CT-2021-002

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the 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:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. and SHAW COMMUNICATIONS INC.

Respondents

- and -

ATTORNEY GENERAL OF ALBERTA and VIDEOTRON LTD.

Intervenors

BOOK OF AUTHORITIES OF THE BELL MOVING PARTIES
(Motion to Quash Subpoenas Issued on October 14, 2022)

October 25, 2022

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LEGISLATION

Competition Tribunal Rules, SOR/2008-141, s. 7.

Competition Act, RSC 1985, c C-34, ss. 11(1)-(2).

SECONDARY SOURCES

Practice Direction Regarding an Expedited Proceeding Process Before the Tribunal, Ottawa, January 2019.

TAB 1

Date: 20080307

Docket: T-1548-06

Citation: 2008 FC 321

Montréal, Quebec, March 7, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

LES LABORATOIRES SERVIER,
ADIR, ORIL INDUSTRIES,
SERVIER CANADA INC.,
SERVIER LABORATORIES (AUSTRALIA) PTY LTD
and SERVIER LABORATORIES LIMITED

Plaintiffs

and

APOTEX INC.
and
APOTEX PHARMACHEM INC.

Defendants

REASONS FOR ORDER AND ORDER
(Motion to Quash Subpoenas)

I. Introduction

[1] Three motions have been brought to this Court by:

a) Andrew I. McIntosh, H. Roger Hart, and Sanofi-Aventis Deutschland GmbH;

b) Anthony Creber and Jennifer Wilkie; and

c) Les Laboratoires Servier, ADIR, ORIL Industries, Servier Canada Inc., Servier Laboratories (Australia) Pty. Ltd. and Servier Laboratories Limited (collectively referred to as Servier).

[2] The moving parties seek to quash seven subpoenas *duces tecum* issued at the request of Goodmans LLP, on behalf of Apotex Inc. and Apotex Pharmachem Inc. (collectively Apotex), requiring that five lawyers, one patent agent and one administrative assistant (described below) attend to testify and to produce certain materials at the trial of the action in Court File No. T-1548-06 (the Perindopril Action). All of the subpoenaed persons, in and around 2000, represented clients in matters that relate to issues raised in the Perindopril Action.

[3] For the reasons that follow, I am satisfied that all of the subpoenas but one should be quashed and that the remaining subpoena should stand on a limited basis.

II. Background

[4] The issues raised by these motions require an understanding of the background to the Perindopril Action and related proceedings.

A. *The Conflict Proceedings leading to the 196 Patent and the 206 Patent*

[5] On October 1, 1981, ADIR, one of the Plaintiffs in the Perindopril Action, filed Canadian Application Number 387,093 (the 093 Application). Around the same time, other claimants filed their own patent applications for the issuance of patents covering overlapping compounds, including Schering Corporation (Schering) in Canadian Application Number 388,336 (the 336 Application) and Hoechst Aktiengesellchaft (Hoechst AG - the corporate predecessor to Sanofi-Aventis Deutschland GmbH (Sanofi Germany)) with respect to Canadian Application Nos. 384,787 (the 787 Application) and 418,453 (the 453 Application). As provided for under the *Patent Act*, R.S.C. 1985, c. P-4, then in force, the Commissioner of Patents (the Commissioner) placed the various competing claims into conflict.

[6] In six decisions dated August 8, 1996, the Commissioner made determinations related to inventorship of the claims in conflict and awarded some claims to Schering, some to ADIR and some to Hoechst AG.

[7] Six proceedings were then commenced by way of actions in the Federal Court, in which proceedings the affected parties (including ADIR) challenged the determinations made by the Commissioner. All of the proceedings were consolidated by the Order of Justice Joyal, dated May 27, 1997, into Court File No. T-228-97.

[8] Subsequent to completion of discoveries in the consolidated actions, an Order on consent was issued by Justice Nadon on December 12, 2000. That Order provided for an allocation of the

claims of the competing applications and attached Minutes of Settlement specifying the claims to which the parties to the conflict were entitled. Ultimately, the result of the Order for ADIR was the issuance of the Canadian Patent No. 1,341,196 (the 196 Patent). The other results were the issuance of Canadian Patent No. 1,341,206 (the 206 Patent) to Schering and the issuance of Canadian Patent No. 1,341,296 (the 296 Patent) to Hoechst AG (Sanofi Germany).

[9] On each of April 3, 2001 and May 14, 2001, certificates of correction were issued with respect to claim 5 of the 196 Patent.

B. *T-1548-06: the Perindopril Action*

[10] By Statement of Claim dated August 25, 2006, Servier commenced the underlying action against Apotex in Court File No. T-1548-06 claiming that Apotex had infringed certain claims of the 196 Patent (the Perindopril Action). Apotex has defended the claim by Statement of Defence and Counterclaim wherein it denies infringing the 196 Patent, and challenges the validity of the patent on various grounds including: (i) the agreement which settled the conflict pleadings and resulted in the 196 Patent was contrary to the *Competition Act*, R.S.C. 1985, c. C-34; (ii) the certificates of correction issued in respect of the 196 Patent were issued contrary to s. 8 of the *Patent Act*; and, (iii) Schering, not Servier, was the first to invent the 196 Patent.

C. *T-161-07: the Ramipril Action*

[11] By Statement of Claim dated January 26, 2007, Schering, Sanofi-Aventis Canada (Sanofi Canada) and Sanofi Germany (collectively referred to with Sanofi Canada as Sanofi) commenced an action against Apotex Inc., alleging that Apotex Inc. infringed the 206 Patent (the Ramipril Action). Apotex Inc. has defended the claim by Statement of Defence and Counterclaim, in which it denies infringing the 206 Patent and challenges the validity of the patent on various grounds, including an allegation that the agreement which settled the conflict pleadings and resulted in the 206 Patent was contrary to the *Competition Act*.

D. *Procedural History in the Perindopril Action*

[12] The Perindopril Action continued through the summer of 2007. Affidavits of documents were served and examinations for discovery of the parties' representatives were conducted. During the examination of Servier's representatives, Apotex sought information and documents pertaining to the prosecution of the 093 Application, the conflict proceedings before the Commissioner and the Federal Court, and communications pertaining to the settlement of the conflict proceedings. Servier objected to answer questions on these topics on various grounds, including privilege and the existence of an implied undertaking, either of which would protect the documents from disclosure. Apotex moved to compel production of the information and documents. By Order of Prothonotary Aronovitch dated July 17, 2007, Apotex's motion was dismissed (the July 17 Order) and subsequently affirmed on appeal by Order of this Court dated September 11, 2007 (the September 11 Order).

[13] Of direct relevance to the subpoenas and the motions now before me, Prothonotary Aronovitch, in the July 17 Order, while maintaining the privileged and confidential nature of the sought-after information, required Servier to produce logs listing Ogilvy Renault's and Servier's files relating to the 093 Application prosecution and settlement.

E. *The Joinder Motions of Sanofi Germany and Schering*

[14] By Notice of Motion dated August 17, 2007, Sanofi Germany sought to be added as a Defendant by Counterclaim to the Perindopril Action. Schering filed a similar Notice of Motion on November 12, 2007. The motions were opposed by both Servier and Apotex. This Court dismissed both motions on November 19, 2007 (*Laboratoires Servier v. Apotex Inc.*, 2007 FC 1210).

F. *The Subpoenas*

[15] On February 18, 2008, the subpoenas which are the subject of the motions before this Court were issued, pursuant to r. 41(1) of the *Federal Courts Rules*, S.O.R./98-106, to the following persons:

1. The Servier Witnesses, consisting of:

    (a) Mr. J. Nelson Landry, who acted as legal advisor and as patent agent to ADIR in respect of the prosecution of the 093 Application, the conflict proceedings, the resulting settlement and issuance of the 196 Patent, and two

certificates of correction for claim 5 of the 196 Patent (Mr. Landry is now counsel with the Ogilvy Renault law firm and, while not counsel of record in the Perindopril Action, has participated in some legal matters related to this action);

(b) Ms. Liliane Benhamou, who was employed as Mr. Landry's assistant during the material times described above; and

(c) Ms. France Côté, who acted as a patent agent to Servier in respect of the 093 Application.

2. The Schering Witnesses, consisting of Mr. Anthony Creber and Ms. Jennifer Wilkie, both of whom are counsel of record to Schering in the Ramipril Action and acted as solicitors and patent agents for Schering in the conflict proceedings and resulting settlement; and

3. The Sanofi Witnesses, consisting of Mr. H. Roger Hart and Mr. Andrew I. McIntosh, who acted as solicitors and patent agents for the predecessors to Sanofi, the third party involved in the conflict proceedings and resulting settlement.

[16] In each subpoena, the proposed witness is required to bring with him or her documents that are described in very broad terms. Generally speaking, each of the Schering Witnesses and the Sanofi Witnesses is required to bring "all things normally understood to be documents" as may be relevant to the conflict proceedings and the settlement.

[17] Mr. Landry's subpoena contains, in addition to the same general description of documents noted above, a requirement to bring two lists of documents set out in Schedule A and B to the subpoena. Schedules A and B are the logs of privileged documents provided by Servier to Apotex pursuant to the July 17 Order. Mr. Landry is also required to bring documents related to the translation of the claims of the 196 Patent and the corrections to claim 5 of the 196 Patent.

[18] Each of Ms. Benhamou and Ms. Côté are required to bring documents related to the translation and correction of the 196 Patent.

III. Analysis

A. *General Principles*

[19] The parties are in agreement that the general test that applies when quashing a subpoena was described by Justice Blais, in *Zundel (Re)*, 2004 FC 798 at paras. 5-7:

> The case law on subpoenas shows that there are two main considerations which apply to a motion to quash a subpoena: 1) Is there a privilege or other legal rule which applies such that the witness should not be compelled to testify?; (e.g. Samson Indian Nation and Band v. Canada (Minister of Indian Affairs and Northern Development), [2003] F.C.J. No. 1238); 2) Is the evidence from the

> witnesses subpoenaed relevant and significant in regard to the issues the Court must decide? (e.g. Jaballah (Re), [2001] F.C.J. No. 1748; Merck & Co. v. Apotex Inc., [1998] F.C.J. No. 294)
>
> Privilege will apply for example in the case of Parliamentary immunity while Parliament is in session (Samson Indian Band, supra), or in the case of solicitor-client privilege, although an attorney acting in a managerial capacity may well be called upon to testify (Zarzour v. Canada, [2001] F.C.J. No. 123).
>
> As to determining whether the evidence to be presented will be useful to the trial judge, courts will be reluctant to prevent parties from calling the evidence the parties feel they need, but courts generally will not allow fishing expeditions. Thus, if one party moves to quash the subpoena, it must show the lack of relevance or significance of the evidence the party that has issued the subpoena intends to produce. Obviously, the judge who decides whether or not to quash the subpoena is not deciding on the weight to be given to such evidence, which is to be determined by the trier of fact (Stevens v. Canada (Attorney General), [2004] F.C.J. No. 98).

[20] Other jurisprudence reinforces the notion that a subpoena must not be a fishing expedition (see, for example, *Merck & Co. v. Apotex Inc.*, [1998] F.C.J. No. 294 at paras. 12-13 (T.D.) (QL) [*Merck*]; *Jaballah (Re)*, 2001 FCT 1287 at para. 13).

[21] A subpoena may be quashed as being an abuse of process. I note Justice MacKay's holding in *Merck*, above at paras. 12-13, in this regard, wherein he indicated that the Court may be willing to quash a subpoena when it constitutes, or comes close to being, an abuse of process.

[22] The parties disagree on who bears the burden of proof on a motion to quash a subpoena. On the basis of the words of Justice Blais in *Zundel (Re)*, above, Apotex asserts that the moving parties must satisfy the Court that the sought-after information is not relevant or significant. The moving parties assert that the burden is on Apotex to demonstrate the relevance and significance of the

sought-after testimony and documents. On the facts of this case, where the subpoenas are being issued to lawyers and where the issue of privilege is prominent, I prefer the views of the moving parties.

[23] Particularly helpful on this question of burden is the Ontario Court of Appeal decision in *R. v. Harris* (1994), 93 C.C.C. (3d) 478 (Ont. C.A.). In that case, the accused sought to subpoena Crown counsel. In overturning the motions court judge's decision to permit the subpoena to stand, the Court adopted the words of Justice Craig in *R. v. Stupp* (1982), 70 C.C.C. (2d) 107 at 121 (H.C.J.), where he said:

> In my opinion, when a subpoena or the right to call a witness is challenged as here, it is not sufficient for the party proposing to call the witness to merely allege that the witness can give material evidence; but rather the onus is on the accused in this case to establish that it is likely that Brian Johnston can give material evidence. That is particularly applicable where, as here, the accused takes the extraordinary step of seeking to call Crown counsel as a witness.
>
> . . .
>
> In my opinion, an accused person should not be permitted to call Crown counsel to conduct a fishing expedition or to examine in the hope that something might turn up that would assist him on the issue; but rather counsel must satisfy the judge that there is a real basis for believing that it is likely the witness can give material evidence.

[24] The Ontario Court of Appeal concluded by stating:

> In our view it is not sufficient to sustain the subpoena that the witness "may have" evidence material to the case. The burden was on the respondent to establish that Murphy was likely, or to put it another way, would probably have evidence material to the issues raised (*Harris*, above at para. 5).

[25] Although *Harris* and *Stupp* were decided in a criminal context, the test established in those cases has been cited in the civil context (see *Zundel (Re)*, above) and, in particular, where lawyers were the subject of subpoenas (see *Wexler v. Bhullar*, 2006 BCSC 1466, aff'd 2007 BCCA 273).

[26] A review of the jurisprudence provided by counsel for purposes of these motions is instructive. In the five hefty volumes of authorities provided to the Court, there were relatively few cases involving subpoenas to lawyers (*Seagrove Capital Corp. v. Leader Mining International Inc.*, [2000] S.J. No. 315 (Q.B.) (QL); *Wexler*, above, *Williams v. Stephenson*, [2005] B.C.J. No. 665 (S.C.) (QL); *Harris*, above, *Zarzour v. Canada*, [2001] F.C.J. No. 123 (T.D.) (QL); *R.A.R.B. v. British Columbia* [2001] B.C.J. No. 908 (S.C.) (QL)). Apotex cited no jurisprudence where lawyers had been successfully made the subject of subpoenas. With one exception (*Zarzour*, discussed below), all of the subpoenas in those cases were quashed. This, of course, does not mean that lawyers can never be required to testify in respect of matters where they acted as legal advisors. However, in my view, it highlights the care that should be taken by the Court before a subpoena is issued that could profoundly affect the special relationship between a lawyer and client. Only in the clearest of cases should subpoenas be permitted that would require a lawyer to testify in respect of matters where he or she was providing advice to a client.

[27] What might satisfy the Court that the issuance of a subpoena is warranted? One case where the Court confirmed a subpoena was *Zarzour*, above. In that case, one of three subpoenas was issued to a lawyer, Ms. Collin, who was in-house counsel with Correction Service Canada. Justice Pelletier, in refusing to quash the subpoena, noted that:

> …when legal counsel is involved in the management of an undertaking communication between counsel and the managers are not necessarily protected by professional secrecy. Such communications will not be privileged if counsel is consulted in her capacity as a manager rather than in her professional capacity – R. Campbell, [1999] 1 S.C.R., at para. 50:
>
> . . .
>
> The question of whether Ms. Collins was consulted in her capacity as a lawyer or as a manager is one of fact which the judge hearing the case will have to decide (*Zarzour*, above at paras. 8-9).

[28] Thus, if the party seeking the subpoena from a lawyer can provide some evidence that the lawyer undertook responsibilities or provided advice (such as, for example, as a patent agent) outside the solicitor-client relationship, the subpoena may be warranted. In particular, the courts have held, depending on the facts before them, that privilege might not arise where the lawyer who is also a patent agent acted in his or her capacity as a patent agent. (*Lumonics Research Ltd. v. Gould* (1983), 70 C.P.R. (2d) 11 at 15 (F.C.A.); *Montreal Fast Print (1975) Ltd. v. Polylok Corp*. (1983), 74 C.P.R. (2d) 34 (F.C.T.D.); *Whirlpool Corp. v. Camco Inc.* (1997), 72 C.P.R. (3d) 444 (F.C.T.D.)). In such situations, the trial judge will be in the best position to decide whether the lawyer was acting as a patent agent or as a solicitor.

[29] A further example where a subpoena may be warranted also relates to a situation where the relationship between lawyer and client falls outside the protection of solicitor-client privilege. Communications made to facilitate an offence are not covered by solicitor-client privilege (*Cadillac Fairview Corp. v. Canada (Commissioner of Competition)* (2003), 29 C.P.R. (4th) 33 at paras. 7-8, 10 (Ont. S.C.J.); *Dublin v. Montessori Jewish Day School of Toronto*, [2007] O.J. No. 1062 (S.C.J.) (QL)). The denial of privilege in such circumstances is based on the policy that the benefits of

maintaining the privilege are outweighed by the benefits to be derived from full disclosure of all circumstances relevant to resolving that issue, including those circumstances contained in documents which are usually protected from disclosure by reason of the solicitor-client privilege (see *Pax Management Ltd. v. Canadian Imperial Bank of Commerce*, [1987] 5 W.W.R. 252 at 261 (C.A.)).

B. *Application of Principles to the Motions before the Court*

[30] With these principles in mind, I turn to the facts before this Court in these motions.

(1) Is the potential testimony relevant?

[31] I begin with the issue of relevance, a question that affects all of the subpoenas. Based on my review of the jurisprudence, I am satisfied that the threshold to show relevance is not high. However, a party must do more than merely assert relevance (*Harris*, above at para. 4; *Zundel (Re)*, above, at para. 8).

[32] Turning now to the relevance of the subpoenaed witnesses before me, I find the moving parties' own affidavits confirm that most of the subpoenaed witnesses were involved in the settlement of the conflict proceedings leading up to the 196 Patent and the issuance of the subsequent certificates of correction:

1. Anthony Creber: paragraph 4 of the affidavit of John Norman confirms that Mr. Creber was counsel for Schering during the conflict proceedings.

2. J. Nelson Landry: paragraph 5 of the affidavit of Sylvie Jaguelin confirms that Mr. Landry was the patent agent for ADIR and Servier during 093 Application.

3. Liliane Benhamou and France Côté: paragraph 6 of the affidavit of Sylvie Jaguelin confirms Ms. Benhamou and Ms. Côté assisted Mr. Landry with the 093 Application.

4. Andrew I. McIntosh and H. Roger Hart: paragraph 9 of the written representations of Mr. McIntosh and Mr. Hart, as well as paragraph 5 of the affidavit of Mr. McIntosh, confirms these witnesses were counsel for Hoechst AG (later Sanofi Germany) during the conflict proceedings.

[33] Given that the issue of the conflict proceedings and certificates of correction are the subject of allegations in Apotex's Counterclaim, I am satisfied that the proposed witnesses might reasonably be supposed to have information which may directly or indirectly enable Apotex to advance its case or damage the case of Servier (*Reading & Bates Construction Co. v. Baker Energy Resources Corp.*, [1988] F.C.J. No. 1025 (T.D.) (QL)).

[34] However, relevance is not the only factor to be taken into account.

(2) Is Apotex conducting a fishing expedition?

[35] As discussed above, this Court has repeatedly held that it will not allow subpoenas to be used as a fishing expedition (*Zundel (Re),* above at para. 7; *Merck & Co. v. Apotex Inc.*, [1997] F.C.J. No. 1458 (T.D.) (QL); *Merck*, above at paras. 12-13). Apotex has cast a very broad net with its subpoenas. This is particularly so for the Sanofi Witnesses and the Schering Witnesses. For example, Mr. Creber is asked to bring with him and produce the following:

> all things normally understood to be documents...as may be relevant to the prosecution of [the 336 Application] on behalf of Schering Corporation, and the settlement of certain conflict proceedings involving the [336 Application and the 093 Application and the 453 Application] which took place before the Commissioner of Patents (the "Commissioner") and, subsequently, proceedings in the Federal Court, being consolidate[e]d Court File No. T-228-97, between Schering Corporation, Hoechst Aktiengellchaft, and the Plaintiff ADIR, each of whom had filed patent applications with the Commissioner.

[36] The subpoena to Mr. Landry relates to three issues in the proceeding – inventorship, the correction to claim 5 and the conspiracy allegations. With respect to the inventorship and conspiracy claims, the subpoena to Mr. Landry contains a list of documents but is, in effect, no less broad than the subpoenas to the Schering or Sanofi Witnesses. The only reason that Apotex is able to list the documents is because of the July 17 Order of Prothonotary Aronovitch that required Servier to provide a list of privileged documents related to the transactions. The existence of the logs in this case does not make the subpoena any less of a fishing exercise.

[37] I am persuaded that the subpoenas to the Schering Witnesses and the Sanofi Witnesses and to Mr. Landry, insofar as they purport to relate to the inventorship or conspiracy allegations, could be struck solely on the ground that they are overly broad and amount, in effect, to a fishing expedition.

[38] The situation with respect to the correction issue is different. Unlike the inventorship or conspiracy allegations, the certificate of correction issue relates to documents covering a limited number of discrete events (the translation of the Patent, the certificate of correction dated April 3, 2001, and the certificate of correction dated May 14, 2001) spanning a short and defined period of time. Further, the requirements set out in the subpoenas to Ms. Côté, Ms. Benhamou and Mr. Landry relating to these issues are clear and relatively well-delineated. Accordingly, I do not find these subpoenas, as they relate to the certificates of correction, to be overbroad.

(3) Is the information sought inadmissible due to privilege?

[39] The moving parties assert that the information sought through the subpoenas is subject to one or more of solicitor-client, litigation and settlement privilege. Further, they allege that the question of privilege has already been determined by the July 17 and September 11 Orders. In response, Apotex puts forward a number of arguments, which I summarize as follows:

- the question of privilege should only be determined at trial, even where (as here) a preliminary determination of admissibility has been made during the discovery

process (*William Allan Real Estate Co. v. Robichaud*, [1990] O.J. No. 41 (H.C.) (QL));

- privilege does not apply where the communications are made for the purpose of obtaining legal advice to facilitate the commission of an offence under the *Competition Act*; and

- privilege does not attach where the solicitor is acting in the capacity of patent agent.

[40] I agree with Apotex that the legal principle of *res judicata*, as set out by the Supreme Court in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para. 25, may not be directly applicable. For example, none of the subpoenaed witnesses were parties to any earlier proceeding in the Perindopril Action. However, the findings of Prothonotary Aronovitch in the July 17 Order and the subsequent actions of the parties are, in my view, relevant in determining whether the subpoenas should be quashed.

[41] In finding that documents related to the earlier prosecution and settlement were privileged, Prothonotary Aronovitch (and this Court in the subsequent appeal) directed her mind to the same question of privilege that is before this Court on these motions. It would be inconsistent for this Court to now hold that, as a defined category, the documents in the possession of Servier are not privileged.

[42] More importantly, nothing has changed since the July 17 Order, beyond the fact that Servier has supplied detailed logs of the documents. The case of *William Allan Real Estate*, above is distinguishable on this basis. In that case, Justice Arbour, as she then was, found that a pre-trial ruling that a document ought not to be disclosed during discovery, on the basis of privilege, did not constitute a final decision on admissibility at trial. However, in *William Allan Real Estate*, the Court was dealing with one document in respect of which *viva voce* and more extensive evidence was presented at trial. Here, I have nothing before me to indicate that the facts upon which Prothonotary Aronovitch made her determination have changed. Privilege was found to apply on July 17, 2007; nothing has been presented by Apotex to persuade me that it might not apply now.

[43] There are three separate grounds of privilege that may be applicable to some or all of the information being pursued by the subpoenas: solicitor-client privilege; settlement privilege; and litigation privilege. At this point in time, based on the evidence before me, I am of the view that it is likely that all of the information sought (other than, possibly, some of the information related to the corrections of the 196 Patent) is caught by one or more of the grounds for asserting privilege and does not fall within any exception.

[44] In this action, Apotex is asserting that the parties entered into the settlement for the purpose of eliminating competition in the market for ACE inhibitors, contrary to the *Competition Act*. Thus, Apotex argues, the communications with their lawyers cannot be protected as privileged. On the evidence before me, I cannot reach that conclusion. While I would agree with Apotex that privilege may be denied in situations where there is evidence of the commission of an offence, in these motions, there is no evidence beyond the bald assertions in Apotex's pleadings that there has been

an offence. More that such assertions are required before privilege will be displaced. In this regard, I refer to the British Columbia Court of Appeal decision in *Pax,* above, where the Court adopted the test set out by Viscount Finlay in *O'Rourke v. Darbishire and Others* [1920], A.C. 581, at 604:

> If the communications to the solicitor were for the purpose of obtaining professional advice, there must be, in order to get rid of privilege, not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact. It is with reference to cases of this kind that it can be correctly said that the Court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The Court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications. [Emphasis added.]

[45] On the record before me, there is insufficient evidence to demonstrate that the allegations of conspiracy are made honestly and with sufficient probability of their truth to disallow the privilege.

[46] For these reasons, I will quash the subpoenas of the Schering Witnesses and the Sanofi Witnesses in their entirety. I will also quash the subpoena of Mr. Landry insofar as it relates to the prosecution of the 093 Application before the Patent Office and the Commissioner, the conflict proceedings and the settlement.

(4) Should the subpoenas issued to the Servier Witnesses stand, in part?

[47] The issue of privilege with respect to the subpoenas of the Servier Witnesses is not so clear.

[48] First, with respect to Mr. Landry, recent responses by Servier to questions raised in discovery conducted January 22, 2008, state unequivocally that Mr. Landry played some role in an alleged “clerical error” and in “handwriting” that appears on a produced document. Thus, as in *Zarzour*, above, there is evidence before me that suggests that Mr. Landry may have testimony and documents that are not subject to privilege because they arise in the context of his capacity as a patent agent. Accordingly, I am prepared to allow the subpoena of Mr. Landry to stand to a limited extent.

[49] I note that at this stage, we simply do not know, with any certainty, what will be asked of Mr. Landry concerning the corrections. I wish to be clear that my conclusion on Mr. Landry’s subpoena does not, of course, remove the right of Servier to object to the admissibility of certain evidence that may be provided by Mr. Landry.

[50] The situation with respect to Ms. Benhamou and Ms. Côté is different. Apotex provided me with no evidence of their individual roles in the translation and correction beyond a general statement of their duties at the relevant time. These subpoenas will be quashed.

IV. Conclusion

[51] In conclusion, the subpoenas of the Schering and Sanofi Witnesses will be quashed with costs to the moving parties. Although the Schering Witnesses requested an assessment of costs “at the highest scale”, I am not persuaded that higher costs are warranted.

[52] The subpoenas of Ms. Benhamou and Ms. Côté will be quashed. The subpoena of Mr. Landry will only be allowed insofar as it relates to the issues of the translation of and corrections to the 196 Patent. As Servier has been substantially but not entirely successful, costs will be awarded to Servier at 80% of the middle of column III of Tariff B.

ORDER

THIS COURT ORDERS that

1. The motions of: (a) Andrew I. McIntosh, H. Roger Hart, and Sanofi-Aventis Deutschland GmbH; and (b) Anthony Creber and Jennifer Wilkie are granted with costs and the motion of Servier is granted in part, with costs at 80% of the middle of column III of Tariff B;

2. The subpoenas issued to Andrew I. McIntosh, H. Roger Hart, Anthony Creber and Jennifer Wilkie are quashed without leave to amend;

3. The subpoenas of Liliane Benhamou and France Côté are quashed without leave to amend; and

4. Requirements 1 (a) (i) and (v) and all of requirements 1(b) and (c) of the subpoena of J. Nelson Landry are struck from the subpoena and the balance allowed to stand.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1548-06
STYLE OF CAUSE:	LES LABORATOIRES SERVIER ET AL **v.** APOTEX INC. ET AL
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	February 29, 2008
REASONS FOR ORDER:	SNIDER J.
DATED:	March 7, 2008

APPEARANCES:

Mrs. Judith Robinson Mr. Horia Bundaru	FOR THE PLAINTIFFS
Mr. Andrew Brodkin Mr. Ben Hackett Mr. Miles Hastie	FOR THE DEFENDANTS
Mr. David M. Paciocco Mr. Richard G. Dearden	FOR ANTHONY CREBER and JENNIFER WILKE
Mr. J. Sheldon Hamilton	FOR THE PLAINTIFF/DEFENDANTS BY COUNTERCLAIM SANOFI-AVENTIS CANADA INC. and SANOFI-AVENTIS DEUTSCHLAND GmbH in T-161-07

SOLICITORS OF RECORD:

OGILVY RENAULT LLP Montréal, Quebec	FOR THE PLAINTIFFS
GOODMANS LLP Toronto, Ontario	FOR THE DEFENDANTS

EDELSON AND ASSOCIATES Ottawa, Ontario	FOR ANTHONY CREBER and JENNIFER WILKIE
GOWLING LAFLEUR HENDERSON LLP Ottawa, Ontario	FOR ANTHONY CREBER and JENNIFER WILKIE

TAB 2

Federal Court | Cour fédérale

Date: 20101126

Docket: DES-7-08

Citation: 2010 FC 1193

Ottawa, Ontario, November 26, 2010

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (IRPA);

AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the IRPA;

AND IN THE MATTER OF Mohammed Zeki Mahjoub

REASONS FOR ORDER AND ORDER

[1] By notice of motion dated November 12, 2010, the Minister of Citizenship and Immigration and the Minister of Public Safety (the Ministers) seek:

(a) an Order quashing subpoenas issued on November 8, 2010 in this proceeding requiring the attendance of Richard Fadden, Stephen Rigby, The Hon. Diane Finley, the Hon. Stockwell Day, Ted Flanigan and Michael Duffy;

(b) an Order prohibiting the Respondent from seeking subpoenas in this matter without leave of the Court, to be obtained on notice to the Ministers;

(c) such other relief as counsel may request and the Court may permit.

[2] The Ministers' stated grounds for the motion are the following:

(a) It has not been demonstrated that the proposed witnesses are likely to give evidence that is relevant to the issues in this proceeding;

(b) the subpoenas issued to Richard Fadden and Stephen Rigby have been obtained in violation of the Court's order requiring the Respondent to provide notice of witnesses to be called, which constitutes an abuse of process;

(c) the Hon. Diane Finley, the Hon. Stockwell Day cannot be compelled to give evidence, as they are subject to Parliamentary privilege;

(d) Michael Duffy's proposed evidence is protected by solicitor/client and litigation privilege;

(e) the documents requested to be produced in the subpoenas include documents which the Court has ruled are properly the subject of another motion. It is abusive for the Respondent to issue subpoenas for the purpose of circumventing the Court's previous ruling;

(f) the information sought from the proposed witnesses is available on the public record without the need for subpoenas;

(g) the subpoenas and requests for documents in general constitute an impermissible fishing expedition;

(h) Rules 41 and 42 of the *Federal Courts Rules*;

(i) such further and other grounds as counsel may advise and this Honourable Court permit.

[3] The Ministers' motion record was served and filed on November 12, 2010, the Respondent record was served and filed on November 17, 2010, and the parties were heard on the motion on November 18, 2010, in Ottawa. Mr. Mahjoub attended via video conference.

[4] The Respondent contests the motion and contends that the subpoenas are properly issued and necessary for the purpose of adducing evidence in his outstanding motions and for his defence in the reasonableness proceeding.

[5] The matter was taken under reserve at the close of the hearing. Prior to the issuance of these reasons, counsel for the Ministers advised the Court that the Ministers were prepared to produce Mr. Paul Vrbanac as a witness to speak on behalf of the Canadian Security Intelligence Service (CSIS or the Service) and Mr. Brett Bush, as a witness to speak on behalf of the Canadian Border Services Agency (CBSA). The parties agreed that these two witnesses would be substituted for Mr. Richard Fadden, the Director of CSIS, and Mr. Stephen Rigby, President of the CBSA, who are currently under subpoena as witnesses on behalf of the CSIS and the CBSA, respectively. The parties further agreed to the attendance of these two witnesses. All other issues raised in the Ministers' motion to quash the subpoenas remain in dispute. I will now turn to address the remaining outstanding issues on the motion.

Issue

[6] Should the subpoenas *duces tecum* at issue be quashed?

The Law

[7] In *Laboratoires Servier v Apotex Inc*. 2008 FC 321, Justice Snider conducted a comprehensive and useful review of the jurisprudence and principles applicable when quashing a subpoena. I agree with the following articulation of the general test:

(a) Is there a privilege or other legal rule which applies such that the witness should not be compelled to testify? (*Re (Zündel)* 2004 FC 798); *Samson Indian Nation and Band v Canada* 2003 FC 975).

(b) Is the evidence from the witness subpoenaed relevant in regard to the issues the Court must decide? (*Jaballah (Re)* 2001 FCT 1287; *Merck & Co v Apotex* 1998 FCJ No. 294).

[8] The jurisprudence also teaches that while the threshold for relevance is low, a party must do more than merely assert relevance. It is not sufficient for the party calling the witness to simply state that the witness might have relevant evidence; rather, the party has to establish that it is likely that the witness will give relevant evidence, *Zündel Re*, 2004 FC 798.

[9] The Respondent contends that the onus is on the person challenging a subpoena to establish a lack of relevance and cites *Zündel*, above, in support of his argument. Upon review of the jurisprudence, I am of the view that the burden of proof remains with the party seeking to sustain the subpoena to establish that the witness would probably have evidence relevant to the issues raised before the Court. See: *Servier*, above, and *R. v Harris* (1994), 93 CCC (3d) 478 (Ont. CA).

Analysis

[10] I propose to deal with each subpoena in turn. In doing so, I will review the respective position of the parties.

Subpoenas issued to the Ministers

[11] The Hon. Diane Finley is currently the Minister of Human Resources and Skills Development. In 2008, she was the Minister of Citizenship and Immigration and signed the current certificate against Mr. Mahjoub. The Hon. Stockwell Day is the President of the Treasury Board and the Minister for the Asia-Pacific Gateway. In 2008, he was the Minister of Public Safety and Emergency Preparedness and signed the current certificate against Mr. Mahjoub.

[12] The Ministers argue that the Hon. Diane Finley and the Hon. Stockwell Day are subject to Parliamentary privilege and that their evidence is not relevant to the issues before the Court.

[13] Mr. Mahjoub does not dispute the existence of the privilege but contends that the scope of the privilege is unclear in Canadian law.

[14] The lack of clarity relates to whether the privilege applies during a recess of a session of Parliament; more specifically in this case, over the holiday adjournment in December. Counsel for Mr. Mahjoub acknowledge that the jurisprudence of this Court has indeed extended the scope of he privilege to the entire session of Parliament, but argues that this conclusion was made in the absence of consideration of the relevant circumstances surrounding the exceptional nature of the procedures in place for the recall of Parliament during such recesses.

[15] In my view, the law is settled. Parliamentary privilege will apply while Parliament is in session, even if not sitting. In *Samson Indian Nation and Band v Canada* 2003 FC 975, at paragraph 43, Justice Teitelbaum stated:

> I find that the privilege exists and has existed historically, and that it persists for the direction of a session, as opposed to the more narrow

> "sitting" advanced in *Telezone*. I agree with the words of Low J.A. in *Ainsworth*, at paragraph 56, and make them mine:
>
> > When Parliament is in session it can be called to sit at any time. When it is in session, it is assembled, whether actually sitting or not…The business of Parliament and the duties of parliamentarians are not at rest just because Parliament, during a session, is not physically sitting.

[16] There is no dispute that Parliament is currently in session. The Respondent seeks to have the Ministers appear before the Court in early January 2011, during which time Parliament is recessed for the holidays. I find that Parliamentary privilege applies during this period. As a consequence, the impugned subpoenas directed to the Hon. Diane Finley and the Hon. Stockwell Day will be quashed. Given this finding I need not address relevancy.

Subpoena issued to Michael Duffy

[17] Mr. Duffy is currently Senior General Counsel in the National Security Law, Public Safety Defence and Immigration Portfolio with the Department of Justice. On June 4, 2009, while he was employed as Senior General Counsel with CSIS legal Services, Mr. Duffy signed a letter to the Court meant to address developments in another certificate proceeding (DES-5-08, concerning Mr. Harkat). In that letter, issues relating to certain deficiencies in the disclosure of information regarding source matrices by the Service are addressed. The letter also indicates that this omission of relevant information may raise similar concerns relating to the integrity of other source matrices in outstanding certificate proceedings and even in the warrant application process.

[18] The Ministers argue that all of the proposed areas of examination of this witness fall within the ambit of solicitor/client or litigation privilege, because Mr. Duffy was employed by the Department of Justice as head of the Legal Services unit of the Service at the time he issued the letter, that is the period identified in his subpoena. The Ministers further submit that Mr. Duffy's evidence is not relevant or necessary to the proceedings. The Ministers argue that the circumstances leading up to Mr. Duffy's letter are the subject of public judgments in the *Harkat* case and that nothing prevents Mr. Mahjoub from reviewing the public record with respect to these events and to file information relevant to the within proceeding.

[19] Mr. Mahjoub argues that Mr. Duffy is a "material" witness for the defence since he signed the June 4, 2009, public letter wherein concerns are raised as to the reliability of the information and evidence in support of other outstanding security certificates. This disclosure constituted a waiver of the solicitor/client and litigation privileges. Mr. Mahjoub further submits that Mr. Duffy's evidence is relevant to the within proceeding, as it concerns the reliability of the information and evidence in support of all outstanding security certificates and therefore may have a direct impact on Mr. Mahjoub's case.

[20] Contrary to the Ministers' submissions, this letter is not a communication between a solicitor and a client. Rather, it is a public communication to the Court and accordingly no solicitor/ client or litigation privileges attaches.

[21] In my view, Mr. Duffy may be called as a witness in respect to the matters that are raised in his letter. I am satisfied that his evidence is likely to be relevant in regard to the issues before the

Court. Should questions arise that potentially engage issues of solicitor/client privilege, these will be dealt with at the hearing.

[22] The subpoena requires Mr. Duffy to bring with him and produce at the hearing the following documentation:

> All material, documents and information that you reviewed in preparation of your letter dated June 4, 2009 in respect of the review of human source matrices within CSIS relating to , in particular, security certificate cases.
>
> All material, documents relating to follow up actions taken in respect of CSIS practice and/or policy relating to all security certificate cases including the case of Mr. Mahjoub since June 4, 2009.

[23] In the circumstances of the within proceeding, the request is unreasonable. It is known to Public Counsel that the Ministers place no reliance on information tendered in private from human sources in support of their case against Mr. Mahjoub. Therefore information relating to human sources is not relevant. What is relevant is information that concerns other source matrices which may have an impact on all certificate proceedings. Mr. Duffy's evidence in this respect does not require the production of the requested materials relating to human sources, which are likely protected information in any event. Mr. Duffy will be required to produce documentation, if any, that relates to "follow up action" by the Service. Objections on solicitor/ client privilege, or litigation privilege regarding the production of any such documentation, will be dealt with at the hearing.

Subpoena issued to Ted Flanigan

[24] Mr. Flanigan is a former manager at CSIS and is now retired. In 2009, he was the Assistant Director of CSIS.

[25] The Ministers argue that Mr. Flanigan's evidence, as a retired CSIS official, is neither relevant nor necessary to the proceedings. Mr. Flanigan, while he was still working with CSIS, gave evidence in the *Charkaoui* certificate process and was cross-examined over two days on the Service's policies and practices. The Ministers submit that it is unnecessary to have a retired CSIS official attend to give evidence if there is a public record through which similar evidence can be tendered. The Ministers also argue that Mr. Flanigan is unlikely to have relevant information about the proposed areas of examination set out by Mr. Mahjoub and that a number of those areas are not relevant to this proceeding.

[26] Mr. Mahjoub argues that Mr. Flanigan is a competent witness from CSIS and is able to testify on the basis of his personal knowledge of pending security certificate cases and about facts related to Mr. Mahjoub's security certificate. Mr. Flanigan's position when employed by the Service as an Executive member and Assistant Director required a high level involvement dealing with the analysis and review of all the security certificate files. Mr. Mahjoub also points out that the CSIS witness provided by the Ministers for the reasonableness hearing, Mr. Guay, did not have the same involvement and personal knowledge of Mr. Mahjoub's file as Mr. Flanigan and that during his examination, Mr. Guay was unable to answer questions about the Classified Security Intelligence Report and about the manner by which it was compiled.

[27] No privilege is claimed in the case of Mr. Flanigan. The only issue is whether his evidence would be relevant in regard to the issues the Court must decide. I am satisfied, in the context of the within proceeding, and particularly in respect to the motion on abuse of process, that his evidence is likely to be relevant. Accordingly, the subpoena requiring his attendance as a witness in this proceeding will stand.

Subpoenas issued to Stephen Rigby and Richard Fadden

[28] By agreement between the parties, the attendance of Mr. Richard Fadden and Mr. Stephen Rigby will not be required. They are substituted by Mr. Paul Vrbanac and Mr. Brett Bush as stated above. Accordingly, the subpoenas issued for the attendance of Mr. Richard Fadden and Mr. Stephen Rigby, will be quashed. I will therefore not address the arguments raised relating to their attendance. However, the documents requested to be produced by the substituted witnesses is still contested and will be dealt with below.

[29] The Ministers' main argument is that the Respondent is attempting to obtain evidence, the disclosure of which is a matter currently before Prothonotary Aalto. The Ministers say that it is abusive to seek the production of the same documentation by way of a subpoena *duces tecum*, particularly when this Court already determined that it would not intervene.

[30] A review of the two subpeonas *duces tecum* at issue reveals that the documentation required to be produced at the hearing is essentially the same documentation ordered produced by Prothonotary Aalto in his November 3, 2010**,** reasons in the *Jaballah* matter. The related information, as it applies to Mr. Mahjoub, will be released to him within a week. While accepting

that the issue is resolved for the most part, counsel for Mr. Mahjoub, nevertheless contend that their request is broader in scope than the disclosure ordered by Prothonotary Aalto. I disagree. Should issues arise regarding a discreet document that is not otherwise produced, the Respondent may seek the Ministers' undertaking to produce such a document and the Court will resolve any dispute that may flow from such a request. The documentation requested is essentially the same documentation to be disclosed as a result of a separate proceeding. It is improper to seek to obtain the same documentation by way of subpoena *duces tecum*. As a consequence, the substituted witnesses will not be required to produce at the hearing the documents requested in the subpoenas. This finding is also applicable to Mr. Flanigan.

[31] The Ministers also seek an Order prohibiting the Respondent from seeking subpoenas in this matter without leave of the Court, to be obtained on notice to the Ministers. The time lines set for the filing of the Respondent's witness list has expired. Any subpoenas required for the attendance of the Respondent's witnesses should have issued by now. Consequently, any further subpoenas may only issue with leave of the Court on notice to the Ministers.

Conclusion

[32] For the above reasons, the subpoenas issued to the Hon. Diane Finley, the Hon. Stockwell Day, Mr. Richard Fadden and Mr. Stephen Rigby will be quashed. The subpoena issued to Mr. Flanigan is proper and he can be called to give evidence in the court hearing of this proceeding. However, as is the case with Mr. Paul Vrbanac and Mr. Brett Bush, he need not produce the documentary evidence requested in the subpoena. Mr. Duffy may be called as a witness and shall

produce only documentation relating to the "follow up actions" of the Service referred to in the subpoena.

ORDER

THIS COURT ORDERS that:

1. The motion is allowed in part;

2. The subpoenas *duces tecum* directed to the Hon. Diane Finley, the Hon. Stockwell Day, Mr. Richard Fadden and Mr. Stephen Rigby are quashed;

3. The subpoena *duces tecum* directed to Mr. Duffy will stand, however he is required to produce at the hearing only documentation relating to the "follow up actions" of the Service referred to in the subpoena;

4. The subpoena directed to Mr. Flanigan will stand and, as in the case of Mr. Paul Vrbanac and Mr. Brett Bush, the substituted witnesses for Director Fadden and President Rigby, he need not produce at the hearing the documentation requested in the subpoena.

5. Any further subpoenas in this proceeding may only issue with leave of the Court on notice to the Ministers.

"Edmond P. Blanchard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-7-08
STYLE OF CAUSE:	The Minister of Citizenship and Immigration and The Minister of Public Safety v. Mohamed Zeki Mahjoub
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING BY TELECONFERENCE:	November 18, 2010
REASONS FOR ORDER:	BLANCHARD J.
DATED:	November 26, 2010

APPEARANCES:

Mr. David Tyndale Mr. Toby Hoffmann Mr. Marcel Larouche Ms. Dominique Castagne Ms. Erin Bodkin Ms. Rhonda Marquis Ms. Sharon Stewart-Guthrie Mr. Daniel Enegel Ms. Jocelyn Espejo Clarke	FOR THE APPLICANTS
Ms. Johanne Doyon Ms. Lucie Joncas Mr. Yavar Hameed Mr. David Kolinsky	FOR THE RESPONDENT
Mr. Gordon Cameron Mr. Anil Kapoor	SPECIAL ADVOCATES

SOLICITORS OF RECORD:

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Doyon & Associés Inc. Desrosiers, Joncas, Massicotte Hameed & Farrokhzad Mr. David J.M. Kolinsky Barrister & Solicitor	FOR THE RESPONDENT
Mr. Gordon Cameron Mr. Anil Kapoor	FOR THE SPECIAL ADVOCATES

TAB 3

Federal Court

Cour fédérale

04 188 031

04 188 031

Date: 20040623

Docket: DES-2-03

Citation: 2004 FC 798

Ottawa, Ontario, June 23, 2004

Present: **The Honourable Mr. Justice Blais**

IN THE MATTER OF a certificate signed pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("Act");

AND IN THE MATTER OF the Referral of that certificate of the Federal Court of Canada pursuant to subsection 77(1), sections 78 and 80 of the Act;

AND IN THE MATTER OF ERNST ZÜNDEL

REASONS FOR ORDER AND ORDER

[1] Mr. Zündel presented a motion on Friday, April 30, 2004 in the course of the hearing being held pursuant to section 80 of the Act on the reasonableness of the security certificate issued by the Ministers against Mr. Zündel. Mr. Zündel sought a declaration that leave is not required for issuance of subpoenas in the proceedings. In the alternative, Mr. Zündel sought an order dispensing with any requirement for leave under Rule 41(4)c) of the *Federal Court Rules, 1998* (Rules) or, in the alternative again, that subpoenas be issued *nunc pro tunc* requiring the

following people to attend this Court on the dates indicated on the subpoena: Mr. Keith Landy, President, Canadian Jewish Congress (CJC); Mr. Frank Dimant, Executive Vice-President, B'Nai Brith Canada; Mr. John Joseph Farrell; Mr. Andrew Mitrovica.

[2] Subpoenas have issued for those four witnesses. One witness, Mr. Farrell, apparently refused service of the subpoena. The other three witnesses have moved to quash the subpoenas, first on the basis of their validity, having not been issued under Rule 41(4)c) of the Rules, then on the basis that the witnesses did not have material evidence to provide to the Court.

[3] An additional witness, the Honourable Regional Senior Justice Marshall of the Ontario Court of Justice, had initially accepted to be a witness for Mr. Zündel. She now moves to have the subpoena quashed.

ISSUES

[4] 1. Should the subpoenas that have issued be quashed?

2. Must leave be granted to issue a subpoena in these proceedings?

ANALYSIS

Grounds for quashing a subpoena

[5] The case law on subpoenas shows that there are two main considerations which apply to a motion to quash a subpoena: 1) Is there a privilege or other legal rule which applies such that the witness should not be compelled to testify?; (e.g. *Samson Indian Nation and Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2003] F.C.J. No. 1238); 2) Is the evidence from the witnesses subpoenaed relevant and significant in regard to the issues the Court must decide? (e.g. *Jaballah (Re)*, [2001] F.C.J. No. 1748; *Merck & Co. v. Apotex Inc.*, [1998] F.C.J. No. 294)

[6] Privilege will apply for example in the case of Parliamentary immunity while Parliament is in session (*Samson Indian Band*, *supra*), or in the case of solicitor-client privilege, although an attorney acting in a managerial capacity may well be called upon to testify (*Zarzour v. Canada*, [2001] F.C.J. No. 123).

[7] As to determining whether the evidence to be presented will be useful to the trial judge, courts will be reluctant to prevent parties from calling the evidence the parties feel they need, but courts generally will not allow fishing expeditions. Thus, if one party moves to quash the subpoena, it must show the lack of relevance or

significance of the evidence the party that has issued the subpoena intends to produce. Obviously, the judge who decides whether or not to quash the subpoena is not deciding on the weight to be given to such evidence, which is to be determined by the trier of fact (*Stevens v. Canada (Attorney General)*, [2004] F.C.J. No. 98).

