure the proper conduct of trials: A. Cardinal, "Quelques aspects modernes du secret professionnel de l'avocat" (1984), 44 *R. du B*. 237, at pp. 266-67. In an oft-cited case, Jackett P. of the former Exchequer Court of Canada explained the purpose of litigation privilege, once known as the lawyer's brief rule, as follows:

> Turning to the "lawyer's brief" rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.
>
> [Emphasis added.]
>
> (*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, at pp. 33-34)

21 Because of these origins, litigation privilege has sometimes been confused with solicitor-client privilege, both at common law and in Quebec law: Royer and Lavallée, at pp. 1003-4; N. J. Williams, "Discovery of Civil Litigation Trial Preparation in Canada" (1980), 58 Can. Bar Rev. 1, at pp. 37-38.

22 However, since *Blank* was rendered in 2006, it has been settled law that solicitor-client privilege and litigation privilege are distinguishable. In *Blank*, the Court stated that "[t]hey often co-exist and [that] one is sometimes mistakenly called by the other's name, but [that] they are not coterminous in space, time or meaning" (para. 1). It identified the following differences between them:

- The purpose of solicitor-client privilege is to protect a *relationship*, while that of litigation privilege is to ensure the efficacy of the adversarial *process* (para. 27);
- Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);
- Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);
- Litigation privilege applies to non-confidential documents (para. 28, quoting R. J. Sharpe, "Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65);
- Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).

23 The Court also stated that litigation privilege, "unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration" (*Blank*, at para. 37). Moreover, the Court confirmed that only those documents whose "dominant purpose" is litigation (and not those for which litigation is a "substantial purpose") are covered by the privilege (para. 60). It

  

noted that the concept of "related litigation", which concerns different proceedings that are brought after the litigation that gave rise to the privilege, may extend the privilege's effect (paras. 38-41).

24 While it is true that in *Blank*, the Court thus identified clear differences between litigation privilege and solicitor-client privilege, it also recognized that they have some characteristics in common. For instance, it noted that the two privileges "serve a common cause: The secure and effective administration of justice according to law" (para. 31). More specifically, litigation privilege serves that cause by "ensur[ing] the efficacy of the adversarial process" (para. 27) and maintaining a "protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (para. 40, quoting Sharpe, at p. 165).

25 The differences identified in *Blank* between solicitor-client privilege and litigation privilege have been adopted in Quebec law: *Desjardins Assurances générales inc. v. Groupe Ledor inc., mutuelle d'assurances*2014 QCCA 1501, at para. 8 (CanLII); Canada (Procureur général) v. Chambre des notaires du Québec2014 QCCA 552, at para. 47 (CanLII); *Informatique Côté, Coulombe inc. v. Groupe Son X Plus inc.*2012 QCCA 2262, at para. 15 (CanLII); Union canadienne (L'), compagnie d'assurance v. St-Pierre2012 QCCA 433[2012] R.J.Q. 340, at paras. 23-24; Imperial Tobacco Canada ltée v. Létourneau2012 QCCA 2260, at paras. 7-8 (CanLII); *Société d'énergie de la Baie James v.* Groupe Aecon ltée2011 QCCA 646, at para. 14 (CanLII); Fournier Avocats inc. v. Cinar Corp.2010 QCCA 2278, at para. 21 (CanLII). In light of *Blank* and the subsequent case law, the earlier *obiter dictum* of LeBel J. in *Foster Wheeler* on which the motion judge relied in the instant case (para. 63) must be placed in its proper context. In *Foster Wheeler*, LeBel J. wrote that litigation privilege "is now being absorbed into the Quebec civil law concept of professional secrecy" (para. 44). However, that observation referred to a tendency that is no longer representative of the state of the law in Quebec. Moreover, because litigation privilege applies, for example, to an unrepresented party without the involvement of a professional counsellor (*Blank*, at para. 27), it cannot be said, despite the common characteristics, that it has been absorbed into, or constitutes a component or subcategory of, the institution of professional secrecy.

26 This being said, the syndic in the case at bar is relying on *Blank* and on the differences identified in it as the basis for three arguments that support her view that litigation privilege should be given a limited scope.

27 First, she submits that litigation privilege is not a class privilege and that this distinguishes it from solicitor-client privilege, as it is intended not to protect a relationship, but solely to facilitate a process. Although taking care not to say that litigation privilege is essentially a [TRANSLATION] "case-by-case privilege", she submits that it is nevertheless a "limited privilege that must yield where the ends of justice so require or where that is justified by an overriding public interest".

28 Next, the syndic argues that litigation privilege must be subjected to a balancing test. In her view, courts must in every case assess the harm that would result from the application of the privilege and consider the opposing interests in deciding whether it should apply. The very existence of the privilege thus depends on an analysis specific to a given situation rather than on the application of certain defined exceptions as is the case for solicitor-client privilege. The syndic considers that litigation privilege no longer reflects contemporary legal realities, which require more extensive co-operation in the courts, and that it should therefore be given a very narrow scope.

29 Finally, the syndic submits that it should not be possible to assert the privilege against someone who is not a party to the litigation in question. The Court should even adopt a [TRANSLATION] "third party investigator exception". In the syndic's opinion, such an exception should apply in favour of anyone who:

> [TRANSLATION] (i) is not a party to the litigation that gave rise to the privilege and is therefore a "third party" to the litigation who has no interest in it; (ii) has investigative powers conferred by the legislature in relation to a function being performed in the public interest; (iii) requests the production of documents that are directly relevant to the fulfillment of that function; (iv) has a duty of confidentiality that bars him or her from disclosing the requested documents, directly or indirectly, to the opposing party in the litigation that gave rise to the privilege; and (v) is authorized to disclose the documents only in a forum that itself is obligated and has the ability to maintain their confidentiality for at least as long as the duration of the litigation that gave rise to the privilege (and any related litigation). [A.F., at para. 136]

  

30 I note that this last argument goes well beyond the narrow issue of legislative abrogation of the privilege raised in this appeal. The proposed exception, which is based on a balancing test, could cause the privilege to be inapplicable even before that issue arises. In support of the exception, the syndic asserts that her oath of discretion and duty of confidentiality substantially limit, or even eliminate, any risk of harm. In short, in a situation like the one in this case, the very limited scope of litigation privilege means that it should yield given the importance of the syndic's function of protecting the public.

