CT-2002-002

THE COMPETITION TRIBUNAL

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

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 one or more orders pursuant to section 92 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and –

ROGERS COMMUNICATION INC. AND SHAW COMMUNICATIONS INC.

Respondents

COMPENDIUM FOR ORAL ARGUMENT

September 12, 2022

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750
145 King Street West
Toronto, ON M5H 1J8

Jonathan C. Lisus (LSO# 32952H)
Tel: 416.598.7873
Email: jlisus@lolg.ca
Crawford G. Smith (LSO# 42131S)
Tel: 416.598.8648
Email: csmith@lolg.ca
Matthew R. Law (LSO# 59856A)
Tel: 416.849.9050
Email: mlaw@lolg.ca
Bradley Vermeersch (LSO# 69004K)
Tel: 416.646.7997
Email: bvermeersch@lolg.ca
Zain Naqi (LSO#: 67870U)
Tel: 416.645.3789
Email: znaqi@lolg.ca

Counsel for the Respondent/Moving Party, Rogers Communications Inc.

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Kent E. Thomson (LSO# 24264J)
Tel: 416.863.5566
Email: kentthomson@dwpv.com
Derek D. Ricci (LSO# 52366N)
Tel: 416.367.7471
Email: dricci@dwpv.com
Steven Frankel (LSO# 58892E)
Tel: 416.367.7441
Email: sfrankel@dwpv.com
Chanakya A. Sethi (LSO# 63492T)
Tel: 416.863.5516
Email: csethi@dwpv.com

Counsel for the Respondent/Moving Party,
Shaw Communications Inc.

TO: **THE COMMISSIONER OF COMPETITION**
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

John S. Tyhurst

Derek Leschinsky

Katherine Rydel

Ryan Caron

Suzanie Chua

Marie-Hélène Gay

Kevin Hong

Tel: (819) 956-2842 / (613) 897-7682
Fax: (819) 953-9267

Counsel for the Applicant/Responding Party,
The Commissioner of Competition

INDEX

REFUSALS AT ISSUE

PLEADINGS

CT-2022-

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N :

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

NOTICE OF APPLICATION

TAKE NOTICE THAT the Commissioner of Competition (the "**Commissioner**") will make an application to the Competition Tribunal (the "**Tribunal**"), on a day and place to be determined by the Tribunal, pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "**Act**") for:

a. an order directing the Respondents not to proceed with the Proposed Transaction;

b. in the alternative, an order requiring the Respondents not to proceed with that part of the Proposed Transaction necessary to ensure that it does not prevent or lessen and is not likely to prevent or lessen competition substantially;

c. an order directing the Respondent, Rogers Communications Inc., to divest such additional assets as are required to eliminate the substantial lessening or prevention of competition;

d. an order directing the Respondents to pay the Commissioner's costs; and

e. such further and other relief as the Commissioner may request and this Tribunal may consider appropriate.

AND TAKE NOTICE that if you do not file a response with the Registrar of the Tribunal within 45 days of the date upon which this Application is served upon you, the Tribunal may, upon application by the Commissioner and without further notice, make such order or orders as it may consider just, including the Orders sought in this Application.

AND TAKE FURTHER NOTICE that the Applicant will rely on the Statement of Grounds and Material Facts below in support of this Application.

AND TAKE FURTHER NOTICE that a concise statement of the economic theory of the case is attached hereto as Schedule "A".

anticompetitive coordination by removing this highly disruptive player from the market.

90. In summary, given the foregoing factors, the Proposed Transaction is likely to prevent or lessen competition substantially in the relevant markets by increasing the likelihood of coordinated behaviour post-merger.

C. Prevention of Competition in Business Services

91. Prior to the announcement of the Proposed Transaction, Shaw had planned to enter the Business Services market. The Proposed Transaction has prevented, or is likely to prevent, Shaw from entering, expanding and becoming a vigorous and effective competitor in that market.

92. Shaw was a poised or emerging competitor in that market. [redacted] By marketing to that base using such approaches as cross-selling and bundling of wireline and wireless services, Shaw would have likely played a disruptive competitive role in this market.

93. The Proposed Transaction prevents or is likely to prevent competition substantially by eliminating Shaw as a competitive threat and participant in the Business Services markets in Ontario, B.C. and Alberta.

D. The Parties' Proposed Divestiture(s) Fail to Remedy the Substantial Lessening or Prevention of Competition Resulting from the Proposed Transaction

94. In order to address competition concerns in the market for Wireless Services, Rogers and Shaw have proposed certain divestitures. These exclude certain assets and interests, including assets Shaw has used to provide Wireless Services and/or wireless subscribers.

95. The proposed divestitures will not eliminate the substantial lessening or prevention of competition resulting from the Proposed Transaction ("SLPC"). Among other things, with the creation by divestiture of this new entity ("New Freedom"):

    a. the proposed new owners are likely to provide less effective financial, managerial, technical or other support for the Wireless Services business;

    b. the proposed divestitures do not provide the assets necessary to effectively replicate the competitive presence of Freedom Mobile and Shaw Mobile in order to eliminate the SLPC; and

    c. the other Wireless Services providers, including Rogers, are not likely to compete with the same vigour as they would have but for the Proposed Transaction, given the pre-merger presence of Freedom and Shaw Mobile in the market.

96. Separating Freedom Mobile from Shaw will reduce New Freedom's competitiveness. Among other things:

    a. the reduction in scale of Freedom Mobile's operations will limit its ability to invest in and expand its network, and result in slower deployment of 5G;

    b. the separation of Freedom Mobile from the Shaw network infrastructure on which it relies will reduce its ability, for example, to offer bundled services by cross-subsidizing and cross-marketing between its product lines with promotions and discounts;

    c. the separation of Freedom from Shaw's integrated network severs its ability to offer customers access to more than 450,000 "Go Wi-Fi" hotspots. Losing these hotspots would result in inferior network coverage by Freedom Mobile as well as increased costs to provide the same level of service. Their loss would also increase costs and hurdles to effect future 5G deployment; and

    d. removing New Freedom's products from Shaw's retail locations and distribution would weaken New Freedom's retail network.

97. New Freedom is unlikely to have adequate access to the devices, network equipment and spectrum it needs to successfully operate and expand its wireless business.

98. New Freedom will face substantially greater hurdles to expand its network and deploy a 5G network than would have been the case for Shaw but for the Proposed Transaction. [redacted] Since the announcement of the Proposed Transaction, Shaw's investment in its network has declined and it did not acquire 5G-critical 3500 MHz spectrum, placing New Freedom in a more disadvantageous position for future expansion.

99. These challenges are heightened by New Freedom's loss of access to Shaw's network, which provides support for small cells and connectivity for the radio access network. As a result, New Freedom will require the infusion of substantially greater investment in order to successfully deploy a 5G network compared to that required by Shaw in the absence of the merger.

100. The divestitures proposed by Rogers and Shaw [redacted]

101. New Freedom will be unable to replace competition from Shaw Mobile in Alberta and British Columbia. The majority of Shaw Mobile customers are currently bundled customers, who tend to have a lower churn rate and a higher expected lifetime value than customers who only subscribe to a single service.

102. New Freedom would no longer have the same level of access to Shaw's wireline assets in Alberta and British Columbia, and would therefore be unable to provide bundled services, or to provide such bundles as competitively. This will limit New Freedom's ability to offer discounted bundled wireless plans and attract new

customers. Furthermore, it is unlikely that New Freedom will be able effectively to maintain the bundled offers to divested customers and therefore retain them. This will likely lead to higher customer churn and lower customer lifetime value for New Freedom, undermining its ability to invest in its network in the future.

103. Following the Proposed Transaction, Wireless Services providers, including Rogers, are unlikely to compete with substantially similar vigour as they would have but for the Proposed Transaction. Shaw, with its regional base as an established wireline service provider in Western Canada with an integrated Wireless Services business, was a maverick competitor with the ability and incentive to grow its business and gain market share. It had an incentive to offer aggressive wireless discounts to its existing base of internet subscribers with a lower wireless re-price risk in those markets. Post-transaction, Rogers would not share that incentive given its relatively high share of the Wireless Services market and greater risk of re-pricing its existing base of subscribers.

104. The divestitures proposed by Rogers and Shaw fail to substantially replicate this disruptive incentive and therefore the benefit of Shaw's competition brought to consumers in the relevant markets.

VI. RELIEF SOUGHT

105. The Commissioner therefore seeks the relief set out above.

DATED AT OTTAWA, ONTARIO, this 8th day of May, 2022.

Boswell, Matthew Digitally signed by Boswell, Matthew
Date: 2022.05.08 16:18:07 -04'00'

Matthew Boswell
Commissioner of Competition
Competition Bureau
Place du Portage, Phase I
50 Victoria Street
Gatineau, QC K1A OC9

CT-2022-002

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

FRESH AS AMENDED RESPONSE OF ROGERS COMMUNICATIONS INC.

I. OVERVIEW

1. Rogers opposes the Commissioner's Application under s. 92 of the *Competition Act* for an order blocking its acquisition of Shaw in whole or in part. Rogers denies that the Commissioner is entitled to any of the relief sought and denies the allegations set out in the Commissioner's Notice of Application. Rogers asks the Tribunal to permit the Transaction, coupled with the Divestiture (as those terms are defined below), to proceed.

5. While the Respondents do not agree with the Commissioner's position, Rogers, Shaw and Quebecor Inc.—the parent company of Videotron—have entered into an agreement for the divestiture of Freedom Mobile to Videotron. Freedom accounts for the vast majority of Shaw's wireless subscribers and wireless revenues. This Divestiture includes, among other things, Freedom's entire wireless business and wireline subscribers. The proposed Divestiture, including the ancillary agreements, would occur immediately prior to Rogers' acquisition of Shaw.