[8] In *R. v. Harris*, [1994] O.J. No. 1875 (Ont. C.A.), the Ontario Court of Appeal ruled that it was not sufficient for the party calling the witness to simply state that the witness might have material evidence; rather, the party had to establish that it was likely that the witness would give material evidence. In that case, the Court weighed the respective affidavits of the parties: on the one hand, the affidavit was that of the secretary of the legal firm that was representing the accused who had subpoenaed Crown counsel, who stated that she had been told that the evidence would be relevant to the alleged good faith of the police officers; on the other, the affidavit of the witness subpoenaed was that he had no material evidence to give. The first affidavit was pure hearsay and highly speculative, and thus the subpoena was quashed.

[9] In *Nelson v. Canada (Minister of Customs and Revenue Agency)*, [2001] F.C.J. No. 1220, Mr. Nelson sought to subpoena a number of ministers, including the Prime Minister, in his action against the Minister of the Customs and Revenue

Agency. The motion was dismissed because there was no evidence from the supporting material that any of these persons had been in any way involved in the events giving rise to the action.

[10] Thus the criterion is one of relevance and materiality of the evidence to be provided by the prospective witness.

Subpoenas at issue

Mr. Keith Landy, President, Canadian Jewish Congress

Mr. Frank Dimant, Executive Vice-President, B'Nai Brith Canada

[11] As the same issues are raised in regards to these two subpoenas, I will address them jointly.

[12] Mr. Landy and Mr. Dimant were each served with a subpoena that they attend court to give evidence and bring with them any and all documents dated January 1, 2003 and after, in any way related to Mr. Zündel, CSIS, or any meeting with any agent of the Federal or Ontario governments related to Ernst Zündel.

[13] Both have filed a motion to quash the subpoena to testify in the present proceedings, on the basis that the subpoena does not comply with the Rules, that

the evidence sought is neither relevant nor necessary to this proceeding, and that the subpoena is overbroad in scope and an abuse of process.

[14] The test is whether Mr. Landy or Mr. Dimant is likely to provide any evidence which would help the Court in its determination of the reasonableness of the certificate. Much of the evidence which either is likely to give is already part of the public domain: the CJC and B'nai Brith have many times called for Mr. Zündel's deportation, and expressed publicly their dismay at seeing Mr. Zündel come back from the United States and apply for refugee status.

[15] Lobbying ministers is a legitimate exercise in an open and democratic society such as Canada. Anyone has the opportunity to lobby any minister at any time and make his or her views known. In this case, the only evidence that was provided concerned the public lobbying by both Mr. Landy's organization and Mr. Dimant's organization. They met with the Ministers, they issued press releases.

[16] The CJC and B'nai Brith have been rather vocal about this matter, so that there is little to be gained from Mr. Landy's or Mr. Dimant's testimony in this regard. They would not be able to testify as to the true influence the CJC or B'nai Brith may have had on the government, since only the decision-makers (in this case, the Ministers) know how the decision was made.

[17] It appears Mr. Zündel is attempting to show that irrelevant considerations were taken into account in the Ministers' decision to issue the security certificate, related to the pressures exerted by Mr. Landy, Mr. Dimant and their respective organizations. We have evidence that the CJC and B'nai Brith have expressed strong views to the Ministers, but no evidence that they provided any material or any evidence.

[18] In *Jaballah (Re)*, [2001] F.C.J. No. 1748, Mr. Jaballah's counsel sought to have the Ministers testify on the decision-making process which led to issuing a second security certificate against Mr. Jaballah, after the first one had been declared unreasonable by Mr. Justice Cullen (*Canada (Minister of Citizenship and Immigration) v. Jaballah*, [1999] F.C.J. No. 1681). Mr. Justice MacKay clearly stated that probing the motives of the Ministers in the exercise of their ministerial discretion was not proper, nor relevant, nor useful.

> ¶ 13 In my opinion, questioning the background knowledge or intent of the Ministers concerned at the time of their decision to issue the second certificate would merely be a fishing expedition. I am not persuaded that the evidence suggested by counsel is relevant to the determination this Court must make under subparagraph 40.1(4)(d) to determine whether the certificate filed by the Minister and the Solicitor General is reasonable on the basis of the evidence and information available to ... the designated judge. ...
>
> ¶ 14 The signature and filing of the certificate by the Ministers was done in the exercise of ministerial discretion. These were administrative actions undertaken in the discharge of statutory responsibilities vested by Parliament, in the interests of security of the state.

[19] The Ministers made the decision to issue the certificate based on all the evidence that was before them. That decision has been referred to this Court to decide on its reasonableness. The intent or motives of the Ministers is of no interest to this Court. The certificate stands or falls on the strength of the evidence supporting it.

[20] Clearly, the subpoena is too onerous in terms of production of notes and documents. Moreover, I have not been convinced that Mr. Landy or Mr. Dimant would be able to shed any new light on the reasonableness of the Ministers' decision. The intervention of the CJC and B'nai Brith has been public and consistent. It is clear that pressure has been exerted by the two organizations, both in public statements and private meetings. This, to me, has nothing to do with the reasonableness of the certificate, nor with whether Mr. Zündel presents a danger to Canadian society. The CJC and B'nai Brith have their own opinion on the matter; the least that can be said is that it is already well-known, as well as the reasons for it.

[21] Mr. Zündel's counsel was unable to specify what questions he would ask of these witnesses. All the evidence presented in support of the subpoenas related to public activities and publicly acknowledged meetings with the Ministers. For lack of relevance to the present proceedings, and given that Mr. Zündel's counsel

could not specify what material evidence these witnesses would be able to provide, I do not believe Mr. Landy's or Mr. Dimant's testimony would help the Court in deciding on the reasonableness of the certificate. I would therefore allow the motion to quash the subpoenas.

Mr. Andrew Mitrovica, author and reporter

[22] Mr. Mitrovica wrote a book that was published in 2002, entitled *Covert Entry.* The book is based mainly on the revelations of one John Joseph Farrell, who purports to have been an agent of CSIS. The book exposes a number of failings within CSIS, and one passage in particular is of interest to Mr. Zündel, where Mr. Farrell tells Mr. Mitrovica that CSIS might have been aware that a bomb was being mailed to Mr. Zündel, and did nothing to stop it.

[23] Mr. Zündel wants to have Mr. Mitrovica testify on his knowledge of the relationship between CSIS and Mr. Zündel. Mr. Mitrovica counters that any information he would have would be hearsay, and moreover, that he would not want to betray the confidence of various sources that may have contributed to his research.

[24] The subpoena served on Mr. Mitrovica is also quite extensive; he is to bring with him all materials, documents, statements etc. in any way related to Ernst Zündel, John Joseph Farrell, CSIS or the book *Covert Entry*.

[25] Mr. Mitrovica argued that the subpoena should be quashed because it would require him to disclose confidential information and sources, contrary to rights recognized at common law and protected by section 2(b) of the *Canadian Charter of Rights and Freedoms*.

[26] These rights have recently been affirmed by a decision of the Superior Court of Justice of Ontario in *R. v. National Post*, [2004] O.J. No. 178, where Justice Benotto stated :

> ...the relationship between the reporter and the source was protected by the common law of privilege. Society's interest in protecting the confidentiality of the source outweighed the benefits of disclosing the document. To undermine the journalist-informant relationship and deprive the media of an important tool in the gathering of news would affect society as a whole.

[27] The test as to whether a journalist should be compelled to testify was set out in detail in *R. v. Hughes*, [1998] B.C.J. No. 1694 (B.C.S.C.), where Justice Romilly had to decide whether a journalist called to testify by a defendant in a sexual assault case could invoke the need to protect confidential sources. In that case, a publication ban was in place to protect the identity of the complainants. However, the judge ruled that the journalist could be called to testify on the content of the interviews he had held with the complainants, since their communication

with him amounted to consent to have the information disclosed, and the content of the interview was highly relevant to the defence of the defendant. In that case, Mr. Justice Romilly set out the factors to be considered by the court in deciding whether to compel a journalist to testify:

a) the relevance and materiality of the evidence to the issues at trial;

b) the necessity of the evidence to the accused's case and his ability to make full answer and defence;

c) the probative value of the evidence;

d) whether the evidence was available through other means, and if so, whether reasonable efforts had been made on the part of the accused to obtain evidence from that other source;

e) if the media's ability to gather and report the news will be impaired by being called to give evidence and if so, the degree to which it is impaired;

f) whether the necessity of the evidence in the case at hand outweighs the impairment, if any, of the role of the media; and

g) whether the impairment of the media's function can be minimized by confining the evidence adduced to only that which is necessary to the accused's case and his right to make full answer and defence.

[28] Mr. Zündel has argued that Mr. Mitrovica's testimony would be relevant because it relates to CSIS' alleged campaign against Mr. Zündel. If it can be shown that CSIS deliberately did not try to stop bomb mailings to Mr. Zündel, all of the evidence which is at the heart of the Ministers' decision would be cast in doubt.

[29] Mr. Zündel has not shown how Mr. Mitrovica's testifying would add anything to what Mr. Mitrovica has already written in his book. As Mr. Mitrovica states in his motion to quash the subpoena, any evidence he may provide will be hearsay. Although that in itself is not sufficient reason to set aside such evidence, given the terms of section 78 of the Act, it does go to the probative value of the evidence Mr. Mitrovica could provide, as well as its relevance to these proceedings. Mr. Mitrovica has already disclosed his main source of information for the book. For other sources, if any, Mr. Mitrovica could invoke his privilege as a journalist, and it seems to me he would be entitled to do so. The benefits of having Mr. Mitrovica testify seem rather doubtful, as against certain harm to the freedom of the press. Lord Denning, writing in *Senior v. Holdsworth*, [1975] 2 All ER 1009 (C.A.) stated the case for balancing the need to know with the need to not hamper the work of journalists (at page 1015):

> Next there is the special position of the journalist or reporter who gathers news of public concern. The courts respect his work and will not hamper it more than is necessary. They will seek to achieve a balance between these two matters. On the one hand there is the public interest which demands that the course of justice should not be impeded by the withholding of evidence. ... On the other hand, there is the public interest in seeing that confidences are respected and that newsmen are not hampered by fear of being compelled to disclose all the information which comes their way. ... As we said in this court as to oral testimony of a newsman:
>
> > The judge ... will not direct him to answer unless not only it is relevant but also it is a proper, and indeed, necessary question in the course of justice to be put and answered.

[30] Mr. Zündel's counsel did attempt to subpoena Mr. Farrell, Mr. Mitrovica's main source, but in vain. This is a separate matter which I will deal with when and if I have to do so. In the meantime, I believe Mr. Mitrovica has little material evidence to contribute beyond what has already been published. Compelling him to produce his notes and materials is unduly intrusive, and given the little probative value that I could attach to such hearsay materials, I see no need to disturb the journalistic privilege that attaches to Mr. Mitrovica's evidence.

[31] The events surrounding the bomb that was sent to Mr. Zündel, and the circumstances surrounding the individuals who were at one time suspects in this affair, are of concern to me, as I have directly stated in court. I do not think that Mr. Mitrovica is the person to shed light on these matters, and in the circumstances, I believe compelling Mr. Mitrovica to testify is unnecessary. Mr. Mitrovica has no direct evidence of CSIS activities, only what has been reported to him, the main source being someone who obviously, to put it very mildly and judging from the content of the book, is at odds with CSIS. For this reason, I do not believe Mr. Mitrovica can provide the Court with relevant evidence.

[32] The last point of the test, whether impairment can be minimized by limiting the scope of the evidence to be provided, was emphasized in Mr. Mitrovica's motion as an intermediate solution. However, for reasons already stated, I fail to

see what Mr. Mitrovica can contribute to these proceedings beyond what is already part of the public domain through his book.

[33] Mr. Mitrovica's motion is allowed, and the subpoena is quashed.

The Honourable Regional Senior Justice L. Marshall (Ontario Court of Justice)

[34] Almost twenty years ago, Justice Marshall, then an attorney, acted for Mr. Zündel. Justice Marshall was to testify on the deportation proceedings which the Canadian government undertook against Mr. Zündel in 1985 immediately after he was convicted of spreading false news, contrary to section 181 of the *Criminal Code*. Section 181 was eventually declared unconstitutional by the Supreme Court of Canada, and Mr. Zündel was acquitted, thus putting an end to the deportation process.

[35] Justice Marshall moved to have the subpoena quashed, on the basis that its issuance was not valid and that she did not have any material evidence to give in the instant proceeding.

[36] The test in this case as in the other motions to quash is the relevance and materiality of the evidence which would be provided by the witness. I do not

believe that the issue of solicitor-client privilege arises, since it is trite law that this privilege belongs to the client, not to the solicitor. If Mr. Zündel is willing to have Justice Marshall testify on certain issues, he thereby waives any privilege attaching to communications relating to those issues (*S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.,* [1983] B.C.J. No. 1499 (B.C.S.C)).

[37] Justice Marshall's main objection to the subpoena is the fact that she has no material evidence to provide related to the proceeding before me. Mr. Zündel has failed to convince me of the relevance of the deportation process almost 20 years ago, which was based on a conviction in a criminal court. The conviction has been voided, the deportation process halted, and the present certificate is an entirely different process, based on entirely different evidence.

[38] Mr. Zündel's counsel argued four reasons for having Justice Marshall testify: her opinion on the speed with which the government acted to have Mr. Zündel deported once he had been convicted; the fact that she had been assaulted when entering the court, at the time she was defending Mr. Zündel, by demonstrators allegedly belonging to a Jewish defence group; her expertise on how deportation is applied in the cases of convicted criminals who have appeared before her in court; and finally, most extraordinarily, Mr. Zündel' counsel would have Justice Marshall help me deal with my difficult task. The intention was to have her

testify on the fact that hearing evidence *in camera* is a very dangerous thing, that she herself, listening only to the examination-in-chief, would sometimes have been misled had it not been for the helpful cross-examination.

[39] Unfortunately for Mr. Zündel, all these arguments failed to convince me. Justice Marshall, as she mentioned in the transcript, had no particular expertise in immigration at the time of Mr. Zündel's deportation proceeding; thus, her opinion on how the government was acting at the time has little relevance. The fact that she was assaulted 19 years ago on entering the court has no relevance to the proceeding before me.

[40] As Justice Marshall's counsel rightly pointed out, the deportation process in the case of criminal convictions has nothing to do with the certificate proceeding we are dealing with. In addition, if the evidence is to show that deportation proceedings usually take years, I would think Mr. Zündel would be a prime example of how long these proceedings can stretch out. Deportation proceedings against Mr. Zündel began in 1985. The Supreme Court judgment acquitting Mr. Zündel came out in 1992. Mr. Zündel was never deported.

[41] Finally, as to the last purpose for which Justice Marshall would testify, I will state only this. I apply the legislation, I did not write it. I have stated many times in

the course of these proceedings how difficult it is to have to deal with secret evidence. I do not need to be reminded of the perils of *ex parte* proceedings, nor to be told how to carry out my judicial duties.

[42] I conclude that Justice Marshall has no material evidence that would be useful to this Court, and allow her motion to quash the subpoena.

Mr. John Joseph Farrell

[43] In the initial motion made to this Court by Mr. Zündel, reference is made to the subpoena issued to Mr. John Joseph Farrell. So far, there is no motion to challenge that subpoena. The motion pursuant to Rule 41(4)c) of the Rules is premature in this case.

[44] If Mr. Farrell appears before this Court, there will no doubt be some discussion on his testifying and the scope of the evidence. That will have to be determined. I would simply point out that in the case of Mr. Farrell, given what appears in Mr. Mitrovica's book, my first inclination would be to say that he has relevant evidence to provide to this Court, and I would be willing to hear him. All this is subject, of course, to any representations which may be made by the parties.

Need for leave of the Court to issue the subpoenas

[45] Given my decision on the motions to quash the subpoenas, it will not be necessary to address the issue of whether leave of the Court must be sought to issue such subpoenas.

[46] In the parties' written submissions, only one party has asked for costs of its motion. I believe that it is not appropriate to allow costs of any of the motions before the Court.

ORDER

IT IS ORDERED THAT:

The subpoenas issued to Mr. Landy, to Mr. Dimant, to Mr. Mitrovica and to the Honourable Justice Marshall are quashed.

There shall be no costs of these motions.

"Pierre Blais"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	DES-2-03
STYLE OF CAUSE:	In the matter of a certificate signed pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*Act*") And in the matter of the referral of that certificate to the Federal Court of Canada pursuant to subsection 77(1), sections 78 and 80 of the *Act;* And in the matter of Ernst Zündel
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	May 9, 16, 2003 July 28, 29, 30, 2003 September 23, 24, 2003 November 6, 7, 2003 December 10, 11, 2003 January 22, 23, 26, 27, 2004 February 9, 12, 18, 19, 2004 April 13, 14, 29, 30, 2004 May 4, 5, 2004
REASONS FOR ORDER AND ORDER:	The Honourable Mr. Justice Blais
DATED:	June 23, 2004

APPEARANCES:

Donald MacIntosh & Pamela Larmondin Department of Justice Toronto, Ontario	FOR THE MINISTER
Murray Rodych & Toby Hoffman Canadian Security Intelligence Service Legal Services Ottawa, Ontario	FOR THE SOLICITOR GENERAL

Peter Lindsay & Chi-Kun Shi Barristers and Solicitors Toronto, Ontario	FOR RESPONDENT
Marvin Kurz Dale Streiman & Kurz Barristers and Solicitors Brampton, Ontario	FOR MR. FRANK DIMANT
Brian MacLeod Rogers Barrister & Solicitor Toronto, Ontario	FOR MR. ANDREW MITROVICA
Paul D. Stern Stern & Landesman Barristers & Solicitors Toronto, Ontario	FOR JUSTICE MARSHALL
Judy L. Chan Blake, Cassels & Graydon LLP Barristes & Solicitors Toronto, Ontario	FOR MR. KEITH LANDY

TAB 4

Reference: *Commissioner of Competition v. Canada Pipe Company*, 2004 Comp. Trib. 5
File no.: CT2002006
Registry document no.: 0069

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: 20040303
Member: Blanchard J. (presiding)
Date of Reasons and Order: 20040310
Reasons and Order signed by: Blanchard J.

REASONS AND ORDER REGARDING COMMISSIONER'S MOTION TO QUASH SUBPOENAE *DUCES TECUM* DELIVERED TO WITNESSES

[1] The Commissioner of Competition (the "Commissioner") brings a motion to set aside subpoenae for the production of documents properly issued by the Competition Tribunal (the "Tribunal") on February 19, 2004, at the request of Canada Pipe Company Ltd. ("Canada Pipe"). These subpoenae direct all witnesses to produce

> . . . any and all documents provided by you or your employer to the Commissioner of Competition prior to August 21, 2003, whether you did so voluntarily or pursuant to a Court Order, as well as any documents received by you or your employer from the Commissioner relating to this matter.

[2] This motion gives rise to the following issues:

(a) Is Canada Pipe's entitlement to obtain production of relevant documents from third party witnesses *res judicata*?

(b) Should the subpoenae for the production of documents by third party witnesses issued by the Tribunal be set aside?

[3] The main point of contention between the parties is whether certain third party witnesses called by the Commissioner should be required to produce under the authority of a subpoena *duces tecum,* at the request of Canada Pipe, documents not relied on and otherwise not disclosed by the Commissioner. In my view, this question has not been determined in any pre-hearing ruling in this case. Previous motions in this case dealt only with the Commissioner's pre-hearing disclosure obligation under the new *Competition Tribunal Rules*, SOR/94-290, (the "Rules"). Since the same question has not previously been decided, the doctrine of *res judicata* cannot apply.

[4] Having read the written submissions of the parties and having heard the parties I conclude that the motion should be granted and the subpoenae *duces tecum* delivered by Canada Pipe to the Commissioner's witnesses will be quashed for the reasons set out below.

[5] The Federal Court of Canada has clearly stated that a broad, sweeping request for documents once a proceeding is underway is not an appropriate use of the subpoena *duces tecum*. In *Merck & Co. v. Apotex Inc.* (1998), 145 F.T.R. 303 at 306, Mackay J. held, after a review of the facts in that case and the request for production:

> . . . . the party seeking documentation, by too broadly describing what is desired, may be seen to be fishing in hopes of finding information relevant to the issues that concern it. That is not an appropriate use of the subpoena. . . .

[6] The subpoenae at issue direct witnesses to produce any and all documents provided or received by the witnesses, or the witnesses' employers, to and from the Commissioner prior to August 21, 2003. The subpoenae fail to limit the documents that must be produced and, in my view, are overly broad. In the circumstances of this case, where Canada Pipe attempted and failed to obtain further production of documents and persons by way of a pre-hearing motion

brought pursuant to paragraph 21(2)(d.1) of the Rules (see 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 dated January 23, 2004, [2004] C.C.T.D. No. 2), such broadly framed subpoenae are tantamount to an abuse of the Tribunal's process effectively circumventing an earlier ruling of the Tribunal.

[7] In *Commissioner of Competition v. Canada Pipe Company* (2003) C.C.T.D. No. 24, I held at paragraph 68 that:

> . . . the Rules provide a complete answer to questions concerning the disclosure obligations of the parties, which, in non-merger proceedings, is to list and produce for inspection all documents intended to be relied upon by the Commissioner during the hearing (paragraph 4.1(2)(*a*) and subsection 4.1(4) of the Rules). . .

The Rules have not since changed. It is axiomatic that documents not relied on by the Commissioner and which the Commissioner is not obligated to disclose pursuant to the disclosure obligations under the Rules, cannot be otherwise ordered produced at the hearing through the use of subpoenae *duces tecum.* Such a process would defeat the purpose and object of the recently amended Rules, which are to ensure that proceedings with respect to contested reviewable matters be dealt with as expeditiously and informally as possible while preserving fairness. In the present circumstances, to allow such broad subpoenae would lengthen the hearing considerably and would allow future respondents to simply argue that they should be entitled to disclosure of *all* documents by the Commissioner, as subpoenae *duces tecum* could be used to obtain these documents at the hearing. Allowing these subpoenae would also undermine the Tribunal's authority to oversee the evidentiary basis upon which its proceedings would be conducted, and would improperly extend the disclosure of documents beyond the reliance standard established by the Rules, and affirmed by the Tribunal.

[8] In the circumstances, Canada Pipe's intended use of the subpoenae *duces tecum* is inappropriate. Having failed to secure further production of documents through the pre-hearing rules governing disclosure, Canada Pipe cannot now obtain such disclosure through the use of subpoenae *duces tecum* during the hearing.

[9] Since the rendering of my January 23, 2004, decision denying further production of documents referred to above, there is no new material before me to establish a change in circumstances or to show that further production is desirable or warranted.

[10] These reasons are to be read solely with respect to the appropriateness of the subpoenae at issue and should not reflect on the propriety and scope of cross-examination.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[11] The Commissioner's motion is granted and the subpoenae *duces tecum* issued to the Commissioner's witnesses are quashed.

DATED at Ottawa this 10th day of March 2004.

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

(s) Edmond P. Blanchard

APPEARANCES:

For the applicant:

The Commissioner of Competition

Donald J. Rennie
Nicole D. Samson
Graham Law

For the respondent:

Canada Pipe Company Ltd.

Kent E. Thomson
James Doris
Milos Barutciski
Anita Banicevic
Davit D. Akman
Charles Tingley

TAB 5

Samson Indian Nation and Band v. Canada, 2003 FC 975 (CanLII), [2004] 1 FCR 556

Date:	2003-08-12
File number:	T-2022-89
Other citations:	[2003] FCJ No 1238 (QL) — 111 CRR (2d) 348 — 238 FTR 68
Citation:	Samson Indian Nation and Band v. Canada, 2003 FC 975 (CanLII), [2004] 1 FCR 556, <https://canlii.ca/t/g9q>, retrieved on 2022-10-24

T-2022-89

2003 FC 975

Chief Victor Buffalo acting on his own behalf and on behalf of the other members of the Samson Indian Nation and Band and **The Samson Indian Band and Nation** (*Plaintiffs*)

v.

Her Majesty the Queen in right of Canada, The Minister of Indian Affairs and Northern Development, and **the Minister of Finance** (*Defendants*)

and

Chief Jerome Morin acting on his own behalf as well as on behalf of all the Members of Enoch's Band of Indians and the residents thereof on and of Stony Plain Reserve No. 135 and **Emily Stoyka** and **Sara Schug** (*Interveners*)

Indexed as: Samson Indian Nation and Bandv. Canada (F.C.)

Federal Court, Teitelbaum J.--Calgary, May 12, 13, 14, 15, 16, 20, 21, 22, 23, 26, 27, 28 and August 12, 2003.

Constitutional Law -- Fundamental Principles -- Indian Band suing Canada for breach of trust regarding natural resources management -- Seeking leave to subpoena as witnesses Prime Minister (P.M.), Indian Affairs Minister -- Crown's position: neither could give relevant evidence, purpose of subpoena request to attract publicity to litigation, force P.M., Minister to debate Crown's position, policies -- Crown also arguing proposed witnesses protected by parliamentary privilege -- If Court finds privilege exists, may not review exercise thereof -- Question is whether privilege claimed is necessary for legislature to function -- Privileges constitutional in nature, form part of fundamental law of Canada -- Texts referred to for definition of parliamentary privilege -- Purposes of M.P.'s personal privileges -- S.C.C. having held, in this context, "privilege" denoting exemption from burden to which others are subject -- Legislative, constitutional framework for parliamentary privilege explained -- Parliament of Canada Act, s. 4 not ultra vires for failure to conform to Constitutional Act, 1867, s. 18, as amended -- In U.K., parliamentary privilege creature of convention, therefore little source material -- English text of 1796 said Members of Parliament (M.P.s) not to be prevented from attendance at Parliament by "trifling interruptions" -- Parliament has paramount right to M.P.'s attendance -- When privilege in effect -- In U.K., during 40 days before and after session and 40 days after dissolution -- 40-day rule obsolete due to advances in communication, transportation -- Privilege is for duration of, 14 days before, after session -- As privilege part of laws of Canada, not inconsistent with rule of law -- Canadian Bill of Rights, s. 2(e) inapplicable as concerns procedural fairness, could not support abrogation of parliamentary privilege -- As parliamentary privilege enjoys constitutional status, not subject to Charter -- International covenants not helpful herein -- Privilege claim may be made by Speaker, M.P.

Practice -- Subpoenas -- Federal Court Rules, 1998, r. 41(4) application for order granting Court Administrator leave to issue subpoenas to Prime Minister (P.M.), Indian Affairs Minister in litigation between Indian Band, Canada -- Leave necessary where, as here, witness resides more than 800 km from where required to attend -- Crown arguing neither witness could give relevant testimony, subpoena request to attract publicity, force P.M. to debate, explain Crown's position, policies -- Cost-benefit analysis -- Application denied for parliamentary privilege -- Canadian Bill of Rights, Charter, international covenants irrelevant herein.

This was an application for an order, under subsection 41(4) of the *Federal Court Rules, 1998*, granting this Court's Administrator leave to issue subpoenas to Prime Minister Chrétien and a Cabinet Minister to appear as witnesses at a trial. Under that provision, leave is required if the proposed witness resides more than 800 km from the place where the witness would have to attend. The Prime Minister and Minister reside more than 800 km from Calgary.

Applicant's position was that the two proposed witnesses could give important and relevant testimony in this case, in which the Samson Indian Band has sued Canada for breach of trust with respect to natural resources management and alleging conflict of interest. Applicant says that, during the last 25 years, the Prime Minister has significantly participated in Crown policy making in relation to the Band and the issues at trial. As for Minister Nault, he could give evidence on current Crown policy regarding the treaty relationship between the Band and the Crown and on other relevant matters. In applicant's submission, neither proposed witness enjoys parliamentary privilege against having to testify or that, if such privilege does exist, it is inconsistent with the rule of law, *Canadian Bill of Rights*, paragraph 2(*e*) and contrary to Charter, sections 7, 15 and *Constitution Act, 1982*, section 35. Applicant further mentioned the increasing role of international law in the Canadian constitutional framework. Should the privilege be found to exist, it ought to be accorded a narrow construction so as to apply only when Parliament is actually sitting.

The Crown denied that either proposed witness could give any relevant evidence and even suggested that the subpoena request is nothing more than an attempt to draw attention to this litigation thereby forcing the current Prime Minister and Indian Affairs Minister to offer explanations and to debate the Crown's historical and current legal position and policies. In addition, the Crown asserted that a cost-benefit analysis would reveal that any benefits of their testimony would be outweighed by its costs. Finally, it was submitted that the proposed witnesses are protected by parliamentary privilege not only whenever Parliament is in session but for 40 days prior to and following a session.

Held, the application should be denied.

The most important issue raised by this application was that of parliamentary privilege. The reasons for judgment of Lord Denman in the 1839 case, *Stockdale v. Hansard*, was authority for the proposition that once a court finds the privilege to exist and determines its extent, it may not review its exercise. That this is still good law in Canada was reaffirmed by our Supreme Court so recently as 1993 by its decision in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly).* McLachlin J. explained that the question is whether the privilege claimed is one necessary to the capacity of the legislature to function. These privileges are constitutional in nature as they form part of the fundamental law of our land. The courts are without power to review the correctness of a decision made pursuant to the privilege. Reference was made to various works for definitions of parliamentary privilege. It is explained in Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, that the "personal privileges of members are to enable them to freely attend in their places in Parliament, to guarantee them against restraint or intimidation in the discharge of their duties and to protect them in their freedom of speech in the debates in Parliament". In *New Brunswick Broadcasting*, McLachlin J. noted that, in this context, "privilege" denotes the legal exemption from some duty, burden, attendance or liability to which others are subject.

The legislative and constitutional framework for parliamentary privilege is found in the preamble and in section 18 of the *Constitution Act, 1867*. Section 18 provides that the privileges of Senate and House of Commons and members thereof shall be such as are defined by the Parliament of Canada but shall not exceed those enjoyed by members of the Commons House of Parliament of the United Kingdom.

Prior to considering the question whether the privilege claimed herein exists, it had to be determined whether Parliament has defined its privileges in accordance with *Constitution Act, 1867*, as amended in 1875, section 18. It was clear that Parliament had defined its privileges in 1867 when it imported into Canadian law all the privileges held by Parliament in the United Kingdom. Section 18 not only recognized inherent privileges but also allowed for the addition of statutory ones. Applicant's argument, that *Parliament of Canada Act*, section 4 is *ultra vires* for failure to conform to the amended language of section 18, was rejected. Nothing in section 4 is inconsistent with the amended section 18. The *Parliament of Canada Act*, enacted in 1868, tracked the language of section 18.

The next question was whether a privilege of being exempt from attending at court as witness whilst Parliament is in session, existed in the United Kingdom at the time of Confederation. In the United Kingdom, parliamentary privilege was a creature of convention and there is but little source material on the subject. But, in *Ainsworth Lumber Co. Ltd. v. Canada (Attorney General)*, the British Columbia Court of Appeal, citing the works of text writers, held that there does exist a parliamentary privilege exempting members from obeying subpoenas to attend at court when Parliament is in session. In Hatsell, *Precedents of Proceedings in the House of Commons*, third edition, published at London in 1796, it was written that members ought "not be prevented by trifling interruptions from their attendance on this important duty" and to that end should be exempted from certain duties and legal process "to which other citizens, not intrusted with this most valuable franchise, are by law obliged to pay obedience". Or, in the words of Maingot, Parliament has the paramount right to the attendance and service of its members. While there has, in Britain, been some debate on this subject, this historical privilege continues to exist there as well as in Canada.

As to when this privilege is in effect, several Canadian texts speak of "during a session"; none except Maingot makes reference to any period before or after a session. That author asserts that the privilege, as it does in the United Kingdom, extends for 40 days before and after a sessions as well as 40 days after a dissolution. That view was adopted by the Trial Division of the Prince Edward Island Supreme Court in *R. v. Brown* (2001), 2001 PESCTD 6 (CanLII), 197 Nfld. & P.E.I.R. 285. But, in an even more recent case, *Telezone Inc. v. Canada (Attorney General)*, [2003] O.J. No. 2543 (S.C.J.) (QL) Backhouse J. of the Ontario Supreme Court held the privilege to apply only whilst the Parliament is actually sitting and for 14 days after adjournment. In arriving at the 14-day period, the Judge referred to the preamble to the *Parliamentary Privilege Act, 1770*, an "Act for the further preventing Delays of Justice by reason of Privilege of Parliament". It was concluded that the privilege endures for the duration of a session since, when in session, Parliament can be called to sit at any time, and extends for 14 days before and after a session. The old 40-day rule is obsolete, given modern advances in transportation and communication. The old *Parliamentary Privilege Act, 1770* was irrelevant as its purpose was to abolish parliamentarians' immunity from legal action during parliamentary service.

None of the other arguments advanced by the applicant was valid. The privilege at issue is part of our laws and so not inconsistent with the rule of law principle. As for the *Canadian Bill of Rights*, the purpose of paragraph 2(*e*) is to ensure procedural fairness in the determination of an individual's rights and obligations. It could not support the abrogation of a parliamentary privilege. The Supreme Court of Canada has held that since parliamentary privilege enjoys constitutional status, it is not subject to the Charter. This Court having found that the privilege claimed herein is, pursuant to the necessity test, within Parliament's jurisdiction, a Charter review need not be proceeded with. Nor were any international covenants helpful in the disposition of this application.

An issue worthy of comment, though not raised by either side, was whether the claim of parliamentary privilege must be raised by the Speaker or can it be put forward by a Member of Parliament. The Court was of opinion that it can be asserted by either.

Parliament being now in session -- though not sitting -- the application for subpoenas had to be dismissed.

statutes and regulations judicially

considered

An Act to define the privileges, immunities and powers of the Senate and House of Commons, and to give summary protection to persons employed in the publication of Parliamentary Papers, 31 Vict., c. 23.

Canadian Bill of Rights, R.S.C., 1985, Appendix III, s. 2(*e*).

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 7, 15.

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], Preamble, s. 18 (as am. by R.S.C., 1985, Appendix II, No. 13).

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 35.

Federal Court Rules, 1998, SOR/98-106, r. 41(4).

Indian Act, R.S.C., 1985, c. I-5.

Parliament of Canada Act, R.S.C., 1985, c. P-1 , ss. 4, 5.

Parliamentary Privilege Act, 1770 (U.K.), 10 Geo. III, c. 50.

cases judicially considered

applied:

Stockdale v. Hansard (1839), 9 Ad. & E. 1; 112 E.R. 1112 (Q.B.); *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319; (1993), 118 N.S.R. (2d) 181; 100 D.L.R. (4th) 212; 13 C.R.R. (2d) 1; 146 N.R. 161; *Ainsworth Lumber Co. Ltd. v. Canada (Attorney General)* (2003), 2003 BCCA 239 (CanLII), 226 D.L.R. (4th) 93; [2003] 7 W.W.R. 715; 181 B.C.A.C. 256; 14 B.C.L.R. (4th) 302 (B.C.C.A.) (as to meaning of "sitting"); *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721; (1985), 19 D.L.R. (4th) 1; [1985] 4 W.W.R. 385; 35 Man. R. (2d) 83; 59 N.R. 321; *Harvey v. New Brunswick (Attorney General)*, 1996 CanLII 163 (SCC), [1996] 2 S.C.R. 876; (1996), 178 N.B.R. (2d) 161; 137 D.L.R. (4th) 142; 454 A.P.R. 161; 37 C.R.R. (2d) 189; 201 N.R. 1.

considered:

R. v. Brown (2001), 2001 PESCTD 6 (CanLII), 197 Nfld. & P.E.I.R. 285 (P.E.I.S.C.T.D.); *Regina v. Gamble & Boulton* (1851), 9 U.C.Q.B. 546; *Telezone Inc. v. Canada (Attorney General)*, [2003] O.J. No. 2543 (S.C.J.) (QL); *Ainsworth Lumber Co. Ltd. v. Canada (Attorney General)* (2003), 2003 BCCA 239 (CanLII), 226 D.L.R. (4th) 93; [2003] 7 W.W.R. 715; 181 B.C.A.C. 256; 14 B.C.L.R. (4th) 302 (B.C.C.A.) (as to duration of privilege).

referred to:

Canada (Attorney General) v. Central Cartage Co., 1990 CanLII 8009 (FCA), [1990] 2 F.C. 641; (1990), 71 D.L.R. (4th) 253; 45 Admin. L.R. 1; 109 N.R. 357 (C.A.).

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APPLICATION, under the *Federal Court Rules, 1998*, for leave to issue subpoenas to the Prime Minister and a Minister to attend court as witnesses. Application dismissed on ground of parliamentary privilege.

appearances:

James A. O'Reilly, Ed H. Molstad, Q.C., Peter W. Hutchins, Nathan J. Whitling and *David L. Sharko* for plaintiffs.
Alan D. Macleod, Q.C. and *Wendy K. McCallum* for defendants.
Brian R. Evernden for Attorney General of Canada.
Marvin R. V. Storrow, Q.C., Maria A. Morellato and *Joseph C. McArthur* for plaintiff in T-1254-92.

solicitors of record:

O'Reilly & Associés, Montréal, *Parlee McLaws LLP* and *Hutchins Soroko & Grant*, Montréal, for plaintiffs.
Macleod Dixon LLP, Calgary, for defendants.
Blake, Cassels & Graydon LLP, Vancouver, for plaintiff in T-1254-92.

The following are the reasons for order rendered in English by

Teitelbaum J.:

[1]The applicants, Samson Cree Nation (hereinafter Samson) apply for an order, pursuant to subsection 41(4) of the *Federal Court Rules, 1998* [SOR/98-106], granting leave to the Administrator of this Court to issue subpoenas for the appearance of the Right Honourable Jean Chrétien (hereinafter the Prime Minister) and the Honourable Robert D. Nault (hereinafter the Minister) as witnesses in the trial of this action.

[2]Subsection 41(4) provides as follows:

41. . . .

(4) No subpoena shall be issued without the leave of the Court

. . .

(*b*) to compel the appearance of a witness who resides more than 800 km from the place where the witness shall be required to attend under the subpoena;

In the case at bar, both the Prime Minister and the Minister reside more than 800 km from the place they shall be required to attend (Calgary) under the subpoena.

[3]In support of its application, Samson filed the affidavit of Florence M. Buffalo, sworn on February 28, 2003. Ms. Buffalo is an elected councillor of the Samson Cree Nation. The respondent Crown, for its part, filed the affidavit of Reinard Kohls, sworn March 17, 2003. Mr. Kohls is the Crown's deponent in the second phase of this trial, money management; he worked for the Department of Indian Affairs and Northern Development from 1956 to 1990, holding a number of different positions.

[4]Ms. Buffalo and Mr. Kohls were cross-examined on the contents of their respective affidavits, the former on April 1, 2003 and the latter on April 2, 2003.

[5]The parties presented the Court with very thorough and extensive materials and submissions. Indeed, oral submissions covered the better part of 12 days.

Applicant's Position

[6]Samson submits that the two proposed witnesses, the Prime Minister and Minister Nault, have relevant and important evidence to give relating to various issues in the trial (see attached Annex for paragraphs 8, 9, 10, 11, 12, and 16 of Ms. Buffalo's affidavit). Samson contends that the Prime Minister has had active and important participation over the past 25 years with respect to Crown policy and initiatives that relate to and affect Samson and the issues in this trial.

[7]With regard to Minister Nault, Samson submits that he has relevant evidence to offer this Court relating to the present position and policy of the Crown and the Department of Indian Affairs and Northern Development with respect to the treaty relationship between the Crown and Samson; the issue of the transfer of control of Samson moneys, held by the Crown in the Consolidated Revenue Fund, to Samson; the application of the *Indian Act* [R.S.C., 1985, c. I-5]; the implementation of the alleged inherent right of self-government; new legislative initiatives; and the issue of a higher rate of return.

[8]Samson also submits that neither proposed witness enjoys any parliamentary privilege that would exempt them from attending and giving evidence in legal proceedings. Alternatively, if such a privilege exists, Samson contends that it is no longer necessary and is inconsistent with the rule of law, 2(*e*) of the *Canadian Bill of Rights* [R.S.C., 1985, Appendix III], and is in breach of sections 7, 15 and 35* of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] . Samson also contends that to the extent that there is a continuing parliamentary privilege, it neglects the increasing place of international law and standards in the Canadian constitutional framework. Further, if such a privilege is found to exist and not be in breach of the rule of law, the *Canadian Bill of Rights*, or the Charter, Samson contends that it should be construed narrowly, so as to apply only when Parliament is actually sitting, as opposed to when it is in session.

Respondents' Position

[9]The Crown submits that neither witness has relevant evidence to give this Court. According to the Crown, the subpoenas are being sought as a tactic to promote attention to the present action before the Court and to compel the current Prime Minister and Minister of Indian Affairs to explain and debate the Crown's historical and current legal position and policies. The Crown contends that the Prime Minister's personal views on such things are neither relevant nor appropriate evidence. However, i f the evidence is found to be relevant, the Crown suggests that a cost-benefit analysis will show that the benefits of such evidence are greatly outweighed by its costs and that it ought not to be admitted.

* Editor's Note: Section 35 of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44].

[10]The Crown submits that the proposed witnesses enjoy the protection of a parliamentary privilege exempting them from the obligation to attend court and give evidence. The Crown contends that such a privilege existed historically and continues to exist today. The Crown further submits that the privilege applies while Parliament is in session, and for 40 days before the commencement of the session and for 40 days after the session has come to a close.

Issues

[11]The issues in this application are whether the evidence of the proposed witnesses is relevant and admissible, and whether the proposed witnesses are exempt from attending and giving evidence by virtue of a parliamentary privilege.

[12]Although the parties presented the Court with their submissions in this order, I will deal with the second issue, *viz.* parliamentary privilege, first.

Analysis

[13]The scope of judicial review of parliamentary privilege is limited to determining only the existence and extent of the privilege claimed. Courts may not delve into the exercise of a privilege once it is found to be necessary. In *Stockdale v. Hansard* (1839), 9 Ad. & E. 1; 112 E.R. 1112 (Q.B.), Lord Denman articulated the necessity test, at page 1169, as follows:

If the necessity can be made out, no more need be said: it is the foundation of every privilege of Parliament, and justifies all that it requires.

[14]The leading authority in Canadian jurisprudence on parliamentary privilege is that of *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319, at page 383, McLachlin J., as she then was, held:

The test of necessity is not applied as a standard for judging the content of a claimed privilege, but for the purpose of determining the necessary sphere of exclusive or absolute "parliamentary" or "legislative" jurisdiction. If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body.

[15]McLachlin J. went on to state, at pages 384-385:

The only area for court review is at the initial jurisdictional level: is the privilege claimed one of those privileges necessary to the capacity of the legislature to function? A particular exercise of a necessary privilege cannot then be reviewed, unless the deference and the conclusion reached at the initial stage be rendered nugatory.

In summary, it seems clear that, from an historical perspective, Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional. The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege. [Underlining added.]

[16]A general definition of parliamentary privilege is contained in Joseph Maingot's *Parliamentary Privilege in Canada* , 2nd ed. (McGill-Queen's University Press, 1997), at page 12:

Parliamentary privilege is the necessary immunity that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces and two territories, in order for these legislators to do their legislative work. It is also the necessary immunity that the law provides for anyone while taking part in a proceeding in Parliament or in a legislature. In addition, it is the right, power, and authority of each House of Parliament and of each legislative assembly to perform their constitutional functions. Finally, it is the authority and power of each House of Parliament and of each legislative assembly to enforce that immunity and to protect its integrity.

[17]*Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st ed. (London: Butterworths, 1989) provides this definition, at pages 69 and 82:

Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law.

. . .

. . . the privileges of Parliament are rights `absolutely necessary for the due execution of its powers'. . . .

I note that this definition of privilege is also found in *Beauchesne's Rules and Forms of the House of Commons of Canada*, 6th ed. (Toronto: Carswell, 1989), at page 11.

[18]The Bourinot text, *Parliamentary Procedure and Practice in the Dominion of Canada*, 4th ed. (Toronto: Canada Law Book, 1916), at pages 37-38 and 43, defined privilege in the following manner:

The privileges of parliament include such rights as are necessary for free action within its jurisdiction and the necessary authority to enforce these rights if challenged. These privileges and powers have been assumed as fundamental and have been insisted upon by custom and usage as well as confirmed and extended by legal enactments. Their extent and nature have frequently been subjects of controversy but in the main they are decided by the legislature itself and its decision, speaking generally, cannot be called into question by any court or other authority, but this does not prevent the courts from inquiring as to whether the legislature has in fact acted within its authority.

. . .

The personal privileges of members are to enable them to freely attend in their places in parliament, to guarantee them against restraint or intimidation in the discharge of their duties and to protect them in their freedom of speech in the debates in parliament. The privilege has been always held to protect members from arrest and imprisonment under civil process, whether at the suit of an individual or of the public.

[19]In *New Brunswick Broadcasting Co.*, at pages 378-379, McLachlin J. stated:

"Privilege" in this context denotes the legal exemption from some duty, burden, attendance or liability to which others are subject. It has long been accepted that in order to perform their functions, legislative bodies require certain privileges relating to the conduct of their business. It has also long been accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch.

[20]The legislative and constitutional framework for parliamentary privilege is found in both the preamble and section 18 of the *Constitution Act, 1867* [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) (R.S.C., 1985, Appendix II, No. 5]]. The preamble states that the authors of our Constitution intend that is should be "similar in Principle to that of the United Kingdom". Section 18 provides,

18. The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the Members thereof respectively, shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.

[21]This section was repealed by the United Kingdom's Parliament in 1875 [R.S.C., 1985, Appendix II, No. 13] and re-enacted to read as follows:

18. The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof. [Underlining added.]

[22]Pursuant to section 18 of the *Constitution Act, 1867*, section 4 of the *Parliament of Canada Act*, R.S.C., 1985, c. P-1 was enacted:

4. The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise

(*a*) such and the like privileges, immunities and powers as, at the time of the passing of the *Constitution Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in-so-far as is consistent with that Act; and

(*b*) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.

[23]Section 5 of the *Parliament of Canada Act* provides:

5. The privileges, immunities and powers held, enjoyed and exercised in accordance with section 4 are part of the general and public law of Canada and it is not necessary to plead them but they shall in all courts in Canada and by and before all judges be taken notice of judicially.

[24]Before embarking upon the question of whether the parliamentary privilege claimed in the case at bar in fact exists, a preliminary issue must be dealt with: has Parliament defined its privileges, powers, and immunities in accordance with section 18 of the *Constitution Act, 1867* as amended in 1875? The applicant submits that Parliament has not and that section 4 of the *Parliament of Canada Act* is *ultra vires* as it does not conform with the amended language of section 18 of the *Constitution Act, 1867*.

[25]It is clear that Parliament defined its privileges, powers, and immunities in 1867 by importing into Canadian law all of the privileges, powers, and immunities held by the United Kingdom's Parliament, which were held either under statute, through resolution, or through custom and usage. Section 18 of the *Constitution Act, 1867* also recognizes inherent privileges and allows for the addition of statutory ones, subject to the limitations imposed by that section. I note that at page 375 in *New Brunswick Broadcasting Co.*, McLachlin J. held:

It is my view that far from contradicting the proposition that Parliament and the legislatures possess inherent constitutional privileges, the wording of our written constitution supports that proposition.

[26]Nothing in section 4 of the *Parliament of Canada Act* appears to be inconsistent with the amended section 18, which provided that when Parliament enacted legislation defining privileges, it could not define those privileges as anything greater than those that existed at the time of the enactment. The *Parliament of Canada Act* was enacted in 1868 [*An Act to define the privileges, immunities and powers of the Senate and House of Commons, and to give summary protection to persons employed in the publication of Parliamentary Papers*, 31 Vict., c. 23] and tracked the language of section 18, that is, that the Parliament of Canada wished to enjoy the same privileges as those that existed at that time, 1867, in the United Kingdom's Parliament. This is consistent with the language of section 18 as amended in 1875. Accordingly, I do not accept the applicant's submission that section 4 of the *Parliament of Canada Act* is *ultra vires* and inoperable as such.

[27]The parliamentary privilege asserted, and contested, in the case at bar is that of being exempt from any obligation to attend as a witness in court whilst Parliament is in session. The Court is thus required to first determine whether such a privilege existed in the United Kingdom at the time of Confederation.