31 I find these three arguments to be without merit. Although litigation privilege is distinguishable from solicitor-client privilege, the fact remains that (1) it is a class privilege, (2) it is subject to clearly defined exceptions, not to a case-by-case balancing test, and (3) it can be asserted against third parties, including third party investigators who have a duty of confidentiality.

*(1) Litigation Privilege Is a Class Privilege*

32 There are two types of privileges in our law: class privileges and case-by-case privileges. A class privilege entails a presumption of non-disclosure once the conditions for its application are met. It is "more rigid than a privilege constituted on a case-by-case basis", which means that it "does not lend itself to the same extent to be tailored to fit the circumstances": R. v. National Post2010 SCC 16[2010] 1 S.C.R. 477, at para. 46. On the other hand, "[t]he scope of [a] case-by-case privilege", as the name suggests, "will depend, as does its very existence, on a case-by-case analysis, and may be total or partial" (*National Post*, at para. 52). The four "Wigmore criteria", the last of which is a balancing of the interests at stake, are applied:

> The "Wigmore criteria" consist of four elements which may be expressed for present purposes as follows. First, the communication must originate in a confidence that the identity of the informant will not be disclosed. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good ("Sedulous[ly]" being defined ... as "diligent[ly] ... deliberately and consciously"). ... Finally, if all of these requirements are met, the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth....
>
> . . . . .
>
> The fourth Wigmore criterion does most of the work. Having established the value to the public of the relationship in question, the court must weigh against its protection any countervailing public interest such as the investigation of a particular crime (or national security, or public safety or some other public good). [paras. 53 and 58]

33 In my opinion, litigation privilege is a class privilege. Once the conditions for its application are met, that is, once there is a document created for "the dominant purpose of litigation" (*Blank*, at para. 59) and the litigation in question or related litigation is pending "or may reasonably be apprehended" (para. 38), there is a "*prima facie* presumption of inadmissibility" in the sense intended by Lamer C.J. in *R. v. Gruenke*, [1991] 3 S.C.R. 263:

> The parties have tended to distinguish between two categories: a "blanket", *prima facie*, common law, or "class" privilege on the one hand, and a "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule).
>
> [Emphasis deleted; p. 286]

34 From this perspective, litigation privilege is similar to settlement privilege and informer privilege, which the Court has already characterized as class privileges: Sable Offshore Energy Inc. v. Ameron International Corp.2013 SCC 37[2013] 2 S.C.R. 623, at para. 12; R. v. Basi2009 SCC 52[2009] 3 S.C.R. 389, at para. 22. Like them, litigation privilege has long been recognized by the courts and has been considered to entail a presumption of immunity from disclosure once the conditions for its application have been met: *Blank*, at paras. 59-60; *Compagnie d'assurance AIG du Canada v. Solmax International inc.*2016 QCCA 258, at paras. 4-8 (CanLII); *Groupe Ledor inc.*, at paras. 8-9; *St-Pierre*, at para. 41; Axa Assurances inc. v. Pageau2009

  

QCCA 1494, at para. 2 (CanLII); Conceicao Farms Inc. v. Zeneca Corp. 200683 O.R. (3d) 792(C.A.), at paras. 20-21; College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)2002 BCCA 665, 23 C.P.R. (4th) 185, at paras. 31-33 and 72; Apotex Fermentation Inc. v. Novopharm Ltd. 199495 Man. R. (2d) 186 (C.A.), at paras. 18-20; *R. v. Brouillette* (1992), 78 C.C.C. (3d) 350 (Que. C.A.), at p. 368; *Opron Construction Co. v. Alberta* (1989), 100 A.R. 58 (C.A.), at para. 5.

35 Furthermore, several courts and authors have, although sometimes diverging on the basis for the privilege or the applicable criteria, explicitly concluded that litigation privilege is in fact a class privilege: R. v. Lanthier2008 CanLII 13797(Ont. S.C.J.), at para. 6; Kennedy v. McKenzie200517 C.P.C. (6th) 229(Ont. S.C.J.), at para. 22; R. v. Soomel2003 BCSC 140, at para. 76 (CanLII); H. C. Stewart, *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-183; B. Billingsley, "'Ingathered' Records and the Scope of Litigation Privilege in Canada: Does Litigation Privilege Apply to Copies or Collections of Otherwise Unprivileged Documents?" (2014), 43 *Adv. Q*. 280, at pp. 283-85.

36 Thus, although litigation privilege differs from solicitor-client privilege in that its purpose is to facilitate a process — the adversary process (*Blank*, at para. 28, quoting Sharpe, at paras. 164-65) — and not to protect a relationship, it is nevertheless a class privilege. It is recognized by the common law courts, and it gives rise to a presumption of inadmissibility for a class of communications, namely those whose dominant purpose is preparation for litigation (*Blank*, at para. 60).

37 This means that any document that meets the conditions for the application of litigation privilege will be protected by an immunity from disclosure unless the case is one to which one of the exceptions to that privilege applies. As a result, the onus is not on a party asserting litigation privilege to prove on a case-by-case basis that the privilege should apply in light of the facts of the case and the "public interests" that are at issue (*National Post*, at para. 58).

*(2) Litigation Privilege Is Subject to Clearly Defined Exceptions and Not to a Case-by-Case Balancing Exercise*

38 Despite the fact that litigation privilege is a class privilege, the syndic proposes that the Court adopt the balancing test developed by Doherty J.A. of the Ontario Court of Appeal in his dissenting reasons in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321:

> Litigation privilege claims should be determined by first asking whether the material meets the dominant purpose test. ... If it meets that test, then it should be determined whether in the circumstances the harm flowing from non-disclosure clearly outweighs the benefit accruing from the recognition of the privacy interest of the party resisting production.
>
> [Emphasis added; p. 365.]

39 I disagree. In the context of privileges, the exercise of balancing competing interests is associated with case-by-case privileges (*National Post*, at para. 58), not class privileges. Rosenberg J.A., who wrote reasons concurring with those of Carthy J.A. for the majority in *Chrusz*, refused to apply such a test, citing the uncertainty that would be caused by a case-by-case approach of balancing the advantages and disadvantages of applying the privilege. I adopt his comments on this point:

> The litigation privilege is well established, even if some of the nuances are not. In my view, the competing interests or balancing approach proposed by Doherty J.A. is more appropriate for dealing with emerging claims of privilege. ... I am concerned that a balancing test would lead to unnecessary uncertainty and a proliferation of pre-trial motions in civil litigation.
>
> That is not to say that litigation privilege is absolute. The Supreme Court of Canada has made it clear that all of the established privileges are subject to some exceptions....
>
> In my view, with established privileges like solicitor-client privilege and litigation privilege it is preferable that the general rule be stated with as much clarity as possible. Deviations from the rule should be dealt with as clearly defined exceptions rather than as a new balancing exercise each time a privilege claim is made ....
>
> [Emphasis added; p. 369.]