6. The Commissioner has rejected this proposal. The Commissioner insists that no aspect of the Transaction can proceed, regardless of what divestiture Rogers and Shaw propose and regardless of the benefits to Canadians and the Canadian economy that will be lost as a result. The Commissioner's position is unreasonable, contrary to both the economic and fact evidence presented to the Bureau, and not supportable at law.

7. The Commissioner cannot establish that the Transaction coupled with the Divestiture will result in a substantial lessening of competition in wireless services, and any alleged impact on competition is far outweighed by the efficiencies likely to be generated by the Transaction and the Divestiture.

8. Contrary to the Commissioner's allegations, the Transaction coupled with the Divestiture will not give rise to any, let alone a substantial, lessening of competition. Among other things, the Transaction:

- Will allow Rogers to be a stronger and more effective competitor and provide a national wireline network;

- Will allow Rogers to make significant improvements to its national wireless network, benefitting the more than 13 million Canadians who currently subscribe to Rogers and Shaw;

- Will allow Freedom to continue as a fourth competitor in the same markets and with the same infrastructure as before the transaction, but with the benefit of lower marginal costs as well as efficiencies and other advantages created from integrating with Videotron; and

- Will allow Videotron to create a strong fourth national wireless services provider.

9. With the divestiture of Freedom to Videotron, the Transaction is pro-competitive and will result in significant benefits to wireless customers in B.C., Alberta, and Ontario, as well as significant efficiencies to the Canadian economy on the whole. The Commissioner has failed to assess, properly or at all, the efficiencies the Transaction and Divestiture will bring to the Canadian economy, which substantially outweigh the competitive effects alleged by the Commissioner.

10. The Commissioner's assertion that Freedom's ability to compete "vigorously" is dependent on leveraging Shaw's wireline assets is wrong. It is not grounded in technical or commercial reality and ignores that Shaw operates Freedom as a stand-alone business, there is little relationship between Freedom and Shaw's

wireline business, and that relationship is conducted on arms-length commercial terms.

11. The significant majority of Freedom's wireless business is located in Ontario, where Shaw has only a limited wireline presence and provides no backhaul services to Freedom. Where Freedom does use Shaw's backhaul services, in British Columbia and Alberta, Shaw charges Freedom market rates for that access.

12. A divested Freedom owned by Videotron would have the same or greater economic incentive to compete as it had when owned by Shaw.

13. There is no basis for any of the relief the Commissioner seeks. Rogers asks that this Application be dismissed in its entirety, or in the alternative that the Tribunal issue an order allowing the Transaction, subject to the Divestiture of Freedom. In either scenario, Rogers seeks its costs of this Application.

II. THE PARTIES AND THE TRANSACTION

Rogers

14. Rogers Communications Inc. ("**Rogers**") is a publicly traded company in the business of providing wireline, wireless, and media products and services. Rogers provides wireline services in Ontario, New Brunswick, and Newfoundland, and wireless services across the country. Its media portfolio includes sports media, TV and radio broadcasting, and digital media.

B. Transaction Will not Substantially Lessen Competition for Wireless Services

32. The Commissioner's analysis of the competitive effects of the Transaction coupled with the Divestiture in the wireless market is flawed and incomplete. Contrary to the Commissioner's allegations, the Transaction has not substantially lessened or prevented competition in wireless services since it was announced in March 2021 and, coupled with the Divestiture, would not do so once completed.

33. The Commissioner's analysis is flawed because, among other things:

a. The Commissioner's analysis of the competitive effects of the Transaction coupled with the Divestiture is backwards looking and fails to take into account the continued role that regulation, including price regulation, will play in the market;

b. The Commissioner wrongly asserts that Rogers has felt significant competitive pressure from Shaw, when Rogers in fact competes much more closely against Bell and Telus, and any competitive pressure Shaw has exerted in the past was attributable to specific market dynamics at that time;

c. The Commissioner has overstated the competitive significance and impact of the Shaw Mobile brand (as distinct from Freedom), in the wireless market. It was launched in British Columbia and Alberta only to protect Shaw's wireline business, with generous promotional discounts offered

only to a subset of Shaw's highest-paying wireline households, and has no viable path for sustained future growth;

d. The Commissioner wrongly asserts that, but for the Transaction, Shaw would have made the necessary investments to allow it to be a significant competitive force in 5G. Among other things, and as noted above, when faced with the prospect of making those significant capital investments, Shaw chose instead to sell; and

e. The Commissioner's assertions that Freedom had planned to expand into business services in a manner that would impact competition are unsupported and incorrect.

C. Divestiture to Videotron Fully Remedies Any Alleged Lessening or Prevention of Competition

34. The Commissioner's assertion that the Transaction would substantially lessen or prevent competition even with the Divestiture is wrong. It is premised, in large part, on the claim that Freedom's competitiveness is dependent on "leveraging" Shaw's wireline assets. It takes no account of the wireless and wireline assets that Videotron would make available to Freedom and that are available to Freedom under the Divestiture Agreement.

35. The Commissioner's assertion that Freedom's success is dependent on Shaw's wireline assets is not grounded in technical or commercial reality and ignores that

[redacted]

36. The Commissioner's assertions that Freedom would not be an effective standalone competitor following the Divestiture are also misguided. What the Commissioner defines as "New Freedom" is in all material respects the same as old Freedom, except for certain advantages that New Freedom will enjoy as a result of its integration with Videotron:

a. New Freedom will have the same spectrum, towers, and other operating assets as it currently does, as well as important 3.5 GHz spectrum that Videotron acquired in the recent auction (which Shaw does not possess);

b. New Freedom will have the same if not greater economic incentives to compete in the market and build out a 5G network. The additional incentives arise from the fact that New Freedom will have access to 3.5 GHz spectrum that Videotron acquired in the recent auction, which is critical for the delivery of high-quality 5G services, and will realize marginal cost savings arising from the integration of Freedom and Videotron; and

c. New Freedom will be able to purchase additional spectrum in the upcoming 3800 MHz auction in 2023.

39. Rogers will also be better placed than Shaw was to compete against Telus in British Columbia and Alberta for bundled wireline / wireless services, given the relative attractiveness of Rogers' wireless network. [redacted]

40. The additional competitive response that Rogers' presence would elicit from other carriers is already evident in the significant number of additional network investments announced by Bell and Telus immediately after the Transaction was announced and in the subsequent months. The Divestiture is likely to elicit further competitive responses from other carriers.

41. Ultimately, the Divestiture provides Videotron with a unique opportunity for fast, efficient, and effective expansion outside of Quebec. It will ensure Freedom's position as an effective fourth wireless carrier in British Columbia, Alberta, and Ontario by increasing Videotron's incentive and ability to compete against Rogers, Bell, and Telus.

42. The Divestiture will also provide new opportunities for product differentiation, significantly boost Freedom's 5G capabilities by adding Videotron's valuable mid-band spectrum holdings, and fully address the Commissioner's concerns about any possible coordinated effects. This is particularly so given Videotron's history as a disruptive competitor and its incentive to grow market share.

CT-2022-002

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

FRESH AS AMENDED RESPONSE OF SHAW COMMUNICATIONS INC.

PART I - OVERVIEW

1. This Application by the Commissioner of Competition (the "**Commissioner**") for an order under section 92 of the *Competition Act* (the "***Act***") blocking a proposed transformative and pro-competitive acquisition (the "**Transaction**") of Shaw Communications Inc. ("**Shaw**") by Rogers Communications Inc. ("**Rogers**") is premised on fundamental misconceptions concerning the business of Shaw, as well as unsubstantiated assertions concerning the Canadian communications

company, with a history of growth and market disruption. The divestiture, which includes ancillary agreements for services such as roaming, backhaul, transport, and third party internet access (collectively, the "**Divestiture**"), will occur immediately prior to the acquisition by Rogers of Shaw.

6. The Transaction and Divestiture will enhance competition in numerous tangible and meaningful ways, including in Canadian telecommunications at a critical moment for the industry, delivering more affordable services, long-term investments in resilient next-generation wireless and wireline networks, innovation and economic productivity. This series of transactions offers an unprecedented opportunity to create two new players that can compete in both the Canadian wireline and wireless services markets at a national level.

7. The combined Rogers/Shaw will have the scale, assets and capabilities needed to compete in Canada's dynamic and rapidly changing wireline communications industry. At the same time, the combination of Freedom and Videotron will result in a robust fourth wireless carrier with an expanded geographic reach, greater spectrum holdings, a larger subscriber base, [redacted] than either Freedom or Videotron alone had before.

8. The new Freedom/Videotron that will emerge from these transactions will be in a much stronger position than today's Freedom to invest and compete in 5G, and to expand, including into the enterprise market. In short, completing this series of transactions is a win for consumers, the economy and the public interest. In particular, it allows Canada to achieve its long-standing policy goal of enabling a

strong, national fourth wireless carrier to emerge and compete for decades to come.

9. The Commissioner concedes the absence of any significant negative competitive effects from combining the wireline businesses of Shaw and Rogers. That is a significant concession given that Shaw generates the overwhelming majority of its revenues and earnings from its wireline business, not its wireless business.

10. The Commissioner also ignores the many pro-competitive impacts of the Transaction and Divestiture in both the Canadian wireline and wireless services markets. Instead, the Commissioner's Application focuses solely on alleged anti-competitive effects of the Transaction, and only in discrete geographic markets for wireless services. The Commissioner seeks with this Application to block the entirety of a pro-competitive and transformative Transaction from proceeding based solely on an alleged prevention or lessening of competition in the wireless services market in parts of Alberta, British Columbia and Ontario. There is simply no basis for this extraordinary measure.

11. While Shaw and Rogers both disagree with the Commissioner's concerns regarding the possible impact of the Transaction on Canada's competitive wireless market, Rogers and Shaw have fully addressed those concerns through the Divestiture.