[28]Parliamentary privilege, for the most part, was a creature of convention in the United Kingdom, and there is scant jurisprudence or source material, as was noted by Low J.A. in *Ainsworth Lumber Co. Ltd. v. Canada (Attorney General)* (2003), 2003 BCCA 239 (CanLII), 226 D.L.R. (4th) 93 (B.C.C.A.), at paragraph 44:

To know the nature and scope of the parliamentary privilege claimed in the present case, one must discover the privilege that existed in the United Kingdom at the time of confederation. For the most part the privilege there is not the subject of statute. It appears to have come about by convention and there is very little source material on the subject. Textbook writers state the privilege in different ways with very little citation of sources.

Nevertheless, the Court in *Ainsworth* concluded that there exists a parliamentary privilege exempting members from answering subpoenas to attend as witnesses in court while Parliament is in session. The Court referred to the Maingot text, *Parliamentary Privilege in Canada*, 1982 edition, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st ed., and *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1997), vol. 34, page 561.

[29]In the 1982 edition of Maingot's text, reference is made, at page 128, to Hatsell, *Precedents of Proceedings in the House of Commons* , 3rd ed. (London: T. Payne, 1796), vol. 1, pages 1-2; Hatsell wrote that Parliament's members:

. . . should not be prevented by trifling interruptions from their attendance on this important duty, but should, for a certain time, be excused from obeying any other call, not so immediately necessary for the great services of the nation; it has been therefore, upon these principles, always claimed and allowed, that the Members of both Houses should be, during their attendance in Parliament, exempted from general duties, and not considered as liable to some legal process, to which other citizens, not intrusted with this most valuable franchise, are by law obliged to pay obedience.

[30]Maingot remarks, on page 134 of the 1982 edition of his text, that Parliament has the paramount right to the attendance and service of its members. This, therefore, is the rationale behind the particular parliamentary privilege at issue in this application (see also the above-noted citation for *Halsbury's Laws of England* on this point).

[31]In Griffith and Ryle's *Parliament: Functions, Practice and Procedures* (London: Sweet & Maxwell, 1989), at pages 86-87, mention is also made of the exemption of parliamentarians from complying with subpoenas.

[32]While there has been some debate in Britain as to whether this particular privilege should continue in existence, no legislation has been enacted that either diminishes or extinguishes this privilege. It existed historically in Britain and continues to exist today; as such, by virtue of section 4 of the *Parliament of Canada Act*, this privilege is one that Canadian parliamentarians hold today.

[33]The duration of this parliamentary privilege is another matter of some debate. In *Ainsworth*, the Court held that the privilege applied only while Parliament is in session, and not to any periods before the start of a session or after its prorogation. The Court relied on several Canadian texts, which simply stated that the privilege applies when the House is in session, which I reproduce now for ease of reference.

[34]Bourinot's text, *Parliamentary Procedure and Practice in the Dominion of Canada* , states at pages 45-46:

The privilege of exemption of members from serving as jurors or attending as witnesses during a session of parliament is well established and precedents are found of the British Commons having punished persons for serving supboenas upon members.

[35]In Norman Ward, *Dawson's The Government of Canada*, 6th ed. (Toronto: University of Toronto Press, 1987), page 115 reads as follows:

A member does not have to serve on a jury during the session; nor at such times can he be compelled to attend court as a witness although, if necessary, the House will give its permission for him to absent himself for such a purpose.

[36]Finally, R. Marleau and C. Montpetit, eds., *House of Commons Procedure and Practice* (Ottawa: House of Commons, 2000) reads at page 81:

The right of the House to the attendance and service of its Members exempts a Member, when the House is in session, from the normal obligation of a citizen to comply with a subpoena to attend a court as a witness.

[37]No reference is made in any of these texts to the inclusion of a before or after period during which the privilege persists.

[38]However, the Maingot text asserts, at page 155 of the 1997 edition (see also page 131 of the 1982 edition), that the privilege continues for 40 days before and after a session:

In Canada, the case of *R. v. Gamble and Boulton* is authority for the proposition that the duration of the privilege is the same as it is in the U.K.: 40 days before and after a session, and 40 days after a dissolution.

[39]*R. v. Brown* (2001), 197 Nlfd. & P.E.I.R. 285 (P.E.I.S.C.T.D.) is another recent case dealing with the same parliamentary privilege. The Prime Minister applied to have a subpoena quashed, which the accused had issued. The case arose from an incident in which the Prime Minister was struck in the face by a pie thrown by the accused. MacDonald C.J.T.D. quashed the subpoena, in part because it was a violation of parliamentary privilege. Relying on the 1982 edition of Maingot and *Regina v. Gamble & Boulton* (1851), 9 U.C.Q.B. 546, the Court held at paragraph 24:

This immunity to attend as a witness before a court of law in relation to a criminal matter extends forty days before and after a session of Parliament, and forty days after dissolution.

[40]Finally, there is *Telezone Inc. v. Canada (Attorney General)*, [2003] O.J. No. 2543 (S.C.J.) (QL). In that case, Backhouse J. held that the right not to attend as a witness is a recognized parliamentary privilege. However, adding a further wrinkle to the debate, the Court held that the privilege applies only to the period that Parliament is actually sitting and for 14 days after it adjourns. The Court relied on this passage [at paragraph 8] from page 100 of *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st ed.:

But the privilege of exemption of a Member from attending as a witness has been asserted by the House upon the same principle as other personal privileges, viz, the paramount right of Parliament to the attendance and service of its members; and on the matter being raised by the Member concerned the Speaker communicates with the court drawing attention to this privilege and asking that the Member should be excused because of the sitting of the House.

[41]Backhouse J. considered that Maingot's use of "in session" in his text, at page 134, was equivalent to May's "sitting." For the 14-day period, B ackhouse J. looked to the preamble of the *Parliamentary Privilege Act, 1770* (U.K.), 10 Geo. III, c. 50. For the sake of convenience and clarity, but not brevity, the preamble reads as follows,

An Act for the further preventing Delays of Justice by reason of Privilege of Parliament.

Whereas the several Laws heretofore made for restraining the Privilege of Parliament, with respect to Actions or Suits commenced and prosecuted at any Time from and immediately after the Dissolution or Prorogation of any Parliament, until a new Parliament should meet, or the same be reassembled; and from and immediately after an Adjournment of both Houses of Parliament for above the Space of Fourteen Days, until both Houses should meet or assemble, are insufficient to obviate the Inconveniences arising from the Delay of Suits by reason of Privilege of Parliament; whereby the Parties often lose the Benefit of several Terms: For the preventing all Delays the King or His Subjects may receive in prosecuting their several Rights, Titles, Debts, Dues, Demands or Suits for which they have Cause; be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled and by the Authority of the same, That from and after the Twenty-fourth Day of June One thousand seven hundred and seventy, and Person or Persons shall and may at any time, commence and prosecute any Action or Suit in any Court of Record, or Court of Equity, or of Admiralty, and in all Causes Matrimonial and Testamentary, in any Court having Cognizances of Causes Matrimonial and Testamentary, against any Peer or Lord of Parliament of *Great Britain*, or against any of the Knights, Citizens and Burgesses, and the Commissioners for Shires and Burghs of the House of Commons of *Great Britain* for the Time being, or against their or any of their menial or other Servants or any other Persons [e]ntitled to the Privilege of Parliament of *Great Britain*; and no such Action, Suit or any other Process or Proceeding thereupon, shall at any time be impeached, stayed or delayed by or under Colour or Pretence of any Privilege of Parliament.

[42]To re-cap, briefly, the British Columbia Court of Appeal, in *Ainsworth*, held that the privilege applies while Parliament is in session; the Prince Edward Island Supreme Court, in *Brown,* held that the privilege applies while Parliament is in session, as well as for 40 days before and after a session; and, finally, the Ontario Superior Court of Justice, in *Telezone*, has held that the privilege applies only while Parliament is sitting and for 14 days after an adjournment.

[43]I find that the privilege exists and has existed historically, and that it persists for the duration of a session, as opposed to the more narrow "sitting" advanced in *Telezone* . I agree with the words of Low J.A. in *Ainsworth*, at paragraph 56, and make them mine:

When Parliament is in session it can be called to sit at any time. When it is in session, it is assembled, whether actually sitting or not. . . . The business of Parliament and the duties of parliamentarians are not at rest just because Parliament, during a session, is not physically sitting.

[44]Applying the necessity test, I find that this privilege is well within the sphere of Parliament's jurisdiction. In order for Parliament to function, it requires the attendance of its members; without them, to use the words of McLachlin J. in *New Brunswick Broadcasting* , the dignity and efficiency of the House could not be upheld. Without this parliamentary privilege, it is possible that either House could be so de-populated by members responding to subpoenas, that the business of Parliament would come to a halt.

[45]As for the duration of the privilege, I find that some additional time is necessary, for a period before the commencement and beyond the close of a session. I do not, however, agree with the reasoning of Backhouse J. on this point, and I do not rely upon the preamble to the *Parliamentary Privilege Act, 1770*. That statute is concerned with the privilege that created an immunity from legal action during parliamentary service; it abolished that privilege, thus allowing for parliamentarians to be sued at any time. With advances in efficiency of modes of travel and communication, what appears to be, according to some sources, the old rule of 40 days before and after a parliamentary session is no longer necessary. However, some time is needed to either wrap up and conclude the business of a session, or to prepare for the commencement of one. A reasonable period of time, therefore, is 14 days; thus I find that the privilege extends beyond a session, to include 14 days before a session convenes and 14 days after a session ends.

[46]Finally, the applicant contends that the parliamentary privilege at issue offends against the rule of law, paragraph 2(*e*) of the *Canadian Bill of Rights*, sections 7 and 15 of the Charter, and section 35 of the *Constitution Act, 1982*, and international law and standards.

[47]There is no question that the rule of law forms part of our Constitution. Indeed, the preamble to the *Constitution Act, 1982* states:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.

[48]In *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at pages 748-749, the Supreme Court of Canada held:

The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. . . .

Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life.

[49]In the instant case, I have concluded that there exists a parliamentary privilege which exempts members from responding to subpoenas while Parliament is in session. This privilege is not just a privilege in the ordinary sense of that word, but it is also a part of our laws and thus cannot be inconsistent with the rule of law principle.

[50]Paragraph 2(*e*) of the *Canadian Bill of Rights* reads as follows:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

. . .

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

[51]This section's purpose is to ensure fair adjudications of individual rights and obligations. It deals with procedural fairness, which implies the right to state one's case adequately; see *Canada (Attorney General) v. Central Cartage Co.* , 1990 CanLII 8009 (FCA), [1990] 2 F.C. 641 (C.A.), at page 664. This section cannot support the setting aside of a parliamentary privilege, which, in the case at bar, has been found to be a valid product of Canadian law.

[52]Turning to the Charter submissions, McLachlin J., as she then was, held in *Harvey v. New Brunswick (Attorney General)*, 1996 CanLII 163 (SCC), [1996] 2 S.C.R. 876, at paragrah 69:

Because parliamentary privilege enjoys constitutional status it is not "subject to" the *Charter*, as are ordinary laws. Both parliamentary privilege and the *Charter* constitute essential parts of the Constitution of Canada. Neither prevails over the other. While parliamentary privilege and immunity from improper judicial interference in parliamentary processes must be maintained, so must the fundamental democratic guarantees of the *Charter*. Where apparent conflicts between different constitutional principles arise, the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them.

[53]McLachlin J. elaborated upon this matter of reconciliation at paragraphs 71 and 74:

To prevent abuses cloaked in the guise of privilege from trumping legitimate *Charter* interests, the courts must inquire into the legitimacy of a claim of parliamentary privilege. As this Court made clear in *New Brunswick Broadcasting*, the courts may properly question whether a claimed privilege exists. . . .

. . .

The courts may review an act or ruling of the legislature to determine whether it properly falls within the domain of parliamentary privilege. If it does not, they may proceed with *Charter* review. If it does, they must leave the matter to the legislature.

[54]Since I have already found that the parliamentary privilege claimed in this case is, pursuant to the necessity test, within the sphere of Parliament's jurisdiction, I need not proceed with a Charter review.

[55]Finally, the various international covenants and instruments referred to me by counsel for the applicant are not helpful in the disposition of this application. While they may have some value in certain contexts, they do not speak to the issue of parliamentary privilege and, as I have already found the parliamentary privilege asserted in this case to be a valid part of Canadian law, I can see no guidance to be had from international law and standards on this point.

[56]Having decided that the parliamentary privilege exists, it is not necessary for me to address the issue of the relevancy of the proposed witnesses' evidence.

[57]Although not specifically raised by either party, a further issue in the present application is the issue of whether the claim of parliamentary privilege must be raised by the individual Member of Parliament claiming the privilege or by the Speaker of the House for and on behalf of the member.

[58]As I am of the opinion that a Member of Parliament has the right to assert a claim of privilege for the reasons above stated, I am satisfied that the Member claiming the privilege may do so on his or her own behalf or, in a general sense, the Speaker of the House may claim the privilege for the Members of Parliament generally. It matters not who asserts the claim of privilege.

[59]In that Parliament is currently in session, although not sitting, with no firm date for its dissolution or prorogation, the present application for the issuance of subpoenas for the appearance of the Prime Minister, the Right Honourable Jean Chrétien, and the present Minister of Indian Affairs and Northern Development, the Honourable Robert D. Nault, as witnesses is dismissed with costs.

A N N E X

The following paragraphs are taken from the affidavit of Florence M. Buffalo, sworn on February 28, 2003:

8. That I understand and I am so informed by counsel of Samson Plaintiffs and verily believe that many of the issues and allegations in ASC no. 4 are matters falling within the unique personal knowledge and past or present responsibilities of The Right Honourable Jean Chrétien and Minister Robert D. Nault as set out more fully in the attached Notice of Motion.

9. That among such issues are the following issues which are described in ASC no. 4:

a) That, pursuant to Treaty No. 6, Samson Plaintiffs retained their aboriginal rights to the areas, lands and natural resources included in Samson Indian Reserves No. 137 and 137A and Pigeon Lake Indian Reserve No. 138A (paragraph 4 of ASC no. 4);

b) That, pursuant to Treaty No. 6, Plaintiff the Samson Indian Nation retained its rights as a nation, encompassing, *inter alia*, its right to self determination, including the right to determine its own membership, which rights are recognized and affirmed and constitutionally protected by Section 35 of the *Constitution Act, 1982* (paragraph 7 of ASC no. 4);

c) That the Samson Cree Nation existed as a Nation in 1876 and 1877 and was recognized as such by the Crown in Treaty No. 6 and the 1877 Adhesion to Treaty No. 6 made by Kiskaquin (or Bobtail) on behalf of the Samson Cree Nation and continues to exist as a Nation (paragraph 7A of ASC no. 4);

d) That the Samson Cree Nation possessed and continues to possess aboriginal or inherent rights and powers in respect of governance, citizenship, taxation, trade and management of its resources and revenues and that these inherent rights and powers were affirmed by Treaty No. 6, the *Royal Proclamation, 1763*, treaties with the Hudson's Bay Company and various constitutional instruments (paragraph 7B of ASC no. 4);

e) At all relevant times, Defendant her Majesty held and had to deal with the reserves and natural resources therein and any royalties, payments or moneys therefrom for the use and benefit of Plaintiffs and was under, alternatively or in combination (paragraph 18 of ASC no. 4):

i. trust or fiduciary obligations and duties;

ii. equitable obligations and duties, as well as;

iii. treaty, constitutional, statutory and common law obligations and duties;

to Plaintiffs in respect to these reserves and the natural resources thereof and all royalties, payments or moneys therein or therefrom;

f) That Defendant Her Majesty has breached Her trust, fiduciary or equitable obligations or other obligations and duties to Plaintiffs referred to in the preceding paragraph and in particular has failed to act as a prudent and competent trustee or fiduciary, has failed to act exclusively for the benefit of Plaintiffs and in their best interests, has failed to protect and preserve the rights, interests and property of Plaintiffs, has failed to maximize economic returns to Plaintiffs, has failed to deal with these reserves and natural resources and royalties, payments or moneys therein or therefrom, in the way most beneficial to Plaintiffs, and has failed to account (paragraph 23 of ASC no. 4);

g) That, moreover, during the entire relevant period, Defendant her Majesty (paragraph 49 of ASC no. 4):

i) has been in a position of conflict of interest, *inter alia*:

1. by lending Herself the Plaintiffs' moneys at a rate and on terms set by Herself and in Her own interest;

2. by placing Herself or permitting Herself to be in the position of both controlling program funding and controlling the trust moneys, and having to choose whether to use Her Majesty's money for programs, such as welfare, or to use the Plaintiffs' moneys;

3. generally by protecting Her own interests to the detriment of the Plaintiffs' interests;

ii) by failing to advise Plaintiffs of Her conflict of interest, particularly in regard to the provision of programs and services and funding for such purpose to Samson Plaintiffs, failing to take suitable measures to remedy or, alternatively, mitigate, such conflict of interest and failing to place the interests of Plaintiffs before Her own interests;

iii) has turned the said trust moneys and Her fiduciary position to Her own profit and advantage and has been unjustly enriched:

1. By saving interest and other costs by lending Herself the Plaintiffs' moneys at a cost less than what Her Majesty would have had to pay arms-length lenders and on terms less favourable than those set for other internal borrowings of Her Majesty;

2. by using or requiring the Plaintiffs to spend, including by way of per capita distributions, Plaintiffs' trust moneys for programs respecting Plaintiffs instead of using government funds, Defendant Her Majesty saved millions of dollars;

iv) has unjustly enriched Herself at the expense of Plaintiffs, *inter alia*, by not being obliged to borrow the sums represented by the amounts of moneys to the credit of Plaintiff Band from time to time and moneys She saved and by using trust funds of Plaintiff Band, including for per capita distributions, to Her own advantage and benefit and in neglect of the beneficiaries' interest;

h) That, moreover, at all relevant times, Defendant Her Majesty had and should have exercised Her power under section 4 of the *Indian Act* to exempt Plaintiffs and their moneys from the provisions of sections 61 to 68 of the *Indian Act* (paragraph 62 of ASC no. 4);

i) That moreover, sections 61 to 68 of the *Indian Act* violate, contravene and are incompatible with the *Constitution Act, 1982*, particularly sections 15, 25 and 35 thereof and it is expedient that sections 61 to 68 of the *Indian Act* be declared to be illegal, unconstitutional, null and void in respect to Plaintiffs and the moneys entrusted to Defendant Her Majesty for Plaintiffs or alternatively constitutionally inapplicable to Plaintiffs and their moneys or subject to the treaty and aboriginal rights of Plaintiffs (paragraph 63 of ASC no. 4).

10. That, as more fully appears from the Notice of Constitutional Questions, Plaintiffs, including the Samson Cree Nation, (Plaintiff the Samson Indian Nation and Band) intend to question the constitutional validity or operability of section 17 and sections 61 to 68 of the *Indian Act* as being contrary to or inconsistent with the treaty, aboriginal and inherent rights of Plaintiffs, the Constitution of Canada, including the unwritten rules and supporting principles and rules forming part of the Constitution of Canada, the *Royal Proclamation of 1763*, the *Constitution Act, 1867*, notably the preamble, section 91(24), sections 102 to 106, section 109, section 125 and section 132, the *Rupert's Land and North-Western Territory Order of 1870, Treaty No. 6* and the adhesions thereto, sections 10 and 11 of the *Constitution Act, 1930* (Alberta N.R.T.A.), the *Constitution Act, 1982*, notably section 15 of the *Charter of Rights and Freedoms* and section 35 of the *Constitution Act, 1982,* or the Rule of Law, including the principles of equality before and under the law (first paragraph of the Notice of Constitutional Questions).

11. That I am informed by counsel of Samson Plaintiffs in the proceedings and verily believe that The Right

Honourable Jean Chrétien and the Honourable Robert D. Nault have evidence to give which is required in order to have a fair and effective determination of certain of the issues raised in the pleadings of this action in regard to general, constitutional and historical matters and in regard to money management matters.

12. That I am informed by counsel of Samson Plaintiffs in the proceedings and verily believe that Samson Plaintiffs require the evidence of the Right Honourable Jean Chrétien and the Honourable Robert D. Nault in respect to the following issues in these proceedings:

(a) the treaty relationship between Samson Plaintiffs and the Crown,

(b) the policy of the Federal Crown and the implementation by the Federal Crown of Treaty No. 6 in relation to Samson Plaintiffs,

(c) the implementation by the Federal Crown of the *Indian Act* and the *Indian Oil and Gas Act* as such legislation impacts upon the foregoing treaty relationship and the treaty rights of Samson Plaintiffs,

(d) Federal Crown policy and conduct regarding the implementation of the inherent rights of self-determination and self-government in relation to Samson Plaintiffs,

(e) the trust relationship between the Federal Crown and Samson Plaintiffs in respect to the natural resources of Pigeon Lake Indian Reserve no. 138A and Samson Indian Reserve no. 137 of which Samson Plaintiffs have the beneficial ownership and which are subject-matters of these proceedings,

(f) the treatment by the Federal Crown of the royalty moneys from the development of the natural resources on those reserves,

(g) the position of the Federal Crown in respect to the immediate transfer to the control of Samson Plaintiffs (to be held in trust) of the royalty moneys of Samson Plaintiffs of some $370 million currently controlled and used by the Crown without the consent of Samson Plaintiffs,

(h) the development and implementation of federal government policies relating to Aboriginal Peoples in regard to Samson Plaintiffs as they affect the subject-matters of these proceedings,

(i) current legislative initiatives as they affect the constitutional issues in these proceedings, including the prevalence of the treaty and aboriginal rights of Samson Plaintiffs over the *Indian Act*,

(j) current legislation initiatives as they affect Samson Plaintiffs and their rights, including Bill C-7 and Bill C-19, and

(k) the position and policy of the Federal Crown in relation to the findings and report of the *Royal Commission on Aboriginal Peoples* of October, 1996.

. . .

16. That I am generally aware and am informed by counsel of Samson Plaintiffs and verily believe that The Right Honourable Jean Chrétien has a unique substantial personal experience in relation to the continuum of developing Crown/Aboriginal relations in the period between the late 1960's and today. He is very probably the individual who has had the most involvement, on the part of the Crown, in a decision-making capacity in respect to the subject-matters described in paragraphs 12 to 14 hereof. He is thus eminently qualified to provide evidence for Plaintiffs in respect to the subject-matters of these proceedings.

TAB 6

Alberta Court of Queen's Bench
Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.
Date: 1990-12-11

D.R. Pahl, Q.C., J. Laskin, H. Rubin and M.M. Maisonville, for plaintiff.

M.H. Dale, Q.C., G.J. Draper, B. Zalmonowitz, D.W. Stepaniuk and L.M. Ziola, for Caterpillar defendants.

I.H. Baker and P. Purdon, for R. Angus Ltd.

C.J. Meagher, for Hitachi Construction Machinery Canada Ltd. and Wajax Industries Limited, Reid and Kataoka.

L.C. Fontaine, for Blackwood Hodge Equipment Limited and Whitman.

B.B. Norton, for Fiatallis (Canada) Ltd. and Fiatallis North America Ltd.

R.J. Gilborn, for Vulcan Machinery & Equipment and Knight.

K.H. Davidson, for Komatsu Canada Limited.

C.L. Bodner, for Pardee Equipment Limited, Pardee, Erickson, and Case Power and Equipment Limited.

F.S. Kozak, for Rivtow Equipment Ltd.

K. Cherniawsky, for Rust and Zimmerling.

L.T. Callaghan, for Challenger Resources Ltd. and Jorgensen.

(Edmonton No. 8003-12393)

December 11, 1990.

[1] BERGER J.:– The issue here is the validity of a number of notices to attend in the form of subpoenas duces tecum served by the Caterpillar defendants upon the applicants, none of whom is a party to the action. The applicants have applied to have the subpoenas quashed as oppressive and an abuse of the court's process.

[2] A subpoena duces tecum (to produce documents) or a writ ad testificandum (to appear and testify) may be issued by a party to proceedings to a witness who is not a party. In *Amey v. Long* (1808), 9 East 473, 103 E.R. 653, the nature of a subpoena duces tecum was described as follows:

> The writ of subpoena duces tecum is of compulsory obligation on a witness to produce papers thereby demanded which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the Court, and not the witness, is to judge.

[3] In Alberta the procedure is set out in R. 293 of the Rules of Court:

> Whenever a party desires to call any person as a witness at the hearing or trial of any action or proceeding he may serve him with a notice requiring him to attend thereon, stating the time and place at which he is required to attend and the documents, if any, which he is required to produce, but the notice is not effective unless at the time of service or prior thereto or within a reasonable time prior to the time at which he is required to attend, he is paid the proper amount of conduct money.

[4] A witness served with a subpoena who is not a party to the cause of action has, however, the status to move to have the subpoena quashed: *Steele v. Savoury* (1891), 8 T.L.R. 94 at 95:

> In a position like the present a witness was entitled to come to the Court at once, and was not bound to stand by and wait till some motion for attachment was made or other proceeding taken against him for non-compliance with the subpoena.

[5] A subpoena, properly served and correct in form, may be quashed where it is held to be either irrelevant, oppressive, or an abuse of the process of the court: *Senior v. Holdsworth; Ex parte Independent T. V. News,* [1976] Q.B. 23, [1975] 2 W.L.R. 987, [1975] 2 All E.R. 1009 (C.A.). In proceedings to quash a subpoena duces tecum, the onus is on the attacker of the subpoena in moving to set it aside: *Fort Norman Explor. Inc. v. McLaughlin* (1982), 36 O.R. (2d) 787, 28 C.P.C. 218, 14 A.C.W.S. (2d) 243 (H.C.). Reid J. stated in *Fort Norman* at p. 790:

> Since *Canada Metal* makes it clear that the mere attack itself casts no onus upon the issuer of the subpoena to justify its issue, the onus lies upon the attacker. If the ground is abuse it is not for the issuer of the subpoena to show no abuse: it is for the attacker to show an abuse.

Are the subpoenas oppressive?

[6] The applicants argue that the lists of requested documents are so vague in their nature and scope that the subpoenas should be quashed on the ground that they are oppressive. Wigmore on Evidence, McNaughton rev. (Boston: Little, Brown & Co., 1961), states this requirement of a subpoena duces tecum at p. 126:

> A peculiarity of the subpoena duces tecum is that, in the nature of things, it must specify, with as much precision as is fair and feasible, the particular documents desired. This is because the witness ought not to be required to bring what is not needed, and he cannot know what is needed unless he is informed beforehand. It is at this point that most disputes arise, for the specification is often so broad and indefinite that the demand is oppressive and exceeds the demandant's necessities.

The applicants cite numerous instances of subpoenas which have not been enforced because the scope of requested documents was too wide, or not sufficiently specific to allow the prospective witness to ascertain those documents which must be produced. The classic statement of this position is in *A.G. v. Wilson* (1839), 9 Sim. 526, 59 E.R. 461,

where the documents requested included all "books and books of account" of the bank, including payment of interest, dividends, investment spending, and annuities for specified accounts. Sir L. Shadwell V.C. refused to order production of documents because, inter alia, the subpoena was too vague. He stated at p. 462:

> … this *subpoena* is much too large and vague to enable the Court to act upon it: for it extends, not by any particular description but by a general description, to all books and accounts in the possession or power of Mr. Blayds which relate to the matters in question in the cause.

[7] In *Senior,* supra, the terms of the summons required the production of a film "of the events of the … Festival," which festival had lasted for three days. Orr L.J. ruled at pp. 1017-18 that it was incumbent upon the applicant to give "clear information … as to the time and nature of the incident in question," and that while it may have been an oversight to have stated the request in such wide terms, "in my judgment it was in that respect oppressive and on that ground alone … [the appeal must succeed and the summons quashed]." Similarly, in *Lee v. Angas* (1866), L.R. 2 Eq. 59, the subpoena duces tecum was served upon a solicitor who was not a party to the action to produce all papers and documents related to a particular piece of farm property, including correspondence between the law firm and either of the plaintiff or the defendant for a period of over 30 years, without specifying the particular documents required. In obiter, Sir W. Page Wood V.C. stated at p. 63:

> A subpoena in this general form, not for production of any document in particular, but calling upon the witness to ransack his papers for a period of thirty-three years, is too wide, being in effect a bill of discovery against a witness. There is no case to shew that Courts, either of common law or equity, will act upon a subpoena so general in form …
>
> No person is to be subjected to the performance of duties not incumbent upon him by any legal or moral obligation, nor to penalties for noncompliance … Such a search as would be required would be very onerous even upon a Defendant, but in the case of a solicitor, who is not a party to the suit, he is not bound to expose himself, without receiving any reward or compensation, to the trouble and expense of searching for particulars of everything that has happened in his office for the last thirty-three years. He must speak the truth within his knowledge, but he is not bound to make this burdensome search for evidence at his own expense.

[8] *Dalgleish v. Basu,* [1975] 2 W.W.R. 326, 51 D.L.R. (3d) 309 (Sask. Q.B.), identifies at p. 312 the following principles in determining whether the description of the documents in a subpoena duces tecum is too broad:

> First: The Specification must be fair to the witness in the sense that he ought not to be required to produce what is not needed and he cannot know what is needed unless he is informed beforehand … It is to be borne in mind that a subpoena by its

> nature asks a witness for *production* only of documents and that it is not a demand to make a *discovery* of documents …
>
> Second: It is proper to ask: has the party issuing the subpoena had an opportunity to familiarize himself with the documents of which he now seeks production? [A less detailed description would be allowable if the party requesting the documents has never seen them, and cannot, therefore, describe them with accuracy.]
>
> Third: If the witness is neither a party to the proceeding nor an agent of a party and as a consequence can be assumed to have no more than a passing acquaintance with the issues then the witness should be entitled in the interests of fairness to insist upon an identification of the documents which will not place upon the witness a burden of any serious magnitude …
>
> Fourth: It is important to consider the scope of the investigation. The greater the scope, the greater should be the permissible breadth of a *subpoena duces tecum.* One must therefore take cognizance of the nature of the proceedings, the issues involved and the defences, if any, proposed to be advanced …

[9] I have attached to this judgment an example of the list of documents required of those applicants who are manufacturers of heavy equipment and a second list typical of the documents required of those applicants who are dealers in heavy equipment [lists omitted]. The lists, on their face, would compel the applicants to interpret, inter alia, the meaning of the phrase, "gray market"; to ascertain when a document may be fairly described as "reflecting a price differential"; and to determine what constitutes a "reimbursement policy." In addition, the documents sought include: "Forms of Dealership Agreements" between certain of the applicants and other "authorized dealers" for heavy equipment for an 11-year period; correspondence between certain of the applicants and other companies "with respect to the import or marketing" of company products for a 5-year period"; price lists reflecting "price differentials between the cost to dealers in Alberta and elsewhere" for an 11-year period; correspondence related to "the effect of currency rates upon the ability … to compete" for an 11 -year period; warranties offered by certain of the applicants for an 11-year period.

[10] It will be noted that severance was not argued by counsel; that is, it was not contended that the court uphold the validity of a portion only of any one or more of the notices to attend.

[11] I am mindful of the nature of the proceedings, the issues involved and the defences proposed to be advanced. The scope of the cause of action is wide in its magnitude; the Caterpillar defendants are to be allowed a greater latitude in ascertaining the permissible breadth of the subpoena.

[12] With all of the foregoing in mind, I am, nonetheless, persuaded that the scope of the requests for documents is so very broad and is so lacking in specificity that a "burden

of serious magnitude" amounting to oppression is placed upon the applicants. On this ground alone, I would quash the notices to attend.

Discovery versus subpoena process

[13] The purpose of a subpoena duces tecum is to compel production of documents into court for the purpose of proving relevant facts at issue; the purpose is not to allow for discovery of documents of persons who are not parties to the action. There is, however, a method by which a party to an action can initiate discovery of documents of a non-party. Rule 209(1) of the Alberta Rules of Court states:

> When a document is in possession of a third person not a party to the action and it is alleged that any party has reason to believe that the document relates to the matters in issue, and the person in whose possession it is might be compelled to produce it at the trial, the court may on the application of any party direct the production of the document at such time and place as the court directs and give directions respecting the preparation of a certified copy thereof which may be used for all purposes in lieu of the original, saving all just exceptions.

[14] The distinction between "discovery" and "proof was discussed in *Radio Corp. of Amer. v. Rauland Corp.,* [1956] 2 W.L.R. 281, [1956] 1 All E.R. 260, varied [1956] 1 Q.B. 618, [1956] 2 W.L.R. 612, [1956] 1 All E.R. 549 (Div. Ct.), where Devlin J. stated at pp. 551-52:

> In that authority [the *Burchard* case] the distinction is made plain between what I have called discovery or indirect material on the one hand, and proof or direct material on the other hand. That is, I think, the true distinction with which one must approach the word "testimony" in this Act. Testimony which is in the nature of proof for the purpose of the trial is permissible. Testimony, if it can be called "testimony", which is mere answers to questions on the discovery proceeding designed to lead to a train of inquiry, is not permissible. Into which category does the present fall? It might perhaps be enough to say that it is plain enough from what I have said of the nature of proceedings in the court in Illinois that they fall into the category of pre-trial proceedings, proceedings by way of discovery.
>
> The distinction is not whether what is to be obtained is documentary material or oral material. This distinction is whether it is a process by way of discovery and testimony for that purpose or whether it is testimony for the trial itself.

This distinction was also discussed in *Dalgleish,* supra, where Bayda J. (as he then was) stated at p. 314:

> But should this Court permit a *subpoena duces tecum* to be used as a substitute for the normal discovery-of-documents procedure? I believe it should not. The subpoena should be used for only that purpose for which it was intended and no other. If justice requires a discovery of documents then appropriate statutory provision should be made if no procedural rules now exist for such a discovery. In short, resort should not be had to a side door if the legislators have not seen fit to open the front door.

[15] In fact, this distinction operated in an implied fashion in the earlier arguments advanced with respect to the scope of the requested documents: though not determinative of the result, the larger the breadth of content and time in the required documents, the more likely it is that the request is a form of discovery and not a request for specific documents to prove a fact in issue. Lord Halsbury L.C. discusses the relationship in *Burchard v. Macfarlane; Ex parte Tindall,* [1891] 2 Q.B. 241 at 245 (C.A.):

> I do not know what documents are asked for. I do not know that the parties have ever condescended upon any particular document, or intimated that they have any knowledge of any document existing at all, and I am led to the conclusion that it is inspection and discovery that is sought, and not proof. The meaning of the order is, as I construe the language of this instrument, that the witness is to be examined if he has got in his possession documents which may become part of the necessary evidence in the cause. If that is the meaning of it, it is quite clear that such a roving order for discovery is not rendered valid because it is limited to a particular ship and the particular years over which these transactions are spread. The order of the Scotch Court has been obtained, not adversely by one of the parties against the other, but by both of them against a third person who has not been consulted, and who has never been heard as to whether or not such an order ought to be made. I am of opinion that to enforce such an order would be a serious invasion of private rights.

[16] In the case at bar, the applicants point to the following factors which, it is suggested, support the view that the issuance of subpoenas duces tecum by the Caterpillar defendants is a disguised form of discovery against non-parties:

(1) the documents are generically listed;

(2) similar lists requesting similar documents were served on a number of third parties;

(3) it was indicated in conversations between counsel that oral testimony of the individuals served is not likely required, and will be required, if at all, only if relevant documentation is found; and

(4) none of the documentation involved any of the parties to the cause of action, but instead relates solely to the affairs of the third parties.

[17] In addition, the applicants cite an earlier interlocutory motion in the same cause of action in which the defendants were partially successful in obtaining discovery of documents under R. 209: *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 63 Alta. L.R. (2d) 189, 94 A.R. 17 (Q.B.). Wachowich J. accepted the reasoning of the British Columbia Court of Appeal in *Rhoades v. Occidental Life Ins. Co. of California,* [1973] 3 W.W.R. 625, which had stated the test for production (subject to certain caveats) to be that of "probable relevance." One of the expressed caveats is that the rule should not

be used as a fishing expedition to discover whether or not a person is in possession of a document. This line of reasoning was also employed by Chief Justice Moore and affirmed by the Alberta Court of Appeal in *Esso Resources Can. Ltd. v. Stearns Catalytic Ltd.* (1989), 45 C.C.L.I. 143, 98 A.R. 374, affirmed C.A., appeal No. 11313, 9th February 1990 [now reported 74 Alta. L.R. (2d) 262, 41 C.P.C. (2d) 222, 108 A.R. 161]. The documents requested in *Esso* were a third party insurer's documents, and the court noted that the request was "broad in nature and description," and lacked specificity: the party was seeking "everything in the hope that some part or parts may be relevant." Moore C.J.Q.B. stated at p. 382:

> Rule 209 should not be used to permit discovery of a person not a party if it amounts to a fishing expedition …
>
> The documents sought herein although generic are not specific. When a list of documents are demanded lacking a specific description of a particular matter or thing then I can only conclude that the applicants are seeking everything in the hope that some part or parts may be relevant. That is simply not good enough.

[18] In written reasons for the dismissal of the appeal from the aforementioned decision, Stevenson J.A. (as he then was) stated in the memorandum of judgment dated 29th May 1990, at pp. 4-5 [pp. 265-66]:

> … what was sought here is, in essence, document discovery of a non-party. We challenged the defendants, during argument, to show us one identifiable document that met the tests for production under this rule. We were taken to the plaintiffs production and referred to documents showing correspondence with an insurer with reference to enclosures which were not separately produced by the plaintiffs. In my view this rule should not be used against a non-party unless it can be shown that the document is in existence and not available through other means; in this case, through a party …
>
> I also agree with the Chief Justice that this form of production should be related to specific documents of a least probable relevance and is not a form of discovery of a non-party. [Agreed to by Hetherington and Harradence JJ.A.]

[19] During the course of argument, Mr. Draper, for the Caterpillar defendants, made the following submissions:

> And that is one of the reasons that we're seeking information with respect to those Respondents is to attempt to find evidence beyond what Caterpillar has itself of the ability of other manufacturers and distributors of earthmoving equipment to enter into either North America or Alberta, depending which view you take of the – the geographic market issue …
>
> And we expect that the documents that we find from the information which we have of those distribution systems, obviously they're not published and one of the reasons that the Respondents are here is they prefer them not to be published, but we anticipate that they will show that – that – that these methods chosen by these other manufacturers enhance the efficiency of distributing their products to the consumers

> and compete with others, including Caterpillar, and that these vertical arrangements are pro-competitive rather than anti-competitive practices …
>
> But that – that is – that is a reason for having asked for these dealership agreements, for example, is because Caterpillar's dealership agreements are going to get a very critical examination, My Lord, and it will be our submission that – that, from what we expect to find in the other dealership agreements, they will not be dissimilar …
>
> … *the defence request at this stage, which is obviously the start of the trial, for the documents is made because we want to be able to review them in preparation* for our cross-examination of the plaintiffs witnesses, particularly the plaintiff's expert witnesses.
>
> With respect to the dealership agreements, for example, that we seek to have produced, we expect to find evidence of the competitors in agreements and policies which we submit will be useful to our cross-examination of some of the plaintiff's witnesses …
>
> Clearly, if the documents are produced in response to this subpoena, they do not become evidence in the cause. Witness will have to be called to introduce any such introductory evidence. If, in fact, such witnesses are called, clearly the matters which you address which is the company's strategies, what happened, are going to be the subject of direct examination, cross-examination, and then any necessary clarification by the Court which, I would submit, will deal with those issues but *those issues are issues that will depend upon our assessment, the defence assessment, after we see the documents, whether we think we can make the case that we hope we can now in that the people that could be called in respect of that evidence will be able to – such of the material,* [my emphasis]

[20] I listened with care to the very able submission of counsel for the Caterpillar defendants. Although I am here dealing with the validity of subpoenas duces tecum and not with an application pursuant to R. 209, the facts of this case are not dissimilar from those in *Esso Resources Can. Ltd.,* supra: the document request lists are generic, not specific; the Caterpillar defendants request enormous numbers of documents spanning lengthy time periods; the Caterpillar defendants have not pointed to any specific documents in possession of the applicants; the same lists or very similar lists have been served on each applicant; the defendants would appear to be seeking everything in the hope that some of the material is relevant.

[21] I am persuaded that the Caterpillar defendants have caused the subpoenas duces tecum to be issued as a substitute for the normal discovery-of-documents procedure contemplated by R. 209. I am led to the conclusion that it is inspection and discovery that is sought and not proof. The subpoenas duces tecum here are properly characterized as a disguised form of discovery against non-parties. For all of these reasons, the notices to attend shall be quashed.

[22] It is, accordingly, unnecessary for the court to adjudicate upon the remaining issues raised by counsel for the applicants. I consider it my duty, however, to make the

following observations: In *Trusz v. Witzke,* [1990] A.W.L.D. 825, a recent unreported judgment of the Court of Appeal, pronounced on 23rd November 1990, Mr. Justice Kerans wrote (at p. 5):

> The governing rule is that a party is denied a fair hearing if for an insufficient reason the trial judge denies the trier of fact access to potentially critical evidence: *Friesen v. Reimer Concrete Ltd.,* [1988] A.W.L.D. 099 (C.A.), December 2nd 1987 (unreported). The rule raises two issues: first, whether the evidence was potentially critical; and, second, whether the trial judge had a sufficient reason.

[23] If the Caterpillar defendants are of the view that they may be denied a fair hearing by reason of my decision to quash the notices to attend, I would encourage them to pursue appellate remedies as promptly as possible, given the anticipated length of this trial.

[24] Counsel may speak to costs.

Notices to attend quashed.

TAB 7

Federal Court of Appeal | Cour d'appel fédérale

Date: 20190620

Docket: A-336-18

Citation: 2019 FCA 188

CORAM: **BOIVIN J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

JANSSEN INC., JANSSEN BIOTECH, INC., CILAG GmbH INTERNATIONAL, CILAG AG and THE KENNEDY TRUST FOR RHEUMATOLOGY RESEARCH

Appellants

and

PFIZER CANADA INC., HOSPIRA HEALTHCARE CORPORATION, CELLTRION HEALTHCARE CO. LTD., CELLTRION, INC. and INNOMAR STRATEGIES, INC.

Respondents

Heard at Ottawa, Ontario, on June 20, 2019.
Judgment delivered from the Bench at Ottawa, Ontario, on June 20, 2019.

REASONS FOR JUDGMENT OF THE COURT BY: GLEASON J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20190620

Docket: A-336-18

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CORAM: **BOIVIN J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

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Appellants

and

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Respondents

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on June 20, 2019).

GLEASON J.A.

[1] The appellants appeal from the portions of the order of the Federal Court (*per* Southcott J.) in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2018 FC 992, in which the Federal Court dismissed the appellants' motion under Rule 233 of the *Federal Courts Rules*, SOR/98-106 for an order requiring production of documents from a non-party.

[2] The Federal Court held that it had discretion under Rule 233 as to whether to order the requested production. In the exercise of that discretion, the Federal Court denied the appellants' request for several reasons, including: (1) the production request was premature because it was made before the parties opposite had completed their initial documentary production and before any oral examinations had taken place; (2) it appeared that many of the documents that the appellants sought could be obtained from an opposing party, which had a contractual right to them, but would receive the documents in a format where irrelevant personal information was redacted; and (3) the documents in the non-party's possession contained irrelevant personal information about people who were not involved in the litigation and would need to be redacted to protect such information.

[3] The appellants submit that the Federal Court erred because they say that Rule 233 is mandatory and requires the Court to order disclosure of documents from a non-party whenever the criteria set out in the Rule are met. They also say that the Federal Court erred in declining to strike the affidavit of the representative of the non-party because he failed to produce the documents requested in the direction to attend that the appellants served on him. The appellants

contend that without this evidence there was no basis for the Federal Court's factual findings and that the decision must be set aside for this reason as well.

[4] On the latter point, we see no reviewable error having been committed by the Federal Court in declining to strike the impugned affidavit in the circumstances of this case. To hold otherwise would require a party disputing an order for production to produce the very documents in dispute before the return of the motion.

[5] As concerns the appellants' arguments on the merits of the Federal Court's decision, we cannot accept the appellants' position. Both the wording of the Rule and the relevant case law recognize that the Court possesses discretion under Rule 233 to grant what may be characterized as an exceptional remedy to require that a stranger to litigation produce documents to a party involved in a proceeding before the Court.

[6] Rule 233(1) is cast in permissive terms. It provides:

On motion, the Court <u>may</u> order the production of any document that is in the possession of a person who is not a party to the action, if the document is relevant and its production could be compelled at trial. [emphasis added]	La Cour <u>peut</u>, sur requête, ordonner qu'un document en la possession d'une personne qui n'est pas une partie à l'action soit produit s'il est pertinent et si sa production pourrait être exigée lors de l'instruction. [mon soulignement]

[7] Similar wording elsewhere in the Rules or the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 has been interpreted as conferring discretion, provided the conditions precedent to its exercise are met: see, e.g., *Horizon Pharma PLC v. Canada (Health)*, 2015 FC 744 at para. 30; *Novartis Pharmaceuticals Canada Inc. v. Abbott*

Laboratories Ltd. (2000), 7 C.P.R. (4th) 264 (F.C.A.) at paras. 12-15. Ontario courts have reached a similar conclusion in interpreting the provision in Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 governing disclosure from non-parties and have held that even if the conditions listed in the Rule for disclosure are met, the court retains discretion to grant or refuse disclosure: see, e.g. *Philip Services Corp. v. Deloitte & Touche*, 2015 ONCA 60 at paras. 8, 10, 330 O.A.C. 148.

[8] The Federal Court therefore did not err in concluding that it has discretion under Rule 233.

[9] Nor did the Federal Court commit a palpable and overriding error in exercising that discretion.

[10] Contrary to what the appellants submit, it was open to the Federal Court to consider the availability of the information sought from other parties to the action and Rule 238 of the *Federal Courts Rules* (dealing with third party examinations) does not foreclose consideration of this issue on a non-party production request. In short, the mere fact that availability of the documents is not listed in Rule 233 as a relevant factor for the Court to consider, but is listed in Rule 238, does not prevent the Court from considering availability of the documents through the normal discovery process as being a factor that weighs against ordering production from a non-party. Given its exceptional nature, common sense would dictate that third party production should not be ordered where it is not necessary.

[11] We also are of the view that the Federal Court did not err in considering the privacy interests in the documents sought by the appellants. Indeed, the case law recognizes that such interests may be weighed in appropriate cases, as was noted by this Court in *BMG Canada Inc. v. Doe*, 2005 FCA 193, [2005] 4 F.C.R. 81 at para. 42 and by the Supreme Court of Canada in *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157 at paras. 36-37, 207 N.R. 81. Once again, the Federal Court reached what we would characterize as a common sense conclusion that non-parties' privacy interests should not be impacted or a non-party put to the expense of redacting documents when it was not clear that the appellants could not receive what they sought from a party to the litigation in a form where the personal information was already redacted.

[12] In closing, the small slice of this litigation to which we have been exposed seems to demonstrate an unfortunate lack of cooperation, which no longer has its place in litigation, if indeed it ever was appropriate. We would urge counsel and the parties to re-read the decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, 2014 SCC 7. We also note that to the extent the non-party is in possession of documents that the appellants have not obtained that are relevant to the litigation before the Federal Court, if the non-party does not cooperate in their production, it is of course open to the appellants to seek to compel their production and to the Federal Court to make the appropriate costs awards.

[13] We will accordingly dismiss this appeal. In the circumstances, we decline to make an order of costs.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-336-18
STYLE OF CAUSE:	JANSSEN INC. ET AL v. PFIZER CANADA INC. ET AL.
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	JUNE 20, 2019
REASONS FOR JUDGMENT OF THE COURT BY:	BOIVIN J.A. RENNIE J.A. GLEASON J.A.
DELIVERED FROM THE BENCH BY:	GLEASON J.A.

APPEARANCES:

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Warren Sprigings	FOR THE RESPONDENTS (Pfizer Canada Inc., Hospira Healthcare Corporation, Celltrion Healthcare Co. Ltd. and Celltrion, Inc.)
Christiaan Jordaan Victoria Yang	FOR THE RESPONDENT (Innomar Strategies, Inc.)

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Healthcare Co. Ltd. and Celltrion, Inc.)

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TAB 8

Federal Court of Appeal | Cour d'appel fédérale

Date: 20170509

Docket: A-278-16

Citation: 2017 FCA 97

CORAM: **STRATAS J.A.**
GLEASON J.A.
WOODS J.A.

BETWEEN:

VOLTAGE PICTURES, LLC, COBBLER NEVADA, LLC, PTG NEVADA, LLC, CLEAR SKIES NEVADA, LLC, GLACIER ENTERTAINMENT S.A.R.L. OF LUXEMBOURG, GLACIER FILMS 1, LLC and FATHERS & DAUGHTERS NEVADA, LLC

Appellants

and

JOHN DOE #1, PROPOSED REPRESENTATIVE RESPONDENT ON BEHALF OF A CLASS OF RESPONDENTS and ROGERS COMMUNICATIONS INC.