  

40 Moreover, other courts have cited Justice Rosenberg's analysis with approval: Brown v. Cape Breton (Regional Municipality)2011 NSCA 32, 302 N.S.R. (2d) 84, at paras. 57-58; Llewellyn v. Carter2008 PESCAD 12278 Nfld. & P.E.I.R. 96, at para. 52; *Kennedy*, at para. 39; Davies v. American Home Assurance Co. 200260 O.R. (3d) 512(S.C.J.), at paras. 43-46. Similarly, in *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, this Court discussed the certainty that was needed in the case of another fundamental privilege, that of the police informer, explaining as follows why a case-by-case determination of whether relevant information is privileged would undermine the confidence of those who are protected by the privilege:

> Police rely heavily on informers. Because of its almost absolute nature, the privilege encourages other potential informers to come forward with some assurance of protection against reprisal. A more flexible rule that would leave disclosure up to the discretion of the individual trial judge would rob informers of that assurance and sap their willingness to cooperate.
>
> [Emphasis added; para. 30.]

The same considerations apply to litigation privilege.

41 What must be done therefore is to identify, where appropriate, specific exceptions to litigation privilege rather than conducting a balancing exercise in each case. In this regard, the Court held in *Smith v. Jones*, [1999] 1 S.C.R. 455, that the exceptions that apply to solicitor-client privilege are all applicable to litigation privilege, given that solicitor-client privilege is the "highest privilege recognized by the courts" (para. 44). These include the exceptions relating to public safety, to the innocence of the accused and to criminal communications (paras. 52-59 and 74-86). They also include the exception to litigation privilege recognized in *Blank* for "evidence of the claimant party's abuse of process or similar blameworthy conduct" (para. 44).

42 Other exceptions may be identified in the future, but they will always be based on narrow classes that apply in specific circumstances. From this perspective, Aviva is proposing a new exception that is narrower than the balancing exercise being advocated by the syndic and that would apply only in the cases of urgency and of necessity. Unsurprisingly, the syndic says that she agrees with the substance of this exception.

43 The idea of an exception based on urgency and necessity is of course appealing. It would help compensate for the fact that, even though litigation privilege is temporary, it may sometimes delay access to certain documents that another party urgently needs in order to prevent serious harm. Such an exception would be based on criteria such as the need to obtain evidence to prevent serious harm, the impossibility of obtaining it by other means and the urgency of obtaining it before the [TRANSLATION] "natural" lapsing of the effects of litigation privilege.

44 This exception would certainly be much narrower than the excessively broad balancing exercise proposed by the syndic. What would be required would be not to ask in each case whether litigation privilege should protect a document whose dominant purpose is preparation for litigation, but to lift the privilege in the rare cases in which a party succeeds in discharging its heavy burden with regard to this exception. Therefore, in a situation similar to the one in this case, it would not be enough for a syndic to simply invoke the need to sanction alleged disciplinary breaches in order to lift the privilege. If that did suffice, such a request would always be sufficient to establish the urgency exception, and that exception would then become the rule. This, in my view, would be improper. To establish the urgency exception in a disciplinary context, the existence of an urgent investigation in which extraordinary harm is apprehended during the period in which litigation privilege applies would instead be needed.

45 However, the record of this appeal from a declaratory judgment reveals no facts that might be presented as concrete examples of circumstances that could justify the application of such an exception. Because the urgency that is required may vary in nature depending on the legal context of the case and the nature of the relationship between the parties, I consider it preferable to leave the actual adoption of such an exception and a detailed analysis of the conditions for its application for a later date. For now, it would be advisable to limit this discussion to the defined exceptions that have been mentioned above.

*(3) Litigation Privilege Can Be Asserted Against Third Parties, Including Third Party Investigators Who Have a Duty of Confidentiality*

  

46 At the hearing, the syndic submitted, lastly, that in every case, it should not be possible to assert litigation privilege against third parties: it should apply only to parties to the litigation in question. In the case at bar, because the syndic is not a party to any litigation related to the litigation between the insurer and the insured person, that privilege cannot, in her opinion, be asserted against her. This is because of the limited purpose of the privilege, which is intended to facilitate the adversarial process in which the parties alone are involved. In the alternative, the syndic proposes the adoption of an exception to the effect that the privilege cannot be asserted against third party investigators who have a duty of confidentiality.

47 These arguments are unconvincing. I instead agree with the courts that have held that litigation privilege can be asserted against anyone, including administrative or criminal investigators, not just against the other party to the litigation: R. v. Kea200527 M.V.R. (5th) 182(Ont. S.C.J.), at paras. 43-44; D'Anjou v. Lamontagne2014 QCCQ 11999, at paras. 92-93 (CanLII).

48 There are several reasons that justify this conclusion. The first is that the disclosure of otherwise protected documents to third parties who do not have a duty of confidentiality would entail a serious risk for the party who benefits from the protection of litigation privilege. There would be nothing to prevent a third party to whom such documents are disclosed from subsequently disclosing them to the public or to the other party, which could have a serious adverse effect on the conduct of the litigation in question. The documents could then be presented to the court in a manner other than that contemplated by the party protected by the privilege. This is the very kind of harm that litigation privilege is meant to avoid: *Susan Hosiery Ltd.*, at pp. 33-34. Moreover, in *Blank*, which concerned the *Access to Information Act*, this Court held that a provision authorizing the government to invoke solicitor-client privilege could also be used to invoke litigation privilege in order to deny a request for access to information by a third party to the litigation (for example, the media or a member of the public) (para. 4).

49 There are also cases in which the courts have held that disclosure to a third party of a document covered by litigation privilege could result in a waiver of the privilege as against all: Rodriguez v. Woloszyn2013 ABQB 269554 A.R. 8, at para. 44; Aherne v. Chang2011 ONSC 3846, 337 D.L.R. (4th) 593, at paras. 12-13. The decisions in those cases are based on the assumption that litigation privilege can be asserted against third parties. To conclude that there are consequences associated with disclosure to third parties, one must first assume that confidentiality in relation to those parties corresponds to a normal application of the privilege.

