CT-2024-012

THE COMPETITION TRIBUNAL

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 for an order pursuant to s. 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.

Respondent

BOOK OF AUTHORITIES OF THE MOVING PARTY, ROGERS COMMUNICATIONS INC.

October 27, 2025

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TAB 1

Rogers - Reasons for Order and Order on a motion for additional production, 2025 CanLII 79245 (CT)

Date: 2025-08-11

Other citation: 2025 Comp Trib 11

Citation:
Rogers - Reasons for Order and Order on a motion for additional production, 2025 CanLII 79245 (CT), <https://canlii.ca/t/kdrrj>, retrieved on 2025-10-16

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Competition Tribunal / Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2025 Comp Trib 11

File No.: CT-2024-012

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an order under section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

BETWEEN:

Commissioner of Competition

(applicant)

and

Rogers Communications Inc.

(respondent)

Date of hearing by videoconference : July 14, 2025

Before: Madam Justice Jocelyne Gagné

Date of Reasons for Order and Order: August 11, 2025

REASONS FOR ORDER AND ORDER PARTIALLY GRANTING A MOTION FOR ADDITIONAL PRODUCTION

I. OVERVIEW

[1] On March 26, 2025, the Tribunal issued a Scheduling Order directing the applicant, the Commissioner of Competition ("Commissioner") and the respondent, Rogers Communications Inc. ("Rogers"), to provide the other party, by June 13, 2025, their affidavit of documents. On June 30, 2025, the parties requested, and the Tribunal granted, an extension to the deadline to file any motion arising from the affidavits of documents and/or productions, from June 30 to July 7, 2025.

[2] On July 7, 2025, Rogers filed an informal motion for an order to compel further documentary production from the Commissioner, that Rogers deems relevant. On July 10, 2025, the Commissioner opposed Rogers' motion, and on July 11, 2025, Rogers filed a reply. The Tribunal heard the motion by videoconference on July 14, 2025.

II. THE NOTICE OF APPLICATION

[3] On December 23, 2024, the Commissioner filed a Notice of Application pursuant to section 74.1 of the *Competition Act*, RSC 1985, c C-34 ("Act"), alleging that Rogers has previously engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(*a*) and subsections 74.011(1) and 74.011(2) of the Act.

[4] According to the Commissioner, Rogers misleads consumers by offering data plans that are said to be unlimited, but that, in fact, have limits. The Commissioner argues that by advertising limited data plans as if they were unlimited, Rogers has made and continues to make representations to the Canadian public that are false or misleading in a material respect for the purpose of promoting the supply or use of wireless telecommunication service and related products, and its business interests more generally (the "Impugned Representations").

[5] The Commissioner seeks various forms of relief, including "a declaration that [Rogers] has engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(*a*) and subsections, 74.011(1) and 74.011(2) of the Act"; "an order prohibiting Rogers from engaging in the reviewable conduct or substantially similar reviewable conduct in Canada for a period of ten years from the date of such order"; "an order requiring Rogers to pay such an administrative monetary penalty as the Tribunal deems appropriate", and "an order requiring Rogers to pay an amount, not exceeding the total amounts paid to Rogers for the products in respect of which the reviewable conduct was engaged in, to be distributed among those persons to whom the products were sold, in an amount and manner to be assessed by the Tribunal."

III. DOCUMENT PRODUCTION

[6] Prior to the start of this proceeding and following an application by the Commissioner, the Federal Court issued an order on December 1, 2023, requiring Rogers to produce records and to provide written returns of information under paragraphs 11(1)(*b*) and (*c*) of the Act.

[7] Rogers now seeks an order to compel the Commissioner to produce the following two categories of records: (i) "All records related to the Commissioner's consideration or investigation of telecommunications providers' unlimited plan representations including prior to September 2021" ("Unlimited Plan Records"); and (ii) "All relevant records from Bell, Telus and any other third party received by the Bureau pursuant to any supplementary or voluntary information request or section 11 order related to their equivalent unlimited plans [...]" – including those obtained in the context of the Commissioner's review and challenge of the Rogers/Shaw transaction (CT-2022-002) ("Third-Party Records").

IV. issues

[8] The present motion raises the following issues:

(a) Are the two categories of records sought by Rogers relevant to the matters at issue in this proceeding?

(b) If any such records are relevant, is Rogers' request consistent with the principle of proportionality?

V. ANALYSIS

(1) Unlimited Plan Records

[9] Rogers seeks production of the Commissioner's Unlimited Plan Records, including (i) the Commissioner's analysis of other telecommunication providers' unlimited plan representations; (ii) notes related to an internal conference call held on April 14, 2020 concerning unlimited plan representations; (iii) documents related to an alleged "pause" in the Commissioner's review of unlimited plan representations across the industry between June 2020 and August 2021; and (iv) documents related to the Commissioner's decision not to pursue other telecommunication providers with respect to their unlimited plan representations.