Respondents

Heard at Toronto, Ontario, on January 11, 2017.

Judgment delivered at Ottawa, Ontario, on May 9, 2017.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: GLEASON J.A.
WOODS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20170509

Docket: A-278-16

Citation: 2017 FCA 97

CORAM: **STRATAS J.A.**
GLEASON J.A.
WOODS J.A.

BETWEEN:

VOLTAGE PICTURES, LLC, COBBLER NEVADA, LLC, PTG NEVADA, LLC, CLEAR SKIES NEVADA, LLC, GLACIER ENTERTAINMENT S.A.R.L. OF LUXEMBOURG, GLACIER FILMS 1, LLC and FATHERS & DAUGHTERS NEVADA, LLC

Appellants

and

JOHN DOE #1, PROPOSED REPRESENTATIVE RESPONDENT ON BEHALF OF A CLASS OF RESPONDENTS and ROGERS COMMUNICATIONS INC.

Respondents

REASONS FOR JUDGMENT

STRATAS J.A.

[1] Under the cloak of anonymity on the internet, some can illegally copy, download, and distribute the intellectual property of others, such as movies, songs and writings. Unless the

cloak is lifted and identities are revealed, the illegal conduct can continue, unchecked and unpunished.

[2] The appellants say this has been happening to them. They are movie producers. They have launched proceedings—a proposed reverse class action—against those they say have been downloading their movies illegally. But the appellants face an obstacle: without knowing the identities of the persons they believe have been infringing their copyrights—persons I shall call "suspected infringers"—they cannot advance their proceedings any further.

[3] Parliament has intervened to assist those in the position of the appellants. Under a relatively new legislative regime, Parliament has allowed copyright owners, like the appellants, to seek information from internet service providers to lift the cloak of anonymity and reveal the identity of the suspected infringers so the copyright owners can act to protect their rights: *Copyright Act*, R.S.C. 1985, c. C-42, sections 41.25 to 41.27 (added by the *Copyright Modernization Act*, S.C. 2012, c. 20, s. 47). The legislative regime regulates a number of matters, including the fee that an internet service provider may charge for the work it does.

[4] Using the legislative regime, the appellants sought information identifying a suspected infringer, the respondent, John Doe #1, from an internet service provider, Rogers Communications Inc. Rogers has now assembled the identifying information.

[5] The appellants moved for an order in the Federal Court requiring the identifying information to be disclosed to them. Rogers was prepared to disclose it, but only if the appellants

paid a fee. The appellants contested the fee, alleging that the legislative regime precluded Rogers from charging anything and that in any event it was far too high and, thus, unreasonable.

[6] The Federal Court (*per* Boswell J.) interpreted the legislative regime and, in the end, agreed with Rogers: 2016 FC 881. It ordered that the identifying information concerning John Doe #1 be disclosed to the appellants but only after they paid Rogers' fee.

[7] The appellants appeal to this Court. At first glance, the fee Rogers proposes—$100 per hour of work plus HST—might strike some as not much of an obstacle for movie producers to pay. But the appellants say there are tens of thousands of suspected infringers whose identifying information can now only be had at the same fee. They see Rogers' fee and the Federal Court's approval of it as a multi-million dollar barrier between them and the starting gate for their legal proceedings—proceedings they consider necessary to protect and vindicate their rights in the movies they make.

[8] The appellants submit that Rogers' fee cannot stand. In their view, the Federal Court erred in law in interpreting the legislative regime.

[9] For the following reasons, I agree with the appellants. The appeal must be allowed with costs.

A. Interpreting the legislative regime

[10] The outcome of this appeal turns on how we interpret this legislative regime. It must be interpreted in accordance with the text of the legislative provisions, their context, the purposes of the legislative regime and, more broadly, the purposes of the *Copyright Act*: see *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601. We must also regard this legislative regime as "remedial" and give it "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.C. 1985, c. I-21, section 12.

[11] As mentioned above, the legislative regime consists of sections 41.25, 41.26 and 41.27 of the *Copyright Act*. Section 41.27 provides for injunctive relief against a provider of an information location tool that is found to have infringed copyright. As this part of the legislative regime is not in issue in this appeal and as it sheds light on neither the issues before us nor the proper interpretation of this legislative regime, it shall not be discussed further.

B. Legislative text

[12] Sections 41.25 and 41.26 of the *Copyright Act* provide as follows:

41.25. (1) An owner of the copyright in a work or other subject-matter may send a notice of claimed infringement to a person who provides	**41.25**. (1) Le titulaire d'un droit d'auteur sur une oeuvre ou tout autre objet du droit d'auteur peut envoyer un avis de prétendue violation à la personne qui fournit, selon le cas :

(*a*) the means, in the course of providing services related to the operation of the Internet or another digital network, of telecommunication through which the electronic location that is the subject of the claim of infringement is connected to the Internet or another digital network;

a) dans le cadre de la prestation de services liés à l'exploitation d'Internet ou d'un autre réseau numérique, les moyens de télécommunication par lesquels l'emplacement électronique qui fait l'objet de la prétendue violation est connecté à Internet ou à tout autre réseau numérique;

(*b*) for the purpose set out in subsection 31.1(4), the digital memory that is used for the electronic location to which the claim of infringement relates; or

b) en vue du stockage visé au paragraphe 31.1(4), la mémoire numérique qui est utilisée pour l'emplacement électronique en cause;

(*c*) an information location tool as defined in subsection 41.27(5).

c) un outil de repérage au sens du paragraphe 41.27(5).

(2) A notice of claimed infringement shall be in writing in the form, if any, prescribed by regulation and shall

(2) L'avis de prétendue violation est établi par écrit, en la forme éventuellement prévue par règlement, et, en outre :

(*a*) state the claimant's name and address and any other particulars prescribed by regulation that enable communication with the claimant;

a) précise les nom et adresse du demandeur et contient tout autre renseignement prévu par règlement qui permet la communication avec lui;

(*b*) identify the work or other subject-matter to which the claimed infringement relates;

b) identifie l'oeuvre ou l'autre objet du droit d'auteur auquel la prétendue violation se rapporte;

(*c*) state the claimant's interest or right with respect to the copyright in the work or other subject-matter;

c) déclare les intérêts ou droits du demandeur à l'égard de l'oeuvre ou de l'autre objet visé;

(*d*) specify the location data for the electronic location to which the claimed infringement relates;

d) précise les données de localisation de l'emplacement électronique qui fait l'objet de la prétendue violation;

(*e*) specify the infringement that is claimed;

e) précise la prétendue violation;

(*f*) specify the date and time of the commission of the claimed infringement; and

f) précise la date et l'heure de la commission de la prétendue violation;

(*g*) contain any other information that may be prescribed by regulation.

g) contient, le cas échéant, tout autre renseignement prévu par règlement

41.26. (1) A person described in paragraph 41.25(1)(*a*) or (*b*) who receives a notice of claimed infringement that complies with subsection 41.25(2) shall, on being paid any fee that the person has lawfully charged for doing so,

41.26. (1) La personne visée aux alinéas 41.25(1)*a*) ou *b*) qui reçoit un avis conforme au paragraphe 41.25(2) a l'obligation d'accomplir les actes ci-après, moyennant paiement des droits qu'elle peut exiger :

(*a*) as soon as feasible forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it; and

a) transmettre dès que possible par voie électronique une copie de l'avis à la personne à qui appartient l'emplacement électronique identifié par les données de localisation qui sont précisées dans l'avis et informer dès que possible le demandeur de cette transmission ou, le cas échéant, des raisons pour lesquelles elle n'a pas pu l'effectuer;

(*b*) retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those six months, for one year after the day on which the person receives the notice of claimed infringement.

b) conserver, pour une période de six mois à compter de la date de réception de l'avis de prétendue violation, un registre permettant d'identifier la personne à qui appartient l'emplacement électronique et, dans le cas où, avant la fin de cette période, une procédure est engagée par le titulaire du droit d'auteur à l'égard de la prétendue violation et qu'elle en a reçu avis, conserver le registre pour une période d'un an suivant la date de la réception de l'avis de prétendue violation.

(2) The Minister may, by regulation, fix the maximum fee that a person may charge for performing his or her obligations under subsection (1). If no maximum is fixed by regulation, the person may not charge any amount under that subsection.	(2) Le ministre peut, par règlement, fixer le montant maximal des droits qui peuvent être exigés pour les actes prévus au paragraphe (1). À défaut de règlement à cet effet, le montant de ces droits est nul.
(3) A claimant's only remedy against a person who fails to perform his or her obligations under subsection (1) is statutory damages in an amount that the court considers just, but not less than $5,000 and not more than $10,000.	(3) Le seul recours dont dispose le demandeur contre la personne qui n'exécute pas les obligations que lui impose le paragraphe (1) est le recouvrement des dommages-intérêts préétablis dont le montant est, selon ce que le tribunal estime équitable en l'occurrence, d'au moins 5 000 $ et d'au plus 10 000 $.
(4) The Governor in Council may, by regulation, increase or decrease the minimum or maximum amount of statutory damages set out in subsection (3).	(4) Le gouverneur en conseil peut, par règlement, changer les montants minimal et maximal des dommages-intérêts préétablis visés au paragraphe (3).

C. The state of the law before the legislative regime was enacted

[13] The earlier state of the law sheds much light on the purposes of the legislative regime. The legislative scheme was aimed at reducing the complexity and cumbersomeness under the earlier law so that copyright owners could better protect and vindicate their rights.

[14] We start with the problem mentioned at the start of these reasons. Copyright owners need information concerning the identities of suspected copyright infringers and internet service

providers hold that information. But internet service providers are understandably reluctant to disclose their customers' information.

[15] The same sort of problem happens in other contexts. Sometimes persons are wronged and intend to bring legal proceedings for the wrong but cannot: they do not know the identity of their wrongdoers. However, a third party does know or has the means of knowing.

[16] Over four decades ago, courts found a solution to this problem: the equitable bill of discovery. A party can use this mechanism to obtain a pre-litigation order against a third party compelling disclosure of identifying information and documents. Today, such an order is often called a *Norwich* order, named after the House of Lords decision that fashioned it: *Norwich Pharmacal Co. v. Customs & Excise Commissioners*, [1973] UKHL 6, [1974] A.C. 133.

[17] In the Federal Courts system, *Norwich* orders can be obtained under Rule 233 of the *Federal Courts Rules*, SOR/98-106: *BMG Canada Inc. v. Doe*, 2005 FCA 193, [2005] 4 F.C.R. 81.

[18] *Norwich* orders are by no means sure things to get. One must show a valid, *bona fide* or reasonable claim, the involvement of a third party in the impugned acts, necessity in the sense that the third party is the only practical source of the information, and desirability in the sense that the interests of justice favour the obtaining of disclosure from the third party.

[19] And that is not all. The court must balance the benefit to the applicant against the prejudice to the alleged wrongdoer in releasing the information. Factoring into the equation is the nature of the information sought, the degree of confidentiality associated with the information by the party against whom the order is sought, and the degree to which the requested order curtails the use to which the information can be put. Finally, the person from whom discovery is sought can be reasonably compensated for the expenses arising out of compliance with the discovery order. See generally *BMG Canada Inc.*, above; *Straka v. Humber River Regional Hospital* (2000), 51 O.R. (3d) 1; 193 D.L.R. (4th) 680 (C.A.); *1654776 Ontario Limited v. Stewart*, 2013 ONCA 184, 114 O.R. (3d) 745.

[20] In seeking a *Norwich* order, complications can arise. What sort of information and documents is the moving party entitled to receive? Does notice have to be sent to the suspected wrongdoers? If so, what is the content of the notice? What sort of compensation is the holder of information and documents entitled to receive? How long must that party retain the information and records? Many other questions can arise.

D. The purpose of the legislative regime

[21] The legislative regime is designed to reduce the complications and answer many of the questions that can arise when a *Norwich* order is sought. In this way, it makes the process more administrative in nature, more predictable, simpler and faster, to the benefit of all involved—but most of all to copyright owners who need to protect and vindicate their rights.

[22] As we shall see, the legislative regime protects and vindicates the rights of copyright owners in other ways, such as by putting suspected infringers on notice so that they may cease any further infringing conduct.

[23] The protection and vindication of the rights of copyright owners is no small thing. That is a central feature of the *Copyright Act*. It is also a central feature of the *Copyright Modernization Act*, the statute that added the legislative regime to the *Copyright Act*. These statutes don't just identify the purpose of protecting and vindicating the rights of copyright owners; they also tell us why this purpose matters.

[24] The preamble to the *Copyright Modernization Act* tells us, among other things, that it is to "update the rights and protections of copyright owners" and to "enhanc[e] the protection of copyright works or other subject-matter" in order to promote "culture and innovation, competition and investment in the Canadian economy." Economic growth creates wealth and employment. The *Copyright Modernization Act* is needed because of "advancements in…information and communications technologies that…present…challenges that are global in scope." Further, "the challenges and opportunities of the Internet" need to be addressed. The preamble to the *Copyright Modernization Act* also reminds us that the *Copyright Act* is "an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors of the knowledge economy."

[25] The *Copyright Act* itself aims at "a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator": *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34, 2 S.C.R. 336 at para. 30. Or as the Supreme Court also put it, "to prevent someone other than the creator from appropriating whatever benefits may be generated": *ibid.*; see also *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, 1 S.C.R. 339 at para. 23.

[26] The overall aim, then, is to ensure that in the age of the internet, the balance between legitimate access to works and a just reward for creators is maintained. The internet must not become a collection of safe houses from which pirates, with impunity, can pilfer the products of others' dedication, creativity and industry. Allow that, and the incentive to create works would decline or the price for proper users to access works would increase, or both. Parliament's objectives would crumble. All the laudable aims of the *Copyright Act*—protecting creators' and makers' rights, fostering the fair dissemination of ideas and legitimate access to those ideas, promoting learning, advancing culture, encouraging innovation, competitiveness and investment, and enhancing the economy, wealth and employment—would be nullified.

[27] Thus, to the extent it can, the legislative regime must be interpreted to allow copyright owners to protect and vindicate their rights as quickly, easily and efficiently as possible while ensuring fair treatment of all.

E. Analyzing the legislative regime

[28] The holders of records who are subject to this legislative regime are defined with particularity under subsection 41.25(1). But for simplicity I shall refer to them in these reasons as internet service providers.

[29] The legislative regime imposes certain obligations upon internet service providers that have identifying information. The legislative regime also regulates the fee that internet service providers can seek from copyright owners for their efforts.

[30] Here's how the legislative regime works. Under section 41.25 of the Act, the owner of a copyright in a work or other subject-matter, such as the appellants, sends a notice of infringed copyright to an internet service provider like Rogers. The notice sets out certain information that allows the internet service provider to review its records and identify the suspected infringer: see subsection 41.25(2) of the Act.

[31] Subsection 41.26(1) of the Act sets out the obligations of the internet service provider upon receiving the notice of infringed copyright and upon the payment of any fee that can be "lawfully charged."

[32] The internet service provider has two sets of obligations: one set in paragraph 41.26(1)(*a*) and another set in paragraph 41.26(1)(*b*). Some obligations are express and are evident in the literal wording of these paragraphs. Other obligations are necessarily incidental to, implied from

or bound up in the express obligations. These other obligations must also exist—otherwise, the purposes underlying the legislative regime will be unfulfilled or, worse, frustrated.

(1) The obligations under paragraph 41.26(1)(*a*)

[33] The internet service provider must forward the notice of claimed infringement to "the person to whom the electronic location identified by the location data specified in the notice belongs," namely the suspected infringer. This furthers the objective of fairness to suspected infringers online: among other things, they may be able to oppose any later disclosure order concerning their information and forestall trouble by contacting the copyright owners and offering any apologies, explanations or settlement proposals. They may also cease their infringing activities, capping both the damage to the copyright owner and their own potential liability.

[34] These objectives, the overall purposes of this legislative regime, and the broader purposes of the *Copyright Act* can only be met if the internet service provider maintains its records in a manner and form that allow it to identify suspected infringers quickly and efficiently, it has searched for and has located the relevant records, and it has done enough work analyzing the records to satisfy itself that it has identified the suspected infringers accurately.

[35] For the legislative regime to work, accuracy must be assured. Thus, to the extent the internet service provider must conduct verification activities to ensure accuracy, the verification activities must be part and parcel of the paragraph 41.26(1)(*a*) obligations.

[36] Finally, the internet service provider must notify the copyright owner that it has sent notices to the suspected infringers or must explain why it was not able to send them.

(2) The obligations under paragraph 41.26(1)(*b*)

[37] The internet service provider must "retain records" that "will allow the identity of the person to whom the electronic location belongs to be determined" by those who will use the records. The "records" are those the internet service provider has located and maintains in a manner and form usable by it to identify suspected infringers in accordance with its paragraph 41.26(1)(*a*) obligations. But the records may not be in a manner and form usable by those seeking to determine the identity of the suspected infringers. Who might those persons be? No doubt the copyright owner needs to know the identity of the suspected infringers so it can determine its options. And ultimately a court will need to know the identity of the suspected infringers so it can determine the issues of copyright infringement and remedy.

[38] Thus, bearing in mind the purposes of the legislative scheme and the broader purposes of the *Copyright Act*, Parliament must have intended that the records be in a manner and form that can be used by the copyright owner to determine its options and, ultimately, by the court to determine issues of copyright infringement and remedy.

[39] To the extent that the records are in a manner and form usable by the internet service provider to identify suspected infringers but are not in a manner and form usable by copyright owners and courts—in other words, to the extent they must be translated or modified in some

way—the internet service provider must perform that work as part of its 41.26(1)(*b*) obligations. An indecipherable jumble of randomly arranged records that copyright owners and courts cannot figure out will not, in the words of paragraph 41.26(1)(*b*), "allow [copyright holders and courts to determine] the identity of the person to whom the electronic location belongs." The records must also be retained in a manner that can be disclosed promptly. Only the prompt provision of helpful, usable records to copyright owners and ultimately to the courts fulfils the purposes of the legislative regime and the broader purposes of the *Copyright Act*.

(3) A summary of the internet service provider's obligations under subsection 41.26(1)

[40] Overall, putting the two sets of subsection 41.26(1) obligations together, the internet service provider must maintain records in a manner and form that allows it to identify suspected infringers, to locate the relevant records, to identify the suspected infringers, to verify the identification work it has done (if necessary), to send the notices to the suspected infringers and the copyright owner, to translate the records (if necessary) into a manner and form that allows them both to be disclosed promptly and to be used by copyright owners and later the courts to determine the identity of the suspected infringers, and, finally, to keep the records ready for prompt disclosure.

[41] These obligations arise only upon the internet service provider being paid a "lawfully charged" fee: see the opening words of subsection 41.26(1); see also subsection 41.26(2), which regulates the amount of the fee. What fee can an internet service provider charge? In this case, what fee can Rogers charge?

(4) The fee that the internet service provider can charge

[42] Under subsection 41.26(2), the responsible Minister, the Minister of Industry, may, by regulation, fix the maximum fee that an internet service provider like Rogers can charge for performing the subsection 41.26(1) obligations. But if no maximum fee is fixed by regulation, the internet service provider may not charge anything for performing the subsection 41.26(1) obligations.

[43] At present, no regulation has been passed. Thus, internet service providers such as Rogers cannot charge a fee for the discharge of their subsection 41.26(1) obligations, as significant as they are.

[44] In the abstract, some may query the policy wisdom of this. But when the text, context and purpose of the legislative regime and the broader purposes of the Copyright Act are kept front of mind and when a little bit of legislative history is taken into account, the query is answered.

[45] Before the enactment of this legislative regime, internet service providers were consulted on the issue of the fee and a number of other matters: see the explanatory note to the order that brought sections 41.25 and 41.26 into force (P.C. 2014-675): *Canada Gazette*, Part II, v. 148, no. 14, pp. 2121-2122. This gave internet service providers an opportunity to weigh in and express concerns about whether the obligations to be imposed on them were too onerous, impractical or expensive.

[46] Looking at the version of the legislative regime that was enacted after the consultations ended, one may surmise that uncertainty remained on the issue of the fee. Rather than specifying a particular amount or a particular formula by which a fee could be calculated, Parliament adopted a more flexible posture.

[47] Another way of putting this is that subsection 41.26(2) has been drafted in a way that makes "no fee" for the subsection 41.26(1) obligations the default position. Depending on everyone's experience concerning the operation of the legislative regime, the Minister of Industry might later make a regulation setting a maximum fee. When in force, that regulation would displace the default position.

[48] The default position of "no regulation and, thus, no fee" for the 41.26(1) obligations is a legislative choice that, at least for the time being, prioritizes considerations of access to identifying information to allow copyright owners the ability to protect and vindicate their rights over the economic interests of internet service providers. This is no surprise given the purposes the legislative regime serves and the broader purposes of the *Copyright Act*.

[49] Inherent in this legislative choice is the view that leaving the cost of the subsection 41.26(1) obligations with internet service providers, at least for the time being, is not unfair. After all, depending on the elasticity of demand, the costs can be passed on to the subscribers of the products of internet service providers, some of whom are the suspected infringers.

[50] If subsection 41.26(2) were drafted differently and internet service providers were allowed to charge without restriction, the purposes behind this legislative regime and the larger purposes of the *Copyright Act* would be frustrated. Internet service providers could potentially charge a fee so large that copyright owners would be dissuaded from obtaining the information they need to protect and vindicate their rights. Parliament's aims of protecting the rights of copyright owners, fostering the wide dissemination of ideas and legitimate access to those ideas, promoting learning, advancing culture, encouraging innovation, competitiveness and investment, and enhancing the economy, wealth and employment would be thwarted. But the pirates' safe houses would thrive.

[51] Throughout the hearing before us, Rogers submitted that it ought to receive reasonable compensation for what it does and that it should not be forced to provide services for free. This may be so in a political, commercial or moral sense. But, as the foregoing analysis of this remedial legislative regime suggests, this is not so in a legal sense.

[52] At present, if the absence of a regulation and the attendant prohibition against charging a fee for the discharge of the subsection 41.26(1) obligations causes economic hardship for internet service providers like Rogers, one immediate recourse is to limit their costs of compliance with their obligations. For example, they can apply their advanced technological expertise to their systems to make their compliance with subsection 41.26(1) more automatic, more efficient and less expensive.

[53] Indeed, this was foreseen and was encouraged. Internet service providers were given six month's advance notice of the entry into force of the legislative regime so that they could "implement or modify their systems": see the explanatory note, above, published in the *Canada Gazette*, above at p. 2122.

[54] And now of course, with the benefit of experience under this new legislative regime and also with the benefit of this Court's interpretation of the legislative regime, the internet service providers can plead their economic case to the Minister and ask for a regulation that would allow them to charge a fee for their work in discharging their subsection 41.26(1) obligations.

F. What the legislative regime does not regulate

[55] After the internet service provider has performed its subsection 41.26(1) activities, it is holding records that are in a manner and form that can be disclosed promptly to copyright owners and that can be used by copyright owners and courts to determine the identity of suspected infringers. All that is left is the actual act of disclosure to the copyright owner. The legislative regime does not regulate this.

[56] As mentioned above, the legislative regime was enacted against the backdrop of the *Norwich* order process, a process that includes the act of disclosure. But by not regulating the act of disclosure, the legislative regime does not displace the *Norwich* order process entirely. The *Norwich* order process remains to govern disclosure.

[57] Thus, it appears that Parliament elected to keep the courts in charge of deciding whether disclosure should be made and, if so, on what conditions. Again, Parliament seems to have sought flexibility: to ensure that at the end of the process the courts can deal with any unfairness arising under this new legislative regime.

[58] Unless an internet service provider is willing to hand over the retained records voluntarily, the copyright owner must seek an order for disclosure. It is reasonable for an internet service provider to insist that a disclosure order be sought. The order can protect it against aggrieved customers whose information is being disclosed.

[59] What criteria govern the granting of that order? It must be recalled that *Norwich* orders emanate from the equitable bill of discovery and so all of the discretionary considerations that can affect equitable relief are live. Further, as *BMG Canada Inc.* tells us, *Norwich* orders can be sought in the Federal Courts system under Rule 233. And under Rule 53(1), the Federal Courts "may impose such conditions and give such directions as [they consider] just."

[60] However, the court's power to impose conditions and make directions is restricted in one major way. A court is bound by the law on the books, in this case sections 41.25 and 41.26 of the *Copyright Act*. As we have seen, in the absence of a regulation, subsection 41.26(2) forbids the charging of a fee for the internet service providers' discharge of their obligations under subsection 41.26(1). A court cannot authorize the charging of fees that Parliament says cannot be charged.

G. The charging of a fee for the act of disclosure

[61] The internet service provider can charge a fee for the actual, reasonable and necessary costs associated with the act of disclosure. The act of disclosure does not fall within subsection 41.26(1) and, thus, is not subject to the "no regulation and, thus, no fee" default rule in subsection 41.26(2).

[62] What do we mean by the act of disclosure? It will be recalled that after the internet service provider has performed its subsection 41.26(1) activities, it is holding records that are in a manner and form that allows them to be used by copyright owners and courts to determine the identity of suspected infringers and in a manner and form that allows prompt disclosure. All that is left is the delivery or electronic transmission of these records by the internet service provider to the copyright owner and the internet service provider's participation in the obtaining of a disclosure order from the Court.

[63] The actual, reasonable and necessary costs of delivery or electronic transmission of the records by the internet service provider are likely to be negligible.

[64] Similarly, the costs associated with a motion for a disclosure order are likely to be minimal. A single disclosure order can authorize the release of the identifying information of many suspected infringers, perhaps even thousands. Except in extraordinary cases, the motion for a disclosure order would proceed as a Rule 369 motion in writing on consent or unopposed, with standard material and a standard draft order placed before the Court. That standard draft

order could include a standard amount, likely nominal, to compensate the internet service provider for its disclosure activities, and nothing else.

H. Analysis of the Federal Court's decision

[65] In the case before us, the Federal Court made an order requiring Rogers to disclose the records it had retained. It was also minded to allow Rogers to charge a fee for its efforts. The issue before us is whether, in light of the principles discussed above, the Federal Court erred in setting the fee.

[66] In the Federal Court, Rogers was prepared to disclose the records if the appellants submitted a proposed form of order and paid a fee of $100 per hour plus HST "to cover its costs associated with compiling such information": Federal Court's reasons at para. 18.

[67] As best as can be determined, Rogers completed its work to satisfy its subsection 41.26(1) obligations. But in response to the appellants' request for disclosure, Rogers re-did some of its work, reviewing the information in its computer system to identify the suspected infringer. To do this, it used a completely different system, one used for law enforcement requests. Rogers says that it needed to do this additional work in order to verify its earlier work and ensure accuracy. Rogers' $100 per hour fee is based mainly on the cost of this additional work.

[68] The Federal Court approved the fee. According to the Federal Court, "the fee is what it is" and if the appellants want the information "they must pay the hourly fee": Federal Court's reasons at para. 21. The fee is to compensate Rogers for the work necessary to "assemble, verify and forward the Subscriber information to the [appellants]": Federal Court's reasons at para. 21.

[69] The Federal Court's reasoning appears to have been that the legislative regime does not provide for disclosure of the information and it does not say that a fee cannot be charged for "complying with a disclosure order made in respect of that information" (at para. 8). Accordingly, in its view, the usual requirement of a *Norwich* order—that the copyright owner reimburse the internet service provider for its reasonable costs—remains unaffected by the legislation. As a result, the Federal Court concluded that it could allow a fee to be paid to Rogers to cover its costs of discharging the subsection 41.26(1) obligations.

[70] In my view, this holding was vitiated by legal error. Under the legislative regime, described and analyzed above, an internet service provider cannot charge a fee for the costs of discharging its subsection 41.26(1) obligations, enumerated and described in paragraph 40, above. Allowing an internet service provider at the point of disclosure to charge a fee for these costs would be an end run around the legislative decision that these activities should not be remunerated at this time.

[71] The additional work Rogers did was identification and verification work. Rogers should have completed this work as part of its subsection 41.26(1) obligations—matters for which it cannot charge a fee at this time. If an internet service provider like Rogers has discharged its

subsection 41.26(1) obligations properly, there should be no need to re-do the work. As mentioned above, the legislative regime contemplates that an internet service provider will discharge its subsection 41.26(1) obligations fully and accurately so that notices are sent only to the correct people and so the correct records can be used by copyright owners and courts if proceedings are later started.

[72] The appellants submit that the Federal Court also erred in saying that the "fee is what it is." They submit that the Federal Court must always ensure that a fee is reasonable in the circumstances. I agree that the Federal Court did not assess the reasonableness of the fee and should have. While the Federal Court noted (at paragraph 19) that "Rogers has offered evidence as to how the $100 per hour fee was established and why it is reasonable," the Federal Court never explicitly assessed its reasonableness.

[73] For these reasons, paragraph 2 of the Federal Court's order, which requires the appellants to pay Rogers a fee of $100 per hour plus HST for its services, must be set aside.

I. What should this Court do in this case?

[74] It is open to us to examine the evidence and to make the order the Federal Court should have made: *Federal Courts Act*, R.S.C. 1985, c. F-7, para. 52(b)(*i*).

[75] As mentioned above, on a motion for a disclosure order, the Court may attach a condition to the order, allowing for compensation to be paid to the internet service provider provided this is

consistent with the legislation. It is for the internet service provider to adduce the evidence necessary to prove its actual, reasonable and necessary costs that can and should be compensated—in this case the costs associated with the act of disclosure. Rogers failed to adduce sufficient evidence on this. It has not satisfied its burden.

[76] The only evidence in the record suggests that Rogers' cost of disclosure in 2012 was, at most, $0.50 per IP address: cross-examination of Ms. Jackson, QQ. 261-295; appeal book at pp. 118-121. But this evidence is not precise enough to be relied upon. The words "at most" mean that the cost in 2012 could have been less than $0.50 per IP address, perhaps significantly less. As well, evidence from 2012 does not tell us much about the present cost of disclosure: as we have seen, the entry into force of the legislative regime was delayed in order for internet service providers to improve their systems. This may have happened and so the cost now may be less. We simply do not know.

[77] Rogers has incurred legal costs in relation to the disclosure order both in the Federal Court and this Court. However, in the circumstances of this case, costs must follow the event, and it will be Rogers that pays the appellants' costs, not *vice versa*. In any event, granting a condition on a disclosure order allowing for compensation is a matter of discretion, at least in part guided by equitable considerations. In light of the position taken by Rogers in this litigation, I would exercise my discretion against any compensation for its legal costs.

[78] None of the foregoing prevents Rogers in future cases from charging a fee, likely nominal, compensating it for the actual, reasonable and necessary costs associated with the act of disclosure as defined in paragraph 62 above.

[79] Again, if Rogers and other internet service providers consider this level of compensation for their work to be unfair, they can ask the Minister to pass a regulation setting a maximum fee. As explained, this would permit them to charge a fee not just for the act of delivery, but also for the discharge of their subsection 41.26(1) obligations.

J. Proposed disposition

[80] For the foregoing reasons, I would allow the appeal. I would set aside paragraph 2 of the Federal Court's order dated July 28, 2016 in file T-662-16. I would set aside the award of costs in paragraph 10 of that order and award the appellants their costs here and below payable by the respondent, Rogers Communications Inc.

"David Stratas"

J.A.

"I agree
Mary J.L. Gleason J.A."

"I agree
Judith Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-278-16
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE BOSWELL DATED JULY 28, 2016, NO. T-662-16	
STYLE OF CAUSE:	VOLTAGE PICTURES, LLC *et al.* v. JOHN DOE #1, PROPOSED REPRESENTATIVE RESPONDENT ON BEHALF OF A CLASS OF RESPONDENTS AND ROGERS COMMUNICATIONS INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 11, 2017
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	GLEASON J.A. WOODS J.A.
DATED:	MAY 9, 2017

APPEARANCES:

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Andrew Bernstein James Gotowiec	FOR THE RESPONDENT, ROGERS COMMUNICATIONS INC.

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TAB 9

Court of Queen's Bench of Alberta

Citation: Trimay Wear Plate Ltd. v. Way, 2009 ABQB 47

Date:20090122
Docket: 9703 22138
Registry: Edmonton

Between:

Trimay Wear Plate Ltd.

Plaintiff

- and -

Keith Way and Premetalco Inc., Carrying on Buisness Under the Firm Name and Style Wilkinson Steel and Metals

Defendants

Memorandum of Decision
of the
Honourable Mr. Justice Robert A. Graesser

Nature of Application

[1] This decision arises in the context of ongoing case management of this matter. The lawsuit is working its way through discoveries, and each party has refused to answer a number of questions for various reasons. Each party has applied to have the other party and its witnesses answer some of the objected-to questions.

[2] Most of the disputed questions have been dealt with expeditiously, during argument. I reserved decision on several questions. This decision relates only to those questions.

Way Undertaking Refusals

[3] Trimay seeks to compel Mr. Way to answer questions and produce documents relating to the development of a potential new product line by Wilkinson in 2000. Way left Trimay's employment in March, 1996. He immediately went to work for Wilkinson, and assisted Wilkinson with the set up of their wear plate business and with Wilkinson's competition in the marketplace with Trimay.

[4] Trimay alleges that Way misappropriated proprietary technical information as to the manufacture of wear plate, and as a result, Wilkinson was able to produce a product that they would not have otherwise been able to produce. Alternatively, Trimay alleges that because of Way's knowledge of Trimay's product and its manufacture, Wilkinson got a head start in being able to produce their wear plate. Further, Trimay alleges that Way misused confidential business information such as customer lists, pricing details and information as to suppliers.

[5] One of the issues in this lawsuit is whether Wilkinson could have been able to manufacture marketable wear plate without the assistance and knowledge of Way, and if so, what length of time it would have taken Wilkinson to do so.

[6] The impugned line of questioning relates to a decision of Wilkinson to try to replicate a rust-resistant product. During examinations for discovery, Way apparently indicated that it hadn't taken Wilkinson long to be able to manufacture wear plate because of Wilkinson's internal skills, the availability of outside expertise and the absence of any technical "secrets" relating to wear plate.

[7] He volunteered that when Wilkinson decided to try to replicate a competitor's rust resistant product, it only took them four months to do so - from the decision to make the attempt, through to the development of proto-types and various levels of testing of the product.

[8] The series of questions relates mainly to testing Way's credibility in his claim that Wilkinson was able to successfully copy another competing product in approximately 4 months.

[9] There is no relevance in this lawsuit to the competing product itself, or the process used to develop it. The fact that Wilkinson was able to produce one product in a particular time period is of no consequence as to whether it would have been able to produce another product in a similar or shorter period of time. Way's opinion as to the level of expertise within Wilkinson is not something that is relevant and material to any of the issues in this lawsuit.

[10] Wilkinson's counsel allowed the questioning to continue for some time during the examination for discovery. During the examination, Trimay's counsel asked for a number of undertakings:

> 62. Seek and produce the written request made of Jack Tracy-Roth authorizing the research and development on the alternate product by Mr. Way and Mr. Jefferis and provide a copy of the same.

63. Produce and written authorization received from Mr. Tracy-Roth with respect to the alternate product.

64. Provide copies of all metal alloy purchases that would have been made to enable Wilkinson to run the tests on the alternate product.

65. Provide the Vaudit sales information or literature that would have been a precursor to Wilkinson getting into the alternate product.

66. Provide any and all records of each mix that was undertaken with respect to the alternate product, all operating parameters that were run on the alternate product, and any and all tests that would be run by NRC, ARC, Syncrude Research, and anyone in the United States with respect to the research and development on the alternate product that was done in the timeframe talked about.

[11] The process used by Wilkinson was described by Way. The requested undertakings, which have since been refused, are related to documenting the steps described by Way and confirming the time taken from start to finish. Answers to the undertakings sought do not bear on any of the issues in the lawsuit in any material way.

[12] The question to determine with these particular questions, therefore, is whether or not discovery questions going solely to credibility are proper.

[13] Rule 200(1.2) makes it clear that a person being examined "is required to answer only relevant and material questions." Relevance is determined with reference to the issues raised in the pleadings. The scope of discovery mandated by the Rules of Court narrowed in 1999 as a result of amendments that were aimed at excluding questions of tertiary relevance.

[14] The Alberta Court of Appeal discussed the scope of oral discovery in ***NAC Constructors Ltd. v. Alberta Capital Region Wastewater Commission***, 2006 ABCA 246 and stated at paras. 12 and 13 :

> Oral examination for discovery is now confined to eliciting facts of primary relevance, that is, facts that are directly in issue, or of secondary relevance, that is, facts from which the existence of the primary facts may be directly inferred. Both primary and secondary relevance are determined by reference to the issues raised by the pleadings. Questions seeking information that could reasonably be expected to lead to facts or records of secondary relevance (that is, questions asking for information that is only of tertiary relevance) need no longer be answered.
>
> In addition to being relevant within the meaning of Rule 186.1, information sought on discovery must be material, that is, be reasonably expected to

> "significantly" help determine one or more of the issues raised in the pleadings. The materiality of evidence refers to its pertinency or weight in relation to the issue it is adduced to prove: *Black's Law Dictionary*, (6th ed. 1990). Facts or documents may be relevant within Rule 186.1, but, either alone or in combination with other evidence, be of no significant help to the examining party in proving or disproving a fact in issue. As Slatter J. observed in ***Weatherill Estate v. Weatherill***, (2003) 337 A.R. 180 (Q.B.), 2003 ABQB 69 at para. 17, "... relevance is determined by the pleadings while materiality is more a matter of proof ...". See also ***Tolko Industries Ltd. v. Railink Ltd.*** (2003), 14 Alta. L.R. (4th) 388, 2003 ABQB 349 at para. 6.

[15] Way's credibility will certainly be a key issue at trial. Trimay alleges that he misappropriated proprietary and confidential information. Way denies this. But will confirmation of a timeline for product development on a different product significantly help determine one or more of the issues at trial?

[16] The answer to that question is clearly no. Questions that relate solely to credibility of the witness were disallowed even before the scope of discovery was narrowed. See Stevenson & Côté, *Civil Practice Encyclopoedia*, 2003 Juriliber, at Chapter 28, Part H.4 and the cases cited therein.

[17] Here, the questions are not related partly to an issue and partly to credibility. They relate solely to credibilty.

[18] As a result, the requested Undertakings 62, 63, 64, 65 and 66 need not be given.

[19] I therefore need not determine the issue as to whether Way, a current employee of Wilkinson, could be ordered to produce documentation in Wilkinson's possession but of which he had is aware and had some responsiblity for.

Shugarman Undertaking Refusals

[20] Mr. Sugarman is an officer of Trimay and is one of their key employees. He was produced as an employee, however, and is not the officer of Trimay for the purpose of discovery. He was involved in the purchase of shares in Trimay and has had ongoing senior management responsibilities for Trimay since approximately 1997.

Wilkinson's counsel asked him for undertakings as follows:

> 14. Review the documents that have been produced by both parties in this litigation and identify any document which establishes that Wilkinson uses Trimay's parameters.
> TAKEN UNDER ADVISEMENT (as of November 7, 2007 OBJECTED TO)

15. Review the documents that have been produced by both parties in this litigation and identify any document which establishes that Wilkinson uses Trimay's powder formulations.
TAKEN UNDER ADVISEMENT (as of November 7, 2007 OBJECTED TO)

[21] Trimay has since refused to answer the undertakings, after taking the requests under advisement.

[22] There is no question that the issue as to whether Wilkinson uses Trimay's parameters is relevant and material. It is one of the central issues in the lawsuit. "Parameters" relates to the operating conditions and settings of the equipment used by each of the parties in the production of wear plate.

[23] Powder formulations are equally relevant and material, as it is the "powders" (metallic additives) that are used in the production process that provides the wear-resistance to the end product. Trimay alleges that the composition of the powders used, and the proportions of powders are proprietary, and fundamental to the commercial success of wear plate.

[24] But just because the subject matter of a question is central to the issues in the lawsuit does not necessarily mean that the question itself is relevant and material, or otherwise a proper question to be answered.

[25] Here, Wilkinson essentially seeks to have a Trimay employee undertake to review all of the multitude of documents produced by both parties in this litigation, and give his opinion as to which documents "establish that Wilkinson uses Trimay's parameters". He is asked to conduct a similar review and advise which documents "establish that Wilkinson uses Trimay's powder formulations".

[26] With respect, the questions as asked oblige an employee of a party to identify the precise documents which he believes will enable his employer to prove part of its case against the other party.

[27] Stevenson & Côté discuss this issue in the *Civil Practice Encyclopaedia* at Chapter 28, Part H.7 and state "One cannot ask about the evidence by which the case will be proved, nor how a given fact will be proved."

[28] Both parties have produced the records they believe to be relevant and material to the issues. The question of what documents establish what facts will have to be determined by the trial judge. Asking a party what documents they intend to rely on to prove their case is tantamount to exposing litigation privilege and strategy.

[29] Asking a party's employee for his opinion as to what documents his employer will use to prove certain facts is even more objectionable. The employee's opinion is of little or no

relevance. Opinions expressed that go to the issues to be determined by the trial judge are objectionable from lay witnesses, and may also be found inappropriate even when expressed by experts. See for example, ***Canadian National Railway v. Volker Stevin Contracting Ltd.***, (1992), 1 Alta. L.R. (3d) 167, where Côté J.A. stated:

> It is curious that some of the scientific and engineering witnesses gave opinions on the nature and types of construction contracts, and on how to interpret certain clauses in this contract. The trial judgment quotes some of that evidence, and seems to rely upon it. But these are legal matters which must be submitted to the curt as argument. It is not a subject a subject for evidence, or weighing of the qualifications of the person who submits it. The contract here contains very little jargon or technical matters, and is composed almost entirely of ordinary English. It is for the court itself to interpret that; even a professor of English should not testify on that point: ... (at para. 5)

[30] These questions relate to some of the "ultimate issues" to be determined in the lawsuit. A witness's opinion as to what documents may prove these issues is of doubtful relevance. It does not meet the threshold of "relevance and materiality".

[31] That is not to say that a party cannot be asked about the documents it has.

[32] It would not have been objectionable to have a witness review his documentation and identify certain documents. It would not have been objectionable to ask Trimay, for example, if it has any documents showing its parameters or powder formulations, and if so to identify them.

[33] But to require a party to review the other party's production and point to the documents there that will be used to prove the case is a very different matter.

[34] Objections to questions and compelling answers are very question specific, issue specific and lawsuit specific. The precise formulation of each question often determines whether it is a proper question or an objectionable one.

[35] The questions here, as framed, are in the objectionable category.

[36] As a result, Mr. Shugarman need not provide the information sought in undertakings 14 and 15.

Costs

[37] The questions in this decision are 9 of well over 100 disputed questions and undertakings dealt with at the case management conferences on January 17 and 19, 2009. There was mixed success on the applications. Each party was order to answer questions previously refused, and each party successfully resisted answering questions objected to. Additionally, the parties were able to agree on a number of the questions. Costs are therefore in the cause.

Heard on the 17th, and 19th day of January, 2009.
Dated at the City of Edmonton, Alberta this 22nd day of January, 2009.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

Donald J. Wilson
Davis LLP
for the Plaintiff

Robert P. James and Lynn Michele Angotti
Parlee McLaws LLP
for the Defendants

TAB 10

2008 CarswellNat 6025
Federal Court

Simpson Strong-Tie Co. v. Peak Innovations Inc.

2008 CarswellNat 6025

Simpson Strong-Tie Company Inc., Applicant and Peak Innovations Inc., Respondent

Kevin R. Aalto Prothonotary

Judgment: December 31, 2008
Docket: T1570-07, T-1571-07

Counsel: None given

Subject: Civil Practice and Procedure; Intellectual Property
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.e Application for order for production
XII.2.e.ii Order
Intellectual property
III Trade-marks
III.6 Opposition
III.6.d Practice and procedure
III.6.d.v Evidence
III.6.d.v.E Cross-examination
Headnote
Civil practice and procedure --- Discovery — Discovery of documents — Application for order for production — Order
Intellectual property --- Trade marks — Opposition — Practice and procedure — Evidence — Cross-examination

***Kevin R. Aalto Prothonotary*:**

1 *UPON MOTION* in writing on behalf of the Applicant, for:

1. an Order requiring Thomas Ciz and Kimberiy La, affiants for the Respondent, who filed evidence in the appeal by way of application from the decision of the Opposition Board:

(a) to re-attend for further cross-examination on all their affidavits, in Toronto, at their own expense, to answer the questions refused on their cross-examinations dated June 10, 2008, and questions arising therefrom and questions on documents produced as a result of this Order and questions arising therefrom, on a date to be agreed upon by the parties, failing which, counsel for the Applicant may issue a further Direction to Attend in accordance with the *Rules*; and

(b) to provide copies of the documents requested on their respective Directions to Attend at least five (5) business days prior to the date set for their attendance.

2. An Order to extend the time for the filing of the Applicant's Record to a date twenty (20) days after the receipt of the further transcripts of cross-examination, or in the alternative, if the Applicant's motion is dismissed, twenty (20) days from the later of, the date of such Order or the receipt of the transcript of Mr. Jeknavorian;

3. An Order requiring the Respondent to pay the costs on a substantial indemnity basis for the attendance of Applicant's counsel in Vancouver, British Columbia for the original examination of the affiants and the costs of this motion; and

4. Such further and other relief as counsel may advise and this Honourable Court permit.

2 The Applicant has brought this motion for answers to questions refused on the cross-examinations of Kimberley La and Thomas Ciz and other relief. Both Ms. La and Mr. Ciz swore affidavits in support of the Respondent. The majority of the questions for which answers are sought focus on documents that the Respondent argues the witnesses were required to produce on the cross-examinations pursuant to Directions to Attend.

3 It must be kept in mind that these questions arise on cross-examinations on affidavits and not on examinations for discovery and that they are two different procedural steps. As noted by Prothonotary Tabib in *Autodata Ltd. v. Autodata Solutions Co.*, 2004 FC 1361 (F.C.):

A cross-examination on affidavit is not an examination on discovery. An affiant being cross-examined testifies as a witness and not as a representative of a party (*Merck Frosst Canada Inc. v. Canada (Minister of Health)*, [1997] F.C.J. No. 1847) (...)

The language of the Applicant's argument is the language of discovery. Certainly, if this proceeding were an action and the question had been posed in discovery, I would agree that the entire share purchase agreement is relevant, as it may lead to a train of further inquiry on relevant issues, and that a request for its disclosure is a proper follow-up request

However, a cross-examination on affidavit is not a discovery, and an application is not an action. An application is meant to proceed expeditiously, in summary fashion. For that reason, discoveries are not contemplated in applications. Parties cannot expect, nor demand, that the summary process mandated for applications will permit them to test every detail of every statement made in affidavits or in cross-examinations against any and all documents that may be in the opposing party's possession. If a party is not required to "accept" a witness' bald assertion in cross-examination, it is however limited in its endeavours to test that assertion to the questions it may put to the witness and the witness' answers in the course of the cross-examination. To the extent documents exist that can buttress or contradict the witness' assertion, production may only be enforced if they have been listed, or sufficiently identified, in a direction to attend duly served pursuant to Rule 91(2)(c) (see *Bruno v. Canada (Attorney General)*, [2003] F.C.J. 1604), I reiterate: a cross-examination on an affidavit is the direct testimonial evidence of the witness, not a discovery of the party.

4 The Directions to Attend which were served are virtually identical and include 11 very wide enumerated descriptions of documents which the Applicant required each of the witnesses to produce. The following are examples of the types of documents requested in the Directions to Attend:

1. All documents within the files or possession of the Respondent relating to Simpson Strong-Tie Company, Inc. or that of its subsidiary, Simpson Strong-Tie Canada, Ltd., or any distributor or retailer in Canada as to their product advertising or promotion via their website or otherwise;

2. All documents within the files or possession of the Respondent relating to other websites reviewed for the purposes of your affidavits of January 24, 2008, January 25, 2008 and May 12, 2008 and copies or downloads made which are not included or referred to within your affidavits;

5 The remaining enumerated items are equally wide in their ambit and reach beyond the specific knowledge, information and belief of the particular witness. Samples of the questions in dispute are as follows from Mr. Ciz's cross examination:

• Do you have any documents or devices to provide me pursuant to direction to attend?

• Sir, in terms of the direction to attend, did you research the files for the documents referred to in the various paragraphs of it?

• What are your guidelines for relevance?

• What investigations did you do with regard to paragraph 3 in the demand there?