50 As for the exception the syndic proposes for third party investigators who have a duty of confidentiality, it is hardly more justifiable. Even where a duty of confidentiality exists, the open court principle applies to proceedings that can be initiated by a syndic (s. 376 *ADFPS* and s. 142 of the Professional Code; art. 11 of the Code of Civil Procedure, CQLR, c. C-25.01). If, in the case at bar, the syndic had decided to file a complaint with the Chamber's discipline committee, or if she had decided to turn to the common law courts (to obtain, for example, an injunction against the person being investigated, as the syndic of the Barreau du Québec did in *Guay v. Gesca ltée*, 2013 QCCA 343, [2013] R.J.Q. 342), it is far from certain, in light of the open court principle, that the documents that would otherwise be protected by litigation privilege would not have had to be disclosed in the course of those proceedings.

51 In *Basi*, this Court held that informer privilege could not be lifted in favour of defence counsel merely because those counsel were bound by orders and undertakings of confidentiality. In the Court's opinion, "[n]o one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies" (para. 44). In that case, the fact that the third parties had duties of confidentiality and the reduced risk of harm did not preclude asserting informer privilege against them.

52 This reasoning applies with equal force to litigation privilege. It would not be appropriate to exclude third parties from the application of this privilege or to expose the privilege to the uncertainties of disciplinary and legal proceedings that could result in the disclosure of documents that would otherwise be protected. Moreover, even assuming that there is no risk that a syndic's inquiry will result in the disclosure of privileged documents, the possibility of a party's work being used by the syndic in preparing for litigation could discourage that party from writing down what he or she has done. This makes it clear why it must be possible to assert litigation privilege against anyone, including a third party investigator who has a duty of confidentiality

  

and discretion. I am thus of the view that unless such an investigator satisfies the requirements of a recognized exception to the privilege, it must be possible to assert the privilege against him or her.

53 I would add that any uncertainty in this regard could have a chilling effect on parties preparing for litigation, who may fear that documents otherwise covered by litigation privilege could be made public. The United States Supreme Court gave a good description of this chilling effect, which litigation privilege (referred to as the "work product doctrine") is in fact meant to avoid:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways — aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.
>
> [Emphasis added.]
>
> (*Hickman v. Taylor*, 329 U.S. 495(1947), at pp. 510-11)

54 In short, in the instant case, the courts below were right to hold that the litigation privilege invoked by Aviva could be asserted against the syndic. None of the exceptions to its application justify lifting the privilege in this case. Thus, all that remains to be determined is whether the privilege can, as the syndic submits, be lifted by applying the statutory provision — s. 337 *ADFPS* — that is central to the case.

***B. Was It Open to Aviva to Assert Litigation Privilege Against the Syndic in Order to Refuse to Produce the Requested Documents?***

55 The syndic argues that the rule from *Blood Tribe* on abrogating solicitor-client privilege must not apply to litigation privilege. She submits that a legislature may abrogate litigation privilege by statute without using express language. In her view, the words "any ... document" in s. 337 *ADFPS* must be interpreted in light of the statute's purpose, namely the protection of the public, and it must be concluded that litigation privilege cannot be asserted against the syndic, because that would [TRANSLATION] "interfere with" her work by delaying her access to the documents to which it applies.

56 Because litigation privilege is a common law rule, it will be helpful to reiterate the general principle that applies to legislative departures from such rules. This Court has held that it must be presumed that a legislature does not intend to change existing common law rules in the absence of a clear provision to that effect: Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 3242003 SCC 42[2003] 2 S.C.R. 157, at para. 39; Slaight Communications Inc. v. Davidson[1989] 1 S.C.R. 1038, at p. 1077; see also R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 504-5. Professor Sullivan writes in this regard that "[t]he stability of law is enhanced by rejecting vague or inadvertent change while certainty and fair notice are promoted by requiring legislatures to be clear and explicit about proposed changes" (p. 504).

57 The Court has therefore imposed strict requirements for the amendment or abrogation of certain fundamental common law rules. For example, in *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, the Court emphasized the need for clear and explicit language to oust the inherent general jurisdiction of the provincial superior courts (para. 46). The requirement for such language in this context, which originated in English law (Peacock v. Bell16671 Wms. Saund. 7385 E.R. 84, at pp. 87-88), is based on the fundamental role played by the inherent jurisdiction of the superior courts in the common law system inherited by Canada.

  

58 Similarly, in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, the Court refused to consider informer privilege to have been abrogated by a provision of the Code of Civil Procedure, CQLR, c. C-25.01, finding that it was not "specific" enough (p. 103). In so doing, the Court emphasized the "public order" and "public interest" nature of informer privilege (p. 93). It was the fundamental importance of that privilege that led the Court to require explicit language for its abrogation.

59 *Blood Tribe*, on which much of the argument in this appeal was focused, was to the same effect. In it, the issue was whether solicitor-client privilege had been abrogated or diluted by a statutory provision that authorized an administrative investigator to compel a person to produce any records the investigator considered necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record" and to "receive and accept any evidence and other information ... that the [investigator] sees fit, whether or not it is or would be admissible in a court of law" (s. 12 *PIPEDA*, now s. 12.1 (S.C. 2010, c. 23, s. 83)). The Court held that the provision at issue was insufficient to abrogate solicitor-client privilege: "Open-textured language governing production of documents [does] not ... include solicitor-client documents" (para. 11 (emphasis deleted)). Instead, the legislature must use "clear and explicit language" to abrogate solicitor-client privilege (para. 2). The Court stated that the privilege "cannot be abrogated by inference" and added that any provisions that allow incursions on the privilege must be interpreted restrictively (para. 11).

60 To justify these requirements, the Court relied on the unique and foundational importance of solicitor-client privilege, which is "fundamental to the proper functioning of our legal system" (*Blood Tribe*, at para. 9). The Court cited a significant body of case law to the effect that the privilege is a "fundamental policy of the law" (para. 11) that must be "as close to absolute as possible to ensure public confidence and retain relevance" (para. 10, quoting R. v. McClure2001 SCC 14[2001] 1 S.C.R. 445, at para. 35). The Court also noted that solicitor-client privilege is of paramount importance because it promotes "access to justice", the "quality of justice" and "[the] free flow of legal advice" (para. 9). What I take from this is that in *Blood Tribe*, the Court held that there is a requirement similar to the one that applies in Quebec under s. 9 of the Quebec Charter, which provides that an "express" legislative override is necessary in order to abrogate professional secrecy.