12. The Commissioner's concerns regarding the alleged inseparability of Shaw's wireline and wireless businesses are wholly misplaced. Shaw has by purposeful design managed Freedom Mobile—formerly known as Wind Mobile—as a fully

49. As of the date of this Response, the Transaction has been approved overwhelmingly by the shareholders of Shaw, and has been determined to be fair and reasonable by the Court of Queen's Bench of Alberta. In addition, the CRTC has concluded its comprehensive review and approved the transfer of Shaw's licenced broadcasting undertakings to Rogers, subject to several conditions and safeguards designed to ensure that Canadian consumers benefit from the Transaction. The waiting periods for clearance under the *Act* have also expired.

50. Pursuant to the conditions that apply to the Freedom Mobile spectrum licences, prior approval of the Minister is required for any direct or indirect transfer of those licences, including the Divestiture. That approval has not yet been provided.

D. DESCRIPTION OF THE DIVESTITURE

51. Although Shaw and Rogers disagree with the Commissioner's concerns regarding the possible impact of the Transaction on Canada's competitive wireless market, Rogers offered to address those concerns by proposing the full divestiture of Freedom Mobile, including all of Freedom Mobile's spectrum licences.

52. On June 17, 2022, Rogers, Shaw and Quebecor Inc. (Videotron's parent company) entered into a letter agreement and term sheet concerning the Divestiture, and the parties finalized terms of the Divestiture in a definitive share purchase agreement on August 12, 2022 (the "**Divestiture Agreement**"). The Divestiture Agreement provides for, among other things: (i) the transfer to Videotron of Freedom's entire wireless business and wireline subscribers; (ii) transitional services from Rogers and Shaw, which will ensure a seamless transfer of ownership to Videotron without

67. The allegations in the Commissioner's Application concerning both (i) the competitive effects of the Transaction in the wireless market; and (ii) the viability of divesting Freedom Mobile to address any potential competitive effects are flawed and incomplete for a host of reasons, including because the Commissioner's Application fails to account properly, or at all, for the Divestiture. Moreover, the Commissioner's Application:

(a) ignores current market conditions and realities;

(b) proceeds on the mistaken assumption that Shaw's wireless services business cannot be separated from Shaw in an effective manner that will ensure the continuing competitiveness of the wireless services business;

(c) misunderstands and mischaracterizes the importance and role of Shaw Go WiFi in relation to Shaw's wireless network and in the competitiveness of Freedom Mobile;

(d) overstates and mischaracterizes the relevance of Shaw's wireline assets to the competitiveness of Shaw's wireless services business;

(e) overstates and mischaracterizes the role and significance of Shaw Mobile in relation to the competitiveness of Shaw's wireless services business;

(f) overstates and mischaracterizes the potential role that, in the absence of the Transaction, Shaw would likely play in a business wireless market that Shaw has never, in fact, entered; and

(g) wrongly asserts that, since the Transaction was announced, competition between Rogers and Shaw has lessened.

68. Each of these matters is addressed in the sections that follow.

(i) The Commissioner's Application Ignores Current Market Conditions

69. The Commissioner's analysis of the competitive effects at issue in this Application is flawed because it is based on a retrospective view of market conditions. The Commissioner assumes—without proper foundation—that Shaw's past impact in the wireless market based on historical market conditions will continue unabated and indefinitely in the current market. This flawed assumption undermines the Commissioner's entire analysis of the competitive effects that are supposedly associated with the Transaction.

70. The Commissioner's analysis of competitive effects does not properly account for the dynamic and rapidly changing nature of the wireless industry in Canada.

71. As set out above, the wireless communications industry in Canada is at an inflection point due to the advent of 5G networks. These revolutionary new networks will require significant ongoing levels of investment that are different in kind and in scale from prior generations of wireless technology. The circumstances in the past that permitted Shaw to grow its wireless business successfully are markedly different from the present situation.

72. In the face of these pressures, Shaw's continued competitive significance in Canada's wireless market could not be assured. By contrast, once the Divestiture

CT-2022-002

THE COMPETITION TRIBUNAL

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

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 one or more orders pursuant to section 92 of the *Competition Act*.

B E T W E E N :

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and -

ATTORNEY GENERAL OF ALBERTA AND VIDEOTRON LTD.

Intervenors

FRESH AS AMENDED REPLY to the Response of Rogers Communications Inc. of the Commissioner of Competition

---

I. OVERVIEW

1. The within application seeks to block Canada's largest wireless company from acquiring its closest competitor because the Proposed Transaction is anti-

competitive. It will harm millions of Canadian consumers in Ontario, Alberta and British Columbia through higher prices, lower quality services, and lost innovation. The Fresh as Amended Response of Rogers Communications Inc. (the "Response") ignores and seeks to obfuscate the substantial harm their Proposed Transaction and the Divestiture will visit upon the Canadian economy. Rogers' assertion that the Proposed Transaction and the Divestiture are competitively neutral (or that they will increase competition) is incorrect.

2. The proposed divestiture of Freedom Mobile to Videotron (the "Divestiture") is not an effective remedy. It fails to eliminate the substantial lessening and prevention of competition the Proposed Transaction will cause. Such a divestiture will not replace the significant and growing competition Shaw Mobile was delivering and would continue to deliver in Alberta and British Columbia, and it would make Freedom Mobile a substantially weaker competitor than it would have been but for the Proposed Transaction. The substantial growth in Freedom's competitive significance under Shaw's ownership amply demonstrate the significant benefits Freedom received from Shaw. In any case, the completion of the proposed divestiture to Videotron is subject to the ISED Minister's approval. The respondents bear the onus of proving that such divestiture is likely to be completed.

3. While Rogers claims there will be many benefits related to the Proposed Transaction and the Divestiture, the cognizable efficiencies Rogers can demonstrate are insufficient to outweigh and offset the anti-competitive effects.

4. While Rogers' Response asks the Tribunal to permit "the Transaction coupled with the Divestiture", Rogers fails to discharge its burden to demonstrate that the proposed remedy will be effective.

5. The Tribunal should prohibit this anti-competitive merger.

II. POINTS IN REPLY

6. The Applicant repeats and relies upon the facts in his Notice of Application, Statement of Grounds and Material Facts and Concise Statement of Economic

the incumbent facilities-based carriers, not increased competition as Rogers has suggested

D. Shaw Planned to Continue to Grow its Business Before the Announcement of the Proposed Transaction

14. Counter to the Respondent's claims,[6] Shaw planned to make 5G investments, enter new areas and expand into wireless Business Services. Shaw has a proven track record of investing in and expanding its business and Shaw would have continued but for the Proposed Merger. Shaw's decisions to cease these investments and to compete less vigorously are a result of the Proposed Transaction.

E. MVNO Entry is Unlikely to be Timely or Sufficient to Replace Competition from Shaw

15. The CRTC's MVNO Policy will not cure the substantial lessening and prevention of Competition the Proposed Transaction creates.[7] Rogers does not deny that MVNO entry is not likely in a period or on a scale that would constrain the likely increase in market power attributable to the Proposed Transaction.

16. Rather, the CRTC's MVNO Policy sought to protect and enhance the pre-merger competition brought about by regional carriers like Shaw who would have been the main beneficiary of the CRTC's policy. The diminishment of Shaw's Wireless business due to the Proposed Transaction and Divestiture will thus substantially reduce the effectiveness of the CRTC MVNO policy and further compound the anti-competitive effects of the Proposed Transaction.

F. There Would be No Increase in Competition

17. While Rogers pleads that the Proposed Transaction and the Divestiture would increase competition,[8] as noted above, that is not the case, given factors which include Rogers' different market position and incentives from Shaw and the difficulties and reduced competitiveness which Vidoetron will face without wireline

[6] Subparagraphs (d) and (e) of the Response.

[7] See paragraphs 28-30 of the Response.

[8] Paragraphs 38-40 of the Response.

assets and other benefits derived by Shaw from its wireline business. These factors make it likely that there will be increased post-merger coordination and reduced competition in Wireless Services. Contrary to Rogers' assertions, prior to the proposed transaction being announced, Shaw was poised to expand, by steps including extending its network in Ontario and the west, participating in the acquisition of new spectrum and offering 5G services.

G. Claimed Efficiencies Do Not Save this Anticompetitive Merger

18. Rogers attempts to justify its anticompetitive merger with Shaw by asserting that it, and the divestiture of Freedom to Videotron, will achieve productive and dynamic efficiencies. The Respondents bear the burden of establishing the likelihood and the extent of each efficiency gain that they claim, and that such gains, if realized, would provide cognizable benefits to the Canadian economy and that they are likely to be greater than, and offset, the anticompetitive effects of the Proposed Transaction.

19. The efficiencies claims made cannot save this anti-competitive merger, as they:

    a. are speculative, unproven and unlikely to be achieved in whole or in part or are grossly exaggerated;

    b. are based on unrealistic assumptions and flawed methodologies;

    c. are not brought about by the Proposed Transaction or Divestiture or would likely have been achieved irrespective of the Proposed Transaction; and

    d. fail to account or to properly account for the cost to achieve the claimed efficiencies.

20. Additionally, the efficiencies Rogers claims[9] are not cognizable under the Act as:

[9] Paragraphs 43-44 of the Response.

CT-2022-002

THE COMPETITION TRIBUNAL

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

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 one or more orders pursuant to section 92 of the *Competition Act*.

B E T W E E N :

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and -

ATTORNEY GENERAL OF ALBERTA AND VIDEOTRON LTD.

Intervenors

FRESH AS AMENDED REPLY to the Response of Shaw Communications Inc. of the Commissioner of Competition

---

I. OVERVIEW

1. The Applicant repeats and relies upon the Fresh as Amended Reply to the Response of Rogers Communications herein in respect of the Fresh as Amended

D. Wireline Assets are Important to the Competitiveness of Shaw Wireless Services

11. Shaw characterizes Freedom Mobile as an easily severable entity from Shaw's wireline assets and downplays the importance of those assets in its Wireless Services business.[5]

12. Shaw Mobile in particular, but also Freedom Mobile, were serving increasing broader segments of the markets and bringing competition not just to the National Carriers flanker brands but other market segments.