• Paragraph 6, did you look for any installation guides, other than the one that's produced?

6 These questions were then usually followed by a lengthy colloquy between counsel as to relevance, privilege, the scope of the Direction to Attend, and, the purpose of cross-examination. Similar examples may be found in the cross-examination of Ms. La.

7 What is noteworthy about these questions is that they seek documentary production and are not focussed on cross-examination of a witness on the affidavit. The Applicant argues that the witnesses are required to produce the documents referred to in the Directions to Attend and the *Federal Courts Rules* when they were amended, contemplated that a witness in a proceeding could be compelled to produce documents reaching far beyond the scope of the affidavit on which they were cross-examined. The Respondent, quite rightly in my view, objected to these questions as they were not focused on the contents of the affidavit and the matters to which were deposed but to efforts made to produce documents not within the possession, power or control of the witnesses. There were no questions asked establishing whether the witness had any of the documents in his or her possession, power or control.

8 Rule 83 permits a party to an application to cross-examine a deponent of an affidavit served by an adverse party. It has been held that the range of inquiry on an affidavit is limited to the issues in respect of which the affidavit was filed or to the credibility of the witness (see *Lépine c. Banque de Nouvelle-Écosse*, 2006 FC 1455 (F.C.)).

9 Rule 91 is directly applicable to the issues raised on this motion. That Rule provides that a party intending to conduct an oral examination shall serve a Direction to Attend on the person to be examined, It is notable that Rule 91(2)(c) is specific to cross-examination on an affidavit. The Rule requires that the documents to be produced for inspection at the examination are those documents "in *that* person's possession, or power or control" [emphasis added] that are relevant to the application. The Rule is specific in that it refers to "that person's possession, power or control", meaning the affiant. This is to be contrasted with Rule 91(2)(a) which deals with examinations for discovery and which refers to documents and other material in the possession, power or control of the party on behalf of whom the person is being examined that are relevant to the matters in issue in the action. Rule 92(2)(a) is obviously much wider in its ambit insofar as production of documents is concerned.

10 On a plain reading of Rule 91(2)(c) and 91(2)(a) the documents to be produced on the cross-examination are only those documents in the affiant's possession, power or control. Thus, a Direction to Attend which seeks "all documents" in the corporation's files are not necessarily in the possession, power or control of the affiant. The request in this case is far beyond the scope of documentary production on a cross-examination. Neither Mr. Ciz nor Ms. La is in possession, power or control of all documents within the files of the Respondent. They each have limited roles within the organization and documents which are clearly within their possession, power or control that are relevant to the issues in the action could be sought to be produced. Such is not the case here. The Applicant in serving the Directions to Attend has dramatically overreached that which an affiant is required to produce.

11 It could very well occur on a cross-examination that when a proper foundation is laid a party will obtain production of additional documents. However, the thrust of the questions asked on this cross-examination which were refused by the Respondent do not seek to lay the foundation which might demonstrate that some of these documents were in the possession, power or control of the affiant. It is no answer to serve a Direction to Attend that seeks production of virtually every single document within the corporate Respondent and say without proper foundation that they are within the possession, power or control of the witness.

12 As a result, questions arising from the Directions to Attend are not proper and need not be answered. There were a few other questions which were refused and counsel agreed that the largest number of questions related to the Direction to Attend and that a ruling dealing with those questions would effectively deal with the motion. In any event, several of the other questions to which argument was not specifically directed dealt with matters which were not relevant, were privileged or exceeded the scope of the affidavits. The Applicant is free to argue on the hearing, if so advised, that an adverse inference should be drawn against the Respondent for its failure to answer or produce documents.

13 The Respondent provided dates as to availability for a hearing on the merits and is anxious that these matters proceed expeditiously. These two applications are part of some 31 applications pending in the Court between these parties. The other proceedings have been stayed pending the outcome of these proceedings. It is essential that a hearing date be set as soon as practicable and thus they will be referred to the Office of the Chief Justice to set a hearing date. To that end the Applicant will serve and file its Applicant's Record on or before January 23, 2009 and will serve a Requisition for Hearing notwithstanding that this order refers the proceedings to the Office of the Chief Justice to set a hearing date. The Respondent will serve and file the Respondent's Record on or before February 20, 2009.

14 The Respondent is entitled to its costs of the motion.

15 *THIS COURT ORDERS that*

1. The motion is dismissed.

2. The Respondent is entitled to its costs of the motion.

3. The Applicant shall serve and file its Applicant's Record on or before January 23, 2009.

4. The Respondent shall serve and file its Respondent's Record on or before February 20, 2009.

5. These applications shall be referred to the office of the Chief Justice to set a hearing date for one day's duration. Notwithstanding this part of the order, the Applicant is still required to file a Requisition for Hearing and pay the appropriate fee.

6. The parties may contact the Court to arrange a case conference if there is any difficulty with meeting the timeline herein.

End of Document

TAB 11

Date: 200010307

Dockets:IMM-2294-96

IMM-2296-96

IMM-2297-96

Neutral Citation: 2001 FCT 147

BETWEEN:

ATLANTIC PRUDENCE FUND CORPORATION

ATLANTIC GROWTH FUND CORPORATION LIMITED

AB CAPITAL CORPORATION

KLC CAPITAL CORPORATION LIMITED

MOUNT ROYAL CAPITAL CORPORATION

PEI GROWTH FUND CORPORATION

ATLANTIC PRUDENCE MANAGEMENT CORPORATION

GRT MANAGEMENT CORPORATION

ABT MANAGEMENT CORPORATION

KLC MANAGEMENT LTD., MTR MANAGEMENT CORPORATION

and PEI GROWTH MANAGEMENT CORPORATION LTD.

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

(Delivered from the Bench at Toronto, Ontario

on February 28, 2001)

HUGESSEN J.

[1] The bulk of the requests made by the applicants in this motion have to do with requests for production of documents addressed to the witness Webber who swore an affidavit on behalf of the respondents. It is common ground that Mr. Webber was, at relevant times, a contract employee of the CIC but is not now such an employee and is in fact working for the World Bank in Washington, DC.

[2] I am quite satisfied that I cannot order a simple witness which is what Mr. Webber is, to produce documents which are not now in his possession, custody or control. To do so, it seems to me, would be to confuse the role of the witness with that of a person being examined for discovery. As I put to counsel during argument, I would test that proposition in a very simple way by looking at the means the Court has at its disposal for enforcing an order to produce documents addressed to a witness. That means is customarily through the compulsion of a contempt order. But I simply could not issue a contempt order against Mr. Webber for failure to produce documents which are not in his possession, custody and control and are in the possession of the Minister. I do not need to reach the question with respect to Mr. Webber as to whether if he were still in the employ of the Minister he is sufficiently highly placed to have what I might call *de facto* possession, custody or control of documents in the Ministry. That disposes of most of the requests for documents in this motion.

[3] There are few minor items remaining over. The first has to do with some departmental guidelines or policy documents. Mr. Webber, in his affidavit, produced such guidelines. Another respondent's deponent who swore an affidavit and was cross-examined thereon, was asked if there were any other such documents, and if I understand his response correctly, he said that there were. It seems to me that those documents can properly be ordered to be produced and should be so ordered. They are referred to in question 132 addressed to Mr. Myatt.

[4] There were also questions put to Mr. Myatt and to Mr. Bissett who are both, as I say, still employees with the department, in connection with minutes of meetings of the steering committee and the working group of which the applicants do not have copies. In order for me to order the production of such documents, I would have to be satisfied that the documents exist and the evidence is simply not there that such documents do exist. It is quite clear that the applicants have a great many minutes and other documents emanating from the steering committee and the working group and there is no satisfactory evidence as to any gaps in that documentation which would justify an order on my part.

[5] The final point taken was with respect to a question relating to the identity of an informant. I am informed by counsel that an objection was taken under section 37 of the *Canada Evidence Act* and in any event that objection was renewed before me this morning, and counsel are in agreement that that objection, together with a number of others taken under section 37, are going to be the subject matter of another motion which will be brought on another day. So the order that will go will dismiss the motion but will contain an order that the respondent's witness Mr. Myatt is to produce the document to which he referred in his answer to question 132.

[6] I will deal with the question of cost later.

"James K. Hugessen"

Judge

Ottawa, Ontario

March 7, 2000

TAB 12

Date: 20100914
Docket: 10/25
Citation: *Carroll (Re); Kent v. Kent* 2010 NLCA 53

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

IN THE MATTER OF:
a proceeding in the
Unified Family Court styled:

BETWEEN:	CATHERINE KENT	APPLICANT
AND:	CLARENCE KENT	RESPONDENT

AND IN THE MATTER OF
an Order made in the aforementioned proceeding against Lisa Carroll, a non-party on March 12, 2010 (hereinafter the Appellant)

Coram: Green, C.J.N.L., Cameron and White, JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Unified Family Court 2005 02U 0035

Appeal Heard: May 11 and 12, 2010
Judgment Rendered: September 14, 2010

Reasons for Judgment by Green, C.J.N.L. and Cameron, J.A.
Concurred in by: White, J.A.

Counsel for the Intended Appellant: Catherine Perry
Counsel for the First Respondent: Jean Dawe, Q.C.
Counsel for the Second Respondent: Keri-Lynn Power

Green, C.J.N.L. and Cameron, J.A.:

[1] This case involving a witness subpoenaed to produce documents during a trial engages questions concerning the test to be applied in determining the obligation of a non-party, in the context of a dispute over child and spousal support, to produce personal financial documents pursuant to a subpoena *duces tecum*. It also indirectly involves a consideration of the degree to which a person's privacy interest in being left alone with her private thoughts and papers can be legitimately interfered with by the exigencies of the court process.

Background

[2] In 2005, by way of an originating application filed in the Unified Family Court[1], Catherine Mary Kent sought against her husband Clarence Francis Kent a divorce, custody of their three children, division of matrimonial property, a share of her husband's business assets, child support, spousal support and costs.

[3] With respect to the claim for child support she sought an amount in excess of the basic table amount, arguing her husband's income was in excess of $100,000 per annum, as well as an amount for special expenses under s. 7 of the *Federal Child Support Guidelines*. She did not claim on the basis of undue hardship under s. 10 of the *Guidelines*.

[4] The trial of the issues between the Kents has been ongoing on an intermittent basis for several years. It is not yet concluded. Counsel have advised that time will be required in the fall of 2010 to complete the trial.

[5] As part of the pre-trial process engaged in by the Kents, Ms. Kent, at a case management conference, sought and was granted leave to make an application to seek discovery of certain financial information from Ms. Lisa Carroll, the person with whom Mr. Kent had commenced a live-in relationship following his separation from Ms. Kent. As matters transpired, Ms. Kent's counsel did not avail of that opportunity.

[6] In January 2010, while the trial was ongoing, Ms. Kent's counsel issued a subpoena *duces tecum* to Ms. Carroll requesting her to appear in Court on January 21, 2010 and to bring with her the following documents:

---

[1] Now known as the Family Division of the Supreme Court of Newfoundland and Labrador, Trial Division. See *Judicature Act*, RSNL 1990, c.J-4, as amended, ss. 20.1, 21, 23 and 43.5.

1. Your Income Tax Returns and Notices of Assessment for the years 2004 through to 2008 inclusive;

2. Financial Statements for your company for each year 2004 through to 2009 inclusive;

3. All loan and mortgage applications signed by you since January 2004;

4. All statements of net worth you have completed in relation to bank financing since January 1, 2004.

[7] Counsel engaged by Ms. Carroll appeared with her in court and objected to the production of the requested material claiming, among other things, that it was not relevant to the issues in dispute in the case. She pointed out that Ms. Kent had not sought discovery of this information earlier and that if Ms. Kent wanted to seek that information now by way of subpoena during trial, she should be required to make a written application setting out the basis for claiming that it was relevant and admissible. Counsel asserted that Mr. Kent and Ms. Carroll had executed a cohabitation agreement in which they agreed to share the expenses of their new household but that their separate assets would remain their separate property with neither having the right to know the financial circumstances, including levels of income, of the other. As such it was submitted that Ms. Kent had no right to delve into Ms. Carroll's separate financial affairs any more than Mr. Kent did.

[8] Counsel for Ms. Kent asserted that she should not have to make a separate application for the desired information; it was perfectly proper to issue a subpoena mid-trial and Ms. Carroll, as was the case with any witness, was bound to comply with the summons to court. The issue was one of relevance to the issues in dispute. She asserted that the information being sought was relevant both to child and spousal support.

[9] Over objections by counsel for Ms. Kent, the trial judge accepted the submission of counsel for Ms. Carroll and ruled that a separate application requesting the information should be filed by Ms. Kent setting out the basis for requesting the documentation. Counsel filed an application seeking an order in the following terms:

> Lisa Carroll, being the common law spouse of the Respondent in this action, Clarence Kent, provide to the Applicant's counsel and bring with her to Court pursuant to a subpoena issued on behalf of the Applicant out of this Honourable

Court on the 14th day of January 2010 and served upon Lisa Carroll on the 16th day of January, 2010, the following documents:

(i) Lisa Carroll's personal complete Income Tax Return for each year from 2004 to and including 2009;

(ii) Copy of all Notices of Assessment and/or Reassessment issued to Lisa Carroll by Revenue Canada for each of the years 2004 through to 2009 inclusive;

(iii) Copies of the Financial Statements for Lisa Carroll's company(ies) for each year 2004 through to 2009 inclusive;

(iv) Copy of Income Tax Returns for Lisa Carroll's company(ies) for each year 2004 through to 2009 inclusive;

(v) Copy of all loan applications submitted by Lisa Carroll for personal bank financing since October 2004;

(vi) Copy of all loan applications submitted on behalf of Lisa Carroll's company(ies) for bank financing and/or government financing including subsidies, since October 2004.

[10] At this point we would make the following observations about the breadth of the language used in the application. First, the scope of the documentation sought is broader than that described in the subpoena *duces tecum*. Secondly, notwithstanding the difference in the documents being sought, Ms. Kent nevertheless required that the documents be brought to court "pursuant to subpoena". Thirdly, the requested order sought to have Ms. Carroll provide copies of the material to Ms. Kent's counsel even though the obligation of a subpoenaed witness is merely to produce the documents to the court upon appearance and not to the parties until in the witness box.

[11] On the hearing of the application, counsel for Ms. Kent reasserted her position that the proper procedure was for Ms. Carroll to apply to set aside the subpoena rather than for Ms. Kent to apply for an order for production of the documents. Nevertheless she presented her argument in accordance with the judge's direction. She grounded her application within rule 32.07 of the *Rules of the Supreme Court, 1986* and the case law interpreting it which, she asserted, established the "overall obligation to provide documents relating to any matter in issue in a proceeding". She also cited cases dealing with special expenses under s. 7 of the *Guidelines.*

The Trial Judge's Ruling

[12] In a judgment styled "Interim Decision" following argument on the application, the trial judge ordered:

> All financial documentation sought in the Applicant's interlocutory application … must be provided to the Applicant, and the Court, concurrent with Ms. Carroll's upcoming attendance in Court pursuant to the issued subpoena.

[13] He commenced his analysis with a discussion of the law concerning production of documents. He noted that rule 56A.40(1**)** made rule 32.07 applicable in a family law proceeding. That latter rule provides:

> **32.07. (1)** The Court may order the production, for inspection by any party or the Court, of any document relating to any matter in question in a proceeding at such time, place and manner as it thinks just.
>
> (2) Where a document is in the possession, custody or control of a person who is not a party, and the production of the document might be compelled at a trial or hearing, the Court may, on notice to the person and any opposing party, order the production and inspection thereof or the preparation of a certified copy that may be used in lieu of the original.
>
> (3) An order for the production of any document for inspection by a party or the Court shall not be made unless the Court is of the opinion that the order is necessary for disposing fairly of the proceeding or for saving costs and is not injurious to the public interest.

[14] The judge emphasized that rule 32.07(1) provided that an order for inspection could be made of "any document relating to any matter in question" in a proceeding. He cited and relied on the decision in **Carter v. Municipal Construction Ltd.** (2001), 204 Nfld. & P.E.I.R. 112 (NLTD), affirmed 2001 NFCA 58, concerning the meaning of "relating to" in comparison with the concept of relevance and concluded, citing from the Trial Division decision, para. 19 and the Court of Appeal decision para. 10, that the notion of "relating to" is broader than the concept of relevance. He quoted from the Trial Division decision:

> [21] … A document will be said to "relate" to a matter in question in the proceeding where it is reasonable to suppose it may throw any light on the case in the sense that it contains information which may either directly or indirectly enable the party receiving or seeking the information to advance his or her own case or to damage the case of his or her adversary or which may fairly lead him or her to a train of inquiry which may do so. With all due respect to those who have

> expressed a contrary view, I do not believe that the test for determining production of documents prior to trial should be tied to the concept of relevance at trial.
>
> (Emphasis added)

[15] He then proceeded to "analyze and determine Ms. Carroll's obligations to provide financial information sought from her with respect to each of the issues in question": basic child support; special expenses; and spousal support. In proceeding to an analysis of the obligations to provide information on the three issues in dispute immediately following his discussion of the test to be applied for production of documents under rule 32.07, it is clear that the judge was proposing to apply, as the touchstone for his order, a test of "relating to" rather than relevance, even though at times he did use the term "relevant".

[16] With respect to basic child support, he ruled that, in the absence of a claim for undue hardship, there was no obligation upon the partner of a person facing a claim for child support to disclose income. He noted that Mr. Kent's annual income had not yet been determined and therefore it was not possible at the current stage of the trial to determine whether an undue hardship plea by Ms. Kent would be triggered. He therefore concluded that to order financial disclosure by Ms. Carroll in respect of the determination of basic child support would be "premature".

[17] As to the claim for special and extraordinary expenses under s. 7 of the *Guidelines* the judge ruled, citing **Earles v. Earles**, 2006 BCSC 221, **Watmore v. Watmore**, 2003 NBQB 139 and **Raftus v. Raftus** (1998), 37 R.F.L. (4th) 59 (NSCA), that the financial information requested should be provided to enable the court to have "regard to the means of the spouses" within s. 7. He held that "in determining the means of spouses, courts have consistently included the incomes of common law partners and spouses".

[18] Although he alluded to the fact that there was some indication in the evidence of "financial intermingling" of Ms. Carroll's and Mr. Kent's affairs, despite the existence of the barrier that was purported to have been erected by the cohabitation agreement, he did not decide the issue on the basis that Ms. Carroll's financial information was necessary to sort out that issue. Instead, he returned to the question of whether the information was needed to determine the "means" of Mr. Kent within s. 7 of the *Guidelines*. He reasoned:

> [35] … I have concluded that all of the financial information sought from Ms. Carroll *relates to* the issue of how special and extraordinary expenses should be proportionately shared, which is clearly a matter in question in these proceedings. I have also concluded that the production of the requested financial information is necessary for disposing fairly of this issue; without the requested financial information being provided, counsel cannot analyze the Respondent's [Mr. Kent's] means, as it is only with such information that the Court can fully and fairly decide this issue. There has also been no evidence provided to lead me to conclude that making such an order would be injurious to the public interest.
>
> (Italics added)

[19] With respect to the issue of spousal support, he similarly concluded, citing **Watmore**; **Hersey v. Hersey** (1993), 47 R.F.L. (3d) 117 (NBCA); **Crase v. Crase**, 2003 NBQB 240; **Schmidt v. Schmidt** (1999), 1 R.F.L. (5^{th}) 197 (BCCA); and **Cox v. Cox**, 2007 ABCA 37, that the reference to considering each spouse's "condition, means, needs and other circumstances" in s. 15.2(4) of the *Divorce Act* meant that the income, assets, corporate financial records and direct and indirect contributions made by a live-in partner to combined household expenses were "relevant" to determination of a spouse's "means".

[20] On this issue, he concluded:

> [42] … that Ms. Carroll must provide all financial disclosure requested. This is because it *relates to* spousal support, a matter in question in these proceedings. It is also necessary for disposing fully and fairly of the spousal support issue and there is also no evidence from which I can conclude that ordering such financial disclosure is injurious to the public interest.
>
> (Emphasis added)

[21] From this analysis, it can be seen that the trial judge:

1. applied the relational test for document production under rule 32.07(1) instead of a test of relevancy (he concluded that the requested documentation "relates to" issues of special expenses and spousal support, matters in question in the proceedings);

2. although applying the test for production under rule 32.07, in other respects purported to treat the issue as one concerning the obligation to respond to a subpoena (his order requires

provision of the documentation "pursuant to the issued subpoena");

3. in conducting his analysis, concluded that the requirement of determining "means" of spouses necessarily meant that the incomes and other financial information of a common law partner must be included;

4. did not engage in an analysis of whether, given the evidence adduced so far and the issues that had actually arisen *in this case*, it was necessary to produce the information;

5. did not appear to give consideration as to whether, even if in principle, such information might be relevant, it was appropriate to order production pursuant to the subpoena *at that point in the trial* given the potential impact on the asserted privacy interests of Ms. Carroll.

Is Leave to Appeal required?

[22] Counsel for Ms. Kent submitted that the judge's ruling was interlocutory in nature and as such leave to appeal was required under rule 57.02(1)(a). She further submitted that there was no basis for granting leave in this case.

[23] Whether or not leave is required depends on whether the order being appealed is interlocutory. In **United Food and Commercial Workers, Local 1252 Fisherman's Union v. Cashin et al** (1994), 124 Nfld. & P.E.I.R. 201 (Nfld.C.A.) Marshall J.A. explained the difference between an interlocutory and a final order as follows:

> [31] … the issue whether an order or judgment is to be treated as interlocutory or final depends upon the nature and effect of the disposition. If it brought the proceedings at first instance to an end, regardless of whether it actually disposes of the rights between the parties, it is final. However, if the disposition's effect is such that the real matter in dispute between the parties remains to be determined in the very proceeding from which it issued, the disposition is interlocutory.

[24] This statement, though made prior to amendment of the rules of court incorporating the current rule 57.02, is still the governing test. See **Curtis v. Smith's Home Centre Ltd.**, 2009 NLCA 14, per Wells J.A. at paras 16-19.

[25] The focus on the nature and effect of the order means that an order may be final even though it results from an interlocutory *proceeding*. Furthermore, the characterization of a particular order as final will not be affected by the fact that, had the opposite decision been made on the issue in dispute between the parties, the order could be characterized as interlocutory. For example, in **SNC- Lavalin Inc. v. Newfoundland and Labrador Hydro-Electric Corporation et al** (1998), 162 Nfld. & P.E.I.R. 172 (Nfld.C.A.), an application to strike out a defendant as a party to the action had been dismissed by an applications judge. On appeal, this Court held that the applications judge's order was interlocutory in effect (because the real matter in dispute between the parties remained undetermined in the proceeding from which the order issued) notwithstanding the fact that if the applications judge had ordered that the defendant be struck out as a party, *that* order would have been regarded as a final order because it finally settled all further issues between the plaintiff and that defendant. See paras. 3-6.

[26] Counsel for Ms. Kent submits that the focus should be on the effect of the order *vis-à-vis* the parties, not Ms. Carroll who is not a party. Viewed from that perspective, counsel submits, a ruling either for or against Mr. Kent or Ms. Kent as to the production of the requested document would leave the real matter in dispute between them (namely, issues of child and spousal support) to be determined. She relies on, amongst other cases, **Osmond v. Clarke**, 2006 NLCA 18 (denying a request, in the course of a proceeding, by an ex-wife for financial disclosure from her former spouse) and **Barnes v. Barnes**, 2010 NLCA 17 (ordering a change of venue for the trial) which held that the orders in question were interlocutory in nature.

[27] The difficulty with Ms. Kent's position is that her argument depends on treating the order in question as interlocutory when viewed through the lens of the parties only. In this case, it is a non-party who is seeking to appeal the order requiring her to disclose financial information.

[28] It is the effect of the order which is sought to be appealed on the party appealing that must be considered. This is a logical extension of the ruling in **SNC-Lavalin** that it is the actual order, not one that could have been made, that must meet the test. Here, the order is made against Ms. Carroll and in favour of Ms. Kent. That order resolves all issues outstanding between the two of them (i.e., whether Ms. Carroll should produce the documents subpoenaed). If Ms. Carroll were to comply with the subpoena and produce the documentation required, her role in the trial is over. She will have no standing, later in the proceeding, to challenge the one issue in dispute

between them – her alleged right to privacy respecting her financial affairs. Once the documents are disclosed, she can never regain her privacy. In that sense, the order of the trial judge is a final order *vis-à-vis* her, even though it may not be regarded as final as against either Mr. or Ms. Kent. It is idle to suggest, as did counsel for Ms. Kent, that she could still vindicate her rights by an appeal at the end of the trial. Even if she would have standing to file such an appeal, success would be a pyrrhic victory because Ms. Kent would have already had access to the information for use at the trial and Ms. Carroll's privacy would have been invaded.

[29] Counsel for Ms. Kent submits that, as a matter of policy, orders of the type under consideration here ought to be required to meet a leave test (and hence be regarded as interlocutory) because otherwise, every order made mid-trial against a witness would be appealable as of right, thereby bogging down and delaying the litigation to which the subpoena relates.

[30] We are not convinced that the problem is of the magnitude suggested. While one of the policies behind the leave requirement is to ensure the smooth running of a trial to its completion without unnecessary interruption, there are other policies in play as well. In any event, the policy against trial interruption is applied primarily in the context of applications involving parties to the proceeding. In the vast majority of procedural or evidentiary issues arising between the parties, the resulting rulings or orders will be regarded as interlocutory and thereby require leave to appeal. In most of those cases as well, the issue can form a ground of appeal, along with any other issues, at the end of the trial if the final result is challenged.

[31] Where, however, the person appealing is a non-party, it will be too late to challenge the correctness of a disclosure order if the information has already been produced. As well, not all such orders affecting non-parties will necessarily be regarded as final. If, for example, the order in this case had in fact refused production, say, on the basis of prematurity, leaving the potential for the witness to be subpoenaed at a later time, the order might well be regarded as interlocutory because it did not finally dispose of the issue between the subpoenaing party and the witness. See, **Smerchanski v. Lewis** (1980), 117 D.L.R. (3d) 716 (Ont.C.A.), per Arnup J.A., pp. 720-721.

[32] In **Fabrikant v. Swamy**, 2008 QCCA 923 the Quebec Court of Appeal held that an order quashing certain subpoenas *duces tecum* requiring production of documents at an examination for discovery was interlocutory in nature, requiring leave of a judge of the Court of Appeal before the appeal

could be heard. Counsel for Ms. Kent relies on this decision in support of her argument that the order refusing to quash the subpoena in this case should equally be regarded as interlocutory. She submitted that the *quashing* of a subpoena in **Fabrikant** is "the reverse" of *upholding* the subpoena in the current case and that "[i]f one is interlocutory in nature, so is the other".

[33] **Fabrikant** does not support Ms. Kent's position. The Court of Appeal's judgment records:

> [2] Said judgment [quashing the subpoenas] granted respondent's [defendants'] motions to quash subpoena *duces tecum* caused by appellant [plaintiff] to issue compelling respondents [defendants] M.N.S. Swamy, T.S. Sankar, S. Sankar, G.D. Xistris and S.V. Hoa to bring with them documents …
>
> [3] Said judgment being interlocutory, an appeal lies only on leave granted by a judge of this Court …
>
> (Underlining added)

[34] The subpoenas were issued by the plaintiff in that case requiring defendants to appear and produce the documents. Unlike the current case, there was no third party witness involved. The issue of whether the subpoenas should be quashed therefore arose between the plaintiff and the defendants. It did not address the situation involving a non-party. Furthermore, counsel is incorrect in asserting that because the particular order in one case is held to be interlocutory, it necessarily follows that the reverse order must also be so characterized. That goes against the principle for which **SNC-Lavalin**, cited earlier, stands.

[35] In **Smerchanski,** which involved an appeal by a plaintiff of two orders quashing subpoenas issued by the plaintiff to non-parties, the issue was whether the order was final, in which case, the appeal was as of right to the Court of Appeal, or interlocutory, in which case the appeal lay, with leave, to the Divisional Court. Arnup J.A., for the Ontario Court of Appeal held that the orders were final in nature. He wrote, at pp. 719-723, with respect to matters pertinent to the current case:

> … this Court has said that trials are not to be interrupted by attempts to challenge allegedly erroneous rulings by the trial Judge. The trial process would soon grind to a halt if all such rulings were subject to immediate appeal or to a motion to quash.

> The present case has two distinguishing features that set it apart from the ordinary situation. … The second is that the issue dealt with, and now sought to be brought to this Court is between a stranger to the action and one of the parties.
>
> The decision on the motion to quash rests upon determining whether the order sought to be appealed is final or interlocutory. … It is well-established law that on an application made in an action, the order made may be interlocutory if a certain result is reached but may be final if a different result is reached. Thus an order dismissing an action because the statement of claim discloses no cause of action known to the law is a final order, whereas an order dismissing an application brought for that purpose is interlocutory. …
>
> This Court has held that an order made in a contest between a party to an action and someone who is not a party is a final order, appealable without leave, if the order finally disposes of the rights of the parties *in the issue raised between them*.
>
> …
>
> … where the objection is taken by a stranger to the action, … 'as a matter of pure reason' there should be a right of appeal from the order made. If the trial judge rules that the evidence may be given, the damage is done before an appeal from his ultimate judgment can be heard …

[36] The analysis in **Smerchanski** has recently been reaffirmed in **CanWest MediaWorks Inc. v. Canada (A.G.)**, 2007 ONCA 567, paras 4-8.

[37] We agree with the reasoning in **Smerchanski** and accept its applicability to the instant case. Accordingly, we conclude that the order made by the trial judge in this case is final in nature and is appealable as of right.

[38] In light of this conclusion, it is not strictly necessary to address the issue of whether leave should be granted even if we had concluded that the order in question was interlocutory in nature. We would simply observe that this is a case where leave, if required, ought to be given in any event. Rule 57.02(4) provides that leave may be granted where, amongst other things,

> (b) the Court doubts the correctness of the order in question;
>
> (c) the Court considers that the appeal involves matters of such importance that leave to appeal should be granted;

(d) the Court considers that the nature of the issue is such that any appeal on that issue following final judgment would be of no practical effect; or

(e) the Court is of the view that the interests of justice require that leave be granted.

[39] In addition, rule 57.02(6) also provides that the Court may summarily grant leave at any time.

[40] In our view, each of paragraphs (b) through (e) quoted above applies here. As will be apparent from the remainder of this judgment, there are considerable difficulties with the way in which the trial judge dealt with the requests for production contained in the subpoena. The issues raised, especially the interrelation between the principles respecting production of documents and those concerning the requisitioning of evidence by way of subpoena at trial and their impact on privacy interests of non-parties, have not been dealt with by this Court before and, in our view, are of sufficient importance to justify examination by this Court now. Furthermore, as noted previously, the nature of the issue is such that any appeal by Ms. Carroll at the end of the trial challenging the order to produce would have no practical effect. In all the circumstances, therefore, if leave were necessary, the interests of justice would require leave to be granted.

Issues

[41] The issues on this appeal are:

1. Did the trial judge apply the correct legal test for determining whether Ms. Carroll was required to produce the requested documents to the court?

2. Is the income of a partner of a former spouse necessarily relevant in litigation whenever spousal support and special expenses relating to child support are in issue between the spouses?

3. Should this Court make the determination of relevance or should the issue be remitted to the trial judge for determination?

Analysis

(a) Proper principles and procedure

[42] The challenge to the production of documents in this case arose as a result of the issuance of a subpoena *duces tecum* to Ms. Carroll in the course of the trial. The subsequent application which the trial judge required to be made to resolve Ms. Carroll's objection to production requested an order that Ms. Carroll provide to Ms. Kent's counsel and bring the documents to court "pursuant to the subpoena". The resulting order of the trial judge required Ms. Carroll to provide the requested documents "pursuant to the issued subpoena".

[43] Yet, the trial judge's analysis of the issue leading to his order was based on the application of the principles relating to discovery of documents, not those relating to enforcement or quashing of subpoenas. The judge's statement of the principles applicable to his decision referred to and relied on rule 32.07 and to the relational test described in **Carter** applicable thereunder. This can be explained, at least in part, by virtue of the fact that the arguments presented by counsel were made on this basis.

[44] There is, however, a clear distinction between pre-trial discovery of documents and their admissibility at trial, whether the documents are submitted voluntarily or compelled pursuant to subpoena. For example, in **Ed Miller Sales and Rentals Ltd. v. Caterpillar Tractor Co. et al** (1990), 78 Alta. L.R. (2d) 207 (Q.B.), Berger, J. emphasized the distinction between "discovery" and "proof". He wrote at p. 212:

> The purpose of a subpoena duces tecum is to compel production of documents into court for the purpose of proving relevant facts at issue; the purpose is not to allow for discovery of documents of persons who are not parties to the action.

[45] A subpoena should not be used as a disguised form of discovery. It is not a demand to make a general disclosure of documents: **Dalgleish v. Basu** (1974), 51 D.L.R. (3d) 309, per Bayda J. at p. 312. The use of documents produced pursuant to subpoena focuses on trial admissibility, engaging, amongst other things, questions of relevancy and materiality.

[46] The search for documents during the discovery process, on the other hand, serves the different purposes of enabling a party to know the documentary case against her or to obtain access to hitherto unknown documents which may assist her case or damage her adversary's case or lead

to a train of inquiry that may be of assistance in preparing for trial. The documents so discovered may or may not be used at trial and, indeed, may not even be admissible because they may ultimately be deemed irrelevant or immaterial.

[47] Argument made to the trial judge supporting or opposing the enforcement of the subpoena on the basis of the principles applicable to discovery of documents was inappropriate. The trial judge erred in analyzing the issue on that basis.

[48] The proper approach was to deal with the matter as an application to set aside, or at least to limit the scope of, the subpoena. A witness served with a subpoena, including one who is not a party to the cause of action, always has status to move to have the subpoena quashed or its enforcement limited: **Re General Hospital Corp** (1986), 63 Nfld. & P.E.I.R. 332 (Nfld.T.D.), per Steele, J. at p. 334; **Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. et al**, per Berger J. at p. 209; **Steele v. Savory** (1891), 8 T.L.R. 94 at p. 95; **Consortium Developments (Clearwater) Ltd. v. Sarnia (City)**, [1998] 3 S.C.R. 3, per Binnie J. at para. 45.

[49] The position of the non-party opposing the enforcement of the subpoena was well-put by Denning, M.R. in **Senior and others v. Holdsworth**, [1975] 2 AllE.R. 1009 at p. 1013:

> If the person summoned takes objection to it, he can wait till the trial and take his objection there. In the old days, if he did this, he had to do it himself and was not allowed counsel to do it for him… Nowadays, of course, he can do it by counsel. The better course is, however, for him to apply before the trial to set aside the summons … The summons will be set aside if the witness has no material documents or if it is oppressive or there is any other sufficient reason to set it aside.

[50] This remains the correct approach to the procedure to be followed by a non-party to oppose the enforcement of a subpoena *duces tecum* in this jurisdiction.

[51] In the current case, Ms. Carroll followed the first option mentioned by Lord Denning – she attended at the trial with counsel pursuant to the subpoena and placed her objection on the record. Her counsel went on, however, and suggested that Ms. Kent ought to make a formal application setting out her position as to why the documents should be produced, so that

Ms. Carroll would then know what it was, specifically, that she was opposing. As noted, the trial judge acceded to this suggestion.

[52] In reality, however, if anyone ought to have made an application it should have been Ms. Carroll, the person attacking the subpoena. It is true that, to the extent that objection to production of the requested documents is based on irrelevancy or immateriality, the objecting witness will not be privy to the pleadings and may not know anything about the specific issues at stake in the litigation. As such, she will not likely be able effectively to make submissions on relevancy and materiality without first knowing why the party issuing the subpoena believes the documents to be relevant and material. That should not, however, impose an obligation on the summoning party to make the application. The concern in this regard can be addressed by proper allocation of the burden of proof on the application, a matter dealt with later in these reasons.

[53] We conclude, therefore, that in approaching the resolution of the issue before him the trial judge erred in principle by: (i) requiring Ms. Kent to make an application justifying admissibility; (ii) applying principles that define the scope of discovery of documents; and (iii) in particular, applying a relational test for production instead of the test for admissibility at trial.

[54] As a result of this error in principle, the trial judge's discretionary decision cannot stand. There remains for consideration, however, what is the proper test to be applied to determine whether the subpoena should be set aside and how that test should operate in the context of the issues that are engaged in the current case.

(b) The test for setting aside a subpoena

[55] The proper procedure to be employed by a person to challenge the obligation contained in the subpoena to which she is subject involves making an application to the court to quash the subpoena. Two issues present themselves:

(i) What are the grounds upon which a subpoena may be quashed; and

(ii) Who bears the burden of persuasion?

(i) Grounds for quashing a subpoena

[56] Rule 46.23(1) provides:

> (1) When a party desires to call any person as a witness at a trial, the party may serve the person with a subpoena in Form 46.23A requiring the person to attend at the time and place stated therein and, if required, to produce certain documents at the trial.

[57] This contemplates the use of both a subpoena *ad testificandum* and a subpoena *duces tecum*. A subpoena is in essence a summons under the authority of the court to appear and/or produce documents in accordance with the terms stated in the subpoena. Failure to appear pursuant to the subpoena could lead to civil arrest and a contempt charge.

[58] Although it operates under the authority of the court, issuance of a subpoena is purely an administrative act flowing from a simple request from one of the parties to the proceeding. There is no pre-screening by the court as to appropriateness, except in the case of an interprovincial subpoena issued under the *Interprovincial Subpoena Act*, RSNL 1990, c. I–20.

[59] Aside from the provision in rule 46.23(4) which states that no person is bound to appear pursuant to a subpoena unless the person is provided with the appropriate witness fees contemplated by the rules, there is no other provision in the rules of court that deals with the circumstances under which compliance with a subpoena can be resisted or attacked either by a party or by the proposed witness to whom it is directed.

[60] It is a necessary incident of the inherent power of a superior court to control its own process so as to prevent abuse, however, that the court has authority to set aside a subpoena where the purposes for which it has been issued are not being served or the court's process is being subverted. In **Re General Hospital Corporation** (1986), 63 Nfld. & P.E.I.R. 332 (Nfld.T.D), a case decided under the old rules of court, Steele J. observed:

> … any party is entitled to a subpoena or a summons as of right but, if improperly issued [it] may be set aside; every court has inherent power to prevent an abuse of the process, for example, where it is oppressive as to the number or nature of the documents required or maybe the expense involved. A summons or a subpoena must be issued in good faith for the purpose of obtaining relevant evidence. A subpoena or summons can be set aside where a statute prohibits its issue.

[61] In the case before him, which was an application to quash a decision of the Labour Relations Board refusing to set aside a summons to the executive director of a party (a hospital corporation facing an application for designation of essential employees) to bring certain documents to the hearings, Steele J. concluded that grounds had not been established to warrant setting aside the summons where: (i) there was no irregularity in issuing the summons; (ii) there was no abuse of process involved; (iii) there was no lack of good faith in the issuing of the summons and the party issuing the summons believed the information sought to be "relevant".

[62] On the basis of this case, therefore, it would appear that at least the following grounds may justify quashing a subpoena:

(a) irregularity in issuance;

(b) abuse of process (including oppressiveness, where the documents may not be readily available or the expense of retrieval does not justify their production);

(c) lack of good faith in issuing the subpoena (including lack of a *bona fide* belief in the relevance of the information sought);

(d) irrelevance of the information sought to the issues in dispute; (i.e. technically, lack of materiality)

(e) statutory prohibition on the use of a subpoena.

[63] **Re General Hospital Corporation** appears to be the only decision in this jurisdiction dealing with the grounds on which a subpoena issued in a civil proceeding may be quashed. In the criminal context, however, Cameron J. in **Leahy v. White**, 1987 CarswellNfld 325 expressed the view that a subpoena issued under what is now s. 698(1) of the *Criminal Code* may be quashed:

> [7] …when it is issued for an indirect or improper purpose …; when the evidence of the applicant is wholly inadmissible because of privilege …; and when the applicant could provide no material evidence.

[64] The decision of Rowe J. in **R. v. Mercer** (2003), 222 Nfld. & P.E.I.R. 239 (NLTD) also recognizes the power in the court to quash a subpoena in a criminal case but does not discuss the grounds generally on which it could be accomplished except to state that a subpoenaed witness could not be

compelled to testify about certain matters because they were “not relevant” to the issue before the court (para 18).

[65] A key – but not the only - question that arises when issues involving the quashing of subpoenas are engaged is the degree of connection that must exist between the information sought pursuant to the subpoena and the issues in the proceeding in which the subpoena has been issued. In the criminal context, the test is one of “material evidence” (although, as noted in **Mercer,** sometimes the touchstone is stated to be “relevance”)

[66] The case law dealing with quashing a subpoena in the criminal context has limited transferability to the civil arena because s. 698(1) of the *Criminal Code* specifically provides that a subpoena may only be issued where the person to be summoned “is likely to give material evidence”. The test for determining the link to the proceeding, as a condition of issuing a subpoena, is thus set out in statute. That is not the situation in the civil context in this province. Nevertheless, a number of cases in other jurisdictions appear to rely on criminal jurisprudence in formulating the test of connection to the case in civil cases.

[67] In other Canadian jurisdictions, the issue of the power of a court to quash a subpoena has arisen in a number of contexts. In some provinces, the rules of court expressly set out grounds for quashing a civil subpoena. In others, as in this province, they do not. We will concentrate on the case law in those other jurisdictions because of the similarity to the matter before us.

[68] In **Canada Metal Co. v. Heap** (1975), 54 D.L.R. (3d) 641 (Ont. C.A.), a leading case cited in many subsequent cases, Arnup J.A. wrote at p. 648:

> The evidence sought to be elicited must be relevant to the issue on the motion. If it is, there is a *prima facie* right to resort to Rule 230 [providing for the issuance of a subpoena]. That right must not be so exercised as to be an abuse of the process of the Court. There will be such an abuse if the main motion is itself an abuse, as by being frivolous and vexatious, or if the process under Rule 230, while ostensibly for the purpose of eliciting relevant evidence, is in fact being used for an ulterior or improper purpose, or if the process is being used in such a way as to be in itself an abuse…

[69] The approach in **Canada Metal** was affirmed in the more recent case of **CanWest MediaWorks Inc. v. Canada (A.G.)**, 2007 ONCA 567, where the Court, by way of endorsement, stated at para 12: “If the evidence sought

to be adduced from a non-party is relevant, there is a *prima facie* right to resort to rule 39.03(1) [dealing with examination of witnesses on a motion or application] as long as the right is not exercised in a manner which constitutes an abuse of process."

[70] **Canada Metal** has also been followed in **Consortium Developments (Clearwater) Ltd. v. Sarnia (City),** [1998] 3 S.C.R. 3 where Binnie J. wrote for the Court:

> [45] … the courts below were correct to quash the summonses and strike from the record certain other evidence. While courts should be slow to interfere with a party's effort to build its case, they should set aside summonses where, as here, the evidence sought to be elicited has no relevance to a live issue in the judicial review applications: *Re Canada Metal Co and Heap* [citation omitted].
>
> (Underlining added)

[71] It will be seen that the common theme in **Canada Metal**, **Can West MediaWorks,** and **Consortium Developments** as to the test for the degree of connection that must exist between the information sought pursuant to the subpoena and the issues in the proceeding is "relevance" to the issues in dispute. In reality, when the focus is on relevance in relation to the issues in dispute what is really being talked about is the concept of materiality. Indeed, as already noted, in the criminal context, the test is usually stated to be "material evidence". Some civil cases in other jurisdictions also adopt the criminal "material evidence" standard (e.g. **Davenport v. Dobreff**, 2008 ONCA 721, para. 1) and some others use terminology that amounts to variations on the "relevance" theme, such as "a link of relevance" (**Bowater Mersey Paper Co. v. Nova Scotia (Minister of Finance)** (1991), 106 N.S.R. (2d) 416 (TD) at para. 10) or "material … likely to be relevant in fact" (**Family & Children's Services of Kings (County) v. S.(M.)** (2002), 208 N.S.R. (2d) 107 at para. 19).

[72] For convenience, we prefer to follow the usage most common in the cases in the civil context: relevance to a live issue in the dispute. That is consistent with the terminology used in **Re General Hospital Corporation, Canada Metal** and **Consortium Developments**. Indeed, it is the correct test in principle since all admissible evidence must pass through such a screen. This is especially so where the issue comes up, as here, at the trial instead of by way of a preliminary application to quash. We do not think it

makes any difference whether it is another party or the subpoenaed non-party who makes the objection. It may be that the other parties, for their own tactical reasons, do not object to admissibility on grounds of relevance or materiality. Unless the subpoenaed non-party is able to raise such issues, he or she may be required – at a cost of considerable time and money - to appear and produce significant amounts of information and material of a personal nature that may not have any connection with the case.

[73] Accordingly, we conclude that a non-party may seek to quash a subpoena on the ground that the information sought is not relevant to the live issues in dispute.

[74] Additionally, even if the material sought can be said to be relevant in this sense, there may be, as **Re General Hospital Corporation** indicates, other grounds on which a person subpoenaed may be able to quash the subpoena or at least postpone its execution. Aside from issues involving irregularity in issuance, and other grounds of inadmissibility, such as privilege and specific statutory exceptions, most other grounds are a manifestation of the jurisdiction of the court to control an abuse of its process. This involves taking into consideration the interests of the subpoenaed witness as well as the interests of the litigants by looking at the actions, motivations and purposes of the party issuing the subpoena as well as the impact on the person subpoenaed. Insofar as the litigant issuing the subpoena is concerned, the *bona fides* of the issuer may be inquired into with a view to determining whether the subpoena has been issued for an improper purpose. With respect to the subpoenaed person, the court could inquire into such issues as whether, given the significance of the evidence and the timing of the request for production, the request can be said to work an unnecessary hardship or would be oppressive as to the number, nature or breadth of the documents required, considering the time and expense involved in obtaining the information and the degree of private, personal information involved. This is essentially a balancing exercise, involving the application of the proportionality principle recognized by this Court in **Szeto et al v. Field**, 2010 NLCA 36.

(ii) The burden of persuasion

[75] The question arises as to who has the onus of establishing that a subpoena should be quashed. The case law on this point is not uniform.

[76] In one sense, it would, as a matter of principle, seem logical that the person seeking to attack the subpoena should have that burden. However, the person attacking the subpoena will in all likelihood have difficulty attacking it on the basis of lack of relevance to a live issue in the dispute because, as a non-party, he or she will not necessarily be familiar with the issues or even the pleadings. On the other hand, it would seem appropriate for the person seeking to quash to have the burden of demonstrating other grounds such as: that the issuance of the subpoena constituted an abuse of process; or that the information was protected from production by privilege or statute; or that there was an irregularity in its issuance. These are all matters that are within the knowledge of the non-party and it should be up to him or her to raise them.

[77] This is the approach taken in **Canada Metal:** the issuer must show the connection between the evidence sought and the issues in the case. It is then up to the person challenging the subpoena to show that it was nevertheless improperly issued. This approach was also adopted in **Laboratoires Servier v. Apotex Inc**., 2008 FC 321, per Snider J. at para. 22; **Dunphy v. Peel Living**, [2009] O.J. No. 1792 (S.C.J.), per Daley J. at para. 15; and **Seagrove Capital Corp. v. Leader Mining International Inc.**, 2000 SKQB 230, per Maurice J. at para. 14. We agree with this approach and would follow it.

(iii) Summary of applicable principles

[78] On the basis of the foregoing analysis, we can summarize the approach and applicable principles with respect to applications to quash a subpoena in a civil proceeding as follows:

1. Where the evidence sought to be elicited from a subpoenaed witness is relevant to a live issue in the case, there is a *prima facie* right to require the attendance of the witness by means of a subpoena;

2. The right of a party to issue a subpoena *duces tecum* is, however, subject to the inherent jurisdiction of the court to control its own process;

3. Because a party has the right, subject to the obligation not to abuse it, to control the presentation of his or her case, the

jurisdiction of the court to quash a subpoena should be used cautiously and sparingly;

4. The grounds on which a subpoena to a non-party may be quashed include:

   (a) the information sought is not relevant to the live issues in dispute;

   (b) the subpoena was irregularly issued;

   (c) the information is privileged from production or is prohibited by statute;

   (d) the subpoena was not issued in good faith for the purpose of obtaining relevant evidence but for an ulterior or improper purpose;

   (e) the matter (such as an interlocutory application in a proceeding) to which the subpoena relates is frivolous or vexatious;

   (f) compliance would be oppressive as to the number, nature and breadth of the documents required or would work an unnecessary hardship, as where the documents may not be easily or readily retrievable and the expense does not justify their production considering their importance to the case, their potential availability from other sources and the importance of the privacy interests at stake;

   (g) its issuance is otherwise an abuse of process;

5. The burden is on the party issuing the subpoena to show that the information sought is relevant to the live issues in the proceeding;

6. The burden is on the witness challenging the subpoena to show that other grounds exist that would justify quashing the subpoena;

7. A person who wishes to challenge a subpoena may do so either by:

(a) making application in advance of the date specified for appearance setting forth the grounds upon which the challenge is being made;

(b) appearing, with or without counsel, on the date specified in the subpoena and making application to quash the subpoena, specifying the grounds relied on.