61 This being said, *Blood Tribe* represents neither a return to the "plain meaning rule" nor an abandonment of the modern approach to statutory interpretation, the goal of which is not to focus solely on the specific words of the provision, but to read the words "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Blood Tribe*, at para. 26. First of all, the legislature does not necessarily have to use the term "solicitor-client privilege" in order to abrogate the privilege. An abrogation can be clear, explicit and unequivocal where the legislature uses another expression that can be interpreted as referring unambiguously to the privilege. Next, even where there is a specific reference to solicitor-client privilege, the chosen words must nevertheless be interpreted in order to determine whether there is in fact an abrogation and, if so, to assess its scope. The Court recently applied this modern approach to a statute that expressly abrogated solicitor-client privilege in order to determine its meaning and scope in Canada (National Revenue) v. Thompson2016 SCC 21[2016] 1 S.C.R. 381, at paras. 22-34. But in accordance with *Blood Tribe*, unless clear, explicit and unequivocal language has been used to abrogate solicitor-client privilege, it must be concluded that the privilege has not been abrogated.

62 In the syndic's view, these requirements that must be met in order to override certain rules of fundamental importance should not apply to litigation privilege. She bases this argument on the limited nature of the privilege, which is not absolute and which, in her opinion, requires a balancing of competing harms and interests.

63 I disagree. The requirements discussed in *Blood Tribe* apply with equal force to litigation privilege. Not only is litigation privilege a class privilege, but it serves an overriding "public interest" as that expression is used in *Bisaillon*. This public interest, as was explained in *Blank*, is "[t]he secure and effective administration of justice according to law" (para. 31). The purpose of litigation privilege is to "ensure the efficacy of the adversarial process" (*Blank*, at para. 27) by maintaining a "protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (para. 40, quoting Sharpe, at p. 165). By maintaining a protected area for the preparation of litigation, litigation privilege in its own way promotes "access to justice" and the "quality of justice" (*Blood Tribe*, at para. 9).

  

64 There is of course no question that litigation privilege does not have the same status as solicitor-client privilege and that the former is less absolute than the latter. It is also clear that these two privileges, even though they may sometimes apply to the same documents, are conceptually distinct. Nonetheless, like solicitor-client privilege, litigation privilege is "fundamental to the proper functioning of our legal system" (*Blood Tribe*, at para. 9). It is central to the adversarial system that Quebec shares with the other provinces. As a number of courts have already pointed out, the Canadian justice system promotes the search for truth by allowing the parties to put their best cases before the court, thereby enabling the court to reach a decision with the best information possible: Penetanguishene Mental Health Centre v. Ontario2010 ONCA 197260 O.A.C. 125, at para. 39; Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.2010 BCSC 1494, 100 C.P.C. (6th) 70, at para. 15. The parties' ability to confidently develop strategies knowing that they cannot be compelled to disclose them is essential to the effectiveness of this process. In Quebec, as in the rest of the country, litigation privilege is therefore inextricably linked to certain founding values and is of fundamental importance. That is a sufficient basis for concluding that litigation privilege, like solicitor-client privilege, cannot be abrogated by inference and that clear, explicit and unequivocal language is required in order to lift it.

65 This conclusion is consistent with a robust line of authority. Like the Quebec Court of Appeal in the instant case, the Alberta Court of Appeal has also held that a party should not be denied the right to claim litigation privilege without "clear and explicit legislative language to that effect": TransAlta Corp. v. Market Surveillance Administrator2014 ABCA 196577 A.R. 32, at para. 36. As well, the Federal Court has applied the principles from *Blood Tribe* to litigation privilege in two cases: Privacy Commissioner of Canada v. Air Canada2010 FC 429, at paras. 14 and 30-37 (CanLII); State Farm Mutual Automobile Insurance Co. v. Privacy Commissioner of Canada2010 FC 736, at para. 115 (CanLII).

66 In the case at bar, s. 337 *ADFPS*, on which the syndic is relying, merely authorizes a request for the production of "any ... document" without further precision. This is what the Court characterized in *Blood Tribe* as a "general production provision that does not specifically indicate that the production must include records for which ... privilege is claimed" (para. 21). In fact, s. 337 *ADFPS* is even less specific than the provisions at issue in *Blood Tribe*, which empowered the investigator to obtain all the evidence he or she wished to obtain, "whether or not it is or would be admissible in a court of law" and "in the same manner and to the same extent as a superior court of record" (s. 12 *PIPEDA*, now s. 12.1).

67 A provision that merely refers to the production of "any ... document" does not contain sufficiently clear, explicit and unequivocal language to abrogate litigation privilege. There are a number of statutes that provide for the disclosure or production of "any document" without further precision. As the intervener Advocates' Society points out, Quebec's Code of Civil Procedure does so, as do the rules of civil procedure of several other provinces. Some courts have held in the past that rules of civil procedure providing for the disclosure of documents in very general terms did not contain the language that would be required in order to abrogate litigation privilege: Louch v. Decicco2007 BCSC 393, 39 C.P.C. (6th) 8, at para. 63; Ward v. Pasternak2015 BCSC 1190, at paras. 37-38 (CanLII). The same conclusion applies in the instant case.

***C. Collateral Issue: The Professional Code and Litigation Privilege***

68 I must address one final point. In response to certain comments made in the Court of Appeal's reasons, the Barreau du Québec has intervened in this Court to raise a collateral issue with respect to the scope of s. 192 of the Professional Code, as amended in 1994. That section explicitly abrogates professional secrecy in the context of a disciplinary inquiry, but does not refer to the assertion of litigation privilege by a professional in such a context. In its reasons, the Court of Appeal made two references to s. 192 (at paras. 23 and 30) to illustrate a situation in which the legislature has expressly abrogated professional secrecy, which it has not done in s. 337 *ADFPS*.

69 Wishing to clear up any ambiguity concerning the scope of those comments, the Barreau submits that s. 192 should be read as abrogating not only professional secrecy, but also litigation privilege, even though it does not actually mention the latter. The Barreau relies on *Blank*, in which this Court held that the protection afforded to solicitor-client privilege by s. 23 of the Access to Information Act, which did not mention litigation privilege, also applied to the latter privilege.

  

70 Although I am mindful of the concerns expressed by the Barreau, I am of the opinion that it would not be appropriate for the Court to rule on this issue at this time without full argument in an adversarial context by all parties who might have an interest in it.