[10] Rogers argues that the documents it seeks are relevant to two parts of its defence as found in paragraphs 24 to 29 of its response to the Notice of Application. First, the Commissioner waited almost 4 years after Rogers started making the Impugned Representations before making Rogers aware of his concerns; and second, the Commissioner has unfairly targeted Rogers for conduct that is industry wide.

[11] According to Rogers, competing telecommunication providers advertise their unlimited plans in substantially the same way as Rogers does, and these similar representations are relevant to assessing consumer understanding in the wireless industry. Moreover, and in addition to competitors' records being relevant to the Tribunal's assessment of the Impugned Representations, not only has the Commissioner "improperly and unfairly singled out Rogers", but Rogers argues that its offering in fact "spurred other major carriers to do the same, leading to a significant pro-consumer shift in the wireless industry."

[12] In short, the Commissioner responds that the rationale or the motivation behind the timing of investigative steps, as well as Rogers' claim that it was "unfairly targeted", are irrelevant considerations. The Commissioner confirmed that he has produced "all the non-privileged evidence he has collected of unlimited representations made by other telecommunications companies" related to the present matter.

[13] The Tribunal agrees with the Commissioner.

[14] As to the timelines of the Commissioner's investigation into Rogers' conduct and subsequent enforcement action, these issues are not part of the debate. There is no dispute that Rogers started making the Impugned Representations in 2019 and that it was not until 2023 that the Commissioner contacted Rogers with his concerns.

[15] In *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2019 Comp Trib 3, the respondents contended that an eight-year gap between a 2009 investigation and a 2017 application created an estoppel and should limit remedy. On discovery, Live Nation asked the Commissioner (i) why it took eight years to take enforcement action; and (ii) why the Commissioner did nothing with earlier complaints about Live Nation's conduct. The Tribunal refused to require the Commissioner to answer both questions for the following reason:

> [18] What is relevant are the facts that the Commissioner apparently took eight years to raise the complaint with the Respondents and allegedly did not follow-up on complaints received in 2008, not the reasons or explanations behind those decisions of the Commissioner.

[16] The same can be said about the four year it took the Commissioner to advise Rogers of his concerns, after the launch of its unlimited plans. I agree with the Commissioner that while the legal significance of the timing can be debated at the hearing, the relevant dates that followed the launch of Rogers' unlimited plans, up until the filing of the Commissioner's application, are not in dispute.

[17] With respect to Rogers' allegation that it was improperly singled out, it is not a defence that is available in law. In *R v Miles of Music Ltd*, 74 OR (2d) 518, 1989 CanLII 255, a case that considered unfairness in abuse of process, the Ontario Court of Appeal found that:

> It cannot be a defence to a speeding driver that the police did not prosecute all drivers who were speeding on the same highway at the same time. In any event, the absence of any evidence that, however prevalent the offensive practice may be, the police had reasonable grounds for prosecuting some other alleged offender, makes it impossible to say that the respondents were selected for prosecution on the basis of grounds relating to personal characteristics.

[18] The Act gives the Commissioner the power and discretion to investigate and enforce its provisions as it sees fit. It does not dictate how and when to do it, nor does it impose an industry wide approach to enforcement.

[19] Therefore, Rogers' requests for the Unlimited Plan Records, as defined in paragraph 9, is denied. The Unlimited Plan Records will not be produced.

[20] Given this conclusion, there is no need for the Tribunal to assess whether the request is consistent with the principle of proportionality.

(2) Third-Party Records

[21] Rogers also seeks production of Third-Party Records received by the Commissioner "pursuant to any supplementary or voluntary information request or section 11 order" since 2019, including in the context of the Rogers-Shaw matter (CT-2022-002). These include (i) marketing plans, reports, research and competitive assessment of unlimited wireless plans; (ii) assessment of the competitive impact of unlimited plans, and (iii) communications related to complaints regarding unlimited wireless plans.

[22] According to Rogers, given the nature of some specifications found in previous section 11 orders and in supplementary or voluntary information requests issued to various telecommunication providers, it is reasonable to expect that the Commissioner received records that are relevant to the present matter – especially since the Commissioner considers as an aggravating factor the fact that other providers such as Bell and Telus launched similar plans to Rogers.

[23] In response, the Commissioner's position is essentially that such a request amounts to a disproportionate, "exorbitant" ask, while the odds that such an exercise yields any critical information are trivial.

[24] The Commissioner pleads at paragraph 46(f) of his Notice of Application that the launch by Bell and Telus of similar plans to Rogers' is an aggravating factor. He also submits on this motion that other telecommunication providers "copied Rogers". Through the material filed by the Commissioner in the present matter, Rogers was made aware that in the context of the review of the Rogers-Shaw transaction, the Commissioner gathered marketing documents from competing telecommunication providers, including about unlimited plans. Those documents informed the Commissioner's inquiry, and the material that concerned Rogers has been produced in the present litigation as part of the Commissioner's Notice of Application.