13. The Application is not premised on any misconception about the business of Shaw. Contrary to Shaw's allegation, the Application is firmly grounded in Shaw's own internal competitive assessment before its business judgment was affected by the private financial incentives a merger provides to Shaw's shareholders.

14. Contrary to the parties' claims, Freedom if divested to Videotron would be a less effective competitor due to factors which include:

    a. additional capital requirements of a standalone wireless entity in B.C. and Alberta;

    b. incremental costs to develop 5G network;

    c. incremental capital or operating costs to build out or purchase from third parties backhaul previously provided by Shaw wireline business;

    d. inability to bundle or cross-sell competitively and the challenge of competing against incumbents who can cross-sell multiple telecommunication products;

[5] Paragraphs 12, 33, 74-80 and 87-91 of the Response.

e. dependence on Rogers and competitive vulnerability as a result of the numerous contractual arrangements included in the proposed divestiture to Videotron; and

f. loss of access, in whole or part, to "Go Wi-Fi" hotspots, resulting in increased costs and inferior coverage.

15. The remedy issue before the Tribunal is not merely whether the Freedom Mobile assets can be separated from Shaw, but whether a divestiture eliminates the substantial lessening and prevention of competition. A Freedom Mobile-only divestiture, as proposed by the Respondents, fails to satisfy the requirements of the *Competition Act*.

16. In fact, there is significant integration of Freedom Mobile within Shaw's organizational structure and, importantly, Freedom Mobile benefits from its parent's related businesses and operations, including Shaw's network infrastructure, Wi-Fi Hotspots and backhaul. Shaw planned to further integrate its wireless and wireline businesses going forward to leverage the synergies between the businesses.

E. Wi-Fi Hotspots are an Important Aspect of Shaw Wireless Competitiveness

17. Contrary to Shaw's assertions,[6] its Wi-Fi hotspots improve network coverage, avoid network costs and reduce network traffic. Wireless customers use and assign significant value to these hotspots and they have been a central feature of Shaw's marketing materials and strategy. Shaw planned to expand its Wi-Fi hotspot network and viewed Wi-Fi and small cell deployment as complementary.

F. Shaw Business Services

18. Shaw's denial of its intentions to enter the Business Services market[7] is inconsistent with the facts; in any case, it does not address the fact that Shaw is a capable and well-positioned poised entrant for that market. In contrast, Videotron is an unproven

[6] Paragraphs 81-85 of the Response.

[7] Paragraphs 98-100 of the Response.

TRANSCRIPT AND ANSWERS TO UNDERTAKINGS

CASE LAW EXTRACTS

Federal Court of Appeal

Cour d'appel fédérale

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.

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

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

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

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

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.

CanLII

Commissioner of Competition v. Canada Pipe Company, 2004 CACT 2 (CanLII)

Date:	2004-01-23
File number:	CT2002006; 0045
Other citation:	29 CPR (4th) 530
Citation:	Commissioner of Competition v. Canada Pipe Company, 2004 CACT 2 (CanLII), <https://canlii.ca/t/1ggj5>, retrieved on 2022-09-09

Reference: *Commissioner of Competition v. Canada Pipe Company*, 2004 Comp. Trib. 2

File no.: CT2002006

Registry document no.: 0045

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

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to sections 79 and 77 of the *Competition Act*;

AND IN THE MATTER OF certain practices by Canada Pipe Company Ltd. through its Bibby Ste-Croix Division.

B E T W E E N :

The Commissioner of Competition

(applicant)

and

Canada Pipe Company Ltd.

(respondent)

Date of hearing by conference call: 20031209

Member: Blanchard J. (presiding)

Date of Reasons and Order: 20040123

Reasons and Order signed by: Blanchard J.

REASONS AND ORDER REGARDING RESPONDENT'S MOTION FOR EXAMINATION OF PERSONS AND DOCUMENTS PURSUANT TO PARAGRAPH 21(2)(d.1) OF THE *COMPETITION TRIBUNAL RULES* AND REGARDING SCHEDULING ISSUES

TABLE OF CONTENTS Paragraph

her disclosure statement and thereby forgo reliance on the document at the hearing. I ruled that such an interpretation was consistent with another regulatory objective of the Rules, namely having the investigatory process completed by the time the disclosure statement is filed and served. Given my above findings that Canada Pipe has not satisfied me that additional discovery of documents or persons is warranted, it is not necessary to deal with public interest privilege. In keeping with my earlier ruling, the Commissioner is taken to have waived the privilege with respect to those documents and information provided in the disclosure statement. Further, privilege is not claimed on any other document that is to be produced in this proceeding. In consequence, public interest privilege is not at issue in this motion. That is not to say that the issue may not arise should the Commissioner claim privilege on any document subsequently ordered produced.

D. DUTY OF FAIRNESS OF THE COMMISSIONER

[60] While the Commissioner's obligation to disclose information is now dictated by a standard of reliance under the Rules, she in nevertheless required to act fairly in the exercise of her duties.

[61] The Commissioner is a public officer with significant statutory powers to gather information and exercise public interest privilege. The Commissioner's oath of office, provided for in subsection 7(2) of the Act, imposes on her the duty to exercise her powers with impartiality:

I do solemnly swear (or affirm) that I will *faithfully, truly and impartially*, and to the best of my judgment, skill and ability, execute the powers and trusts reposed in me as Commissioner of Competition. . . [emphasis added]

There is a presumption that the Commissioner is acting in good faith.

[62] In these proceedings, the Commissioner is not a normal adversary, she is a public officer with a statutory obligation to act fairly. Similarly prosecutors must act fairly. Rand J. elaborated on the role and duty of a Crown prosecutor in the frequently quoted case of *Boucher v. The Queen*, 1954 CanLII 3 (SCC), [1955] S.C.R. 16 [*Boucher*] at pages 23-24:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.

[63] L'Heureaux-Dubé J. more recently emphasized that the duty to disclose is inherent in the role of a public officer, such as the Crown prosecutor, in *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411 [*O'Connor*] at pages 477-478:

Though the obligation on the Crown to disclose has found renewed vigour since the advent of the *Charter*, in particular in s. 7, this obligation is not contingent upon there first being established any violation of the *Charter*. *Rather full and fair disclosure is a fundamental aspect of the Crown's duty to serve the Court as a faithful public agent, entrusted not with winning or losing trials but rather with seeing that justice is served.* . . [emphasis added]

[64] It naturally follows that just as the Crown prosecutor must be motivated by fairness and not the notion of winning or losing, so too the Commissioner must be motivated by goals of fundamental fairness and not by achieving strategic advantage on the proceeding. This is not to say that the duties articulated in such landmark criminal cases as *Boucher, supra,* or *O'Connor, supra,* should be directly imported into an administrative law setting. The Tribunal is an administrative tribunal with an administrative process and procedural fairness must be customized to accommodate the expedited process required by the legislation and rules which govern its proceedings. Though the standard of disclosure may justifiably be different in proceedings before the Tribunal than in criminal proceedings, the underlying notion of fairness must remain constant for both. It is in this context that the reliance standard is to be applied.

E. DISCLOSURE OF NAMES AND ADDRESSES OF WITNESSES

Federal Court of Appeal | Cour d'appel fédérale

Date: 20180124

Docket: A-149-17

Citation: 2018 FCA 24

CORAM: **STRATAS J.A.**
BOIVIN J.A.
LASKIN J.A.

BETWEEN:

VANCOUVER AIRPORT AUTHORITY

Appellant

and

COMMISSIONER OF COMPETITION

Respondent

Heard at Ottawa, Ontario, on October 17, 2017.

Judgment delivered at Ottawa, Ontario, on January 24, 2018.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: BOIVIN J.A.
LASKIN J.A.

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

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

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

[30] The procedural fairness obligations require the Commissioner of Competition to disclose to the Airport Authority evidence that is relevant to issues in the proceedings. This is necessary for the Airport Authority to know the case it has to meet and to fairly defend itself against the allegations. Often—as the Commissioner has recognized in this case by releasing roughly 8,300 documents from his investigatory file—this includes exculpatory material or other material

resting in the investigatory file that could assist the party whose conduct is impugned in testing the evidence called by the Commissioner or in building its own case: see, *e.g.*, in other contexts, *Shooters Sports Bar Inc. v. Ontario (Alcohol & Gaming Commission)* (2008), 238 O.A.C. 9, 168 A.C.W.S. 580 (Div. Ct.); *Markandey v. Ontario (Board of Ophthalmic Dispensers)*, [1994] O.J. No. 484 at para. 43 (Gen. Div.); *Thompson v. Chiropractors' Assn. (Saskatchewan)*, [1996] 3 W.W.R. 675, 36 Admin. L.R. (2d) 273 at paras. 3-6 (Q.B.); *Shambleau v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1629, [2003] O.J. No. 4089 at para. 6; *Re Fauth*, 2017 ABASC 3; *Law Society of Upper Canada v. Savone*, 2015 ONLSTA 26 at para. 23, aff'd 2016 ONSC 3378, [2016] O.J. No. 2988. In some cases, there may be limits on the obligation to disclose based on materiality, proportionality, applicable legislative standards and the nature of the proceedings: *Ciba-Geigy Canada Ltd. v. Canada (Patented Medicine Prices Review Board)*, [1994] 3 F.C. 425, 55 C.P.R. (3d) 482 (T.D.), affirmed (1994), 56 C.P.R. (3d) 377, 170 N.R. 360 (F.C.A.); *Sheriff v. Canada (Attorney General)*, 2006 FCA 139, [2007] 1 F.C.R. 3.

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

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

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

disclose them to the respondent. Summaries of undisclosed documents were vetted and provided to the Airport Authority.