**VI. Disposition**

71 Litigation privilege is a class privilege that is distinct from solicitor-client privilege and is subject to certain defined exceptions that do not apply in this case. Given the absence of clear, explicit and unequivocal language in the *ADFPS* providing for the abrogation of this privilege, it may be asserted against the syndic, and the Superior Court and Court of Appeal were right to reach this conclusion. I would accordingly dismiss the appeal with costs to Aviva.

*Appeal dismissed.*

*Pourvoi rejeté.*

**End of Document**

TAB 7

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*]

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# Jurisdiction and Powers of the Tribunal

### Jurisdiction

**8 (1)** The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.

### Powers

**(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.

### Power to penalize

**(3)** No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

R.S., 1985, c. 19 (2nd Supp.), s. 8; 1999, c. 2, s. 41; 2002, c. 16, s. 16.1.

### Costs

**8.1 (1)** The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the *Competition Act* on a final or interim basis, in accordance with the provisions governing costs in the *Federal Court Rules, 1998*.

### Payment

**(2)** The Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

### Award against the Crown

**(3)** The Tribunal may award costs against Her Majesty in right of Canada.

### Costs adjudged to Her Majesty in right of Canada

**(4)** Costs adjudged to Her Majesty in right of Canada shall not be disallowed or reduced on taxation by reason only that counsel who earned the costs, or in respect of whose services the costs are charged, was a salaried officer of Her Majesty in right of Canada performing those services in the discharge of that counsel's duty and remunerated for those services by salary, or for that or any other reason was not entitled to recover any costs from

# Compétence et pouvoirs du Tribunal

### Compétence

**8 (1)** Les demandes prévues aux parties VII.1 ou VIII de la *Loi sur la concurrence*, de même que toute question s'y rattachant ou toute question qui relève de la partie IX de cette loi et qui fait l'objet d'un renvoi en vertu du paragraphe 124.2(2) de cette loi, sont présentées au Tribunal pour audition et décision.

### Pouvoirs

**(2)** Le Tribunal a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toutes autres questions relevant de sa compétence, les attributions d'une cour supérieure d'archives.

### Outrage au Tribunal

**(3)** Personne ne peut être puni pour outrage au Tribunal à moins qu'un juge ne soit d'avis que la conclusion qu'il y a eu outrage et la peine sont justifiées dans les circonstances.

L.R. (1985), ch. 19 (2e suppl.), art. 8; 1999, ch. 2, art. 41; 2002, ch. 16, art. 16.1.

### Frais

**8.1 (1)** Le Tribunal, saisi d'une demande prévue aux parties VII.1 ou VIII de la *Loi sur la concurrence*, peut, à son appréciation, déterminer, en conformité avec les *Règles de la Cour fédérale (1998)* applicables à la détermination des frais, les frais — même provisionnels — relatifs aux procédures dont il est saisi.

### Détermination

**(2)** Le Tribunal peut désigner les créanciers et les débiteurs des frais, ainsi que les responsables de leur taxation ou autorisation.

### Couronne

**(3)** Le Tribunal peut ordonner à Sa Majesté du chef du Canada de payer des frais.

### Frais adjugés à Sa Majesté du chef du Canada

**(4)** Les frais qui sont adjugés à Sa Majesté du chef du Canada ne peuvent être refusés ni réduits lors de la taxation au seul motif que l'avocat pour les services duquel les frais sont justifiés ou réclamés était un fonctionnaire salarié de Sa Majesté du chef du Canada et, à ce titre, rémunéré pour les services qu'il fournissait dans le cadre de ses fonctions, ou bien n'était pas, de par son statut ou

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 8

CANADA

CONSOLIDATION

CODIFICATION

# Competition Tribunal Rules

# Règles du Tribunal de la concurrence

SOR/2008-141

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***electronic transmission*** includes transmission by electronic mail (e-mail) or via the Tribunal website. (*transmission électronique*)

***file*** means to file with the Registrar. (*déposer*)

***intervenor*** means

**(a)** a person granted leave to intervene by the Tribunal in accordance with rule 46;

**(b)** an attorney general who intervenes under section 88 or 101 of the Act; or

**(c)** the Commissioner who intervenes under section 103.2 or subsection 124.2(3) of the Act. (*intervenant*)

***originating document*** means either a notice of application, a notice of reference, or an application for leave under section 103.1 of the Act. (*acte introductif d'instance*)

***paper hearing*** means a hearing in which documents are provided in paper form to the registry and are presented in paper form in the course of the hearing. (*audience sur pièces*)

***party*** means an applicant or a respondent. (*partie*)

***person*** includes a corporation, a partnership and an unincorporated association. (*personne*)

***reference*** means the reference of a question to the Tribunal for determination under section 124.2 of the Act. (*renvoi*)

***Registrar*** means the Registrar of the Tribunal. (*registraire*)

***registry*** means the Registry of the Tribunal. (*greffe*)

***respondent*** means a person who is named as a respondent in a notice of application. (*défendeur*)

magnétoscopique ou informatisé, ou toute reproduction totale ou partielle de ces éléments d'information. (*document*)

***greffe*** Le greffe du Tribunal. (*registry*)

***intervenant*** Selon le cas :

**a)** toute personne à qui le Tribunal a accordé la permission d'intervenir aux termes de la règle 46;

**b)** le procureur général qui intervient en vertu des articles 88 ou 101 de la Loi;

**c)** le commissaire, lorsqu'il intervient en vertu de l'article 103.2 ou du paragraphe 124.2(3) de la Loi. (*intervenor*)

***Loi*** La *Loi sur la concurrence*. (*Act*)

***membre judiciaire*** Sauf à la partie 10, juge nommé au Tribunal aux termes de l'alinéa 3(2)a) de la *Loi sur le Tribunal de la concurrence*. (*French version only*)

***partie*** Demandeur ou défendeur. (*party*)

***personne*** S'entend notamment d'une personne morale, d'une société de personnes et d'une association sans personnalité morale. (*person*)

***président*** Membre judiciaire nommé président du Tribunal en application du paragraphe 4(1) de la *Loi sur le Tribunal de la concurrence*. (*Chairperson*)

***registraire*** Le registraire du Tribunal. (*Registrar*)

***renvoi*** Renvoi d'une question au Tribunal conformément à l'article 124.2 de la Loi. (*reference*)

***transmission électronique*** S'entend notamment de la transmission par courrier électronique (courriel) ou au moyen du site Web du Tribunal. (*electronic transmission*)

# Rules Applicable to All Proceedings

## Dispensing with Compliance

### Variation

**2 (1)** The Tribunal may dispense with, vary or supplement the application of any of these Rules in a particular case in order to deal with all matters as informally and

# Règles applicables à toutes les instances

## Dispense d'observation des règles

### Dérogation

**2 (1)** Le Tribunal peut, dans des cas particuliers, modifier ou compléter les présentes règles ou dispenser de l'observation de tout ou partie de celles-ci en vue d'agir

expeditiously as the circumstances and considerations of fairness permit.