8. Upon application being made, the judge may give directions to the party issuing the subpoena as to what material should be submitted to show the relevance of the information sought to the live issues in dispute and why, generally, the information is needed from the particular witness in question, as opposed to from any other available source, and when during the trial the information is needed.

9. The judge may also give directions as to whether further material should be filed by the person challenging the subpoena and by other parties, as well as how and when the various issues involved in the challenge should be argued;

10. As an alternative to quashing the subpoena, the judge may consider whether the subpoena should be limited in scope or whether the execution of the subpoena should be postponed to a later date in the trial when the necessity for the evidence may become more apparent.

(c) **The impact of the cohabitation agreement on Ms. Carroll's privacy interests**

[79] Ms. Carroll relied on the fact that she had entered into an agreement with Mr. Kent that, although providing for a sharing of their household expenses, effectively kept their financial affairs otherwise separate and did not even give Mr. Kent the right to know Ms. Carroll's income. Counsel for Ms. Carroll submitted that the existence of this agreement reinforced Ms. Carroll's claim to privacy (if Mr. Kent himself could not obtain access to this information, how could Ms. Kent, the opposing party, claim to do so?) and demonstrated the unfairness of requiring Ms. Carroll to disclose such information which, Ms. Carroll says, is in any event not relevant to a live issue in the case.

[80] In **Juman v. Doucette**, [2008] 1 S.C.R. 157, Binnie J., writing for the Court, observed at para. 24 that "pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers". That statement applies equally to requiring a non-party to respond to a subpoena at trial. Binnie J. also recognized at para. 25, however, that while such a person is "entitled to a measure of protection", in the end, "the public interest in getting at the truth in a civil action outweighs the examinee's privacy interest".

[81] The mere existence of the cohabitation agreement in this case cannot shield Ms. Carroll from providing the requested information where there are strong competing interests at stake in the litigation. In **The King v. Daye**, [1908] 2 K.B. 333 (C.A.) a document was deposited with a banker upon terms that it should not be delivered up without the consent of the depositors. The Court held that the existence of the agreement not to disclose the information was no answer to a subpoena *duces tecum* requiring the banker to produce the document. Lord Alverstone, C.J. stated at p. 338:

> … it is quite impossible to say that the subpoena can be answered and defeated by the fact that one of the persons who deposited the document with the bank made an arrangement that it should not be delivered up by the bank without the consent of the two parties who deposited it.

[82] In principle, this result must prevail; otherwise, a party could shield relevant information from litigation by the simple expedient of entering into a confidentiality arrangement with a third party. While Mr. Kent and Ms. Carroll are perfectly entitled to create a regime of privacy between them, such an arrangement cannot prevail over the litigation rights of Mr. Kent's former spouse and children.

[83] The trial judge in this case ruled that:

> [33] I cannot conclude, as maintained by counsel for Ms. Carroll, that the provisions of the cohabitation agreement are so specific and unambiguous that they should act as a barrier to all disclosures sought by [Ms. Kent].

[84] While we agree with the trial judge that the agreement in this case does not *ipso facto* constitute a bar to the provision of the information sought by Ms. Kent, we would go further and say that that conclusion does not depend on whether the agreement is "specific and unambiguous". Such an agreement, whether clear or not, cannot operate as a shield against provision

of the information, provided, of course, that the information is otherwise admissible and necessary to the litigation interests of the parties.

[85] That said, however, even though the existence of the agreement cannot prevail over the requirements of the court in ensuring a fair trial, issues of privacy still have relevance in at least two respects. First, they require careful consideration of whether the live issues in the dispute require the degree of disclosure requested. In other words, the existence of a legitimate claim to protection of a privacy interest requires the court to allow production of no more information than is reasonably necessary for the purposes of the case. Secondly, the need to protect privacy as much as possible without compromising the litigation requires the court to consider such matters as the timing and necessity of execution of the subpoena; it may be, for example, that by delaying production pursuant to the subpoena so as to see if the information is actually needed (because it might become available less intrusively from another source) or may not assume the importance in the case as first thought, a modicum of privacy protection may be achieved without compromising the litigation.

(d) Relevance of Ms. Carroll's income and financial resources to child and spousal support issues

[86] The trial judge considered whether Ms. Carroll should be required to disclose her income and extensive financial information regarding her company in three circumstances: (1) in determining basic child support for Mr. Kent's children; (2) on consideration of an application under section 7 of the *Federal Child Support Guidelines* for sharing of special and extraordinary expenses for those children; and (3) on consideration of an application for spousal support under the *Divorce Act*.

[87] He held that, barring a finding of undue hardship, there is no provision of the *Federal Child Support Guidelines* requiring Ms. Carroll to disclose her income in relation to basic child support[2]. He further held that it would be premature to make an undue hardship order in relation to basic child support, Mr. Kent's income not having been then determined. That aspect of his order has not been appealed.

[88] Section 7(1) of the *Federal Child Support Guidelines* states:

[2] Where either party makes a claim for undue hardship under the *Guidelines*, Rule 56A.40 of the *Rules of the Supreme Court, 1986* permits the court to order certain non-parties to file financial statements in Form 56A.27A. The description of non-parties could include a common-law partner or spouse.

> In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense, in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation.
>
> (Emphasis added)

[89] Section 15.2 of the *Divorce Act* provides for orders for spousal support. Subsection (4) says that in making an order for spousal support, "the court shall take into consideration the condition, means, needs and other circumstances of each spouse … ". (Emphasis added)

[90] The trial judge noted that the word "means" has been liberally interpreted in the context of both spousal support and section 7 child expenses. Consequently, he held that it followed from the use of the word "means" in the *Act* and the *Guidelines* that Ms. Carroll was required to provide financial information, including that related to her company. He further held that the cohabitation agreement entered into by Ms. Carroll and Mr. Kent did not limit the power of the court to require such disclosure.

[91] As noted previously, the trial judge concluded that, when considering claims for spousal support and section 7 special and extraordinary expenses the means of spouses included the incomes of common-law partners and spouses.

[92] In determining whether Ms. Kent had established that the information being sought by subpoena from Ms. Carroll was connected, by relevance, to the issues in dispute in the case, it is therefore necessary to examine the position of the trial judge (and counsel for Ms. Kent) that it is axiomatic that a new spouse or partner of a payor spouse must provide his or her financial information to a court considering an application for spousal support or section 7 special and extraordinary expenses for a child. We must first examine the relevant legal principles relating to both spousal support and section 7 expenses.

(i) General principles

[93] The new spouse or partner of a payor spouse has no obligation to support the payor's former spouse: **Davignon v. Davignon** (2001), 5 R.F.L. (5th) 37 (Ont.C.A.). Consequently, a court should not simply include the

partner's income, in whole or in part, in the payor's income to determine his or her ability to pay spousal support: **Meiklejohn v. Meiklejohn** (2001), 19 R.F.L. (5th) 167 (Ont.CA). However, a payor's new spouse's income and other resources may be taken into account in establishing a payor's ability to pay because the new spouse or partner is expected to contribute his or her fair share to their household expenses.

[94] With respect to child support, in the absence of a new spouse or partner having assumed the parent role to the children of the former marriage, she or he has no obligation to support the payor's children from that former marriage. There is no suggestion of any such relationship between Ms. Carroll and the three children of the marriage in this case. However, as in spousal support, the presence of the new spouse or partner may have an impact on the payor's ability to pay.

(ii) Analysis

[95] We turn first to the authorities considered by the trial judge. In **Watmore** the court considered the "financial benefits" that the payor spouse derived "from sharing living expenses with his new partner" who was employed. Having stated that fact and the amount of the new partner's income, the court gave no guidance as to how one factored in the "income." In **Earles,** the trial judge said that the new spouse's income could be included in the "means" of the payor spouse. However, at para. 37, Chamberlist J. added:

> This, of course, does not mean that in calculating the proportionate amount of each parent's contribution one takes into account a third party's income but one looks at the necessity of the expense and the reasonableness of the expense in relation to the means of the spouses to afford that expense.

[96] In **Hersey**, the New Brunswick Court of Appeal stated that the trial judge was in error in failing to take into account the impact of the income of $33,921 of the second spouse of the payor. Hoyt C.J.N.B., at para. 4 said:

> In my view, the trial judge erred in failing to take into account the present Mrs. Hersey's income from N.B. Power as contributing towards meeting the expenses of Mr. Hersey's household. While, perhaps, the income from his new spouse cannot be used directly to support Mr. Hersey's children, it can, and indeed must, be taken into account in determining the income available to meet Mr. Hersey's household expenses. In that sense, the present spouse's income may indirectly support his children.

[97] Ryan J.A., in a concurring opinion, at para.16, referred to the use a court could make of such income:

> The trial judge has no right to consider the income of the second Ms. Hersey as disposable by her husband but it can be taken into account in the calculation of what means are available to the husband to pay his new family's operating expenses thereby freeing monies to assist in paying his support obligations.

[98] **Hersey** was the basis of the statement in **Crase**, at para. 43, that the payor had an obligation to provide the court with some evidence of his partner's income in circumstances where it is necessary to assess his means and ability to pay spousal support. In **Crase**, however, the amounts were not available to the court. Consequently, the court accepted the evidence that Mr. Crase and his partner shared living expenses on a 50/50 basis.

[99] These cases and others which were cited on appeal support the legal proposition that the income of a second spouse or partner is not considered to be the income of the payor. Rather, it is a question of determining the economic impact of the presence of that person on the payor's ability to pay. The impact may be neutral. The payor's expenses for his or her household may have increased or decreased as a result of sharing the household with a third party. While the amount of income of the new spouse or partner is frequently referred to, very few of the cases explain how that income factors into the determination of the payor's means. Generally, however, it appears to be used as background information for the purpose of determining whether the payor spouse is bearing a disproportionate degree of expenses of his new household, thereby reducing his ability to pay spousal or child support.

[100] To reduce the expenses of the payor by the income of the new spouse or partner would be to do indirectly what you cannot do directly – add the income of the new spouse to that of the payor. However, it would be equally wrong for the payor spouse to increase his or her household expenses by assuming all the responsibility for a new family, where the other adult in the household is in a position to contribute. Some courts attribute a portion of the household expenses to the new partner, irrespective of the actual contribution being made (**Laughren v. Laughren**, (1996) 147 Sask. R. 236 (Q.B.); and **Moritz v. Moritz**, [1997] S.J. No. 214). It is more common for courts to state merely that the presence of the other person has been taken into account. In **Watmore** the court merely noted the new spouse's salary and that it was required to factor in the financial benefit of sharing expenses.

See also: **S.A.M. v. P.D.M.** (1996), 186 A.R. 386 (Q.B.). It should also be noted that while many courts are provided with information regarding the new spouse or partner's income, generally this information seems to have been voluntarily provided by one of the parties.

[101] The import of the submission of counsel for Ms. Kent is that where the law permits reference to the means of a payor spouse, the income and other financial information of the new spouse or partner of the payor, including information regarding companies owned solely by the second spouse, must, *ipso facto*, be made available to the court. The decision of the trial judge indicates that he accepted that submission. This is an error in law. The position of Ms. Kent has the advantage of providing an easy answer but the result could unnecessarily interfere with the rights of others. For example, under this analysis, no consideration is given to the privacy interests of the non-party who has no obligation to the spouse or children of the payor.

[102] The Saskatchewan Court of Appeal in **Wright v. Wright** (1996),141 Sask. R. 44, considered the impact of a new spouse on the means of the payee spouse. Jackson J.A. said:

> [27] Having regard for the current authorities on this issue, including our previous statement, the law in Saskatchewan is that the new spouse's presence must be considered. **No precise or rigid formula can be applied, but rather the approach must remain flexible to deal with the circumstances of each particular case**. There is no obligation on the new parent to support the children, but to the extent that he or she enables the custodial partner to apply more of her own income to household and child care expenses, the new partner's presence is a relevant factor to be considered.
>
> [Emphasis added]

[103] **Wright**, of course, was concerned with the means of a payee spouse. However, the rationale commends itself to the circumstances of this case. This approach would balance the privacy interest of a third party against the interests of the parties to the action. In the absence of an absolute legal requirement that a third party provide financial information, the party seeking access to such information must demonstrate that the interference with the privacy of the third party is necessary in the particular circumstances and the extent to which it is necessary: **Marchand v. Boon**, 2004 SKQB 21 and **Buhr v. Buhr** (1997),124 Man. R. (2d) 89 (Q.B.). As the **Cox** case, which will be discussed below, illustrates, even where a court

determines that certain financial information must be provided it does not follow that all financial information, no matter what its precise nature and no matter the degree of its specificity, must be provided.

[104] While there will be circumstances where the privacy interest of the third party must yield to the interests of the parties to the action or their children, that need not always be the case. The approaches adopted by the courts indicate that in considering the presence of the third party as part of the means of a payor spouse, it is not always necessary to know the actual amount of the third party's income. Sometimes the appropriate contribution of the new spouse or partner to household expenses can be determined on a percentage basis and as long as that person is assuming that amount or more, there is no necessity of quantifying the third party's income, let alone the financial circumstances of the third party's company. In some circumstances the contribution makes no difference to the payor's obligation. For example, in **Laughren**, though one third of the household expenses were attributed to the payee's fiancé, the trial judge found it was not appropriate to reduce the obligation of the payor spouse because of the significant disparity in the income of the two parents and the fact that the children were entitled to a lifestyle based upon the joint income of their parents.

[105] Some examples, not intended to be an exhaustive list, of typical circumstances where the balancing of interests may be considered follow. These illustrate the importance of an examination of the circumstances of each case in order to determine whether, and to what degree, the financial information is necessary to the determination of the issues in the particular case.

[106] The most obvious case where the financial information from the new spouse or partner could properly be ordered to be revealed is illustrated in the **Cox** case. In that case, the applicant was able to convince the judge that the requirements of the relevant Alberta rule for the production of documents had been met. The issue was the income of the payor spouse and the question raised by the first spouse (applicant), was whether the payor spouse, with the assistance of his second wife, had divested or hidden income through the dealings of certain companies. The court had the benefit of evidence regarding the interactions of two companies, one said to be owned by the payor and one by his second wife. It should be noted that in **Cox**, while the court ordered the production of a second wife's corporate financial records, it stayed the part of the order dealing with her personal financial records. Other cases where the court considered whether a

corporation might be the means of hiding the payor's income include **Omah-Maharajh v. Howard** (1998),58 Alta L. R. (3d) 236; **Jaasma v. Jaasma** (1999), 3 R.F.L. (5th) 74 (Alta. Q.B.); **Blaine v. Saunders** (2000), 144 Man. R. (2d) 300 (Q.B.); and **Cholodniuk v. Sears** (2001), 14 R.F.L. (5th) 9 (Sask.Q.B.).

[107] Another case which we would put in this general category is **Church v. Hagen** (1995), 10 R.F.L. (4th) 457 (B.C.S.C.), which was relied upon by Ms. Kent. In that case, the court was considering an application by the payor spouse to vary an order for child support. The second wife's business had been purchased from the payor spouse. The payor was claiming that he was in debt to his present spouse and his poor health prevented his working. He had filed affidavits with the court containing "significant" inconsistencies. Those affidavits included information regarding his new wife's income which was inconsistent. The material in support of his claim that he could not work was held to "fall short of what is required in a case contested vigorously." In denying the claim the Chambers judge cited, among other things, a lack of knowledge of the circumstances of the new wife.

[108] If the payor spouse claims that his or her ability to pay is lessened because the new spouse or partner cannot contribute his or her fair share to the cost of the household, generally the payor spouse voluntarily presents the evidence of the earnings of the common-law partner. This is done to demonstrate an increased demand on the payor spouse by the second family and a corresponding reduction in ability to pay support to the first family. Failure to provide such supporting information could result in the court assuming certain division of responsibility within the household to the detriment of the payor's position.

[109] Second families often comprise more than two people. The obligation of the payor spouse and his or her new spouse or partner within that unit will be influenced by whether there are children of either in the household, the roles of each vis-à-vis the children and whether the support of those children is being contributed to by others. Another factor is that the addition of the new partner may result in a need for larger accommodation.

[110] Even where a court is persuaded that access to financial information regarding a third party is required, it does not follow that all such information must be provided. In **Bates v. Welcher**, 2001 MBCA 33, the Manitoba Court of Appeal denied an application for disclosure of a company's financial records where one spouse held a 22% interest in a

family company. The court cited the fact that the spouse did not have controlling interest in the company. Steel J.A. said:

> … financial disclosure is by its nature an invasive process. There must be a balancing of the interests of all parties and that balancing is accomplished by requiring the applicant to satisfy the court that the information requested is relevant and reasonably necessary to the facts as opposed to a fishing expedition.

[111] This is just an illustration of a circumstance where a court determined that all financial information regarding a party need not be provided because of the invasion of the privacy of others. This case is concerned with the privacy interests of a non-party. The balancing can be no less important.

[112] It follows from this analysis that one cannot say that just because the quantum of spousal support or section 7 expenses is in play it necessarily follows that the specific income level and other financial information of a new partner of the payor spouse is automatically relevant and can be required to be produced by subpoena directed to that non-party partner. The analysis must be more nuanced than that. The Court must consider how and to what extent any of that information may be necessary to resolve the specific support issues as they present themselves in the context of the specific case. Because of the potential impact on the partner's privacy interests, if that information should be provided, the timing becomes a relevant consideration, as well as whether the information could be obtained in a less intrusive way from another source.

[113] Accordingly, we conclude that when the trial judge ruled that because, in the abstract, the income of a payor spouse's new partner might in a given case be relevant to (or to use his terminology, "relate to") the issues of spousal support and section 7 expenses in the sense that the presence of the partner in the new relationship has to be factored, in a general manner, into the equation, it necessarily follows that detailed financial information about income levels must always be relevant and produced, he erred.

(e) Who should make the determination of relevance and the existence of grounds to quash the subpoena?

[114] It remains to be considered whether this Court ought now to rule on whether the subpoena should be quashed or whether the matter should be remitted to the trial judge for determination on the basis of the principles outlined in these reasons.

[115] In our view, the weighing of interests required to determine whether Ms. Carroll must provide all or any of the information requested is best done by the trial judge, who has had the benefit of hearing testimony of persons with knowledge of Mr. Kent's financial circumstances and Ms. Kent's needs. Transcripts of that testimony were not provided on this application and appeal. We do not, and in the circumstances cannot, have a full overview of the evidence as it has unfolded to date and we cannot therefore have a proper appreciation of the subtleties of how the unfolding evidence relates to the broad issues of spousal and child support. As we noted above, the relevance of Ms. Carroll's specific income levels and other private financial information of herself and her companies must be determined on the specific circumstances of the case rather than by the rote application of a pat answer. Since the trial is not yet complete, the advantage to the trial judge is clear.

[116] For this reason though the appeal must be allowed the matter should be remitted to the trial judge for determination.

[117] We would make the following observations, however, by way of guidance to the trial judge:

1. In approaching the application by Ms. Carroll to quash the subpoena, the principles outlined in para. 78 of these reasons should be applied;

2. With respect to the issue of relevance, the court should be satisfied that Ms. Kent has shown that the specific information, on an item-by-item basis, is relevant, in the context of the unfolding evidence, to a live issue in the proceeding; it is not sufficient to conclude, in the abstract and on a global basis, that the information might in theory be relevant to the type of issues that could arise;

3. With respect to the issue of oppressiveness or unnecessary hardship (if these matters are relied on by Ms. Carroll), the court should inquire into the impact that compliance with the subpoena would have on Ms. Carroll, including:

    (a) the cost and inconvenience of complying;

    (b) the degree of interference with her privacy interests (bearing in mind that, in the end, privacy not amounting

to privilege cannot be allowed to trump the right of a litigant to a fair trial);

(c) the number, nature and breadth of the documents requested;

and balance those matters against:

(d) the importance of the requested information to the presentation of Ms. Kent's case;

(e) the difficulty, if any, in Ms. Kent's being able to obtain the information from alternative, more convenient or more easily accessible sources;

(f) the impact on Ms. Kent's right to conduct her own case in the interests of having a fair trial;

5. If the impact of compliance on Ms. Carroll is deemed to be significant and the degree of relevance of the information is considered slight, the court should consider whether Ms. Kent's and Ms. Carroll's respective interests could be more fairly balanced by either narrowing, rather than quashing, the scope of the subpoena or by postponing its execution until a later point in the trial when the necessity for the information in relation to live, not merely theoretical, issues in the dispute becomes clearer;

6. The execution of the subpoena should not be used to achieve indirectly the discovery of documents that Ms. Kent did not pursue pre-trial; in other words, any order upholding the subpoena, in whole or in part, should provide for its use strictly within the trial context.

Summary and Disposition

[118] The appeal is allowed and the decision of the trial judge ordering the production of the information requested in the subpoena issued to Ms. Carroll and in the subsequent application by Ms. Kent, as directed by the trial judge, is set aside.

[119] The order of the trial judge awarding costs in favour of Ms. Kent is also set aside. While it might be thought appropriate to leave the issue of

costs, both existing and future, on the issue relating to the enforceability of the subpoena to the trial judge once he has finally dealt with the issue, we have concluded that because the erroneous way the parties approached and argued the issue in the original application before the trial judge resulted in essentially wasted effort, it would be inappropriate for those costs to be borne by one party or the other depending on who ultimately prevails. The better approach in the unusual circumstances of this case is therefore to require that Ms. Carroll and Ms. Kent bear their own costs in the Family Division up to this point.

[120] The matter is remitted to the trial judge for determination on proper principles as outlined in this decision.

[121] As Ms. Carroll was successful on the appeal, she shall have her costs in this Court on a party and party basis.

J.D. Green, C.J.N.L.

M.A. Cameron, J.A.

I concur:

C.W. White, J.A.

TAB 13

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2016 SKQB 134**

Date: **2016 04 21**
Docket: QBG 2102/2015
Judicial Centre: Regina

BETWEEN:

LAW SOCIETY OF SASKATCHEWAN

APPLICANT

- and -

PETER VINCENT ABRAMETZ

RESPONDENT

- and -

MNP LLP

RESPONDENT

Counsel:

Gordon Kuski, Q.C. and
Heather Franklin, student-at-law — for the respondent
Timothy Huber — for the Law Society of Saskatchewan

JUDGMENT — MCMURTRY J.
April 21, 2016

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[1] Three applications are before the court. One is brought by the Law Society of Saskatchewan [LSS]; and the second and third by Peter Abrametz [Abrametz]. The applications are as follows:

> 1. The LSS applies, pursuant to Rule 3-26 of *The Queen's Bench Rules* and s. 63 of *The Legal*

> *Profession Act, 1990*, SS 1990-91, c L-10.1 [*Act*], for an order allowing persons designated by the LSS to enter Abrametz's office and residence and the office of Abrametz's accountant, Gordon Jahn [Jahn] of Myers Norris Penny LLP [MNP], for the purpose of searching and seizing records;
>
> 2. Abrametz applies, pursuant to Rule 6-13, for an order requiring the Deputy Director and Complaints Counsel of the LSS, Donna Sigmeth [Sigmeth], to attend and submit to cross-examination on her affidavits, filed by the LSS in the first-mentioned application; and
>
> 3. Abrametz applies for an order quashing the *subpoena duces tecum* issued to himself, Jahn and MNP and, pursuant to Rule 13-7(2), for an order abridging time for service of this application.

Application to Seize Records

[2] In its application to search for and seize records in the possession of Jahn and MNP, the LSS seeks:

> a. All files, information and documents that pertain to the personal income tax filings of Abrametz for the tax years 2008 to 2012, including all

> foundational documents used to prepare annual income tax returns;
>
> b. All files, information and documents that pertain to the income tax filings of the law firm Abrametz & Eggum, or the law firm Eggum, Abrametz & Eggum, or other entity under which Abrametz practiced law for the tax years 2008 to 2012, including all foundational documents used to prepare annual income tax returns; and
>
> c. All files, information and documents that pertain to the income tax filings of any corporation, including a professional corporation, in which Abrametz has had an ownership interest for the tax years 2008 to 2012, including all foundational documents used to prepare annual corporate income tax returns [Records].

[3] The LSS asserts that the documents are required for the purposes of an investigation into Abrametz's conduct. Specifically, the LSS requires the documents to determine whether Abrametz has exploited his clients and his firm trust account as part of a scheme to evade payment of income tax.

[4] Abrametz argues, and the LSS does not dispute, that this application to search for and seize records should not be heard until Abrametz's applications to cross-examine Sigmeth on her affidavits and to quash the *subpoena duces tecum* are determined. As a consequence, this

decision relates only to those two matters. The LSS's application pursuant to s. 63 may be brought back to chambers on 14 days' notice.

BACKGROUND TO REMAINING APPLICATIONS

[5] The LSS is conducting an investigation into Abrametz for conduct unbecoming a lawyer in relation to his trust accounts. In December, 2012, in the course of a different investigation, the LSS commissioned a report from its auditor to review Abrametz's practice. The review encompassed all records and documents relating to trust and non-trust transactions for the period January 1, 2008 to June 30, 2012, and resulted in a report dated October 30, 2014 [Trust Report].

[6] On February 5, 2013, before the auditor concluded his investigation, the LSS served on Abrametz a Notice of Intention to Suspend his ability to practice law, pending further investigation of certain matters that arose from the investigation.

[7] The LSS permitted Abrametz to continue his law practice on the condition that he enter into a series of undertakings, which included an agreement to engage a supervisor to oversee and monitor his practice and trust account activities. Abrametz also agreed to fully cooperate with the LSS and its ongoing investigation, including disclosing and producing files and accounting materials immediately, or as soon as practicable, when requested.

[8] Upon completion of the Trust Report, the LSS again served Abrametz with a notice that it intended to seek an interim suspension, pending further investigation of allegations contained in the report. Since then, the

Conduct Investigation Committee has referred certain matters to a discipline hearing. These matters are set out in a Formal Complaint dated October 13, 2015.

[9] The Formal Complaint asserts that Abrametz is guilty of conduct unbecoming a lawyer in that he:

> 1. Did in relation to the following clients, effect withdrawals of trust funds for the payment of fees, disbursements or other expenses in a manner contrary to the Law Society of Saskatchewan Rule 942(3) [clients' names omitted];
>
> 2. Did knowingly cause trust cheques to be issued to a fictitious person for the purposes of effecting a transfer of trust funds for payment to himself;
>
> 3. Did falsify the signature of a fictitious person as an endorsement on his firm trust cheque for the purposes of effecting a transfer of trust funds for payment to himself;
>
> 4. Did fail to maintain proper books and records in relation to his legal practice contrary to Part 13(H) of the Law Society of Saskatchewan Rules in relation to the following client matters [clients' names omitted];

> 5. Did enter into or continue a debtor/creditor relationship with the following clients (loaning money) when his interests and the interests of those clients were in conflict [particulars and names of clients omitted];
>
> 6. Did breach the fiduciary duty he owed to the following clients by charging excessive fees and interest on loans and/or advances [clients' names omitted]; and
>
> 7. Did, contrary to Law Society of Saskatchewan Rule 942(4), fail to pay money from his trust account expeditiously after a legal matter was concluded on the following matters [clients' names omitted] (Formal Complaint, dated October 13, 2015).

[10] The Conduct Investigation Committee is still investigating other issues raised in the Trust Report. These issues include, as described by Sigmeth, "whether or not the Member used his clients and his firm trust account in a scheme to evade payment of income tax on certain fees" (Affidavit of Donna Sigmeth, sworn November 6, 2015).

[11] In an earlier affidavit, Sigmeth provided further particulars of the concerns of the LSS (Affidavit of Donna Sigmeth, sworn September 2, 2015, at para 4):

> 4. Abrametz is currently under investigation by the Law Society Conduct Investigation Committee. The subject matter of the investigation includes various apparent trust accounting rule breaches and other misconduct. The Law Society, in the course of its investigation, has become aware of a number of instances where Abrametz appears to have received payment of his fees by way of a practice of artificially reducing legal fees set out in official billing documents giving the appearance that his clients were paying him less. Abrametz's practice appears to have been to issue multiple cheques to his clients before inviting those clients to endorse some of those cheques back to him, as payment for the total unreduced fee usually less applicable taxes. Abrametz appears to have then cashed these cheques and retained the funds for his personal use. The net effect of this practice appears to be that Abrametz was taking payment of fees in cash outside of his firm accounting system. No satisfactory explanation has been provided for why the Member was engaging in this practice. There are reasonable and probable grounds to believe that Abrametz was engaging in this practice as part of a tax avoidance scheme. If Abrametz was indeed using his firm trust account and his clients in furtherance of an illegal scheme to avoid payment of tax, such conduct is within the purview of the Law Society and would constitute conduct unbecoming.

[12] The LSS seeks to determine whether Abrametz "claimed [the] amounts of income taken as cash in his business or personal income for tax purposes" (Affidavit of Donna Sigmeth, sworn September 2, 2015, para. 6). The LSS seeks to review documentation that would confirm the relevant amounts were, or were not, claimed as income.

[13] Sigmeth deposed that she is a person designated by the LSS to investigate lawyers and to make demands for records under s. 63 of the *Act*. Sigmeth deposed further that she has "…reasonable and probable grounds to believe that records relevant to the Law Society's investigation into the conduct of Abrametz are located…" in Abrametz's office, connected premises and off-site storage; in Abrametz's residence; and at MNP's offices in Prince

Albert. She seeks authorization pursuant to s. 63 to search for and seize the records from these locations.

Application to Cross-Examine Sigmeth

[14] Abrametz seeks to cross-examine Sigmeth in order to accomplish the following:

1. To clarify information solely within Sigmeth's knowledge;

2. To clarify the LSS's purpose in investigating him;

3. To test Sigmeth's credibility; and

4. To expand, or narrow, Sigmeth's statements in the affidavit.

[15] Abrametz brings his request under Rule 6-13of *The Queen's Bench Rules*, which allows the court to order the cross-examination of a person making an affidavit. Rule 6-13 reads as follows:

> **6-13**(1) On any application or petition, evidence may be given by affidavit, but the Court may, on the application of either party, order the attendance for cross-examination of the person making the affidavit.

> (2) The party applying for any cross-examination pursuant to subrule (1) shall bear the costs of the cross-examination.

[16] The general principles for determining when it is appropriate to allow cross-examination on affidavits are set out in *Wallace v Canadian Pacific Railway*, 2009 SKQB 178, 81 CPC (6th) 125 [*Wallace*]:

> 5 The law with respect to when a court ought to exercise its discretion in favour of a request to permit cross-examination on a deponent's affidavit is well settled. The general principles and criteria considerations gleaned from the jurisprudence in this jurisdiction may be summarized as follows:
>
> 1. There is no inherent right to cross-examine a deponent on his affidavit.
>
> 2. Granting leave to cross-examine on an affidavit is a discretionary remedy.
>
> 3. Permission to cross-examine on the affidavit may be granted by the Court pursuant to *Rule* 317 [now 6-13].
>
> 4. The party making the request must establish that the cross-examination will assist in resolving the issue before the Court and that it will not result in an injustice.
>
> 5. Leave to cross-examine will be sparingly, and not routinely, granted.
>
> 6. Generally, leave to cross-examine ought only be granted where there is contradictory evidence before the Court; however, in the absence of contradictory evidence, the Court may nonetheless grant leave where there is a sincere and legitimate need for clarification of the information deposed to and that information is solely within the knowledge of the affiant.
>
> 7. Generally, leave to cross-examine on an affidavit ought not be granted on interim applications.

> 8. There is no enhanced right of cross-examination under *The Class Actions Act*, S.S. 2001, c. C-12.01. The general principles apply.
>
> See *Schroeder v. DJO Canada, Inc.*, 2009 SKQB 169; *R. v. Brooks*, 2009 SKQB 75, [2009] S.J. No. 111 (QL); *Cole v. Prairie Centre Credit Union*, 2007 SKQB 171, 295 Sask. R. 159 (Q.B.); *Hoffman v. Monsanto Canada Inc.*, 2003 SKQB 564, 242 Sask. R. 286; and *Canada Safeway v. Saskatchewan Human Rights Commission* (1993), 108 Sask. R. 253 (Q.B.). (Emphasis added)

[17] Abrametz acknowledges that there is no contradictory evidence before the court on the LSS application. He asserts, however, that cross-examination is necessary to clarify information deposed to by Sigmeth, which is solely within her knowledge. First, he wishes to determine whether Sigmeth is authorized under the *Act* to make the demand for records. Sigmeth deposed that she is and produced minutes of a meeting of the Benchers of the LSS to substantiate her claim. I do not consider this matter to be in issue.

[18] Second, Abrametz seeks to cross-examine Sigmeth to enquire into the basis for her assertion that she has reasonable and probable grounds to believe "that records relevant to the Law Society's investigation are located within the offices occupied by Abrametz… within his personal residence… [and] within the offices of MNP". Abrametz submits that reasonable and probable grounds mean more than suspicion the documents will be found. He relies on *Baron v Canada*, [1993] 1 SCR 416, wherein Sopinka J., writing for the court, discussed the reasonableness standard in relation to a search at 447:

> … "Reasonableness" comprehends a requirement of probability. As Wilson J. said in *R. v. Debot*, [1989] 2 S.C.R. 1140, at p. 1166, aff'g (1986), 30 C.C.C. (3d) 207 (Ont. C.A.), at p. 219, the standard to be met in order to establish reasonable grounds for a search is "reasonable probability".

[19] In determining whether Abrametz has grounds to cross-examine Sigmeth on her assertion that she has reasonable and probable grounds to believe documents in a certain place are relevant to the LSS investigation, I accept that she must believe that it is reasonably probable the records are in the places described.

[20] Abrametz asserts that he requires clarification from Sigmeth. I do not agree that cross-examination of Sigmeth will clarify whether it is reasonably probable that the records are in places controlled by Abrametz or that he has access to. There would not seem to be much doubt on this issue.

[21] Abrametz further submits that he requires clarification from Sigmeth on her assertion that she needs the records "to determine whether or not he exploited his clients and his firm trust account as part of a scheme to evade payment of income tax on certain amounts" (Originating Application of the LSS, filed September 10, 2015, para. 6).

[22] As well, he wishes to challenge certain conclusions drawn by Sigmeth in her affidavit of September 2, 2015, wherein she states, in both paras. 4 and 5 that "[n]o satisfactory explanation has been provided for why the Member was engaging in this practice". He further seeks clarification of her assertion, at para. 7, that he "provided unclear responses to questions surrounding if and when he claimed the amounts in question".

[23] Sigmeth responds with respect to all three concerns that she has no knowledge of matters relevant to the investigation of Abrametz, beyond that contained in the Trust Report; the correspondence on file; and the transcript produced from a questioning of Abrametz on February 5, 2015 [Transcript], all of which has been provided to Abrametz (Affidavit of Donna Sigmeth, sworn November 6, 2015).

[24] Abrametz does not assert that the records sought are irrelevant to the question of whether he paid income tax on fees. Indeed, the records sought are files, information and documents that pertain to income tax filings by Abrametz, his firm(s) and his professional corporation. I do not think there is much question of the relevance of the records to the investigation.

[25] Moreover, it is a matter of argument and not a matter within Sigmeth's exclusive knowledge whether Abrametz failed to provide a satisfactory explanation to the LSS for his billing practices, or whether he provided unclear responses to LSS counsel when asked about tax payments.

[26] Third, Abrametz seeks to establish whether the disciplinary proceedings against him are *ultra vires* the jurisdiction of the LSS. He relies on *Law Society of Saskatchewan v Robertson Stromberg* (1996), 139 Sask R 182 (Sask QB), wherein Baynton J. quashed a complaint and proceedings by the LSS against members of a law firm. The LSS asserted the respondents had committed a criminal offence. Baynton J. found as follows paras. 125-126:

> 125 The Law Society clearly has the power and obligation to charge lawyers with disciplinary offences that are primarily breaches of professional conduct. It must obviously name the lawyer charged, and in some instances other individuals or entities who are not lawyers in order to particularize the complaint.

> 126 But a disciplinary proceeding begins to go off the rails when it approaches the matter on the basis that the conduct is unprofessional because it constitutes a criminal offence not yet determined by the criminal courts. It goes completely off the rails when its net effect is to investigate and determine whether the lawyer has engaged in conduct which is directly or indirectly characterized as a specific criminal offence. It has by then usurped the exclusive domain of the federal government and the criminal courts over criminal law and procedure, a head of power clearly assigned pursuant to the division of powers in the Constitution to the federal government. If the allegations of criminal conduct involve named entities or individuals who are not lawyers, the unconstitutionality of such disciplinary proceedings is all the more evident.

[27] The LSS responds that Abrametz has not demonstrated that granting permission to cross-examine Sigmeth would in some manner assist in the resolution of this issue between the parties (See *Murray v Boyle* (1989), 75 Sask R 293 (QB)). I agree. Abrametz has not shown that Sigmeth is likely to be in possession of any additional information which could clarify anything deposed to in her affidavits.

[28] Finally, Abrametz submits that cross-examination of Sigmeth is necessary to test her credibility. However, he has not provided any justification for questioning her credibility.

[29] I am not satisfied that "there is a sincere and legitimate need for clarification of the information deposed to and that information is solely within the knowledge of the affiant" (*Wallace*, para 5) as required before cross-examination is ordered. Abrametz's application to cross-examine Sigmeth is dismissed.

Application to Quash *Subpoena Duces Tecum*

[30] Abrametz seeks to quash the *subpoena duces tecum* served on himself, his accountant, Jahn, and MNP, the firm in which Jahn practices. He claims that it is an abuse of process for the LSS to proceed with its application under s. 63 of the *Act*, and also to compel Jahn and MNP, by subpoena, to produce the same financial records it seeks in the s. 63 application.

[31] Section 63 of the *Act* reads:

> **63**(1) Every member and every person who keeps any of a member's records or other property shall comply with a demand of a person designated by the benchers to produce any of the member's records or other property that the person designated by the benchers reasonably believes are required for the purposes of an investigation pursuant to this Act.
>
> (2) Where, on an *ex parte* application by the society, a judge of the court is satisfied by the oath of a person designated by the benchers that the person believes, on reasonable and probable grounds, that:
>
> > (a) a member whose records or other property have been demanded pursuant to subsection (1), or a person who keeps records or other property of that member, has:
> >
> > > (i) refused to comply with a demand pursuant to subsection (1); or
> > >
> > > (ii) failed to comply with a demand pursuant to subsection (1) within a reasonable time of the demand; and
> >
> > (b) records or other property that are the subject of a demand pursuant to subsection (1):
> >
> > > (i) are required for the purposes of an investigation pursuant to this Act; and
> > >
> > > (ii) are or are likely to be found in a specified place;
>
> the judge may make an order described in subsection (3).

(3) An order pursuant to subsection (2) authorizes the person named in the order, together with any peace officer that the person may call on for assistance, at any reasonable time, to enter by force if necessary the place named in the order and every part of the place named in the order and of the premises connected with that place to:

(a) examine the place and connected premises; and

(b) search for and seize and take possession of the member's records and other property demanded pursuant to subsection (1).

(4) Where any member's records or other property are produced pursuant to subsection (1) or seized pursuant to an order described in subsection (3) or 61(9), the person designated by the benchers to whom the records or other property were produced or who seized the records or other property, a member of the committee conducting the investigation for which the records or other property were demanded or the trustee may:

(a) make or cause to be made one or more copies of the records or other property produced or seized and return the originals to the person who produced them or from whom they were seized; or

(b) retain any of the member's records or other property and dispose of them in accordance with the directions of the chairperson of the discipline committee.

(5) Every entry and search pursuant to this section or subsection 61(9) is to be made during normal business hours unless the judge who issues the order authorizing the entry and search authorizes entry and search at another time.

(6) A copy or extract of a member's records or other property certified by a person mentioned in subsection (4) who made the copy or extract is admissible in evidence in any action, proceeding or prosecution as prima facie proof of the original record or property and its contents without proof of the signature or capacity of the person.

[32] Section 39 of the *Act* provides for a subpoena to be issued by a Local Registrar of this Court, at the request of a number of different persons. Section 39 reads:

> **39**(1) On application by:
>
> (a) a member whose conduct is under investigation;
>
> (b) counsel for the society; or
>
> (c) the chairperson of:
>
> (i) the conduct investigation committee;
>
> (ii) a hearing committee; or
>
> (iii) the professional standards committee;
>
> the local registrar of the court at any judicial centre, on payment of the appropriate fees, shall issue writs of subpoena *ad testificandum* or subpoena *duces tecum*.
>
> (2) Where a writ issued pursuant to subsection (1) is disobeyed, the proceedings and penalties are those applicable in civil cases in the court.

[33] The LSS challenges Abrametz's standing to challenge the Jahn and MNP subpoenas because he is not the person subpoenaed. The LSS did not object to the notice it received of the application. Abrametz responds that he also received a subpoena and, in any event, his standing comes from his privacy interest in all the records sought by the LSS.

Standing

[34] Abrametz asserts that he has standing to apply to quash all three subpoenas as the financial records sought are his. Indeed, the LSS has not denied his claim to an interest in the documents. Abrametz relies on the analysis of the Supreme Court of Canada, in *L.L.A. v A.B.*, [1995] 4 SCR 536 [*L.L.A.*], regarding the standing of a litigant to defend a privacy interest.

[35] In *L.L.A.*, the accused served *subpoenas duces tecum* on various institutions that had provided counselling services to *L.L.A*. The subpoenas directed the institutions to bring to court all records relating to the proceedings and to *L.L.A.* An issue arose with respect to standing:

> 27 The one question that remains is whether both a complainant, a third party to the proceedings (whether or not an appellant, but here one of the appellants), and the Crown, a party to the proceedings, have standing in third party appeals. There is no doubt in my mind that they do. The *audi alteram partem* principle, which is a rule of natural justice and one of the tenets of our legal system, requires that courts provide an opportunity to be heard to those who will be affected by the decisions. The rules of natural justice or of procedural fairness are most often discussed in the context of judicial review of the decisions of administrative bodies, but they were originally developed in the criminal law context. In *Blackstone's Criminal Practice* (Murphy rev. 1993), the authors remark at p. 1529:
>
> > Traditionally, the rules of natural justice have been defined with a little more precision, and are said to involve two main principles - no man may be a judge in his own cause, and the tribunal must hear both sides of the case. [Emphasis added.]
>
> See *Forsythe v. The Queen*, [1980] 2 S.C.R. 268; and *Attorney General of Quebec v. Cohen*, [1979] 2 S.C.R. 305.
>
> 28 Here, both the complainant and the Crown possess a direct and necessary interest in making representations. Both would be directly affected by a decision regarding the production of the complainant's private records. The decision is susceptible of affecting the course of

> the criminal trial. Both, therefore, must be afforded an opportunity to be heard.

[36] Abrametz also relies on a decision of the Newfoundland and Labrador Court of Appeal in *Kent v Kent*, 2010 NLCA 53, 324 DLR (4th) 238 [*Kent*], wherein the court held that both a party, and a subpoenaed non-party, may make an objection to the subpoena:

> 72 … We do not think it makes any difference whether it is another party or the subpoenaed non-party who makes the objection. It may be that the other parties, for their own tactical reasons, do not object to admissibility on grounds of relevance or materiality. Unless the subpoenaed non-party is able to raise such issues, he or she may be required -- at a cost of considerable time and money -- to appear and produce significant amounts of information and material of a personal nature that may not have any connection with the case.

[37] The records sought by the *subpoenas duces tecum* are records created by the subpoenaed party at the request of, and from information given by, Abrametz. The only person with an interest in resisting the subpoenas is Abrametz. For the reasons given in *L.L.A.* and *Kent*, I agree that Abrametz should be heard on the application.

Should the Subpoenas be Quashed

[38] The correct procedure for attacking a subpoena is discussed by the Saskatchewan Court of Appeal in *Wal-Mart Canada Corp. v Saskatchewan (Labour Relations Board)*, 2004 SKCA 154, 257 Sask R 12:

> 34 This is not to say that any court or tribunal is entitled to issue or to enforce subpoenas compelling production of irrelevant or privileged documents. If that is done, the injured party has the same recourse as

was resorted to by the employer in this case: to move to have the tribunal quash the subpoena or to rule on the issues of relevance or privilege in respect of the documents which it does not believe it should be compelled to produce.

35 The appropriate practice is set out in an article referred to by the chambers judge, *Subpoena Duces Tecum*, by James E. Dunn, (1983), 4 Adv. Q. 94 at p. 99:

> If the witness can demonstrate that the evidence sought by the subpoena is clearly irrelevant then he is entitled to have the subpoena quashed. Obviously, if there is any doubt at all about the relevance of the documents, the subpoena should be upheld and the witness should be directed to attend with his documents before the trial judge. The relevance of the documents is a question of fact for the court to determine and, accordingly, the witness is obliged to comply with the terms of the subpoena whether or not he believes the documents are material. [footnotes omitted]
>
> A subpoena should not be quashed in advance of trial unless it is abundantly clear that it is being used for an improper or coercive purpose. Again, the proper procedure is to uphold the validity of the subpoena and then refer the question to the trial judge who may penalize the litigant in costs should circumstances warrant. The onus to prove that the subpoena has been issued for an improper purpose is upon the person attacking the subpoena. [footnotes omitted]

36 *Wigmore on Evidence*, (McNaughton rev. 1961) (Toronto: Little, Brown and Company, 1961), Vol. VIII, art. s. 2200(1)(v) at pp. 127-9 says as follows:

> (v) It often happens, however, that the party desiring the evidence does not precisely know what documents exist in the hands of the witness or what existing documents contain relevant material, or that a document, if of a certain tenor, would be privileged from disclosure on one or another ground (s. s. 2210-2233 infra). In such a situation, it is obviously not for the witness to withhold the documents upon his mere assertion that they are not relevant (s. 2210 infra) or that they are privileged. It is his duty to bring what the court requires. The court can then to its own satisfaction determine by inspection whether the documents produced are irrelevant or privileged. This does not deprive the witness unduly of any rights of privacy, since the court's determination is made by

> its own inspection, without submitting the documents to the opponent's view. Unless such a mode of determination were employed, there could be no available means of preventing the constant evasion of duty by witnesses. [footnotes omitted]

[39] Abrametz does not contest the likely relevance of the documents sought by the LSS through the *subpoenas duces tecum*. He asserts, however, that it is an abuse of process, and an attempt to circumvent s. 63, for the LSS to subpoena documents as a form of discovery, without any procedural safeguards.

[40] Here, the subpoenas were issued and served on Jahn and MNP without notice to Abrametz, although the records sought relate to his private financial affairs and the subpoenas sought to compel Jahn and MNP to produce the records at the LSS office within five days of service.

[41] In *Dalgleish v Basu*, [1975] 2 WWR 326 (Sask QB) [*Dalgleish*] Bayda J. (as he then was), found that however compelling the need for a pre-hearing discovery of documents, a *subpoena duces tecum* should not be used for that purpose, at 330:

> But should this court permit a subpoena *duces tecum* to be used as a substitute for the normal discovery-of-documents procedure? I believe it should not. The subpoena should be used for only that purpose for which it was intended and no other. If justice requires a discovery of documents then appropriate statutory provisions should be made if no procedural rules now exist for such a discovery. In short, resort should not be had to a side door if the legislators have not seen fit to open the front door.

[42] Abrametz asserts further that the language of s. 39 is far broader than in any other province in Canada and the use of the court to compel production of records, without the safeguards provided by the court, would appear to run afoul of *Dalgleish* and of the Supreme Court of Canada decision

in *Canadian Pacific Air Lines Ltd. v Canadian Air Line Pilots Assn.*, [1993] 3 SCR 724 [*CALPA*].