[112] As the discussion of case law above shows, the recognition of a class privilege does not depend on whether the beneficiary of the privilege is prepared to act fairly. And the Commissioner cannot defend a class privilege on the basis that it does not create procedural unfairness if there is no sufficient, proven reason for the class privilege to exist in the first place. In any event, fairness is in the eye of the beholder: the Airport Authority believes that the withholding of the 1,200 documents is working unfairness.

[113] There is something to this. If the class privilege urged by the Commissioner is recognized, something incongruous emerges: Competition Tribunal proceedings are subject to procedural fairness obligations at the highest level, akin to court proceedings, yet the Commissioner can unilaterally assert a class privilege and withhold all documents obtained from third parties in his investigation—here, the entire case against the Airport Authority—unless the Commissioner unilaterally decides to waive the privilege over some of the documents. Thus, as far as disclosure of the case against the party whose conduct is impugned is concerned, that party gets only what the Commissioner deigns to give it. And requests for more disclosure may well be dismissed by the Competition Tribunal because, on the authority of a decision by this Court upholding the class privilege, the interests in confidentiality supporting the class privilege will be seen to be very high. Perhaps summaries of withheld documents might be provided. But by definition, summaries leave information out. What may seem innocuous or irrelevant to the preparers of the summaries may be critical to the party whose conduct is impugned. And the

actual documents authored by participants in the matters under investigation are often more useful for cross-examination than summaries prepared by non-participants. This entire scenario is fraught with the potential of interference with procedural fairness rights and the truth-finding function of the proceedings: see discussion earlier in these reasons at paras. 28-33.

[114] The Commissioner's submission that he has acted fairly by disclosing so many documents and by providing summaries is also telling in a related way. After conducting a document-by-document review of the documents covered by the alleged class privilege in this case, the Commissioner found that confidentiality was unnecessary for 86% of them and so it disclosed these documents. As for the others, it says that some information can be disclosed by summaries. This tends to show a number of things:

- the blanket 100% confidentiality coverage of a class privilege is unnecessary for maintaining the relationship between the Commissioner and third party sources;

- a case-by-case public interest privilege—one that the Supreme Court says gives "the necessary flexibility to weigh up and balance competing public interests in a context-specific manner", where established on the evidence, may be more appropriate: National Post at para. 51; in any event, a class privilege that is so significantly whittled down through waiver after a document-by-document review is no more effective in maintaining the relationship between the Commissioner and third party sources than a case-by-case, document-by-document public interest privilege;

Minister of Justice *Appellant*

v.

Sheldon Blank *Respondent*

and

Attorney General of Ontario, The Advocates' Society and Information Commissioner of Canada *Interveners*

Indexed as: Blank *v.* Canada (Minister of Justice)

Neutral citation: 2006 SCC 39.

File No.: 30553.

2005: December 13; 2006: September 8.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Access to information — Exemptions — Solicitor-client privilege — Distinction between solicitor-client privilege and litigation privilege — Claimant requesting documents relating to prosecutions of himself and a company for federal regulatory offences — Charges subsequently quashed or stayed — Request for access denied by government on various grounds including solicitor-client privilege exemption set out in s. 23 of Access to Information Act — Whether documents once subject to litigation privilege remain privileged when litigation ends — Access to Information Act, R.S.C. 1985, c. A-1, s. 23.

Law of professions — Barristers and solicitors — Solicitor-client privilege — Litigation privilege — Distinction between solicitor-client privilege and litigation privilege — Nature, scope and duration of litigation privilege.

In 1995, the Crown laid 13 charges against B and a company for regulatory offences; the charges were quashed, some of them in 1997 and the others in 2001.

Ministre de la Justice *Appelant*

c.

Sheldon Blank *Intimé*

et

Procureur général de l'Ontario, The Advocates' Society et Commissaire à l'information du Canada *Intervenants*

Répertorié : Blank *c.* Canada (Ministre de la Justice)

Référence neutre : 2006 CSC 39.

N° du greffe : 30553.

2005 : 13 décembre; 2006 : 8 septembre.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Accès à l'information — Exemptions — Secret professionnel de l'avocat — Distinction entre le secret professionnel de l'avocat et le privilège relatif au litige — Requérant demandant l'accès à des documents relatifs à des poursuites intentées contre lui et une société pour des infractions réglementaires fédérales — Annulation des accusations ou arrêt des procédures — Accès refusé par le gouvernement pour divers motifs dont l'exemption du secret professionnel de l'avocat prévue à l'art. 23 de la Loi sur l'accès à l'information — Les documents protégés par le privilège relatif au litige, continuent-ils à bénéficier de cette protection lorsque le litige prend fin? — Loi sur l'accès à l'information, L.R.C. 1985, ch. A-1, art. 23.

Droit des professions — Avocats et procureurs — Secret professionnel de l'avocat — Privilège relatif au litige — Distinction entre le secret professionnel de l'avocat et le privilège relatif au litige — Nature, portée et durée du privilège relatif au litige.

En 1995, le ministère public a porté 13 accusations contre B et une société pour des infractions réglementaires; certaines accusations ont été annulées en 1997, et

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

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

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

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is

professionnel de l'avocat, fermement établi depuis des siècles. Il reconnaît que la force du système de justice dépend d'une communication complète, libre et franche entre ceux qui ont besoin de conseils juridiques et ceux qui sont les plus aptes à les fournir. La société a confié aux avocats la tâche de défendre les intérêts de leurs clients avec la compétence et l'expertise propres à ceux qui ont une formation en droit. Ils sont les seuls à pouvoir s'acquitter efficacement de cette tâche, mais seulement dans la mesure où ceux qui comptent sur leurs conseils ont la possibilité de les consulter en toute confiance. Le rapport de confiance qui s'établit alors entre l'avocat et son client est une condition nécessaire et essentielle à l'administration efficace de la justice.

Par ailleurs, le privilège relatif au litige n'a pas pour cible, et encore moins pour cible unique, les communications entre un avocat et son client. Il touche aussi les communications entre un avocat et des tiers, ou dans le cas d'une partie non représentée, entre celle-ci et des tiers. Il a pour objet d'assurer l'efficacité du processus contradictoire et non de favoriser la relation entre l'avocat et son client. Or, pour atteindre cet objectif, les parties au litige, représentées ou non, doivent avoir la possibilité de préparer leurs arguments en privé, sans ingérence de la partie adverse et sans crainte d'une communication prématurée.

R. J. Sharpe (maintenant juge de la Cour d'appel) a particulièrement bien expliqué les différences entre le privilège relatif au litige et le secret professionnel de l'avocat :

> [TRADUCTION] Il est crucial de faire la distinction entre le privilège relatif au litige et le secret professionnel de l'avocat. Au moins trois différences importantes, à mon sens, existent entre les deux. Premièrement, le secret professionnel de l'avocat ne s'applique qu'aux communications confidentielles entre le client et son avocat. Le privilège relatif au litige, en revanche, s'applique aux communications à caractère non confidentiel entre l'avocat et des tiers et englobe même des documents qui ne sont pas de la nature d'une communication. Deuxièmement, le secret professionnel de l'avocat existe chaque fois qu'un client consulte son avocat, que ce soit à propos d'un litige ou non. Le privilège relatif au litige, en revanche, ne s'applique que dans le

very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

("Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65)

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

contexte du litige lui-même. Troisièmement, et c'est ce qui importe le plus, le fondement du secret professionnel de l'avocat est très différent de celui du privilège relatif au litige. Cette différence mérite qu'on s'y arrête. L'intérêt qui sous-tend la protection contre la divulgation accordée aux communications entre un client et son avocat est l'intérêt de tous les citoyens dans la possibilité de consulter sans réserve et facilement un avocat. Si une personne ne peut pas faire de confidences à un avocat en sachant que ce qu'elle lui confie ne sera pas révélé, il lui sera difficile, voire impossible, d'obtenir en toute franchise des conseils juridiques judicieux.

Le privilège relatif au litige, en revanche, est adapté directement au processus du litige. Son but ne s'explique pas valablement par la nécessité de protéger les communications entre un avocat et son client pour permettre au client d'obtenir des conseils juridiques, soit l'intérêt que protège le secret professionnel de l'avocat. Son objet se rattache plus particulièrement aux besoins du processus du procès contradictoire. Le privilège relatif au litige est basé sur le besoin d'une zone protégée destinée à faciliter, pour l'avocat, l'enquête et la préparation du dossier en vue de l'instruction contradictoire. Autrement dit, le privilège relatif au litige vise à faciliter un processus (le processus contradictoire), tandis que le secret professionnel de l'avocat vise à protéger une relation (la relation de confiance entre un avocat et son client).

(« Claiming Privilege in the Discovery Process », dans *Special Lectures of the Law Society of Upper Canada* (1984), 163, p. 164-165)

29 À l'exception de la Cour d'appel de la Colombie-Britannique dans l'arrêt *Hodgkinson c. Simms* (1988), 33 B.C.L.R. (2d) 129, les juridictions d'appel du pays ont conclu de façon constante que le privilège relatif au litige repose sur un fondement différent de celui sur lequel repose le secret professionnel de l'avocat : *Liquor Control Board of Ontario c. Lifford Wine Agencies Ltd.* (2005), 76 O.R. (3d) 401; *Ontario (Attorney General) c. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (« *Big Canoe* »); *College of Physicians & Surgeons (British Columbia) c. British Columbia (Information & Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, 2002 BCCA 665; *Gower c. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716, 2001 MBCA 11; *Mitsui & Co. (Point Aconi) Ltd. c. Jones Power Co.* (2000), 188 N.S.R. (2d) 173, 2000 NSCA 96;

the disclosure it was bound but failed to provide in criminal proceedings that have ended.

V

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

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

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

[TRANSLATION] which increasingly attenuate the purely accusatory and adversarial nature of the civil trial, tend

public de refuser de communiquer des documents en matière civile, alors qu'il était tenu de les divulguer, mais ne l'a pas fait, dans le cadre des procédures pénales qui ont pris fin.