#### Urgent matters

**(2)** If a party considers that the circumstances require that an application be heard urgently or within a specified period, the party may request that the Tribunal give directions about how to proceed.

## Time Limits

#### *Interpretation Act*

**3** Unless otherwise provided in these Rules, time limits under these Rules or under an order of the Tribunal shall be calculated under sections 26 to 30 of the *Interpretation Act*.

#### Calculating time limits

**4 (1)** If the time for doing an act expires on a holiday or a Saturday, the act may be done on the next day that is not a holiday or a Saturday.

#### Time limit less than six days

**(2)** If a time limit is less than six days, holidays and Saturdays shall not be included in the calculation of the time limit.

#### Varying time limits

**5** The time limits prescribed by these Rules may only be shortened or extended by an order or a direction of a judicial member.

## Documents

#### Memorandum of fact and law

**6** Where in these Rules a reference is made to a memorandum of fact and law, the memorandum of fact and law shall contain a table of contents and, in consecutively numbered paragraphs,

**(a)** a concise statement of fact;

**(b)** a statement of the points in issue;

**(c)** a concise statement of the submissions;

**(d)** a concise statement of the order sought, including any order concerning costs;

**(e)** a list of the authorities, statutes and regulations to be referred to; and

**(f)** an appendix, and if necessary as a separate document, a copy of the authorities (or relevant excerpts)

sans formalisme et en procédure expéditive dans la mesure où les circonstances et l'équité le permettent.

#### Demandes urgentes

**(2)** La partie qui est d'avis que les circonstances exigent qu'une demande soit entendue sans délai ou dans un délai précis peut demander au Tribunal de lui donner des directives sur la façon de procéder.

## Délais

#### *Loi d'interprétation*

**3** Sauf disposition contraire des présentes règles, le calcul des délais prévus par celles-ci ou fixés par une ordonnance du Tribunal est régi par les articles 26 à 30 de la *Loi d'interprétation*.

#### Calcul de délais

**4 (1)** Le délai qui expirerait normalement un jour férié ou un samedi est prorogé jusqu'au jour suivant qui n'est ni un jour férié ni un samedi.

#### Délai de moins de six jours

**(2)** Les jours fériés et les samedis ne comptent pas dans le calcul de tout délai de moins de six jours.

#### Modification de délais

**5** Les délais prévus par les présentes règles ne peuvent être abrégés ou prorogés que par une ordonnance ou une directive d'un membre judiciaire.

## Documents

#### Mémoire des faits et du droit

**6** Le mémoire des faits et du droit comprend une table des matières, est divisé en paragraphes numérotés consécutivement et comporte les éléments suivants :

**a)** un exposé concis des faits;

**b)** les points en litige;

**c)** un exposé concis des arguments;

**d)** un énoncé concis de l'ordonnance demandée, notamment toute ordonnance relative aux frais;

**e)** la liste des décisions, des textes de doctrine, des lois et des règlements qui seront invoqués;

**f)** en annexe et, au besoin, dans un document distinct, copie des arrêts cités — ou des extraits pertinents de ceux-ci — et des dispositions législatives ou

### Technology

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

### Questions as to practice or procedure

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

### Tribunal may direct

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

## PART 2

# Contested Proceedings

## Application

### Application of Part

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

### Notice of application

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

### Form and content

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

**(a)** the sections of the Act under which the application is made;

**(b)** the name and address of each person against whom an order is sought;

**(c)** a concise statement of the grounds for the application and of the material facts on which the applicant relies;

### Directives sur la technologie

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

### Questions concernant la pratique ou la procédure

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

### Directives du Tribunal

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

## PARTIE 2

# Instances contestées

## Demandes

### Application de la présente partie

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

### Avis de demande

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

### Forme et contenu

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

**a)** les dispositions de la Loi en vertu desquelles la demande est présentée;

**b)** les nom et adresse de chacune des personnes contre lesquelles une ordonnance est demandée;

**c)** le résumé des motifs de la demande et des faits importants sur lesquels se fonde le demandeur;

**(a)** a use to which the person who disclosed the evidence consents;

**(b)** the use, for any purpose, of

**(i)** evidence that is filed with the Tribunal,

**(ii)** evidence that is given or referred to during a hearing; or

**(iii)** information obtained from evidence referred to in subparagraph (i) or (ii),

**(c)** the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding, or

**(d)** the use of evidence or information in a subsequent Tribunal proceeding.

**a)** l'utilisation d'éléments de preuve ou de renseignements à laquelle consent la personne qui a divulgué ceux-ci;

**b)** l'utilisation, à une fin quelconque, de ce qui suit :

**(i)** les éléments de preuve qui sont déposés auprès du Tribunal,

**(ii)** les éléments de preuve qui sont présentés ou mentionnés au cours d'une audience,

**(iii)** les renseignements tirés des éléments de preuve visés aux sous-alinéas (i) ou (ii);

**c)** l'utilisation d'éléments de preuve obtenus au cours d'une instance, ou de renseignements tirés de ceux-ci, pour attaquer la crédibilité d'un témoin dans une autre instance;

**d)** l'utilisation d'éléments de preuve ou de renseignements dans des instances subséquentes devant le Tribunal.

**Non-application**

**(4)** If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the Tribunal may, on motion, order that the deemed undertaking referred to in subrule (2) does not apply to the evidence or to information obtained from it, and may impose any terms and give any directions that are just.

**Ordonnance de non - application**

**(4)** S'il est convaincu que l'intérêt de la justice l'emporte sur tout préjudice que pourrait subir une partie qui a divulgué les éléments de preuve, le Tribunal peut ordonner que la présomption d'engagement implicite visée au paragraphe (2) ne s'applique pas aux éléments de preuve ou aux renseignements tirés de ceux-ci, et imposer les conditions et donner les directives qu'il estime justes.