[43] In *CALPA*, the court was concerned with s. 118 of the *Canada Labour Code*, RSC 1985, c L-2, a provision empowering the Canada Labour Relations Board "to require that certain persons attend and to compel them to give evidence, whether it be oral or written, and to produce documents or other things which the Board deems requisite in the circumstances" (*CALPA*, at 736). The court held that the Board's "power of compulsion" must be exercised in the "context of a formal hearing" (*CALPA*, at 737). Gonthier J., writing for the majority, explained at 737-738:

> This conclusion is also supported by the nature of the provision. The power granted by s. 118(a) is coercive. While the orders of the Board are not executory in themselves, they are enforceable by filing with the Registry of the Federal Court, as judgments of that court pursuant to s. 123 of the *Code*, with the penalties attached thereto including that of imprisonment. The exercise of such powers is normally reserved uniquely for courts of law, and it is exceptional that they may be initiated by a body such as the Board. This is significant in two ways. First, because s. 118(a) is an exceptional provision which grants to a body a significant power, special attention must be given for this reason alone to any limits which are placed on the exercise of that power by the words of the provision granting it. The Board has no inherent jurisdiction, unlike superior courts whose powers of coercion find their origins in the inherent jurisdiction of those courts.
>
> Second, it requires consideration of the special application of the power which the Board seeks to have affirmed. The context in which the power was purportedly exercised is an administrative one. … There is no reference in the provision to the exercise of the powers to compel the production of documents in the context of the administrative role of the Board. On the contrary, each and every reference to the manner of exercise of the power contained in the provision relates to its exercise in a non administrative context in contrast to the other information gathering provisions of s. 118. As noted above, persons subject to the power are [page738] referred to as

> "witnesses", the process by which their presence is to be secured is by means of summons, and the evidence is to be given on oath.
>
> Indeed, the nature of the acts authorized by para. (a) is judicial. Reference may be had to the case of *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218, at p. 225. In that case, the commissioner who had required the production of documents had the authority to act with the powers of a superior court in term. In rejecting the argument that cases involving other actions of commissions were applicable, it was decided that the nature of the activity of the commission must be properly identified. It was held that:
>
> > ... what is presently in issue is the validity of strictly judicial acts: the compulsion of witnesses to testify and to produce documents.
>
> …
>
> The characterization of the power in question cannot proceed without reference to the exorbitant nature of the penalties which are available to [page739] secure compliance. In light of the judicial nature of the power, an extension of the power so that it would be exercisable in an administrative context would be an exceptional enlargement of its application. The power cannot be envisaged to be so broad in the absence of clear wording to that effect.
>
> [Emphasis Added]

[44] Abrametz argues that, like the legislation in issue in *CALPA*, the subpoena power in s. 39 of the *Act* must be considered in relation to the more particular discovery provision in s. 63 of the *Act*. The Supreme Court said as much in *CALPA*, at 742-743:

> Nor can the argument that the more general provisions justify a broader interpretation of the power to compel the production of documents be supported in light of a careful review of the purposes and role of the Board. It was submitted that the administrative aspect of the role of the Board required that the powers of the Board be viewed in a generous fashion. This argument cannot succeed here, for two reasons. First, the Board does not only have an administrative function to perform. The Board is required to act in the manner of a court of law in assessing legal arguments in relation to complex

> factual circumstances. Second, and as a result, the procedural safeguards which normally accompany a process having a judicial character cannot be viewed as alien in relation to the activities of the Board. At the most general level, the limitations which are imposed upon the Board's exercise of its power to compel the production of documents are consistent with the principle of *audi alteram partem*. I am in agreement with Marceau J.A. in that (at p. 267 N.R.):
>
> > This is not a matter of limiting the scope of the Board's investigations, simply of requiring that to secure the production of documents and testimony of witnesses it [page743] should only use the measures at its disposal to overcome the reticence of an individual in a manner which allows that individual to adequately present the reasons for his objections.
> >
> > This is not to say that there is no other way in which fairness to a witness who is compelled to produce evidence may be achieved. But it does demonstrate that these limits are consistent with the functioning of the Board, when the purposes of the Board are seen as a whole. (emphasis added)

[45] The Alberta Court of Appeal expressed similar concerns in *R v Gingras* (1992), 71 CCC (3d) 53 (Alta CA) [*Gingras*]. In *Gingras*, a subpoena was issued by a judge of the trial court, directing the subpoenaed witness to produce "[t]he complete institutional files… of [John Smith], and to produce the same to the party calling you subject to any claim of privilege that may exist". The Court of Appeal determined that the procedure contemplated by the words "to produce the same to the party calling you" misconceived the nature of a subpoena. The court explained:

> We know of no common law or statutory authority for the words "the party calling you". A subpoena must call for testimony or documents to be given to the Court. The closing words appear in substance to convert this into something like a civil notice to produce, saying that documents are to be handed over to the defence counsel, not to the Court. That would entail a host of dangers, not the least of which would be loss of privilege without any real effective chance to test it. It must be remembered that many forms of privilege were a live issue in this case. It is arguable therefore that the subpoena itself was a

> nullity and did not need quashing upon its return at trial. If it had any life, it was only on the grounds that an order of a Superior Court stands unless and until it is revoked. If a Superior Court issues an order or similar document which the law does not permit it to issue, we have no doubt that the inherent power of the Court allows it to revoke the same upon this being brought to its notice.
>
> [Emphasis Added]

[46] The document in issue, a *subpoena duces tecum,* is understood to have a particular function − to compel the subpoenaed person to court, or other independent tribunal, to testify and to bring with him/her certain, specified documents. Watt J. (as he then was) described a subpoena in these terms in *R v Baltovich*, [2007] OJ No 3506 (QL) (Ont Sup Ct): "literally translated 'under penalty', [a subpoena] is a command to the person named to appear at a time and place specified to give testimony about a matter in issue between the parties to a proceeding" (para. 88). Watt J. then explained the function of a *subpoena duces tecum* and the limits that ought to attach to its use:

> 88 … A *subpoena duces tecum* requires the witness to bring with him or her things like books, papers and other things connected with his or her testimony. In the usual course, a *subpoena duces tecum* is not used to obtain these other things, which are often used as *aides memoires* for production at trial.
>
> …
>
> 91 It is uncontroversial that, where alternative methods of obtaining evidence are available, the party who seeks the evidence may generally choose the means to achieve that end. At the same time, however, courts should be chary of manifest circumventions of traditional methods of acquiring evidence, especially those that avoid adherence to established constitutional principle. A *subpoena duces tecum* ought not to be used to avoid the scrutiny associated with other methods of acquisition. See, by comparison, *R. v. French* (1977), 37 C.C.C. (2d) 201, 213-4 (Ont. C.A.) *per* MacKinnon J.A., affirmed on other grounds (1979), 47 C.C.C. (2d) 411 (S.C.C.).

[47] Abrametz asserts that the LSS is using the subpoenas to circumvent the s. 63 process and its concomitant judicial oversight. He asks that the subpoenas be quashed for abuse of process.

[48] In seeking this remedy, Abrametz relies on the decision of Dawson J. in *Thompson v Consolidated Fastfrate Inc.*, 2005 SKQB 226, 267 Sask R 134 wherein the plaintiff, having lost an application for production of specified documents, served a *subpoena duces tecum* on a witness demanding that he produce the same documents at trial. Dawson J. found that the subpoena was obtained for an improper purpose and was, therefore, an abuse of process. Dawson J. explained as follows:

> 8 This Court in *Seagrove Capital Corp. et al. v. Leader Mining International Inc. et al.*, 2000 SKQB 230; (2000), 193 Sask.R. 273 (Sask. Q.B.) reiterated the law with respect to the Court's jurisdiction to set aside a subpoena. Justice Maurice therein said at para. 14:
>
> > The Court has an inherent jurisdiction to set aside a writ of subpoena where it is satisfied a witness is unable to give relevant evidence or where its issue was an abuse of the Court's process. *Tribune Newspaper Co. v. Fort Frances Pulp & Paper Co. et. al.*, [1932] 4 D.L.R. 179 (Man. C.A.): *R. v. McConnell* (1977), 35 C.C.C. (2d) 435 (Sask. C.A.); *R. v. Gares* (1989), 80 Sask.R. 241; 53 C.C.C. (3d) 82 (Sask. C.A.). Where a subpoena is challenged the burden is on the person issuing the writ of subpoena to establish that the person subpoenaed "would probably have evidence material to the issues raised": *R. v. Harris (M.)* (1994), 74 O.A.C. 398; 93 C.C.C. (3d) 478, at p. 480 [C.C.C.] (C.A.).
>
> ...
>
> 10 In *Dalgleish and Basu*, [1975] 2 W.W.R. 326; (1974), 51 D.L.R. (3d) 309, Justice Bayda of our Court (as he then was) confirmed that a subpoena is not to be used for the discovery of documents. He stated at p. 328:
>
> > ... It is to be borne in mind that a subpoena by its nature asks a witness for production only of documents and that it is not a

> demand to make a discovery of documents (*Lee v. Angas* (1866), L.R. 2 Eq. 59; *Newland v. Steer* (1865), 13 L.T. 111, 13 W.R. 1014. [Emphasis in original]

He continued at p. 330:

> But should this Court permit a subpoena *duces tecum* to be used as a substitute for the normal discovery-of-documents procedure? I believe it should not. The subpoena should be used for only that purpose for which it was intended and no other. ...

> 11 It is trite law that a party to an action, who has chosen not to appeal a judgment in their action, cannot make a collateral attack on the judgment at a later stage in the proceedings.
>
> …
>
> 15 In this case the subpoena was obtained not for the purpose of requiring a person to attend and give material evidence. The plaintiff here is speculating that the documents may have material evidence. He proposes to go on a fishing expedition with the hope of turning up something useful. The plaintiff has failed to meet the onus of establishing Mr. Bach would likely give material evidence to the issues raised.
>
> 16 It is evident that the subpoena *duces tecum* was obtained for the sole purpose of circumventing the ruling made by Justice Matheson, who had rejected the plaintiff's application for an order for production and discovery of the documents. To obtain a subpoena for this purpose is, in my view, to obtain a subpoena for an indirect and improper purpose and in the circumstances constitutes an abuse of the process of the Court.

[49] In response, the LSS relies on the Ontario Court of Appeal decision in *Sazant v College of Physicians and Surgeons of Ontario*, 2012 ONCA 727, 113 OR (3d) 420 [*Sazant*], wherein the court considered the summons power given to an investigator, appointed by the Registrar of the College of Physicians and Surgeons of Ontario, to investigate specific complaints of misconduct and/or incompetence. The court described the summons power as follows:

> 8 Under s. 76(1) of the *Code* [*Health Professions Procedural Code*], a College investigator has the same investigatory powers as a commission under the *Public Inquiries Act*, 2009, S.O. 2009, c. 33, Sch. 6. Such powers include the power to issue, without prior judicial authorization, a summons to any person, requiring that person to give or produce relevant evidence to the investigator. (emphasis added)

[50] The LSS argues further that a narrow interpretation of its subpoena power under s. 39 would unduly hamper its ability to investigate members' conduct, a result that is inconsistent with Supreme Court of Canada authority. In *Pharmascience Inc. v Binet*, 2006 SCC 48, [2006] 2 SCR 513 LeBel J., writing for the majority, observed that the fundamental role of the professional governing body is to protect the public interest:

> 36 This Court has on many occasions noted the crucial role that professional orders play in protecting [page535] the public interest. As McLachlin J. stated in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, "[i]t is difficult to overstate the importance in our society of the proper regulation of our learned professions" (p. 249). The importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them. Also, it should not be forgotten that in the client-professional relationship, the client is often in a vulnerable position. The Court has already had occasion to address this point in respect of litigants who entrust their rights to lawyers (*Fortin v. Chrétien*, [2001] 2 S.C.R. 500, 2001 SCC 45, at para. 17). The general public's lack of knowledge of the pharmaceutical field and high level of dependence on the advice of competent professionals means that pharmacists are another profession in which the public places great trust. I have no hesitation in applying the comments I wrote for this Court in *Finney*, at para. 16, generally to the health field to emphasize the importance of the obligations imposed by the state on the professional orders that are responsible for overseeing the competence and honesty of their members:
>
> > The primary objective of those orders is not to provide services to their members or represent their collective interests. They are created to protect the public, as s. 23 of the *Professional Code* makes clear... .
>
> The privilege of professional self-regulation therefore places the individuals responsible for enforcing professional discipline under an

> onerous obligation. The delegation of powers by the state comes with the responsibility for providing adequate protection for the public. *Finney* confirms the importance of properly discharging this obligation and the seriousness of the consequences of failing to do so.

[51] In *Sazant*, the Ontario Court of Appeal also discussed the need for flexibility in the investigatory tools available to professional bodies to allow them to carry out their responsibilities to the public:

> 99 Bearing this in mind, in my view, s. 76(1) must not be read narrowly, as restricting an investigator's power under the section to inquiring into and examining matters described in s. 3 of the *Medicine Act*, 1991 as falling within the scope of the practice of medicine. Rather, s. 76(1) should be given a broad and purposive interpretation to enable an investigator to carry out his or her duty to investigate. This in turn assists the College in its statutory mandate to properly regulate the profession and protect the public.
>
> 100 Considered in this way, the power "to inquire into and examine the practice of the member to be investigated" must include the power to inquire into whether the member has committed acts of professional misconduct.
>
> 101 The Supreme Court of Canada has consistently emphasized the need for courts to interpret professional discipline statutes with a view to ensuring that such statutes protect the public interest in the proper regulation of the professions: see, e.g., *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, [1990] S.C.J. No. 65, at p. 249 S.C.R.; *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, [2004] S.C.J. No. 31, 2004 SCC 36, at para. 40.
>
> 102 As the court put it unequivocally in *Pharmascience Inc. v. Binet*, [2006] 2 S.C.R. 513, [2006] S.C.J. No. 48, 2006 SCC 48, at paras. 36-37:
>
> > The importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them.
> >
> > . . . . . [page440]
> >
> > In this context, it should be expected that individuals with not only the power, but also the duty, to inquire into a professional's conduct will have sufficiently effective means

> at their disposal to gather all information relevant to determining whether a complaint should be lodged.

[52] Finally, the LSS argues that the Law Societies of Alberta and British Columbia have similar powers to the *subpoena duces tecum* in s. 39, allowing those societies to obtain records during the investigation stage of a complaint. These provisions are as follows:

> ***Legal Profession Act*, RSA 2000, c. L-8, s. 55 [Alberta s. 55]:**
>
> **55**(1) An investigation may be conducted by an officer or employee of the Society or by a person engaged by or on behalf of the Society for that purpose.
>
> (2) An investigator may direct the member concerned or any other member
>
> > (a) to answer any inquiries the investigator may have relating to the investigation,
> >
> > (b) to produce to the investigator any records or other property in the member's possession or under the member's control that are or may be related in any way to the investigation,
> >
> > (c) to give up possession of any record referred to in clause (b) for the purpose of allowing the investigator to take it away, make a copy of it and return it within a reasonable time after receiving it, or
> >
> > (d) to attend before the investigator for the purpose of complying with clause (a), (b) or (c).
>
> (3) The Society may apply to the Court of Queen's Bench for
>
> > (a) an order directing the member concerned or any other member to comply with all or part of subsection (2);
> >
> > (b) an order directing any person
> >
> > > (i) to produce to the investigator any records or other property in the person's possession or under the

> person's control that are or may be related in any way to the investigation, or
>
> (ii) to give up possession of any record referred to in subclause (i) for the purpose of allowing the investigator to take it away, make a copy of it and return it within a reasonable time after receiving it;
>
> (c) an order directing any person to attend before the investigator to answer any inquiries the investigator may have relating to the investigation.
>
> (4) An application for an order under subsection (3) may be made without notice to the other party if the Court is satisfied that it is proper to make the order in the circumstances.
>
> ***Legal Profession Act*, SBC, 1998, c. 9, s. 26 [BC s. 26]**
>
> **26** …
>
> (4) For the purposes of an investigation authorized by rules made under subsection (2), an employee designated or a person appointed under subsection (3) may make an order requiring a person to do either or both of the following:
>
> (a) attend, in person or by electronic means, before the designated employee or appointed person to answer questions on oath or affirmation, or in any other manner;
>
> (b) produce for the designated employee or appointed person a record or thing in the person's possession or control.
>
> (5) The society may apply to the Supreme Court for an order
>
> (a) directing a person to comply with an order made under subsection (4), or
>
> (b) directing an officer or governing member of a person to cause the person to comply with an order made under subsection (4).

[53] The LSS asserts that the Ontario Court of Appeal's reasoning in *Sazant*, upholding the summons power, is applicable also to the s. 39 subpoena. The difficulty with this argument is that it ignores the breadth of s. 39, which

gives the same subpoena power to a member under investigation and to the chairpersons of various committees as it does to LSS counsel. Arguably, the summons power at issue in *Sazant* is closer to a s. 63 demand than it is to the s. 39 subpoena power.

[54] Moreover, the LSS has not asserted that its ability to compel the production of records is limited in s. 63, or needs to be supplemented by the subpoena power in s. 39 in order for the LSS to properly carry out its functions.

[55] In both Alberta s. 55 and BC s.26, an employee or person designated by the Law Society makes a demand for records of a member. If the member does not comply, the society may apply to the superior court for an order directing compliance. It appears to me, therefore, that the Alberta and British Columbia legislation provides prehearing powers to compel production of records that is comparable to s. 63, not s. 39.

[56] Section 63 provides judicial oversight over the extraordinary power to compel a person to attend for questioning and to bring with him/her certain, specified documents. A *subpoena duces tecum* is generally used in circumstances where appropriate procedural safeguards are also in place. In contrast, these subpoenas directed the subpoenaed parties to attend the LSS office with records in hand, on five days' notice. The only judicial oversight was the ability to apply to quash the subpoenas for irrelevance, or abuse of process. At the very least, such an application is an awkward way of getting before the court that issued the subpoenas. Certainly, only a subpoenaed party with an interest in the records is likely to object.

[57] Abrametz has indicated that he seeks to argue on the s. 63 application that the LSS is not entitled to the records because the proceedings are *ultra vires* the jurisdiction of the LSS. This argument would be for nought if Jahn and MNP had turned over the records, pursuant to the subpoenas, before Abrametz learned of the existence of the subpoenas.

[58] In the final analysis, the role of s. 39 within the disciplinary process remains obscure. As previously stated, s. 39 provides the same subpoena power to the member, as it does to the LSS. I am not persuaded that the legislators intended to provide the LSS alone in s. 39, with the extraordinary power to use a subpoena to compel production of documents outside of a hearing. Therefore, in this case, I am satisfied that the LSS improperly sought to discover documents through the use of a *subpoena duces tecum*. In these circumstances, the subpoenas issued to Jahn, MNP and Abrametz are an abuse of the court's process.

[59] The subpoenas are quashed, therefore.

J.
J.E. MCMURTRY

TAB 14

CITATION: Reflection Productions v. Ontario Media Dev. Corp., 2022 ONSC 64
DIVISIONAL COURT FILE NO.: DC-19-315
DATE: 2022-01-12

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MORAWETZ C.J., VARPIO, KRISTJANSON JJ.

BETWEEN:	
REFLECTION PRODUCTIONS CANADA LTD. Applicant	*Peter I. Waldmann*, for the Applicant
– and –	
ONTARIO MEDIA DEVELOPMENT CORPORATION Respondent	*Andi Jin*, for the Respondent
	HEARD: by videoconference at Toronto December 1, 2021

REASONS FOR DECISION

VARPIO J.:

OVERVIEW

[1] In 2017, the applicant, Reflection Productions Canada Ltd., produced a series of 39 hour-long television shows entitled *Reflections.* *Reflections* contained film of natural settings with Biblical scripture superimposed upon same.

[2] The Ontario Media Development Corporation ("OMDC"), an agency of the Ministry of Heritage, Sport, Tourism and Culture Industries, is mandated to stimulate employment and investment within Ontario's cultural media industry. In that capacity, it is responsible for

administering a tax credit program for Ontario-based productions. In order to qualify for this tax credit, a film must be either a "co-production", must have 85% of its production shot in Ontario, or must be classified as a "documentary".

[3] The applicant applied for the tax credit. All parties accept that it is not a "co-production" and that only 23% of *Reflections* was shot in Ontario. Accordingly, in order to receive the tax credit, *Reflections* must be categorized as a "documentary".

[4] After review and consultation with the applicant's principal, Mr. Mihkel Harilaid, the OMDC found that *Reflections* was not a "documentary". As such, *Reflections* did not qualify for the tax credit.

[5] The applicant seeks judicial review of that finding and submits that the OMDC was unreasonable in arriving at that conclusion.

[6] For the reasons that follow, I find that the OMDC's decision-making process and its decision were reasonable and, as a result, I will dismiss the appeal.

FACTS

The Applicant

[7] The applicant was incorporated in 2013 for the sole purpose of making *Reflections,* which was to be broadcast in Canada and the United States. Mr. Harilaid is an experienced film maker having previously received a tax credit through the OMDC for a fishing show he produced entitled *Hookin' Up with Nick and Mariko.*

The OMDC and the Governing Statutory Framework

[8] The OMDC administers a tax credit program known as the Ontario Film and Television Tax Credit ("OFTTC"). Section 27(1)(7)(ii) of Ontario Regulation 37/09 as filed under the *Taxation Act, 2007,* S.O. 2007, c. 11, Sch. A. governs eligibility for the OFTTC:

> 27. (1) A film or television production made by a qualifying production company is an eligible Ontario production for the purposes of section 91 of the Act if the following conditions are satisfied:
>
> […]
>
> 7. If the production is not an interprovincial co-production or a treaty co-production,
>
> […]
>
> iii. If the production is not a documentary, the photography or key animation for the production was done in Ontario during at least 85 per cent of the total number of days during which photography or key animation was done for the production.

[9] The term "documentary" is not defined within the *Taxation Act* or the regulations informing same.

Reflections and the OFTTC

[10] On November 3, 2016, the applicant applied for the OFTTC in relation to *Reflections*. OFTTC guidelines require that the applicant submit any application it makes for federal tax credits along with the OFTTC application. Accordingly, the applicant filed a copy of its application for a federal tax credit program as administered by the Canadian Audio-Visual Certification Office ("CAVCO"). In both the OMDC and CAVCO applications, the applicant described *Reflections* as follows:

> Enjoy breathtaking scenes from many of God's miraculous creations. Be immersed in the Word of God while you take in the majestic Rockies, the forests, lakes, and rivers of the Northern Ontario, the awe-inspiring Banff National Park, the beauty of Spain, Morocco, Mexico, South East Asia and much more. Familiar hymns and beautifully produced original music accompany Scripture to help you let go and surrender during a time of daily prayer and meditation.

[11] Originally, the applicant had classified *Reflections* as a "Lifestyle/Human Interest" production with CAVCO, as opposed to a "documentary". On September 14, 2017, the OMDC advised the applicant of its concerns regarding *Reflections'* eligibility for the OFTTC:

> I see in the CAVCO application you have classified the production as Lifestyle/Human Interest, and the CRTC category assigned is 040 – Religion (not 02B – long form documentary) yet for your OFTTC you've classified it as a documentary. After reviewing the production there are concerns regarding classifying the production as a documentary.

[12] Mr. Harilaid responded to this concern on September 14, 2017 and asked: "Could you refresh my memory and let me know what concerns you have about the documentary genre?"

[13] On September 20, 2017, the OMDC advised the applicant that *Reflections* may not be eligible for the OFTTC because it was not a co-production, it did not meet the 85% shoot requirement and was not a "documentary". The OMDC requested that the applicant withdraw its application.

[14] The applicant asked the OMDC what criteria were used to determine whether *Reflections* was a "documentary". The OMDC responded that they used the CAVCO genre definitions, which defines "documentary" as follows:

> An original work of non-fiction, primarily designed to inform but which may also educate and entertain, providing an in-depth critical analysis of a specific subject or point of view.

[15] On September 26, 2017, the OMDC advised the applicant of its concern that *Reflections* "contain[ed] no research component, no analysis, and no critique". However, the OMDC offered to review individual episodes of *Reflections* that met the 85% shoot requirement so that those episodes might qualify for the OFTTC.

[16] On October 4, 2017, the applicant advised the OMDC that *Reflections* "meets all international criteria for a documentary" and was similar to renowned documentaries such as *Planet Earth.* The applicant also stated that CAVCO had reclassified *Reflections* as a documentary.

[17] On October 7, 2017, Mr. Harilaid and his co-producer spoke with the OMDC's reviewing business officer and its team lead. The OMDC director was not on this call. In his affidavit in support of this application, Mr. Harilaid deposed that he made the following submissions to the OMDC at that time:

> (a) "...the intention of the production [*Reflections*] was always a non-narrative documentary in the mold [sic] of *Baraka* and *Koyaanisqatsi*";
>
> (b) "CAVCO had changed their classification of the production [to "documentary"]";
>
> (c) "if the applicant were not granted the OFTTC, it would result in its bankruptcy."

[18] Mr. Harilaid also deposed that during the October 7, 2019 conversation, the OMDC representatives referred to *Reflections* in a disparaging tone by using statements such as "that's just a Bible quote", "that's just a Christian thing" and "how is the Bible anything critical?" As a result, Mr. Harilaid deposed that,

> [a]fter the conversation had concluded, and I discussed it further with [*Reflections'* co-producer], it became clear to me that the representatives of the OMDC were dismissive of the source material used in the production. Upon reflection, what seemed to me and [the co-producer] to be the primary issue that was informing their decision to deem the production ineligible for the OFTTC was the Christian message in the production.
>
> I recall [the OMDC representatives] stating "your broadcaster is Daystar; that's the big church [in] Texas". It appeared to me that the OMDC representatives were unwilling to engage with my arguments and unwilling to see the true content of the production as it had a Christian message which they clearly deemed ignorant and objectionable.
>
> In light of my previous experience with applying for the OFTTC and in light of the comments and decision made by the OMDC with respect to the production, I verily believe that the OMDC, without giving proper consideration to industry standards and the filmmaker's intent, denied the Applicant's OFTTC application not because the production does not fit into the definition of documentary, but

> for some improper and invalid reason or reasons, which may include an anti-Evangelical Christian sentiment held by members of the OMDC.

[19] On October 19, 2017, the OMDC advised the applicant that the reviewing business officer, the overseeing team lead, and the director had discussed *Reflections* and that the OMDC continued to have concerns regarding whether *Reflections* qualified as a "documentary". The OMDC offered the applicant a further opportunity to make submissions, specifically as to why the production met the CAVCO definition of "documentary" as opposed to "religion". Mr. Harilaid responded as follows:

> In previous discussions, you have suggested that the CAVCO classification was of no import to your decision, but I agree with your current position that it is relevant.
>
> CAVCO has certified this as a documentary so, regardless of my understanding of these criterion, it is certain that the project is a documentary by their standard.
>
> To answer your question, to qualify as religion there are two criterions that must BOTH be met. Firstly, that it deals with "religion and religious teachings" and, secondly, that there is a "discussion of the human spiritual condition". Although "Reflections" does deal with and use religion as source material there is no discussion of the human spiritual condition. This definitionally takes it out of this genre.
>
> I note the exact wording for the religion criterion states "as well as," which is in contrast to the documentary definition with uses "may also".
>
> It is unreasonable to suggest that all programs that deal with religion or reference God are spiritual programs.
>
> There is no question that "Reflections" is a work of non-fiction in accordance with the CAVCO definition. This is an original work with all of the video material being filmed by us. The fact that we use scripture as our text does not negate the originality just as Ken Burn's use of stills does not make his documentary, "The Civil War", less "original". It is the treatment and presentation of the material that dictates this. Our primary purpose here is to inform and educate the audience about what we believe are distinct connections of the world and certainly this is a "specific point of view" not shared by all.
>
> I hope this puts the project into perspective and that you can now certify "Reflections" properly as a documentary and allow this to move forward with the full tax credit as filed.

[20] On December 1, 2017, the OMDC advised the applicant that it had considered the applicant's arguments and had decided that *Reflections* could not be characterized as a "documentary". *Reflections* was therefore ineligible for the OFTTC. In this correspondence, the OMDC director stated:

> Thank you for your response. We do acknowledge that effort and money were spent on the production. However, **we have reviewed the content of the series and your written arguments and found the production cannot be characterized as a documentary as it has not made a critical analysis of a subject or presented a point of view.**
>
> After further considering and reviewing the examples and arguments you presented on October 7, 2017, we gave you the opportunity to explain why the production meets the definition of "documentary". Your response did not provide an explanation as to why the production should be considered a documentary. Rather, you have focused on why the production should not be categorized as "religion". **The production displays excerpts from scriptures on screen, which are recited by narrators, juxtaposed with images of nature, with music as opposed to providing an in-depth critical analysis or point of view on a subject.**
>
> **The production does not present an in-depth discourse, for example, about God, spirituality, scriptures, religion, music, or nature. Rather it literally displays excerpts from scriptures.**
>
> As you are aware only productions that fulfill the 85% shot in Ontario requirement qualify for the OFTTC unless the production qualifies as a documentary or co-production. As the production consists of only 23% Ontario shooting, we will be issuing a letter of ineligibility on or after December 18, 2017. [Emphasis added.]

[21] On December 22, 2017, the director issued a letter of ineligibility that formalized the OMDC's finding (the "Decision").

The Application for Judicial Review

[22] On June 19, 2019, the applicant filed the instant application seeking judicial review of the Decision. Mr. Harilaid's affidavit attached a variety of materials including newspaper articles and polling data. These materials describe what Mr. Harilaid suggests is an anti-evangelical Christian bias in media, government and Canadian society in general.

[23] The applicant served the director of the OMDC with a Rule 39.03 Notice of Examination with a Summons to Witness returnable December 9, 2020. On November 25, 2020, the OMDC brought an application to quash that subpoena. In grounds in support of the motion, the OMDC stated that

> The Applicant's proposed examination seeks documents and testimony that are protected by the doctrine of deliberative secrecy. The proposed examination is a fishing expedition based on an unreasonable and ultimately entirely speculative allegation of bias.
>
> ….

> The Applicant has failed to meet this test. It has advised that the basis for its proposed examination is as follows:
>
> > "We are seeking to obtain as in a *subpoena duces tecum* from [the director's] documentation that may have influenced the decision… including any which may reflect on any element of discrimination on the basis of religion which may have affected the decision, and questions to [the director's] knowledge of same."

[24] In its motion record, the OMDC made reference to the allegedly discriminatory remarks that were allegedly made by OMDC representatives on the October 7, 2019 call.

[25] The motion was granted, and the subpoena was quashed.

POSITIONS OF THE PARTIES

[26] The applicant raised several arguments in its factum and in oral argument. Effectively, it submitted that the OMDC engaged in improper conduct towards the applicant in its application for the OFTTC. Specifically, the applicant argued that:

a. *Reflections* was inspired by, and is similar to, world-renowned films such as *Kohaanisqatsi* and *Baraka* which are categorized as documentaries by leading experts such as the American Library of Congress and Roger Eberts;

b. *Reflections* is listed on IMDB as a documentary (as are *Koyaanisqatsi* and *Baraka*);

c. The OMDC did not specify *Reflections'* actual genre;

d. CAVCO ultimately re-classified *Reflections* as a "documentary";

e. Mr. Harilaid had previously received the OFTTC for *Hookin' Up with Nick and Mariko,* which the OMDC accepted as a "documentary";

f. *Reflections* provides the critical analysis necessary to meet the CAVCO definition of "documentary": "[t]his critical analysis is provided by the juxtaposition of biblical scripture and filmed photography of the beauty of the world";

g. The decision was not transparent because the OMDC refused to disclose its internal working documents;

h. The decision is contrary to the OMDC's objective of stimulating employment and investment in Ontario because it has bankrupted the applicant;

i. It was unreasonable for the director to adopt the CAVCO definition of "documentary"; and

j. The director improperly considered anti-evangelical Christian sentiment.

[27] The applicant submitted that the appropriate standard of review was one of reasonableness.

[28] With respect to the arguments advanced by the applicant, the respondent submitted that the OMDC's decision to adopt the CAVCO definition of a "documentary" was reasonable, that its interpretation of that definition was reasonable and that the OMDC afforded the applicant appropriate levels of procedural fairness.

ANALYSIS

Reasonableness

[29] Applications for judicial review begin with presumption that courts will review the decisions of administrative bodies on the basis of reasonableness. As the majority of the Supreme Court of Canada stated at paras. 82 and 83 of *Vavilov* v. *Canada*, 2019 S.C.J. No 65:

> Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir*, at paras. 27-28 and 48; *Catalyst Paper Corp.* v. *North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 10; Reference re *Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 10.
>
> It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios* v. *Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker -- including both the rationale for the decision and the outcome to which it led -- was unreasonable.

[30] The majority of the Supreme Court in *Vavilov* then described how a reviewing court ought to examine a decision-maker's reasons at paras. 86 and 87:

> Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned

> mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
>
> This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the outcome of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc.* v. *Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with both outcome and process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

[31] At paras. 94 to 96 of *Vavilov*, the majority of the Supreme Court focused on the need to interpret an administrative decision in light of its legal and factual framework:

> The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.
>
> That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

> Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

[32] Therefore, the reviewing court must be satisfied that the decision-maker's reasoning has no "fatal flaws in its overarching logic" and that "there is a line of analysis within the given reasons that could reasonably lead to [the outcome]": see *Vavilov* at para. 55.

Application to This Case

[33] A further consideration of the applicant's submissions reveals that a number of the applicant's ostensibly discrete positions are actually positions that support larger arguments. Accordingly, the court will consider these arguments as part of the following analysis:

a. The adoption of the CAVCO decision;

b. The interpretation of the definition;

c. The application of the definition to *Reflections*; and

d. Procedural fairness.

<u>The Adoption of the Definition</u>

[34] In its factum, the applicant argued that the OMDC was unreasonable in adopting CAVCO's definition of "documentary" for the purposes of administering the OTTFC. In oral argument, the applicant resiled from this position by stating that, for practical purposes, it was preferrable for filmmakers to have one definition of "documentary" in order to simplify the procurement of tax credits.

[35] In light of this concession, considerable effort is not necessary to analyze the OMDC's decision to adopt this definition, however it bears repeating that the applicant's concession is appropriate. First, it is preferable that filmmakers have a consistent definition of "documentary" in order to determine whether their works are eligible for tax credits at both

the provincial and federal levels. Second, the applicant does not suggest that there is anything in the definition that fails to account for what would commonly be understood by the term "documentary", other than the arguments it raised as described at para. 23 of these reasons. Thus, I find that the definition of "documentary" adopted by the OMDC is reasonable in the circumstances.

The Interpretation of the Definition

[36] The applicant effectively argues that the OMDC was unreasonable in its interpretation of "documentary" in that:

a. A plain reading of the definition is such that the "critical analysis" element of the definition is optional, as opposed to mandatory;

b. CAVCO has re-classified *Reflections* as a documentary, ergo the OMDC's failure to re-classify *Reflections* is unreasonable;

c. Other films, such as *Koyaanisqatsi* and *Baraka*, qualify as documentaries on online databases such as IMDB, or are so classified by experts like Roger Eberts and the Library of Congress. Accordingly, the OMDC's failure to categorize *Reflections* as a documentary is unreasonable;

d. *Hookin' Up with Nick and Mariko* was classified as a "documentary" for the purposes of administering the OFTTC, ergo *Reflections* should qualify as well;

e. The OMDC's failure to advise the applicant as to *Reflections'* actual categorization demands that *Reflections* is, in fact, a "documentary". As such, the decision is unreasonable;

f. A principle of tax law stipulates that disputes about interpretation should generally be resolved in favour of the taxpayer. Accordingly, the decision is unreasonable; and

g. The fact that the applicant will become insolvent if it does not receive the OTTFC demands that the OMDC's interpretation of "documentary" is not in keeping with the OMDC mandate to encourage economic growth in the Ontario film industry. This incongruence proves that the OMDC's interpretation of the definition is unreasonable.

Grammatical Construction

[37] The Court of Appeal for Ontario recently reiterated the approach to be taken when engaging in statutory interpretation in *R. v. Walsh*, 2021 ONCA 43 at paras. 59 and 60:

> It is trite law that the modern approach to statutory interpretation requires that "the words of an Act must be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the

> Act, and the intention of Parliament": *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, at para. 26.
>
> The starting point is to determine the ordinary meaning of the text: *R. v. Wookey*, [2016] O.J. No. 4158, 2016 ONCA 611, 351 O.A.C. 14, at para. 24. At para. 25 of *Wookey*, quoting from Ruth Sullivan, Sullivan on the Construction of Statutes, 6th ed. (Markham, Ont.: LexisNexis Canada, 2014), *Pharmascience Inc. v. Binet*, [2006] 2 S.C.R. 513, [2006] S.C.J. No. 48, 2006 SCC 48, at para. 30, and *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn*., [1993] 3 S.C.R. 724, [1993] S.C.J. No. 114, at p. 735 S.C.R., this court states that ordinary meaning "refers to the reader's first impression meaning, the understanding that spontaneously comes to mind when words are read in their immediate context" and is "the natural meaning which appears when the provision is simply read through". In other words, the "plain" or "ordinary" meaning of a word is not dictated by its dictionary meaning nor is it frozen in time.

[38] Although the definition of "documentary" is not found in a statute, the term "documentary" is used in the Regulations interpreting the eligibility requirements for the OFTTC. Accordingly, the above-referenced jurisprudence governs the interpretation of "documentary" and, as such, the court must determine the "ordinary meaning" of the definition of "documentary" in accordance with, *inter alia*, the ordinary rules of grammatical construction.

[39] One rule of ordinary grammatical construction involves "parenthetical expressions". A "parenthetical expression" is defined at page 543 of Mastering Effective English, (1950, Vancouver, Toronto and Montreal) by the authors J.C. Tressler and Claude E. Lewis who state:

> **Comma**
>
> **3.To set off an expression requires two commas unless the words to be set off come first or last in the sentence.**
>
> …
>
> **6.Most parenthetical expressions are set off by commas –** for example, *however, on the other hand, for instance, by the way, to tell the truth, to say the least, I think, I believe, I repeat.*
>
> …
>
> The lion, like everything great, has his share of critics and detractors. [Emphasis in original.]

[40] The grammatical website englishclub.com defines a parenthetical expression as follows:

> **A parenthetical expression is a word or words added to a sentence without changing the meaning or grammar of the original sentence**. Parenthetical

> expressions give extra information but are not essential. You can add and remove a parenthetical and the sentence works just the same. [Emphasis added.]

[41] As noted earlier in these reasons, the OMDC adopted CAVCO's definition of "documentary", which is:

> An original work of non-fiction, **primarily designed to inform but which may also educate and entertain**, providing an in-depth critical analysis of a specific subject or point of view. [Emphasis added.]

[42] CAVCO's definition of "documentary" thus contains a parenthetical expression, namely the phrase "*primarily designed to inform but which may also educate and entertain*". This expression does not alter the meaning of the primary thought, namely that a documentary is "[a]n original work of non-fiction... providing an in-depth critical analysis of a specific subject or point of view". Put another way, the phrase "*primarily designed to inform but which may also educate and entertain*" does not obviate the need for "*in-depth critical analysis*" because the impugned phrase is merely a parenthetical expression.

[43] The OMDC's interpretation that a documentary requires "in-depth critical analysis of a specific subject" is thus not unreasonable. Rather, it is entirely consistent with the ordinary rules of grammatical construction and the jurisprudence governing statutory interpretation.

CAVCO, Roger Eberts, the Library of Congress and Hookin' Up with Nick and Mariko

[44] With regards to CAVCO's classification of *Reflections* as a documentary, Miller J.A. of the Court of Appeal for Ontario stated at para. 23 of *Pong Marketing and Promotions, Inc.* v. *OMDC,* 2018 ONCA 555, citing *McLean* v. *British Columbia,* 2013 SCC 6:

> … "under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist". It is not enough for a party seeking judicial review of a decision to establish that a competing interpretation is reasonable; the applicant's burden is to establish that the interpretation adopted by the administrative decision maker is unreasonable. [Emphasis in original.]

[45] This principle was repeated by this court in *Sticky Nuggz Inc.* v. *AGCO,* 2020 ONSC 5916 at paras 53 and 54:

> The onus of proving unreasonableness falls upon the Applicant. Decision-makers will often be confronted with multiple possible solutions or choices, all of which would be consistent with the applicable law that guides their decision. The ultimate choice, however, rests with the decision-maker. Their decisions on such matters are entitled to the greatest deference.
>
> The use of non-specific language in the governing legislation suggests a legislative intention that the decision-maker has the authority to decide which interpretation best furthers the statutory mandate. It is not enough for a party seeking judicial review to establish that a competing interpretation is reasonable, or even that a competing interpretation may be preferable. An applicant is

> required to establish that the interpretation chosen by the decision-maker is unreasonable, *Pong Marketing and Promotions Inc*. v. *Ontario Media Development Corp*., 2018 ONCA 555 at paras. 22 and 23.

[46] Ergo, CAVCO's re-classification of *Reflections* as a documentary does not render the OMDC's non-classification unreasonable. The OMDC's classification must be reviewed on its own merits as described above.

[47] With respect to the applicant's argument that similar films have been classified as documentaries by Roger Eberts and others, this evidence does not support any finding whatsoever since the impugned films are not before the court, the definitions used by Roger Eberts and others are not filed with the court and, even if said evidence were before the court, the principles described in *Pong Marketing* would form a complete answer to the applicant's submission.

[48] The same rationale holds true for the OMDC's decision to classify *Hookin' Up with Nick and Mariko*.

[49] Accordingly, the classification of other films is irrelevant to the analysis to be undertaken by this court.

The Non-Disclosure of Reflections' Categorization

[50] The OMDC's failure to advise the applicant as to how *Reflections* should be categorized (fiction, lifestyle/human interest, etc.) does not affect the reasonableness analysis. The OTTFC is awarded to films that are, *inter alia*, categorized as "documentaries". For the purposes of awarding the OTTFC in this case, it does not matter how *Reflections* is classified except to state that it is, or is not, a "documentary". This argument does not, therefore, affect the reasonableness analysis.

The Residual Presumption in Tax Law

[51] The applicant's takes the position that there is a residual presumption that tax disputes ought to be ruled in favour of the taxpayer. As such, the applicant's interpretation of "documentary" ought to be adopted by the OMDC and the decision is therefore unreasonable. That position is negated by the Court of Appeal for Ontario's decision in *Pong Marketing*.

[52] In *Pong Marketing*, the court faced a situation where the OMDC denied a digital sweepstakes game maker a tax credit. The maker appealed the decision to the Divisional Court and then the Court of Appeal. At the Court of Appeal, three justices gave three separate concurring reasons that found that the OMDC's decision was reasonable in the circumstances. One of the issues before the court was whether the OMDC, when faced with multiple interpretations of a given of a taxation statute, was required to side with the taxpayer. At para. 42 of the decision, Miller J.A. described the presumption as follows:

> The OMDC, echoing the dissent of Sachs J., argues that this alternative argument is in error. It argues this approach cannot account for the deference that is to be accorded to the decisions of administrative decision makers. It argues that **a rule that legislative indeterminacy must always be resolved by choosing the interpretation advanced by the taxpayer** would be inconsistent with the core function of administrative decision-makers of interpreting their home statutes in a manner that advances statutory objectives. [Emphasis added]

[53] Ultimately, Miller J.A. found at paras 51 and 52:

> In this case, the Regulation requires the OMDC to determine a product's "primary purpose" as well as whether that purpose is to "educate, inform or entertain the user". As discussed above, these criteria require evaluations of what is primary, and specifications of what it means to educate, inform or entertain.
>
> Were the residual presumption to be applied in the manner suggested by Pong, it would eliminate much of the authority conveyed on the OMDC by statute. This would undermine the statutory scheme and be inconsistent with the rationale for and nature of a reasonableness standard of review. The majority of the Divisional Court accordingly erred in its conclusion that this presumption applied to support the interpretation advanced by Pong.

[54] Laskin J.A. and Pacciocco J.A. concurred in the result but had different rationales. At paras. 67 to 69 of the decision, Laskin J.A. wrote:

> The other basis on which I would still find the residual presumption inapplicable is on the assumption that the Regulation gives rise to two reasonable interpretations: the majority of the Divisional Court's interpretation and OMDC's interpretation. Even on that assumption, the residual presumption cannot apply. To apply it would be incompatible with reasonableness review.
>
> In the two Supreme Court of Canada cases referred to by counsel, the residual presumption in favour of the tax payer is said to apply "in the exceptional case where application of the ordinary principles of interpretation does not resolve the issue": *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, [1994] S.C.J. No. 78, at p. 19 S.C.R.; and *Placer Dome Canada Ltd. v. Ontario (Minister of Finance*), [2006] 1 S.C.R. 715, [2006] S.C.J. No. 20, 2006 SCC 20, at para. 24. In both cases, courts were interpreting taxation statutes. In neither case was the Supreme Court looking at the interpretation of a statute by an administrative decision maker, which is reviewable on a deferential standard of reasonableness.
>
> **It seems to me that if reasonableness review applies, as it does here, and if a reviewing court concludes that the administrative decision-maker's interpretation is reasonable, as Miller J.A. does, that is the end of the matter. It is not for the reviewing court to look around to see if another reasonable interpretation more favourable to the tax payer exists, and then apply that other reasonable interpretation. To do so would entirely defeat the principles and objectives of reasonableness review.** [Emphasis added.]

[55] Pacciocco J.A. agreed with Laskin J.A. as regards the residual presumption. He stated at para. 73:

> I also agree with my colleagues that the Divisional Court erred in relying on the residual presumption in favour of the tax payer. **I agree with Laskin J.A., that where a reviewing court concludes that "the administrative decision-maker's interpretation is reasonable . . . that is the end of the matter. It is not for the reviewing court to look around to see if another reasonable interpretation more favourable to the tax payer exists, and then apply that other reasonable interpretation." Applying the residual presumption to overcome a reasonable interpretation arrived at by an administrative decision-maker is inconsistent with the reasonableness standard of review that must be applied by a reviewing court.** [Emphasis added.]

[56] Therefore, in *Pong Marketing*, the Court of Appeal for Ontario held in three separate opinions that any residual presumption in favour of a tax payer's definition is superseded by an administrative body's reasonable interpretation of its own statute.

[57] As such, the residual presumption is of no assistance to the applicant.

Insolvency

[58] The fact that the applicant claims it will be insolvent if it is not awarded the OTTFC is not relevant to the instant case. It was conceded in oral argument that the applicant could have consulted with the OMDC to determine whether *Reflections* was eligible for the OFTTC prior to filming, but the applicant chose not to do so. The failure to avail itself of this opportunity effectively negates the applicant's submission.

[59] Also, this argument, taken to its logical conclusion, would suggest that all films with any ties to Ontario should qualify for the OFTTC since the OMDC must promote the Ontario media industry. This is an absurd result that also nullifies the applicant's submission.

Conclusion

[60] Having considered the applicant's submissions, this court finds that the OMDC's interpretation of "documentary" accords with common grammatical structure while the applicant's submissions are without merit. The OMDC's interpretation of "documentary" is therefore reasonable given the grammatical, factual and legal context informing same.

<u>The Application of the Definition to *Reflections*</u>

The Juxtaposition of Scripture and Film

[61] The applicant submits that the juxtaposition of scripture and nature creates a visual argument for the existence and greatness of God. Accordingly, *Reflections* is a documentary because it is a work of critical analysis and the decision is therefore unreasonable.

[62] This argument is belied by applicant's own description of *Reflections*:

> Enjoy breathtaking scenes from many of God's miraculous creations. Be immersed in the Word of God while you take in the majestic Rockies, the forests, lakes, and rivers of the Northern Ontario, the awe-inspiring Banff National Park, the beauty of Spain, Morocco, Mexico, South East Asia and much more. Familiar hymns and beautifully produced original music accompany Scripture to **help you let go and surrender during a time of daily prayer and meditation**. [Emphasis added.]

[63] As noted in the director's December 1, 2017 e-mail, the ordinary meaning of "critical analysis" involves the engagement of one's reasoning and questioning. Rather than engage in such an act of intellectual rigor, the applicant's own description states that *Reflections* will "help you let go and surrender during a time of daily prayer and meditation". Clearly, the applicant's view of its own work stands in contrast to CAVCO's definition of a "documentary" in that a documentary is supposed to make the viewer think and analyze whereas the applicant suggests that *Reflections* will help the viewer let go and surrender.

[64] Therefore, the applicant's argument is without merit.

Procedural Fairness

[65] The applicant effectively argues that the OMDC denied the applicant's right to procedural fairness in two ways:

a. The OMDC's decision-making was fettered by anti-evangelical Christian bias; and

b. The OMDC allegedly withheld relevant production from the applicant that may have evidenced that bias.