V

L'issue du présent pourvoi est dictée par la conclusion selon laquelle le privilège relatif au litige expire au moment où le litige prend fin. J'aimerais néanmoins ajouter quelques mots à propos des circonstances dans lesquelles il prend naissance.

La question s'est posée de savoir si le privilège relatif au litige devrait s'attacher aux documents dont un objet important, l'objet principal ou le seul objet est la préparation du litige. Parmi ces possibilités, la Chambre des lords a opté pour le critère de l'objet principal dans *Waugh c. British Railways Board*, [1979] 2 All E.R. 1169. Ce critère a également été retenu dans notre pays : *Davies c. Harrington* (1980), 115 D.L.R. (3d) 347 (C.A.N.-É.); *Voth Bros. Construction (1974) Ltd. c. North Vancouver School District No. 44 Board of School Trustees* (1981), 29 B.C.L.R. 114 (C.A.); *McCaig c. Trentowsky* (1983), 148 D.L.R. (3d) 724 (C.A.N.-B.); *Nova, an Alberta Corporation c. Guelph Engineering Co.* (1984), 5 D.L.R. (4th) 755 (C.A. Alb.); *Ed Miller Sales & Rentals*; *Chrusz*; *Lifford*; *Mitsui*; *College of Physicians*; *Gower.*

Je ne vois aucune raison de déroger au critère de l'objet principal. Bien qu'il confère une protection plus limitée que ne le ferait le critère de l'objet important, il me semble conforme à l'idée que le privilège relatif au litige devrait être considéré comme une exception limitée au principe de la communication complète et non comme un concept parallèle à égalité avec le secret professionnel de l'avocat interprété largement. Le critère de l'objet principal est davantage compatible avec la tendance contemporaine qui favorise une divulgation accrue. Comme l'a souligné Royer, il n'est guère surprenant que la législation et la jurisprudence modernes

portent de plus en plus atteinte au caractère purement accusatoire et contradictoire du procès civil, tendent à

to limit the scope of this privilege [that is, the litigation privilege]. [p. 869]

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

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

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

A related issue is whether the litigation privilege attaches to documents gathered or copied — but not *created* — for the purpose of litigation. This issue arose in *Hodgkinson*, where a majority of the British Columbia Court of Appeal, relying on *Lyell v. Kennedy* (1884), 27 Ch. D. 1 (C.A.), concluded that copies of public documents gathered by a solicitor were privileged. McEachern C.J.B.C. stated:

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

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

The conflict of appellate opinion on this issue should be left to be resolved in a case where it is explicitly raised and fully argued. Extending the privilege to the gathering of documents resulting

limiter la portée de ce privilège [soit le privilège relatif au litige]. [p. 869]

Ou, pour reprendre les termes utilisés par le juge Carthy dans *Chrusz* :

[TRADUCTION] La tendance moderne favorise une divulgation complète et il n'existe aucune raison apparente de freiner cette tendance dans la mesure où l'avocat continue à jouir d'une souplesse suffisante pour servir adéquatement son client qui est partie à un litige. [p. 331]

61 Tandis que le secret professionnel de l'avocat a été renforcé, réaffirmé et relevé au cours des dernières années, le privilège relatif au litige a dû être adapté à la tendance favorable à la divulgation mutuelle et réciproque qui caractérise le processus judiciaire. Dans ce contexte, il serait incongru de renverser cette tendance et de revenir au critère de l'objet important.

62 Se pose également la question connexe de savoir si le privilège relatif au litige s'attache aux documents recueillis ou copiés — mais non *créés* — en vue du litige. Cette question a été soulevée dans *Hodgkinson*, où les juges majoritaires de la Cour d'appel de la Colombie-Britannique, s'appuyant sur *Lyell c. Kennedy* (1884), 27 Ch. D. 1 (C.A.), ont conclu que les copies de documents publics recueillies par un avocat étaient protégées. Le juge en chef McEachern a dit ce qui suit :

[TRADUCTION] Je conclus que le droit veut depuis toujours — et cette règle devrait selon moi être maintenue — qu'en pareilles circonstances, l'avocat qui réussit à colliger, grâce à ses connaissances, ses habiletés, son jugement et ses efforts soutenus, une pile de copies de documents pertinents pour ses dossiers en vue de conseiller ou de représenter son client à l'occasion ou en prévision d'un litige, ait le droit, et soit en fait tenu, sauf avec le consentement de son client, de revendiquer le privilège à l'égard de tous ces documents et de refuser de les produire. [p. 142]

63 Cette approche a été rejetée par les juges majoritaires de la Cour d'appel de l'Ontario dans *Chrusz*.

64 La divergence d'opinions des juridictions d'appel à ce sujet devra être tranchée lorsque cette question sera expressément soulevée et pleinement débattue. Il semblerait davantage compatible avec

from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect.

le fondement et l'objet du privilège relatif au litige de l'étendre aux documents recueillis au moyen de recherches ou à l'aide de connaissances et d'habiletés. Cela dit, je tiens à mentionner que le fait d'attribuer une portée aussi étendue au privilège relatif au litige n'a pas pour objectif, et ne devrait pas avoir pour effet, de soustraire automatiquement à la communication tout document ou renseignement qui aurait dû être communiqué au préalable, s'il n'avait pas été transmis à l'avocat ou versé aux dossiers constitués par une partie relativement au litige.

VI

VI

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

Pour tous ces motifs, je suis d'avis de rejeter le pourvoi. L'intimé recevra le remboursement de ses débours devant la Cour.

The reasons of Bastarache and Charron JJ. were delivered by

Version française des motifs des juges Bastarache et Charron rendus par

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

LE JUGE BASTARACHE — J'ai lu les motifs du juge Fish et j'y souscris quant au résultat. Je crois toutefois qu'il est nécessaire de donner une interprétation plus définitive et plus complète de l'art. 23 de la *Loi sur l'accès à l'information*, L.R.C. 1985, ch. A-1 (« *Loi sur l'accès* »), afin d'écarter la possibilité d'une application parallèle de la règle de common law concernant le privilège relatif au litige dans les cas où la *Loi sur l'accès* est invoquée. Je propose donc de circonscrire la portée de l'art. 23 et d'exclure l'application de la common law en l'espèce.

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

En l'occurrence, l'institution fédérale a tenté de refuser de communiquer des documents en revendiquant le privilège relatif au litige en application de l'art. 23 de la *Loi sur l'accès*. La question de savoir si ces documents sont protégés par le privilège relatif au litige ne se pose que s'il est statué que la portée de l'art. 23 s'étend au privilège relatif au litige. Il faut donc déterminer si le législateur a voulu que l'expression « secret professionnel qui lie un avocat à son client » utilisée à l'art. 23 soit considérée comme englobant également le privilège relatif au litige. Que l'art. 23 soit interprété comme incluant ou comme excluant le privilège

In the Court of Appeal of Alberta

Citation: Alberta v Suncor Energy Inc, 2017 ABCA 221

Date: 20170704
Docket: 1603-0148-AC
Registry: Edmonton

Between:

Her Majesty the Queen In the Right of Alberta

Appellant
(Applicant)

- and -

Suncor Energy Inc.

Respondent
(Respondent)

- and -

Richard Howden, Jim Harris, Corey Black, Andrew Robinson, Patrick Fortune, Juan Bracho, Wayne MacDonald, Berislav Samardzic, Ryan Tarkowski, Catherine Canning and Richard Loiselle

Not Parties to the Appeal
(Respondents)

- and -

The Advocates' Society

Intervenor

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Sheila Greckol

---

[36] Solicitor-client privilege attaches to confidential communications between a client and a legal advisor that are connected to seeking or giving legal advice: *Blood Tribe Department of Health v Canada (Privacy Commissioner)*, 2008 SCC 44 at para 10, [2008] 2 SCR 574; see also *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at paras 26-38, [2006] 2 SCR 319 [*Blank*]. The communication does not have to be in contemplation of litigation, and the privilege is of permanent duration: *Blank* at paras 28, 50.

[37] Litigation privilege attaches to documents created for the dominant purpose of litigation: *Blank* at paras 59-60. This includes any document created for the dominant purpose of preparing for related litigation that "remains pending or may reasonably be apprehended": *Blank* at para 38. The object of this inquiry is the purpose for which the document was *created*, or came into existence, as distinct from the purpose for which it may have been collected or put to use: *Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2014 ABCA 244 at para 38, 577 AR 335.

[38] The focus of the chambers judge was on whether sections 18 and 19, on their face and in effect, expressly *ousted* the ability of Suncor to claim legal privilege. He correctly concluded the terms of the *OHSA* did not operate to defeat legal privilege, though he did not have the advantage of *Lizotte* at that time.

[39] However, given the breadth of the litigation privilege he conceived and the referee process he directed, the chambers judge has not yet turned his mind to the interplay between the claims of legal privilege and the statutory obligations upon Suncor under sections 18 and 19 of the *OHSA*. These include the obligation to carry out an investigation, prepare a report, and provide access to the workplace and employees for information respecting the accident for the *OHS* investigation. He may be required to consider Suncor's obligation to prepare a report "outlining" the circumstances and corrective action taken after an accident, under section 18 (3) (b) of the *OHSA;* or employees' obligation to provide information to an OHS officer after an accident under s 19 (2) of the *OHSA*, when their statements are also prepared for the internal investigation and claimed to be privileged.

[40] Plainly, if legal privilege does not cover particular records or information, and the requirements of sections 18 and 19 of the *OHSA* apply to those same records or information, the question of whether sections 18 and 19 operate to override any aspect of privilege disappears. Once the procedure for assessing the contested materials is complete, records or information sifted out of the scope of privilege will be subject to the consideration under the correct legal interpretation of sections 18 and 19 of the *OHSA*.

[41] In conclusion, the chambers judge erred in finding that the dominant purpose of the investigation was in contemplation of litigation and proceeding to conclude that, within the context of Suncor's internal investigation carried out in anticipation of litigation, the material "created and/or collected during the internal investigation with the dominant purpose that they would assist in the contemplated litigation, are integrally covered by litigation privilege".