**Supplementary affidavit**

**63** A party who has served an affidavit of documents and who comes into possession or control of or obtains power over a relevant document, or who becomes aware that the affidavit of documents is inaccurate or deficient, shall as soon as possible serve a supplementary affidavit of documents listing the document or correcting the inaccuracy or deficiency.

**Affidavit supplémentaire**

**63** La partie qui a signifié un affidavit de documents et qui soit entre en possession d'un document pertinent, en assume la garde ou le prend sous son autorité, soit constate que l'affidavit comporte des renseignements inexacts ou incomplets signifie sans délai un affidavit supplémentaire qui fait état du document ou qui complète ou corrige l'affidavit original.

**Examination for discovery**

**64 (1)** Examination for discovery shall occur as of right.

**Interrogatoire préalable**

**64 (1)** L'interrogatoire préalable est un droit des parties.

**Power of the Tribunal**

**(2)** The Tribunal may, in case management, make rulings to deal with the timing, duration, scope and form of the discovery as well as the appropriate person to be discovered.

**Pouvoirs du Tribunal**

**(2)** Le Tribunal peut, dans le cadre de la gestion d'instance, rendre des décisions sur le moment, la durée, la portée et la forme des interrogatoires préalables, ainsi que sur les personnes qu'il convient d'interroger.

TAB 9

CANADA

CONSOLIDATION

CODIFICATION

# Federal Courts Rules

# Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to August 8, 2022

Last amended on January 13, 2022

À jour au 8 août 2022

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**Questioning by other parties**

**(4)** A person being examined under rule 238 may also be questioned by any other party.

**Cross-examination or hearsay**

**(5)** A person being examined under rule 238 shall not be cross-examined and shall not be required to give hearsay evidence.

**Use as evidence at trial**

**(6)** The testimony of a person who was examined under rule 238 shall not be used as evidence at trial but, if the person is a witness at trial, it may be used in cross-examination in the same manner as any written statement of a witness.

**Scope of examination**

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

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

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

**Obligation to inform self**

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

**Objections permitted**

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

**(a)** the answer is privileged;

**(b)** the question is not relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party;

**(c)** the question is unreasonable or unnecessary; or

**Interrogatoire par les autres parties**

**(4)** Toute autre partie à l'action peut également interroger la personne interrogée aux termes de la règle 238.

**Contre-interrogatoire interdit**

**(5)** La personne qui est interrogée aux termes de la règle 238 ne peut être contre-interrogée ni tenue de présenter un témoignage constituant du ouï-dire.

**Utilisation en preuve**

**(6)** Le témoignage de la personne interrogée aux termes de la règle 238 ne peut être utilisé en preuve à l'instruction mais peut, si celle-ci sert de témoin à l'instruction, être utilisé dans le contre-interrogatoire de la même manière qu'une déclaration écrite d'un témoin.

**Étendue de l'interrogatoire**

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

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

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

**L'obligation de se renseigner**

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

**Objection permise**

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

**a)** la réponse est protégée par un privilège de non-divulgation;

**b)** la question ne se rapporte pas à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire ou par la partie qui l'interroge;

**(d)** it would be unduly onerous to require the person to make the inquiries referred to in rule 241.

**c)** la question est déraisonnable ou inutile;

**d)** il serait trop onéreux de se renseigner auprès d'une personne visée à la règle 241.

**Objections not permitted**

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

**(a)** the answer would be evidence or hearsay;

**(b)** the question constitutes cross-examination.

**Objection interdite**

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

**a)** la réponse constituerait un élément de preuve ou du ouï-dire;

**b)** la question constitue un contre-interrogatoire.

**Limit on examination**

**243** On motion, the Court may limit an examination for discovery that it considers to be oppressive, vexatious or unnecessary.

**Droit de limiter l'interrogatoire**

**243** La Cour peut, sur requête, limiter les interrogatoires préalables qu'elle estime abusifs, vexatoires ou inutiles.

**Examined party to be better informed**

**244 (1)** Where a person being examined for discovery, other than a person examined under rule 238, is unable to answer a question, the examining party may require the person to become better informed and may conclude the examination, subject to obtaining answers to any remaining questions.

**Obligation de mieux se renseigner**

**244 (1)** Lorsqu'une partie soumet une personne, autre que celle visée à la règle 238, à un interrogatoire préalable et que celle-ci est incapable de répondre à une question, elle peut exiger que la personne se renseigne davantage et peut mettre fin à l'interrogatoire préalable à la condition d'obtenir les réponses aux questions qu'il lui reste à poser.

**Further answers**

**(2)** A person being examined who is required to become better informed shall provide the information sought by the examining party by submitting to a continuation of the oral examination for discovery in respect of the information or, where the parties agree, by providing the information in writing.

**Renseignements additionnels**

**(2)** La personne contrainte de mieux se renseigner fournit les renseignements demandés par la partie en se soumettant à nouveau à l'interrogatoire préalable oral ou, avec le consentement des parties, en fournissant les renseignements par écrit.

**Information deemed part of examination**

**(3)** Information provided under subsection (2) is deemed to be part of the examination for discovery.

**Effet des renseignements donnés**

**(3)** Les renseignements donnés aux termes du paragraphe (2) sont réputés faire partie de l'interrogatoire préalable.

**Inaccurate or deficient answer**

**245 (1)** A person who was examined for discovery and who discovers that the answer to a question in the examination is no longer correct or complete shall, without delay, provide the examining party with the corrected or completed information in writing.

**Réponse inexacte ou incomplète**

**245 (1)** La personne interrogée au préalable qui se rend compte par la suite que la réponse qu'elle a donnée à une question n'est plus exacte ou complète fournit sans délai, par écrit, les renseignements exacts ou complets à la partie qui l'a interrogée.

CT-2022-002

**THE COMPETITION TRIBUNAL**

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

**AND IN THE MATTER OF** the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

**AND IN THE MATTER OF** an application by the Commissioner of Competition for an Order pursuant to section 92 of the *Competition Act*.

**B E T W E E N:**

**COMMISSIONER OF COMPETITION**

**Applicant**

**and**

**ROGERS COMMUNICATIONS INC.**
**SHAW COMMUNICATIONS INC.**

**Respondents**

**and**

**ATTORNEY GENERAL OF ALBERTA**
**VIDEOTRON LTD.**

**Intervenors**

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**BOOK OF AUTHORITIES**

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