Bias

[66] During oral submissions, the applicant took the position that it was not alleging that the OMDC was biased as against the applicant as a result of anti-evangelical Christian motives. Rather, the applicant submitted that the OMDC's reasoning was merely fettered by same. Simply put, this is a pyrrhic distinction in that an allegation that a decision-maker's reasoning is fettered by bias is in fact an allegation of bias. Accordingly, the legal principles governing allegations of bias apply to this case.

[67] Allegations of bias must be made at first instance to the decision-maker in question: *Alberta (Information and Privacy Commissioner)* v. *Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 23; *Speck v. OLRB*, 2021 ONSC 3176 at para 44 (Div. Ct.). In this case, the applicant conceded in oral argument that it did not raise any concerns regarding bias to the OMDC.

[68] The applicant's concerns about anti-evangelical Christian bias are founded upon Mr. Harilaid's interpretation of statements allegedly made by OMDC representatives. It bears

repeating that a decision-maker is presumed to be impartial and that party's interpretation of a decision-maker's tone of voice, facial expressions and body language are insufficient to overcome the presumption of impartiality: *Beard Winter LLP* v. *Shekhdar,* 2016 ONCA 493 at para 12; *Ramirez* v. *Canada*, 2012 FC 809 at paras. 22 and 23; *SMR* v. *Children's Aid Society of Oxford County*, [2003] OJ No. 2568 (Ont. S.C.) at paras 23 – 25. The nature of the concerns raised by the applicant are thus not capable of overcoming the high hurdle required to show bias.

[69] Finally, the statements made by people other than a decision-maker are not proof of the decision-maker's state of mind: *Elson* v. *Canada*, 2017 FC 459 at paras. 146 – 149. Any statements made during the October 7, 2019 conversation between the applicant and representatives of the OMDC, even were the court to accept that the statements were made and that they evidence some form of bias as against evangelical Christians, are not evidence of potential bias held by the director, who was not present for that call.

[70] The applicant's effective submission that the OMDC was biased as against the applicant due to an anti-evangelical Christian motivation therefore fails.

Production

[71] The Applicant served a Notice of Examination under Rule 39.03 of the *Rules of Civil Procedure*, which is a mechanism to compel oral testimony. The Notice of Examination was quashed. The decision to quash was not appealed. The Notice of Application seeking judicial review does not raise the decision to quash the Notice of Examination as an error.

[72] A *subpoena duces tecum* is a mechanism to have a witness present oral testimony. It is not an order to produce documents to a party outside of court, as set out in *Law Society of Saskatchewan v Abrametz,* 2016 SKQB 134 at para 46:

> The document in issue, a *subpoena duces tecum*, is understood to have a particular function - to compel the subpoenaed person to court, or other independent tribunal, to testify and to bring with him/her certain, specified documents. Watt J. (as he then was) described a subpoena in these terms in *R. v. Finkle*, [2007] O.J. No. 3506 (Ont. S.C.J.) (QL): "literally translated 'under penalty', [a subpoena] is a command to the person named to appear at a time and place specified to give testimony about a matter in issue between the parties to a proceeding" (para. 88). Watt J. then explained the function of a *subpoena duces tecum* and the limits that ought to attach to its use:
>
> > ... A *subpoena duces tecum* requires the witness to bring with him or her things like books, papers and other things connected with his or her testimony. In the usual course, a *subpoena duces tecum* is not used to obtain these other things, which are often used as *aides memoires* for production at trial.
> >
> > . . .

> It is uncontroversial that, where alternative methods of obtaining evidence are available, the party who seeks the evidence may generally choose the means to achieve that end. At the same time, however, courts should be chary of manifest circumventions of traditional methods of acquiring evidence, especially those that avoid adherence to established constitutional principle. A *subpoena duces tecum* ought not to be used to avoid the scrutiny associated with other methods of acquisition. See, by comparison, *R. v. French* (1977), 37 C.C.C. (2d) 201, 213-4 (Ont. C.A.) *per* MacKinnon J.A., affirmed on other grounds (1979), 47 C.C.C. (2d) 411 (S.C.C.). [Emphasis in original.]

[73] Although not raised in the Notice of Application, the applicant now argues that the record filed by the decision-maker was underinclusive.

[74] Section 10 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 provides:

> **Record to be filed in court**
> When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.

[75] Ergo, pursuant to s. 10 of the *Judicial Review Procedure Act*, it was available to the applicant to bring a motion seeking production of documents it alleges were relied on by the decision-maker but are not contained in the record: see, for example *K.D. v. Peel Children's Aid Society*, 2017 ONSC 7392 (Div. Ct.) at paras. 16-17). The applicant failed to do so. As a result, it is precluded from raising this issue for the first time on judicial review.

[76] The applicant's argument in this regard therefore fails.

Conclusion

[77] There is no evidence to suggest that the OMDC failed to afford appropriate levels of procedural fairness to the applicant when it arrived at the Decision.

CONCLUSION

[78] The Decision was reasonable and the OMDC's conduct was also reasonable. The instant application for judicial review is dismissed.

COSTS

[79] The parties could not agree on costs. *Reflections'* counsel filed a Bill of Costs seeking $25,665.05 (all inclusive) at a partial indemnity rate. The OMDC's counsel seeks costs in the amount of $12,705.00 for the hearing of the application and $5,000.00 (as agreed upon by the parties) for the motion to quash the subpoena. Given the mandates of Rule 57.01

and given the Bill of Costs filed by *Reflections*, the quantum of costs sought by the OMDC is entirely appropriate.

[80] Therefore, the applicant shall pay $17,705.00 in costs (all inclusive) to the respondent (for both the instant application and the motion to quash) within 90 days of today's date.

Varpio, J.

"I agree" Morawetz, CJSCJ

"I agree" Kristjanson J.

Released: January 12, 2022

CITATION: Reflection Productions v. Ontario Media Dev. Corp., 2022 ONSC 64

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MORAWETZ C.J., VARPIO, KRISTJANSON JJ.

BETWEEN:

REFLECTION PRODUCTIONS CANADA LTD.

- and –

ONTARIO MEDIA DEVELOPMENT CORPORATION

REASONS FOR DECISION

Released: January 12, 2022

TAB 15

CITATION: Canada (Commissioner of Competition) v. Chatr Wireless Inc., 2013 ONSC 5386
COURT FILE NO.: CV-10-8993-00 CL
DATE: 20130820

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
THE COMMISSIONER OF COMPETITION	)	J. Thomas Curry, Jaan Lilles, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
ROGERS COMMUNICATIONS INC. AND CHATR WIRELESS INC.	)	Kent E. Thomson , James D. Bunting, for the Respondents
	)	
Respondents	)	
	)	
	)	
	)	
	)	**HEARD:** June 7, 2012

MARROCCO J.

RULING CONCERNING PUBLIC INTEREST PRIVILEGE AND LITIGATION PRIVILEGE

The Facts

[1] The Commissioner brought an Application in November 2010 seeking an Order that Rogers Communications Inc. ("Rogers") engaged in reviewable conduct contrary to ss. 74.01(1)(a) and 74.01(1)(b) of the *Competition Act*, R.S.C. 1985, c. C-34. The applicant asserts that an ad campaign for Rogers' subsidiary brand Chatr Wireless Inc. ("Chatr"), which boasted fewer dropped calls than the new wireless carriers, violated the *Competition Act*.

[2] The applicant asserts that at several points in cities in which the fewer dropped calls campaign was running, Chatr actually had a higher dropped call rate than one of the new entrants, resulting in false or misleading advertising contrary to s. 74.01(1)(a). Additionally, the applicant asserts that Chatr did not do sufficient testing to substantiate the claim of having fewer dropped calls before it began its advertising campaign contrary to s. 74.01(1)(b).

[3] Both sides have made document requests.

[4] The applicant requested Rogers' dropped call data for its 2G network and the minimum retention and access levels on the 2G network.

[5] Rogers requested a number of documents consisting of communications between:

- The Applicant and Mobilicity;
- The Applicant and Public Mobile;
- The Applicant and Wind Mobile;
- The Applicant and Industry Canada; and
- Notes by Officers of the applicant.

[6] The communications between the applicant and Public Mobile consist primarily of e-mails exchanged between officers of the Competition Bureau and Public Mobile, as well as data provided by Public Mobile to the Competition Bureau. The documents relate to network data, including the following: dropped call rates; coverage maps; impact of sales; available customer plans; and technical specifications of the Public Mobile network.

[7] The communications between the applicant and Wind Mobile are similar to those exchanged between the applicant and Public Mobile. The communications are primarily e-mails concerning the complaint and requests for information from Wind Mobile. The network data requested is also similar, including the following: cell tower and switch data; dropped call rates; the impact of sales; the rate of obtaining new customers; coverage maps; and Wind Mobile drive testing results.

[8] The communications between the applicant and Mobilicity are comparable to the communications between the applicant and Public Mobile and Wind Mobile. The communications are primarily e-mails concerning the initial complaint against Rogers and requests by the applicant for information. Network data was provided, including the following: dropped call rates; coverage maps; network performance; performance of the company since Chatr's launch; devices available from Mobilicity; and specifications for certain devices.

[9] Finally, Rogers and Chatr seek notes made by the Competition Commission regarding communications between the applicant and Industry Canada, Public Mobile, Wind Mobile, Mobilicity and Videotron. These are handwritten notes prepared by officers of the Competition Bureau that were created during phone calls or meetings.

[10] The applicant resists the Rogers and Chatr request, claiming public interest and litigation privilege over the documents.

The Law

Public Interest Privilege

[11] Public interest privilege protects the process of government decision-making. Public interest privilege also protects against the disclosure of information possessed by government where such disclosure is not in the public interest.

[12] In a judicial context, the question is whether the public interest in secrecy outweighs the public interest in ensuring that courts have access to all relevant information: see Robert W. Hubbard, Susan Magotiaux & Suzanne M. Duncan, *The Law of Privilege in Canada*, vol. 1 looseleaf (Toronto: Thomson Reuters Canada Limited, 2013) at 3-4 – 3-4.1.

[13] Public interest privilege is generally determined on a document-by-document basis: see *Smerchanski v. Lewis* (1981), 31 O.R. (2d) 705 (C.A.). Generally, a document in respect of which public interest privilege is claimed is presumed to be admissible, and a compelling policy reason must justify its exclusion: see *R. v. Trang*, 2002 ABQB 19, 168 C.C.C. (3d) 145, at para. 32.

[14] Class privilege, in contrast, generally results in a presumption of inadmissibility concerning a class of documents.

[15] Public interest privilege in the context of the *Competition Act* has developed in its own unique way. The Federal Court of Appeal has recognized a class-based public interest privilege attaching to documents collected by the Competition Bureau during the course of an investigation. Class privilege means that a document in the class will only be disclosed for important public policy reasons: see *Canada (Director of Investigation and Research, Competition Act) v. D & B Companies of Canada Ltd.*, 176 N.R. 62 (F.C.A), at paras. 3-7, leave to appeal to S.C.C. refused, 24423 (February 23, 1995).

[16] In *D & B Companies*, the Federal Court of Appeal refused an application for an order requiring the Competition Bureau to disclose the following documents:

- The complaint made by a player in the industry;
- Notes and materials prepared by the Director and staff from meetings with the player; and

- Statements, notes and materials obtained or prepared by the Director or staff from meetings with various Canadian and U.S retailers, manufacturers and market research companies in the industry.

[17] The court stated that these documents were within the class of documents protected by public interest privilege for the following reasons:

- The Competition Bureau required cooperation from the industry concerned in order to perform its function; and

- In order to gain this cooperation, members of the industry had to be satisfied that their information would be kept in confidence and their identities not exposed unless they were called as witnesses.

[18] I adopt the following view of McKeown J., as summarized by the Federal Court of Appeal in *D & B Companies*, at para. 2:

> [T]he Director has to be able to obtain information from the relevant industry in performing his functions under the Competition Act. To gain the cooperation of people in the industry he must be able to gather information in confidence.

[19] This was affirmed in *Canada (Commissioner of Competition) v. Toshiba Canada Ltd.*, 2010 ONSC 659, 100 O.R. (3d) 535. In this case, Toshiba sought an internal memorandum created by the staff of the Competition Bureau. Toshiba asserted that the document could reveal either a conspiracy against it within the Bureau or that information was being gathered by the Bureau so it could be shared with non-Canadian regulatory bodies. Croll J. stated that class privilege regarding documents created or obtained in the course of an investigation by the Commissioner was "well-established": see *Toshiba*, at para. 27.

[20] Public interest privilege is not absolute. As stated in *Canada (Commissioner of Competition) v. Sears Canada Inc.*, 2003 Comp. Trib. 19, (2004) 28 C.P.R. (4th) 385, at para. 40, if a "more compelling competing interest" supplants public interest privilege, disclosure will be ordered. The Supreme Court of Canada stated in *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536, at para. 65, that there is a heavy onus on the party attempting to override a class privilege.

Documents Requested Relating to Public Mobile

[21] Rogers and Chatr seek disclosure of documents that relate to the communications between Public Mobile and the Competition Bureau. Specifically, these documents date from the period of July 28, 2010, to December 30, 2010. Rogers asserts that these documents contain information about Public Mobile's view of Chatr's advertisements and dropped call rates. Rogers argues that having the fullest evidentiary record possible is a compelling public interest that outweighs the public interest in keeping documents provided by the industry to the applicant confidential. In determining the balance between these two competing interests, the actions of

Public Mobile are relevant for the purpose of determining whether public mobile had an expectation of confidentiality in these documents.

[22] Public Mobile made several public announcements proclaiming its prominent role in the Competition Bureau's investigation of the Chatr claims. Public Mobile made it clear that it wanted the public to know about the Competition Bureau's investigation of Chatr and Public Mobile's role in the investigation. Public Mobile's well-publicized statements undermine any notion of cooperation with the Competition Bureau in return for confidentiality. When this weakened interest in confidentiality is balanced against the public interest in having the fullest evidentiary record possible, I find that the balance weighs in favour of disclosure.

Documents Requested Relating to Wind Mobile

[23] Similar to its requests for documents from Public Mobile, Rogers also seeks disclosure of documents relating to communications between Wind Mobile and the Competition Commission. These communications began in July 28, 2010. Rogers asserts that these communications contain references to the Chatr advertisements concerning dropped call rates—a fundamental issue in this litigation. Public statements and press releases highlighted Wind Mobile's role in the investigation. Specifically, Wind Mobile itself made numerous public statements regarding the investigation and its role in bringing about the investigation. Like Public Mobile, Wind made it abundantly clear that it wanted its role in encouraging the applicant to investigate Rogers and Chatr to be publicly known. Wind Mobile's well-publicized statements undermine any notion of cooperation with the Competition Bureau in return for confidentiality. When this weakened interest in confidentiality is balanced against the public interest in having the fullest evidentiary record possible, I find that the balance weighs in favour of disclosure.

Litigation Privilege

[24] Litigation privilege protects documents and correspondence prepared or created for the dominant purpose of actual or contemplated litigation. Litigation privilege creates a "zone of privacy" to allow counsel and clients to prepare for litigation: see *General Accident Assurance Co. v. Chrusz* (1999), (2000) 45 O.R. (3d) 321 (C.A), at pp. 332-333; and *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, at para. 32. Litigation privilege can extend to third parties; litigation privilege encompasses "communications between the client or his solicitor and third parties if made for the solicitor's information for the purpose of pending or contemplated litigation": see Alan W. Bryant and Sidney N. Lederman, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at p. 653. This definition was endorsed by the Ontario Court of Appeal in *Chrusz*, at p. 330. Documents prepared or created for the dominant purpose of actual or contemplated litigation are protected from disclosure.

Litigation Privilege for Documents from Public Mobile and Wind Mobile

[25] The fact that public interest privilege does not apply to the documents and communications passing between Public Mobile, Wind Mobile and the applicant does not determine whether the documents in question are protected by litigation privilege.

[26] I am satisfied by the evidence adduced on this motion that litigation was the dominant purpose for communications between Public Mobile and Wind Mobile and the applicant from September 27, 2010, and on. At this point, the Competition Bureau was clearly contemplating bringing proceedings against Rogers in regard to the Chatr advertisement campaign.

[27] Accordingly, all documents and communications passing between Public Mobile, Wind Mobile and the applicant from and after September 27, 2010, are protected by litigation privilege and need not be disclosed.

Public Interest Privilege for Documents from Mobilicity

[28] Any data provided by Mobilicity concerning its dropped call rate would be relevant to the central issue in this case. Nevertheless, evidence from Mobilicity is not a part of the Competition Bureau's case.

[29] An adverse inference may be drawn concerning Mobilicity's dropped call rate at the relevant time if no evidence concerning that dropped call rate is produced by the applicant. The fact that the court can draw an adverse inference from the failure to produce this evidence weighs against the need for disclosure of the information provided by Mobilicity.

[30] Consequently, Rogers has not demonstrated a compelling competing interest warranting disclosure of communications passing between the applicant and Mobilicity.

Statement of Mr. McAlpine Regarding Mobilicity

[31] Mr. McAlpine's statement, at paragraph 64 of his affidavit, that "Mobilicity provided insufficient dropped call information to allow for proper analysis and its data is not included" will be removed. This statement is contentious hearsay contrary to rule 39.01(5) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and will be disregarded.

Officers' Notes and Communications with Industry Canada

[32] Rogers seeks disclosure of notes made by members of the Competition Bureau in respect to discussions with Industry Canada. These notes were prepared by staff of the applicant during meetings held between representatives of Industry Canada and the Competition Bureau. These notes were prepared for internal use at the Competition Bureau and were not intended for public distribution.

[33] Notes of communications between the Competition Bureau and Industry Canada are not relevant to this litigation. Any concerns which Industry Canada communicated to the Competition Bureau cannot affect whether Rogers' dropped call rate between July and December, 2010, was lower or higher than the new wireless carriers.

[34] These notes fall into a class similar to that discussed in *Toshiba*. The notes are necessary for the Competition Bureau to effectively execute its investigative function. Competition Bureau employees must be able to take proper notes of interviews with other government agencies, and they cannot do so if they are concerned that the notes will be disclosed and thereby reveal the confidential information of another government agency.

[35] Finally, although not necessary for my decision, I am satisfied that any relevant communications between employees of the Competition Bureau and Industry Canada after September 17, 2010, were likely for the dominant purpose of litigation, and are thus shielded from disclosure by litigation privilege.

Disposition

1. Public interest privilege does not apply to communications between the applicant and Wind Mobile and Public Mobile after July 28, 2010, because their well-publicized statements proclaiming their prominent role in the Competition Bureau's dropped call claim investigation undermine any notion of cooperation with the Competition Bureau in return for confidentiality.

2. An order for disclosure of documents and communications passing between Wind Mobile, Public Mobile and the applicant before September 27, 2010, concerning Rogers Communications Inc. and Chatr Wireless Inc. is granted.

3. An order for disclosure of documents and communications passing between the applicant and Public Mobile and Wind Mobile after September 27, 2010, is refused on the basis of litigation privilege.

4. An order for disclosure of the notes of employees of the Competition Bureau concerning their discussions with representatives of Industry Canada regarding this matter is refused on the basis of public interest privilege.

5. An order for disclosure of communications between the applicant and Mobilicity is refused on the basis of public interest privilege.

Marrocco J

Released: August 20, 2013

CITATION: Canada (Commissioner of Competition) v. Chatr Wireless Inc., 2013 ONSC 5386
COURT FILE NO.: CV-10-8993-00 CL
DATE: 20130820

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

ROGERS COMMUNICATIONS INC. AND CHATR WIRELESS INC.

Respondents

REASONS FOR JUDGMENT

Marrocco J

Released: August 20, 2013

TAB 16

CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Rules

Règles du Tribunal de la concurrence

SOR/2008-141

DORS/2008-141

Current to October 5, 2022

À jour au 5 octobre 2022

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

as well as a copy of any statutory or regulatory provisions cited or relied on that have not been reproduced in another party's memorandum.

réglementaires citées ou invoquées qui ne sont pas reproduits dans le mémoire d'une autre partie.

Subpoena

7 (1) The Registrar or the person designated by the Registrar may issue a writ of subpoena for the attendance of witnesses and the production of documents.

Assignation

7 (1) Le registraire ou une personne désignée par celui-ci peut délivrer des assignations à témoigner et à produire des documents.

In blank

(2) The Registrar may issue a writ of subpoena in blank and the person to whom it is issued shall complete it and may include any number of names.

En blanc

(2) Le registraire peut délivrer une assignation en blanc; la personne à qui elle est délivrée la remplit et peut y inclure un nombre indéterminé de noms.

Service of Documents

Originating document

8 (1) Service of an originating document shall be effected

(a) in the case of an individual, by leaving a certified copy of the originating document with the individual;

(b) in the case of a partnership, by leaving a certified copy of the originating document with one of the partners during business hours;

(c) in the case of a corporation, by leaving a certified copy of the originating document with an officer of the corporation or with a person apparently in charge of the head office or of a branch of the corporation in Canada during business hours;

(d) in the case of the Commissioner, by leaving a certified copy of the originating document at the Commissioner's office during business hours; and

(e) in the case of a person referred to in any of paragraphs (a) to (d) who is represented by counsel, by leaving a certified copy of the originating document with the counsel who accepts service of the document.

Alternative manner

(2) If a person is unable to serve an originating document in a manner described in subrule (1), the person may apply to a judicial member for an order setting out another manner for effecting service.

Service of order

(3) The person who obtains an order made under subrule (2) shall serve the order on each person named in the originating document.

Signification de documents

Acte introductif d'instance

8 (1) La signification d'un acte introductif d'instance se fait :

a) s'il s'agit d'un particulier, par remise d'une copie certifiée de l'acte à celui-ci;

b) s'il s'agit d'une société de personnes, par remise d'une copie certifiée de l'acte à l'un des associés pendant les heures de bureau;

c) s'il s'agit d'une personne morale, par remise d'une copie certifiée de l'acte à l'un de ses dirigeants ou à une personne qui semble être responsable de son siège social ou d'une de ses succursales au Canada, pendant les heures de bureau;

d) s'il s'agit du commissaire, par livraison d'une copie certifiée de l'acte à son bureau pendant les heures de bureau;

e) s'il s'agit d'une personne visée à l'un des alinéas a) à d) qui est représentée par un avocat, par la remise d'une copie certifiée de l'acte à l'avocat qui est disposé à en accepter la signification.

Mode alternatif

(2) La personne qui ne peut signifier l'acte introductif d'instance de la manière prévue au paragraphe (1) peut demander à un membre judiciaire de rendre une ordonnance prévoyant un autre mode de signification.

Signification de l'ordonnance

(3) La personne qui obtient l'ordonnance visée au paragraphe (2) la signifie à chacune des personnes nommées dans l'acte introductif d'instance.

CANADA

CONSOLIDATION

CODIFICATION

Competition Act

Loi sur la concurrence

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

L.R.C. (1985), ch. C-34

Current to October 5, 2022

Last amended on June 23, 2022

À jour au 5 octobre 2022

Dernière modification le 23 juin 2022

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

(iii) the alleged offence

and the names of the persons believed to be concerned therein and privy thereto; and

(c) a concise statement of the evidence supporting their opinion.

R.S., 1985, c. C-34, s. 9; R.S., 1985, c. 19 (2nd Supp.), s. 22; 1999, c. 2, ss. 6, 37.

et les noms des personnes qu'on croit y être intéressées et complices;

c) un résumé des éléments de preuve à l'appui de leur opinion.

L.R. (1985), ch. C-34, art. 9; L.R. (1985), ch. 19 (2e suppl.), art. 22; 1999, ch. 2, art. 6 et 37.

Inquiry by Commissioner

10 (1) The Commissioner shall

(a) on application made under section 9,

(b) whenever the Commissioner has reason to believe that

(i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or Part VIII,

(ii) grounds exist for the making of an order under Part VII.1 or Part VIII, or

(iii) an offence under Part VI or VII has been or is about to be committed, or

(c) whenever directed by the Minister to inquire whether any of the circumstances described in subparagraphs (b)(i) to (iii) exists,

cause an inquiry to be made into all such matters as the Commissioner considers necessary to inquire into with the view of determining the facts.

Enquête par le commissaire

10 (1) Le commissaire fait étudier, dans l'un ou l'autre des cas suivants, toutes questions qui, d'après lui, nécessitent une enquête en vue de déterminer les faits :

a) sur demande faite en vertu de l'article 9;

b) chaque fois qu'il a des raisons de croire :

(i) soit qu'une personne a contrevenu à une ordonnance rendue en application des articles 32, 33 ou 34, ou des parties VII.1 ou VIII,

(ii) soit qu'il existe des motifs justifiant une ordonnance en vertu des parties VII.1 ou VIII,

(iii) soit qu'une infraction visée à la partie VI ou VII a été perpétrée ou est sur le point de l'être;

c) chaque fois que le ministre lui ordonne de déterminer au moyen d'une enquête si l'un des faits visés aux sous-alinéas b)(i) à (iii) existe.

Information on inquiry

(2) The Commissioner shall, on the written request of any person whose conduct is being inquired into under this Act or any person who applies for an inquiry under section 9, inform that person or cause that person to be informed as to the progress of the inquiry.

Renseignements concernant les enquêtes

(2) À la demande écrite d'une personne dont les activités font l'objet d'une enquête en application de la présente loi ou d'une personne qui a demandé une enquête conformément à l'article 9, le commissaire instruit ou fait instruire cette personne de l'état du déroulement de l'enquête.

Inquiries to be in private

(3) All inquiries under this section shall be conducted in private.

R.S., 1985, c. C-34, s. 10; R.S., 1985, c. 19 (2nd Supp.), s. 23; 1999, c. 2, ss. 7, 37, c. 31, s. 45.

Enquêtes en privé

(3) Les enquêtes visées au présent article sont conduites en privé.

L.R. (1985), ch. C-34, art. 10; L.R. (1985), ch. 19 (2e suppl.), art. 23; 1999, ch. 2, art. 7 et 37, ch. 31, art. 45.

Order for oral examination, production or written return

11 (1) If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that a person has or is likely to have

Ordonnance exigeant une déposition orale ou une déclaration écrite

11 (1) Sur demande *ex parte* du commissaire ou de son représentant autorisé, un juge d'une cour supérieure ou d'une cour de comté peut, lorsqu'il est convaincu d'après une dénonciation faite sous serment ou affirmation solennelle qu'une enquête est menée en application de

information that is relevant to the inquiry, the judge may order the person to

(a) attend as specified in the order and be examined on oath or solemn affirmation by the Commissioner or the authorized representative of the Commissioner on any matter that is relevant to the inquiry before a person, in this section and sections 12 to 14 referred to as a "presiding officer", designated in the order;

(b) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or

(c) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

Records or information in possession of affiliate

(2) If the person against whom an order is sought under paragraph (1)(b) or (c) in relation to an inquiry is a corporation and the judge to whom the application is made under subsection (1) is satisfied by information on oath or solemn affirmation that an affiliate of the corporation, whether the affiliate is located in Canada or outside Canada, has or is likely to have records or information relevant to the inquiry, the judge may order the corporation to

(a) produce the records; or

(b) make and deliver a written return of the information.

No person excused from complying with order

(3) No person shall be excused from complying with an order under subsection (1) or (2) on the ground that the testimony, record or other thing or return required of the person may tend to criminate the person or subject him to any proceeding or penalty, but no testimony given by an individual pursuant to an order made under paragraph (1)(a), or return made by an individual pursuant to an order made under paragraph (1)(c), shall be used or received against that individual in any criminal proceedings thereafter instituted against him, other than a prosecution under section 132 or 136 of the *Criminal Code*.

l'article 10 et qu'une personne détient ou détient vraisemblablement des renseignements pertinents à l'enquête en question, ordonner à cette personne :

a) de comparaître, selon ce que prévoit l'ordonnance de sorte que, sous serment ou affirmation solennelle, elle puisse, concernant toute question pertinente à l'enquête, être interrogée par le commissaire ou son représentant autorisé devant une personne désignée dans l'ordonnance et qui, pour l'application du présent article et des articles 12 à 14, est appelée « fonctionnaire d'instruction »;

b) de produire auprès du commissaire ou de son représentant autorisé, dans le délai et au lieu que prévoit l'ordonnance, les documents — originaux ou copies certifiées conformes par affidavit — ou les autres choses dont l'ordonnance fait mention;

c) de préparer et de donner au commissaire ou à son représentant autorisé, dans le délai que prévoit l'ordonnance, une déclaration écrite faite sous serment ou affirmation solennelle et énonçant en détail les renseignements exigés par l'ordonnance.

Documents ou renseignements en possession d'une affiliée

(2) Lorsque, en rapport avec une enquête, la personne contre qui une ordonnance est demandée en application des alinéas (1)b) ou c) est une personne morale et que le juge à qui la demande est faite aux termes du paragraphe (1) est convaincu, d'après une dénonciation faite sous serment ou affirmation solennelle, qu'une affiliée de cette personne morale a ou a vraisemblablement des documents ou des renseignements qui sont pertinents à l'enquête, il peut, sans égard au fait que l'affiliée soit située au Canada ou ailleurs, ordonner à la personne morale :

a) de produire les documents en question;

b) de préparer et de donner une déclaration écrite énonçant les renseignements.

Nul n'est dispensé de se conformer à l'ordonnance

(3) Nul n'est dispensé de se conformer à une ordonnance visée au paragraphe (1) ou (2) au motif que le témoignage oral, le document, l'autre chose ou la déclaration qu'on exige de lui peut tendre à l'incriminer ou à l'exposer à quelque procédure ou pénalité, mais un témoignage oral qu'un individu a rendu conformément à une ordonnance prononcée en application de l'alinéa (1)a) ou une déclaration qu'il a faite en conformité avec une ordonnance prononcée en application de l'alinéa (1)c) ne peut être utilisé ou admis contre celui-ci dans le cadre de poursuites criminelles intentées contre lui par la suite sauf en ce qui

TAB 17

Expedited Proceeding Process before the Tribunal

January 2019

PRACTICE DIRECTION REGARDING AN EXPEDITED PROCEEDING PROCESS BEFORE THE TRIBUNAL

The purpose of this Practice Direction is to introduce an indicative timeline for an expedited proceeding process ("Expedited Process") that parties may contemplate and propose depending on the specific circumstances of a particular matter, subject to overall approval by the Competition Tribunal. This Practice Direction reflects what the Tribunal considers to be a reasonable time frame for an Expedited Process. For greater certainty, the timeline set forth below should be viewed as a guideline. It may be varied by the judicial member responsible for the case management of a given matter, depending on the circumstances of each case.

This Practice Direction is being issued in furtherance of the Tribunal's general objective of continuing to improve the efficiency and effectiveness of its proceedings. It is also consistent with the Tribunal's statutory mandate to deal with matters as "informally and expeditiously as the circumstances and considerations of fairness permit", pursuant to subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp). This Expedited Process was developed pursuant to consultations with the Commissioner of Competition ("Commissioner") and the Canadian Bar Association ("CBA") through the Tribunal/Bar Liaison Committee.

Availability

The Tribunal will likely adopt the Expedited Process if all parties consent to it in a particular proceeding. The Tribunal may also adopt the Expedited Process even if only one of the parties requests it. In such a case, the requesting party would need to satisfy the Tribunal that the Expedited Process is reasonable and advisable in light of

the circumstances of the particular matter and considerations of fairness. When considering the circumstances and the considerations of fairness in a given case, the Tribunal may take into account various factors, including the following:

- Whether there is any informational advantage or disadvantage that exists between the parties;
- The complexity of the proceedings (including the number of issues that may be in dispute between the parties);
- Any relevant commercial imperatives for the use of the Expedited Process, such as material timing considerations;
- Any other relevant imperatives, such as the amount of time the alleged anti-competitive practice or arrangement has been in place and the extent of the alleged harm to competition in the relevant market;
- In matters involving deceptive marketing practices under Part VII.1 of the *Competition Act*, RSC 1985, c C-34 ("Act"), the frequency and duration of the alleged conduct, the vulnerability of the class of persons likely to be adversely affected by the alleged conduct and the effect of the alleged conduct on competition in the relevant market;
- The availability and use of any interim or injunctive measures in respect of the conduct at issue, as well as the nature of the remedy that is being sought; and
- Whether the party requesting the Expedited Process is willing to reduce or eliminate certain procedural steps (such as elements of the discovery process) to facilitate expedition.

For greater certainty, the foregoing factors will not fetter the Tribunal's discretion or override a legislative direction, and will be developed more precisely over time through the jurisprudence.

Although it has been suggested that the Expedited Process may be better suited for applications in relation to mergers (where time is often of the essence), the Tribunal considers that the Expedited Process is an option available for all types of applications filed before it, and may also be well-suited for cases under the other reviewable practices provisions in Part VIII of the Act as well as under Part VII.1.

Timeline

The Tribunal considers that a period of five (5) to six (6) months between the filing of a Notice of Application ("NOA") and the commencement of the hearing on the merits will typically be a reasonable timeline for the Expedited Process, subject in each case to the nature of the particular application. The Tribunal expects that the timetables proposed by the parties for the disposition of an application under this process will generally fall within this time frame. The Tribunal will aim to issue scheduling orders that contemplate completing the various discovery and pre-hearing steps under the Expedited Process within this overall timeline. In this regard, the detailed steps to be followed by the parties and the Tribunal are described in the indicative timeline for

the Expedited Process set out in Appendix A. For greater certainty, the Tribunal recognizes that there may be circumstances where the parties may consider a five (5) to six (6) months period to be too long or too short. In such circumstances, they shall remain free to propose and agree to an alternative timetable.

The indicative timeline for the Expedited Process complements the timeline set out in the Tribunal's *Practice Direction regarding Timelines and Scheduling for Proceedings Before the Tribunal ("Practice Direction regarding Scheduling")* for the regular proceeding processes before the Tribunal, and offers an additional avenue along the spectrum of options for proceedings before the Tribunal.

Initial Notice to the Tribunal

If all parties agree to proceed under the Expedited Process, the applicant shall notify the Tribunal accordingly at the same time as a NOA is filed. Upon receipt of such notice of consent to the Expedited Process, the Tribunal will convene a case management conference ("CMC") on an urgent basis to approve the use of the Expedited Process in the circumstances of that particular matter.

A notice of consent to the Expedited Process does not necessarily mean that the parties will be obliged to adopt all aspects of the indicative timeline described in Appendix A. However, the parties will generally be expected to respect the expedited deadlines associated with the filing of the pleadings (i.e., Response and Reply). The actual expedited scheduling order, including all other discovery and pre-hearing steps, will be finalized as part of the opening case management conference ("Opening CMC") to be convened shortly after the pleadings have closed.

Where all parties do not agree that an Expedited Process should be followed, the party proposing its adoption shall notify the Tribunal that it intends to seek an expedited scheduling order within five (5) days after the filing of the NOA. In those circumstances, the Tribunal will convene a CMC on an urgent basis to assess whether the Expedited Process is a reasonable and advisable option given the circumstances of that particular matter and having regard to considerations of procedural fairness and other related factors described above.

Opening CMC

As indicated in the Tribunal's *Practice Direction regarding Scheduling*, the Tribunal will take an active role in the case management of its proceedings. This will be particularly so in the context of the Expedited Process. Accordingly, when an application proceeds under the Expedited Process, the Tribunal will convene an in-person Opening CMC within 14 days after the close of pleadings.

From a procedural perspective, the main purpose of the Opening CMC will be to finalize the draft scheduling and confidentiality orders which will have been previously submitted by the parties (i.e., within seven (7) days after the close of

pleadings). It is anticipated that an early finalization of the confidentiality order will also limit issues concerning privilege and confidentiality classification.

The timetable to be proposed by the parties shall incorporate deadlines for serving the parties' affidavits of documents ("AODs"), completing examinations for discovery, serving their witness statements and expert reports, exchanging requests for admissions, and other steps set out in Appendix A. If counsel cannot agree on a timetable, separate submissions shall be made in advance of the Opening CMC.

In addition to finalizing the scheduling and confidentiality orders, the Tribunal will also address, at the Opening CMC, the discovery plans of the parties. Such discovery plans should generally have been exchanged between the parties within seven (7) days after the close of pleadings. It is expected that potential disputes with respect to documentary disclosure and examinations for discovery will be reduced through the use of discovery plans. The discovery plans should generally:

- Identify and prioritize key topics, custodians, record types, relevant time frames and other parameters within which the production will be conducted for relevant records;
- Consider anticipated volume of records, cost and resources required to search for and review records for relevance, and the importance and complexity of the issues;
- Identify persons intended to be produced for oral examination for discovery in the relevant proceeding and include information respecting the timing and length of the examinations;
- Prioritize steps to be taken and consider whether a phased approach would be appropriate; and
- Consider whether to reduce or eliminate certain procedural steps (such as elements of the discovery process) to facilitate expedition.

Any disagreements arising from the exchange of the discovery plans shall be dealt with by the Tribunal at the Opening CMC.

The Tribunal will also use the Opening CMC to raise any other procedural and/or substantive issues that may "aid in the disposition of the application" (Rule 137 of the *Competition Tribunal Rules*, SOR/2008-141 ("Rules")), and it will expect all parties to do the same. Other areas that may be explored at the Opening CMC to achieve efficiency may include:

- Document management;
- The use of an agreed statement of facts;
- The use of references to dispose of discrete issues; and
- The use of agreed books of documents and joint briefs of authorities.

The Tribunal will also take the opportunity afforded by the Opening CMC to actively identify certain issues or sub-issues that, if adjudicated and/or otherwise resolved early on, would lead to a more efficient and effective proceeding. As such, in addition to proactively examining the pleadings for such issues, the Tribunal expects the parties will do the same.

Approach to Case Management

Throughout the discovery and pre-hearing steps leading to the hearing on the merits, the Tribunal will take an active role in the scheduling and case management of the Expedited Process. The following guidance explains how the Expedited Process will be managed in the absence of exceptional reasons for departing from this general approach.

The parties will be expected to reasonably cooperate and agree on expediting discovery and pre-hearing steps, as well as the hearing itself, including with respect to documentary discovery, examinations for discovery, and the presentation of evidence in a manner that could streamline the hearing.

Counsel should ensure that they will be reasonably available for CMCs, to complete discoveries on a timely basis, and for an expedited hearing.

While the Tribunal will endeavour to make a judicial member available to preside over CMCs or to deal with motions, counsel will be expected to have conferred among themselves before requesting any CMC or bringing any motion. The judicial member responsible for the case management of a given matter may require that a CMC be held before any motion is brought. The Tribunal specifies that the judicial member to be made available may not be the judicial member responsible for the case management of the matter.

Applications for Leave to Intervene

Under the Expedited Process, the Tribunal will deal with intervenor applications in accordance with the following expedited schedule and process:

- Motion for leave to intervene would be served and filed within seven (7) days after the end of the period for filing the Response;
- Motion Response would be served and filed within four (4) days after the service of the Motion;
- Motion Reply would be served and filed within two (2) days after the service of the Motion Response; and
- Intervention will be disposed of by the Tribunal without a hearing unless the Tribunal directs otherwise.

As soon as the Tribunal determines that an application will be dealt with under the Expedited Process, a notification to that effect will be immediately posted on the Tribunal's website. Such notification will indicate that the application will proceed

under the Expedited Process and will set out the date by which motions for leave to intervene are to be filed. Rule 25 provides that, in case of a NOA under Part VIII of the Act, the Registrar is to publish a notice in the *Canada Gazette* and, over a period of two weeks, in two daily newspapers. Such notice must set out, among other things, the date by which a motion for leave to intervene is to be filed. In the context of the Expedited Process, the Tribunal will likely dispense with the application of this provision, and use the above notification on the Tribunal's website as an alternative notification process.

Mediation

As indicated in the Tribunal's *Practice Direction regarding Mediation*, "[p]arties should expect that, in all proceedings, the Tribunal will also be proactive in exploring the prospects for mediation during the early and later stages of the case management process".

In light of this guidance, and as proposed by both the Commissioner and the CBA, the Tribunal has allotted two optional steps for mediation in its indicative timeline for the Expedited Process: 1) after the close of pleadings but prior to commencing the discovery process; and 2) after discovery and disclosure (e.g., service of witness statements), but before the hearing on the merits commences.

Given its success thus far, the Tribunal will continue to encourage the parties to engage in mediation. To that end, the Tribunal is willing to facilitate the process of mediation in accordance with its mediation protocol.

Discovery Process

In addition to the implementation of a rigorous Opening CMC, the Tribunal is of the view that the best way to expedite its proceedings is to apply certain parameters and limitations to the discovery process.

As indicated above, the first of these measures is requiring the parties to exchange discovery plans which should preclude, or at least reduce the number of, motions associated with documentary and oral discovery following production of documents.

The second measure is the expectation that the parties will generally exchange the AODs within a period of 60 to 70 days after the filing of the NOA. The parties are encouraged to examine ways to limit the scope of documentary discovery in order to facilitate expedition. Updated AODs will also have to be provided by the parties in accordance with their obligation to make continuous disclosure. If needed, directions to that effect will be set by the judicial member responsible for the case management of the matter.

Furthermore, with the consent of the affected parties (not to be unreasonably withheld), the Commissioner will not be required to produce in his/her AOD those documents that have been received from a respondent, including documents

submitted to the Commissioner by the parties in response to a request for information, section 11 order(s), supplementary information requests or provided voluntarily. Conversely, with the consent of the Commissioner (not to be unreasonably withheld), a respondent will not be required to produce in its AOD those documents that have already been provided to the Competition Bureau.

As a third measure, the Tribunal also adopts certain parameters and limits associated with examinations for discovery set out in the Federal Court's *Notice to the Parties and the Profession regarding Case Management: Increased Proportionality in Complex Litigation before the Federal Court*. These parameters and limits will apply to all examinations for discovery:

- No refusals motion will be permitted until oral discoveries are completed, although as discussed below, a judicial member of the Tribunal may adjudicate on "spot objections" in appropriate circumstances;
- Refusals motions will be limited to one (1) hour per day of discovery of each party's representative;
- Potentially significant cost sanctions may be imposed against unsuccessful or unreasonable parties; and
- Questions should be answered unless clearly improper, or where the disclosure of privileged communication could result. In all other situations, questions considered by a party to be objectionable will be required to be answered under objection, with reasons to be stated on the record.

The Tribunal further expects that, in examinations for discovery, counsel will take questions "under advisement" on an exceptional basis and that the number of such questions will therefore be limited.

Unless the parties agree otherwise or the Tribunal allows additional days in light of the particular circumstances of a given matter, oral discovery shall normally be limited to two (2) days for each of the applicant(s) and the respondent(s). In addition, in order to facilitate the oral discovery process and to reduce potential lengthy delays associated with discovery motions, the Tribunal will make a judicial member available, either in person or via teleconference, to adjudicate "spot objections" raised during examinations for discovery.

The purpose of these guidelines is to ensure a focused, effective approach to oral discovery by the parties, an efficient use of the Tribunal's resources and appropriate proportionality in proceedings before the Tribunal.

For greater certainty, the principle of proportionality applies to all stages of an application, including oral discoveries. However, departures from the Rules or from the terms of this Practice Direction on the basis of proportionality shall require the prior approval of the Tribunal.

Pre-hearing Process

The indicative timeline provides that all parties are to serve their respective witness statements, expert reports and documents relied upon at the same time, for both the initial filings and the reply filings. Simultaneously with the service of expert reports, the parties shall specify the subject areas in which they propose to qualify their respective expert witnesses. The Tribunal notes that, in merger cases where an efficiencies defense is raised, the foregoing sequence for the exchange of expert reports may require adjustments.

Any objections regarding a proposed expert, including regarding his/her qualifications; the area(s) in respect of which he/she is proposed to be qualified; and his/her expert report more generally should be raised as soon as possible with the judicial member responsible for the case management of the matter, and in any event, within 15 days of service and filing of the expert reports. The Tribunal expects that, in most cases, there will be no objections and the parties will agree to the scope of expertise of each expert witness. Where agreement is reached, short written statements of the proposed area of expertise for each expert witness shall be exchanged and provided to the Tribunal. Where disagreement remains, the issues will be expected to be raised and resolved under case management, save and except for those instances where the presence of the expert before the Tribunal is required in order for an issue to be resolved. In such a case, the issue will be addressed at a time and in a manner directed by the judicial member responsible for the case management of the matter.

The parties are also expected to prepare a joint statement of issues, to be delivered two (2) weeks prior to the hearing on the merits. For those issues upon which agreement cannot be reached, the parties shall each deliver their own statement to the Tribunal.

A proposed schedule for hearing proceedings, including the order and estimated duration of the testimony of witnesses and opening statements, shall be submitted to the Tribunal at least one (1) week prior to the hearing. Any disagreement with respect to the schedule will be decided by the presiding judicial member after hearing from the parties.

Read-ins from discovery will be taken as read in and marked as exhibits at the hearing, subject to objections in writing by the opposing party and/or qualifications to the read-ins prior to the end of the hearing. Parties are encouraged to share lists of anticipated read-ins at least one (1) week before the hearing. Read-ins should be grouped by subject matter.

Final written arguments and compendia of key documents in both electronic and paper format shall be provided to the Tribunal, and shall include only the relevant excerpts of evidence to be relied upon by each party. Best efforts should be made to

provide a joint compendium. Otherwise, separate compendia shall be provided to the Tribunal. The length of final written arguments and compendia shall be determined by the Tribunal after hearing from the parties.

Hearing Process

The hearing will adopt the "chess clock" process set out in the Tribunal's *Notice on 'Chess Clock' Proceedings*, and will generally conform to the following guidelines:

- The evidentiary portion of the hearing will generally be limited to 5-7 days, with limited oral examinations in-chief;
- Oral argument will generally be limited to 1-2 days.

Decision

Although nothing in this Practice Direction shall bind the Tribunal, the Tribunal will aim to issue its decision within one (1) month after oral argument.

For any additional information or assistance, please contact the Deputy Registrar at (613) 954-0857.

Justice Denis Gascon
Chairperson

Appendix A – Indicative Timeline for the Expedited Process

Step	Timing	Day
Notice of Application ("NOA")		1
Case Management Conference ("CMC") to determine if the Expedited Process applies	Convened within 7 days of the NOA	8
Notification of Expedited Process on the Tribunal's website	Posted within 2 days of the CMC	10
Response	Filed within 14 days of the NOA	15
Reply	Filed within 7 days of the Response	22

Step	Timing	Day
Filing of Proposed Confidentiality and Scheduling Orders Exchange of Discovery Plans between the Parties	Filed or completed within 7 days of the Reply	29
Opening CMC (“Opening CMC”)	Convened within 7 days of filing of Proposed Confidentiality and Scheduling Orders	36
Possibility of a second CMC to discuss Discovery Plans	Convened within 7 days of the Opening CMC	43
Issuance of Confidentiality and Scheduling Orders by the Tribunal and approval of the Discovery Plans	Within 10 days of the Opening CMC	46
Mediation (Optional)	If requested by the parties	--
DISCOVERY PROCESS		
Service of Affidavits of Documents (“AODs”) and delivery of documents by the parties	Served within 60 to 70 days of the NOA	60-70
Completion1 of AOD motions	Within 20 days of service of the AODs	80-90
Examinations for discovery of Applicant’s and Respondent’s representatives	Completed within 30 to 45 days of service of the AODs	90-115
Completion of discovery motions (productions, claims of privilege, refusals or answers to undertakings)	Completed within 15 days of examinations for discovery	105-130
PRE-HEARING PROCESS		

Step	Timing	Day
Witness Statements, Expert Reports and Documents Relied Upon (“Initial Filings”)	Parties to serve their initial witness statements, expert reports and documents relied upon (within 15 to 20 days after completion of discovery process), and to file their expert reports	120-150
Witness Statements, Expert Reports and Documents Relied Upon in response (“Response Filings”)	Parties to serve their witness statements, expert reports and documents relied upon in response (within 15 days after the Initial Filings) and to file their expert reports in response	135-165
Deadline for delivering any Requests for Admissions	Within 15 days after the Initial Filings	135-165
Pre-hearing CMC	Convened within 10 days after the Response Filings	145-175
Admissions or deemed admissions Commissioner to serve his/her list of documents proposed to be admitted without further proof	To be received within 10 days after service of Requests for Admissions	145-175
Deadline to provide to the Tribunal documents for use at the hearing (e.g., witness statements, anticipated read-ins from examinations for discovery, agreed books of documents, and joint briefs of authorities)	Within 10 days after the Response Filings	145-175

Step	Timing	Day
Mediation (Optional)	If requested by the Parties, within 14 days of completion of the Response Filings	--
Hearing on the merits	To start 5 days after Pre-hearing CMC, with 5 to 7 days for the evidentiary portion and 1 to 2 days for argument	150-180
Decision	Within 30 days after oral argument	190-220

[1]Completion means filed, argued, decided and complied with.