[42] Since the decisions in *Lizotte* and *University of Calgary*, it is clear the statutory obligations upon Suncor following a workplace accident, and found in sections 18 and 19 of the *OHSA*, do not preclude claims of litigation privilege. In accordance with *ShawCor*, each document or bundle of like documents must be described with sufficient particularity to identify the claimed privilege and the evidentiary basis for the claim.

[43] The referee's inquiry, and ultimately that of the chambers judge, must focus on the dominant purpose for creating each document or bundle of like documents, whether it be for routine, day to day operation of the plant or some other purpose; for compliance with statutory obligations, including sections 18 and 19 of the *OHSA;* or for seeking or giving legal advice or for contemplated litigation. Remaining to be decided is what material falls within the sphere of legal privilege, and the interplay between sections 18 and 19 of the *OHSA* and those privilege claims.

2. Did the chambers judge err in finding that the documents were sufficiently described to allow an assessment of the privilege claims?

[44] Alberta argues the chambers judge erred by concluding that Suncor had sufficiently described the documents, and the grounds for asserting privilege, in its list of bundled records. With respect to solicitor-client privilege, the chambers judge accepted that Suncor engaged in privileged communications with its lawyers. However, the chambers judge referred to a referee the question of which particular communications were covered by solicitor-client privilege. The chambers judge contemplated that the referee's role would include an "initial assessment and identification of the records": Decision at para 92. He also referred to the referee the assessment of whether litigation privilege applies to each bundle of documents: Decision at para 95.

[45] Suncor asserted both solicitor-client *and* litigation privilege over nearly all of the documents it refused to produce. Although documents may frequently be subject to both forms of privilege, Suncor must independently distinguish whether solicitor-client or litigation privilege applies, in order to permit a meaningful assessment and review of each bundle of documents. Making a blanket assertion that both forms of privilege apply, in instances where one or the other is clearly unavailable, is a litigation tactic that ought to be discouraged.

[46] Parties must describe the documents in a way that indicates the basis for their claim: *ShawCor* at para 9. The grounds for claiming solicitor-client privilege and litigation privilege are distinct. A description that supports one class of privilege does not necessarily support the other.

[47] To support a claim of solicitor-client privilege, Suncor must at least describe the documents in a manner that indicates communications between a client and a legal advisor related to seeking or receiving legal advice.

[48] To support a claim of litigation privilege, Suncor must describe documents with enough particularity to indicate whether the dominant purpose for their *creation* was in contemplation of litigation.

In the Court of Appeal of Alberta

Citation: Canadian Natural Resources Limited v ShawCor Ltd., 2014 ABCA 289

Date: 20140915
Docket: 1301-0128-AC
Registry: Calgary

Between:

Canadian Natural Resources Limited

Respondent (Plaintiff)

- and -

ShawCor Ltd., Shaw Pipe Protection Ltd., Bredero Shaw Company Limited

Appellants (Defendants)

IMV Projects Inc., Flint Field Services Ltd., Flint Pipeline Services Ltd., formerly Transline Energy Services Ltd., ABC Ltd., and XYZ Inc.

Not Parties to the Appeal
(Defendants)

**Ram River Pipeline Outfitters Ltd. and
Dunn Hiebert & Associates Ltd.**

Not Parties to the Appeal
(Third Party Defendants)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Jack Watson

Reasons for Judgment Reserved

Appeal from the Order by

> While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process.

[84] In addition, it must be remembered that under the dominant purpose test, the focus is on the purpose for which the records were prepared or created, not the purpose for which they were obtained: ***Ventouris v Mountain***, [1991] 1 WLR 607 at 620-622 (Eng CA); ***General Accident Assurance Company v Chrusz et al*** (1999), 45 OR (3d) 321 at 334 (CA). Pre-existing records gathered or copied at the instruction of legal counsel do not automatically fall under litigation privilege: ***Bennett v State Farm Fire and Casualty Company***, 2013 NBCA 4 at paras 47-51, 358 DLR (4th) 229. Because the question is the purpose for which the record was originally brought into existence, the mere fact that a lawyer became involved is not automatically controlling.

[85] This very point was made thirty years ago by this Court in ***Nova***, *supra* at para 20:

> The only case for exclusion which can be made [on the facts before the court] is for documents which were brought into existence by reason of an intention to provide information to solicitors. That this is *an* object is insufficient – such a test provides a cloak where other purposes predominate. Such a test would clothe material that probably would otherwise have been prepared, and otherwise not privileged, with a privilege intended to serve a narrow interest. Such a test conflicts with the object of discovery today which is to disclose material provided for other purposes.

[86] CNRL began its investigation into the Pipeline failure to discover its cause and to determine how to mitigate its effects in the context of a well blowout. That investigation was ongoing on February 4, 2009. Indeed, the case management judge identified seven reasons why CNRL, regardless of any decision to litigate, would have pursued testing and investigation beyond February 4, 2009. Among them were the following: "understanding the extent of the Pipeline failure, correcting the problems that had occurred and avoiding them in future, repairing the Pipeline," and "providing the necessary information to CNRL management to respond to the failure...". It appears, therefore, that the general character of the investigation remained the same even after Harvey's trip to see Mendes. The only thing that appears to have changed at that point was the direction of the mail. Thus, it is difficult to see how, without more information, the case management judge could have found that all the investigation records created post-February 4, 2009 not disclosed by CNRL were created for the *dominant* purpose of litigation. February 5 is simply the date that CNRL chose to direct all records through its in-house counsel.

[87] We accept that when an investigation is ongoing, records may be created for the dominant purpose of litigation at any point after litigation is contemplated. And we recognize the case management judge

effectively found that litigation would be pursued as of February 4, 2009. But the purpose behind the creation of a record does not change simply because the record is forwarded to, or through, in-house counsel, or because in-house counsel directs that all further investigation records should come to him or her. Or even because a decision has been made to pursue litigation. One must always look to the particular record at issue and *determine* the dominant purpose behind its creation. After all, litigation privilege "must be established document by document": ***Gichuru v British Columbia (Information and Privacy Commissioner)***, 2014 BCCA 259 at para 32, citing ***Keefer Laundry Ltd. v Pellerin Milner Corp. et al.***, 2006 BCSC 1180 at para 96. An assertion that something was for the dominant purpose of litigation must always be examined in the context of all the facts, the nature of the records in question and all the real reasons that the records were created.

[88] Here, the case management judge found that even if the subject litigation had not occurred, CNRL would have conducted an investigation for some or all of the purposes he identified. Thus, without further information from CNRL as to precisely what records were created, and for what purpose, we are unable to understand how all these testing and investigation records, created for a variety of purposes, could be found, without further inquiry, to fall within solicitor-client privilege or litigation privilege. This is so even accepting that CNRL had decided to pursue litigation as of the critical date. The reasons of the case management judge also indicate that he concluded that any third-party expert retained might "generate a privileged analysis for litigation purposes": para 40. However, while the analysis would likely be privileged, it is not necessarily the case that the factual platform on which that analysis is built automatically shares that same status.

[89] All this said, it does not follow that ShawCor is entitled to all the testing and investigation records created after February 4, 2009 not disclosed by CNRL. Some, many, or perhaps even all of those records might yet be found to be within the scope of either one or both of the privileges claimed. However, we are not able to determine on the materials before us whether these privileges have been properly invoked. Whether this continues to be a contentious issue after CNRL has provided the new or supplementary affidavit of records as directed herein remains to be seen. At that point, if the parties cannot agree on whether a particular record fits within the declared privilege, then the matter can be reviewed by a judge under Rule 5.11.

C. Waiver of Privilege and Content of Pleadings

[90] Because CNRL is being directed to file a new or supplementary affidavit of records, it would be premature to discuss the issue of waiver and we decline to do so.

VII. Disposition and Summary

[91] The appeal is allowed and CNRL is directed to provide a new or supplementary affidavit of records in compliance with the *Rules* and this judgment.

SUSAN HOSIERY LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Toronto 1968 Oct. 15

Ottawa 1969 Feb. 19

Discovery—Evidence—Solicitor-client privilege—Communications between solicitor and client's accountant—Extent of privilege.

The privilege which protects from disclosure at trial or on discovery (1) confidential communications between a client and his legal adviser for the purpose of giving or obtaining legal advice, and (2) documents obtained for the lawyer's brief for litigation, covers communications between a legal adviser and an accountant used as the client's representative. The privilege, moreover, applies to any questions on discovery as to the contents of such communications and documents.

Lyell v. Kennedy No. 2 (1883) 9 App. Cas. 81; *Wheeler v. Le Marchant* (1881) 17 Ch.D. 675, applied.

[10] [1967] 2 Ex. C. R. 308.

1968

SUSAN HOSIERY LTD. v. MINISTER OF NATIONAL REVENUE

Jackett P.

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.

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

> But then it is argued that though that is so you may, as has been repeatedly said, search the conscience of the party by inquiring as to his information and belief from whencesoever derived, and that it consequently follows from that (this I think was the argument which was put) that although a brief has been refused, and it has been said, "You must not inspect that brief," you are nevertheless entitled to ask the party himself, "Did not you read the brief, and when you had read it what was your belief derived from reading that brief?" That, I think, was the position which was taken; and it was argued in support of it, if I understood and followed the argument rightly, that inasmuch as nobody had ever actually raised the point, and inasmuch as in all the different books of pleading and other things, where they very frequently do discuss what is the extent of discovery, nobody had hitherto discussed this point either one way or the other, the silence of people implied that it should be so, and that you ought to be able to put that question. Now as to that I believe that there is no authority, and I think that Cotton L J. says that there is no authority; but as it seems to me the plain reason and sense of the thing is that as soon as you say that the particular premises are privileged and protected, it follows that the mere opinion and belief of the party from those premises should be privileged and protected also I do not mean to state (and I mention it in case I should be misunderstood) that a man has a privilege to say, "I have

> a deed, which you are entitled to see in the ordinary course of things, but I claim a privilege for that deed, because it was obtained for me by my attorney in getting up a defence to an action," or "in the course of litigation" That would be no privilege at all. So again with regard to another fact, such as a man being told by an attorney's brief that there is ground for thinking that there is a tombstone or a pedigree in a particular place—if the man went there and looked at it and saw the thing itself I do not think that he would be privileged at all in that case: because it is no answer to say, "I know the thing which you want to discover, but I first got possession of the knowledge in consequence of previous information" That is not within the meaning of privilege But when the interrogatory is simply "what is the belief which you have formed from reading that brief?" it seems to me (and I think that that is the effect of what Cotton L J. says at the end of his judgment (23 Ch D at p 408)) to follow that you cannot ask that question. It is a new point; it has never been raised before; but it seems to me that that is right.

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

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

(a) that no communication, statement or other material made or prepared by an accountant as such for a business man falls within the privilege unless it was prepared by the accountant as a result of a request by the business man's lawyer to be used in connection with litigation, existing or apprehended; and

(b) that, where an accountant is used as a representative, or one of a group of representatives, for the purpose of placing a factual situation or a problem before a lawyer to obtain legal advice or legal assistance, the fact that he is an accountant, or that he uses his knowledge and skill as an account-

Karine Lizotte, in her capacity as assistant syndic of the Chambre de l'assurance de dommages *Appellant*

v.

Aviva Insurance Company of Canada and Traders General Insurance Company *Respondents*

and

Canadian Bar Association, Advocates' Society and Barreau du Québec *Interveners*

Indexed as: Lizotte *v.* Aviva Insurance Company of Canada

2016 SCC 52

File No.: 36373.

2016: March 24; 2016: November 25.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Law of professions — Ethics — Powers of investigation of syndic — Production of documents — Litigation privilege — Inquiry by syndic of Chambre de l'assurance de dommages into conduct of claims adjuster — Whether statutory provision creating obligation to produce "any . . . document" at request of syndic can be interpreted as abrogating litigation privilege — Act respecting the distribution of financial products and services, CQLR, c. D-9.2, s. 337.

In the course of an inquiry into a claims adjuster, the assistant syndic of the Chambre de l'assurance de dommages (the "syndic") asked insurer A to send her a complete copy of its claim file with respect to one of its insured. The syndic based this request on s. 337 of the *Act respecting the distribution of financial products and services* ("*ADFPS*"). In response, the insurer produced a number of documents, but explained that it had withheld some on the basis that they were covered either by

Karine Lizotte, ès qualités de syndic adjoint de la Chambre de l'assurance de dommages *Appelante*

c.

Aviva, Compagnie d'assurance du Canada et Compagnie d'assurance traders générale *Intimées*

et

Association du Barreau canadien, Advocates' Society et Barreau du Québec *Intervenants*

Répertorié : Lizotte *c.* Aviva, Compagnie d'assurance du Canada

2016 CSC 52

N° du greffe : 36373.

2016 : 24 mars; 2016 : 25 novembre.

Présents : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit des professions — Déontologie — Pouvoirs d'enquête du syndic — Production de documents — Privilège relatif au litige — Enquête du syndic de la Chambre de l'assurance de dommages sur la conduite d'un expert en sinistre — Une disposition législative prévoyant l'obligation de fournir « tout document » à la demande du syndic peut-elle être interprétée comme écartant le privilège relatif au litige? — Loi sur la distribution de produits et services financiers, RLRQ, c. D-9.2, art. 337.

Dans le cadre d'une enquête sur un expert en sinistre, la syndique adjointe de la Chambre de l'assurance de dommages (la « syndique ») demande à l'assureur A de lui communiquer une copie complète de son dossier de réclamation relatif à une de ses assurées. La syndique s'appuie à cette fin sur l'art. 337 de la *Loi sur la distribution de produits et services financiers* (« *LDPSF* »). En réponse, l'assureur transmet plusieurs documents, mais explique en avoir retranché certains au motif que ceux-ci

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

opposer à la syndique le privilège relatif au litige dans ce même contexte. Pour y répondre, il faut déterminer si le privilège relatif au litige peut être abrogé par des termes d'acception générale plutôt que clairs, explicites et non équivoques et, en conséquence, si l'art. 337 *LDPSF* peut être interprété comme abrogeant valablement ce privilège. Avant de m'attarder à cette question, il importe que je cerne d'abord les caractéristiques du privilège relatif au litige.

V. Analyse

A. *Les caractéristiques du privilège relatif au litige*

[19] 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 : J.-C. Royer et S. Lavallée, *La preuve civile* (4e éd. 2008), p. 1009-1010.

[20] Le privilège relatif au litige est une règle de common law d'origine anglaise : *Lyell c. Kennedy (No. 2)* (1883), 9 App. Cas. 81 (H.L.). 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, alors considéré comme une règle de preuve nécessaire pour la bonne marche des procès : A. Cardinal, « Quelques aspects modernes du secret professionnel de l'avocat » (1984), 44 *R. du B.* 237, p. 266-267. Dans une décision souvent reprise, le Président Jackett, de l'ancienne Cour de l'Échiquier du Canada, a décrit ainsi l'objet du privilège relatif au litige, connu à une certaine époque comme le principe applicable au dossier de l'avocat (« *lawyer's brief rule* ») :

> [TRADUCTION] Pour en venir au principe applicable au « dossier de l'avocat », sa raison d'être tient évidemment à ce que, dans notre système judiciaire accusatoire, l'avocat ne doit pas être gêné dans la préparation de la cause de son client par la possibilité que les documents qu'il prépare soient retirés de son dossier et déposés devant le tribunal d'une manière autre que celle qu'il envisage. Les documents qui aideraient à mettre à jour la

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",

vérité s'ils étaient présentés de la façon prévue par l'avocat qui en a dirigé la préparation pourraient fort bien servir à déformer la vérité au préjudice de son client s'ils étaient soumis par une partie aux intérêts opposés qui ne comprend pas ce qui a donné lieu à leur préparation. Si les avocats pouvaient fouiller dans les dossiers les uns des autres au moyen du processus de la communication préalable, la simple préparation des dossiers pour l'instruction se transformerait en une regrettable parodie de notre système actuel. [Je souligne.]

(*Susan Hosiery Ltd. c. Minister of National Revenue*, [1969] 2 R.C. de l'É. 27, p. 33-34)

[21] 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 : Royer et Lavallée, p. 1003-1004; N. J. Williams, « Discovery of Civil Litigation Trial Preparation in Canada » (1980), 58 *R. du B. can.* 1, p. 37-38.

[22] Toutefois, depuis l'arrêt *Blank* rendu en 2006, il est établi que le secret professionnel de l'avocat et le privilège relatif au litige se distinguent. Dans *Blank*, la Cour indique que « [c]es privilèges coexistent souvent et [qu']on utilise parfois à tort le nom de l'un pour désigner l'autre, mais [que] leur portée, leur durée et leur signification ne coïncident pas » (par. 1). La Cour 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

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. Basi*, 2009 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'assurances 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. Pageau*, 2009 QCCA 1494, at para. 2 (CanLII); *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 83 O.R. (3d) 792 (C.A.), at paras. 20-21; *College of Physicians and Surgeons*

autre intérêt public opposé, comme la tenue d'une enquête sur un crime précis (ou la sécurité nationale, la sécurité publique ou une autre considération intéressant le bien collectif). [par. 53 et 58]

[33] À mon avis, le privilège relatif au litige se qualifie de privilège générique. Une fois établies les conditions de son application, c'est-à-dire une fois que l'on est en présence d'un document dont « l'objet principal [. . .] est la préparation du litige » (*Blank*, par. 59) et que ce litige ou un litige connexe est encore en cours « ou peut être raisonnablement appréhendé » (par. 38), il y a une « présomption à première vue d'inadmissibilité » au sens où l'entendait le juge en chef Lamer dans *R. c. Gruenke*, [1991] 3 R.C.S. 263 :

> Les parties ont eu tendance à établir une distinction entre deux catégories : un privilège *prima facie* « général » de common law ou un privilège « générique », d'une part, et un privilège « fondé sur les circonstances de chaque cas », d'autre part. Les premiers termes sont utilisés pour désigner un privilège qui a été reconnu en common law et pour lequel il existe une présomption à première vue d'inadmissibilité (lorsqu'il a été établi que les rapports s'inscrivent dans la catégorie) à moins que la partie qui demande l'admission ne puisse démontrer pour quelles raisons les communications ne devraient pas être privilégiées (c.-à-d., pour quelles raisons elles devraient être admises en preuve à titre d'exception à la règle générale). [Soulignement omis; p. 286]

[34] De ce point de vue, le privilège relatif au litige s'apparente au privilège relatif au règlement et au privilège de l'indicateur de police, que la Cour a déjà qualifié de privilèges génériques : *Sable Offshore Energy Inc. c. Ameron International Corp.*, 2013 CSC 37, [2013] 2 R.C.S. 623, par. 12; *R. c. Basi*, 2009 CSC 52, [2009] 3 R.C.S. 389, par. 22. Comme ces derniers, il est reconnu par les tribunaux depuis longtemps et a été considéré comme comportant une présomption d'immunité de divulgation une fois qu'il est satisfait à ses conditions d'application : *Blank*, par. 59-60; *Compagnie d'assurances AIG du Canada c. Solmax International inc.*, 2016 QCCA 258, par. 4-8 (CanLII); *Groupe Ledor inc.*, par. 8-9; *St-Pierre*, par. 41; *Axa Assurances inc. c. Pageau*, 2009 QCCA 1494, par. 2 (CanLII); *Conceicao Farms Inc. c. Zeneca Corp.* (2006), 83 O.R. (3d) 792 (C.A.), par. 20-21; *College of Physicians and Surgeons of*