[25] Similar documents obtained from Bell and Telus through section 11 orders, also in the context of the review of the Roger-Shaw transaction, are similarly relevant for the following reasons:

1. They are likely to inform the Tribunal about consumer's understanding and effect of the representations in the marketplace, and what Bell and Telus understood about the marketplace, including any market research they did about the plans;

2. They go to the Commissioner's pleading of aggravating factors as pleaded in paragraph 46(f) of his Notice of Application.

[26] The Tribunal agrees with Rogers that records that may reveal whether competing telecommunication providers merely followed suit, or rather already planned to launch their own unlimited plan, are relevant to this issue.

[27] However, I do not find relevant the documents that may reveal whether other telecommunication providers unlimited plans were successful in attracting customers and reducing or eliminating any alleged "benefit" Rogers received from introducing its unlimited plans.

[28] Turning to the question as to whether the production by the Commissioner of these records is consistent with the principle of proportionality (the main, if not only, basis for the Commissioner's position on this issue), the Tribunal considers that it is. Importantly, the Commissioner provided no evidence to sustain the allegation that to proceed with the production was overly burdensome. The Commissioner alleges that reviewing the Bell and Telus records for relevance to this Application would require reviewing over a million documents. In support of that allegation, the Commissioner refers the Tribunal to a 2023 affidavit sworn in a context of the section 11 application against Rogers whereby the affiant states that it took several months to review 22,000 records from the Rogers/Shaw Supplemental Information Request (RS SIR) for information that might overlap with the section 11 request. This evidence does not support the Commissioner's allegation in the present matter.

[29] In *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16, the Tribunal stated the following:

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

[30**]** The Commissioner also alleges that the parties agreed that neither would be required to review or list the records produced in response to the RS SIR for relevance to this application. In support of that allegation, the Commissioner refers the Tribunal to his June 2025 affidavit of documents, where it is rather stated that this agreement covers the records produced by Rogers, not those produced by third parties such as Bell and Telus.

[31**]** I am therefore of the view that the Commissioner's argument on proportionality – or lack thereof – must fail.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[32**]** Rogers' motion for additional production is granted in part.

[33**]** The Commissioner is to file, and deliver to Rogers on or before August 18, 2025, a further affidavit of document inclusive of the following Third-Party Records:

- (a)Marketing plans, reports, research and competitive assessment of unlimitedwireless plans;
- (b)Assessment of the competitive impact of unlimited plans (including Rogers); and
- (c)Communications related to complaints regarding unlimited wireless data plans.

[34**]** As success on this motion is divided, costs shall be in the cause.

DATED at Ottawa, this 11 day of August, 2025.

SIGNED on behalf of the Tribunal by the Presiding Judicial Member.

(s) Jocelyne Gagné

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TAB 2

Canada v. Lehigh Cement Limited, 2011 FCA 120 (CanLII)

Date: 2011-03-31
File number: A-263-10
Other citations: 417 NR 342 — [2011] 4 CTC 112 — [2011] FCJ No 515 (QL) — [2011] DTC 5069

Date: 20110331

Docket: A-263-10

Citation: 2011 FCA 120

CORAM: EVANS J.A.

DAWSON J.A.

LAYDEN-STEVENSON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LEHIGH CEMENT LIMITED

Respondent

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

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

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: EVANS J.A.

LAYDEN-STEVENSON J.A.

Date: 20110331

Docket: A-263-10

Citation: 2011 FCA 120

CORAM: EVANS J.A.

DAWSON J.A.

LAYDEN-STEVENSON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LEHIGH CEMENT LIMITED

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

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

1. Answer the following question: If the shares of CBR Cement Corp. had been owned by the appellant instead of a non-resident company related to the appellant, would the Crown have contested the arrangement (the disputed question).

2. Produce internal memoranda of the Canada Revenue Agency (CRA) from 2000 to July 2007 that specifically relate to the development of a general policy concerning paragraph 95(6)(*b*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5 Supp.) (Act), not including documents relating to a particular taxpayer (the disputed documents).

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

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

The Facts

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

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

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

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

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

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

[...]

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

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

The Decision of the Judge

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

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

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

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

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

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

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

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

(c) to procure admissions which may destroy an opponent's case;

(d) to facilitate settlement; pre-trial procedure and trial;

(e) to eliminate or narrow issues;

(f) to avoid surprise at trial.

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

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

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

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

The Asserted Errors

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

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

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

c. ordering the production of internal CRA memoranda; and

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

Consideration of the Asserted Errors

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

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

1. During oral discovery, counsel for Lehigh singled out two CRA officers, Wayne Adams and Sharon Gulliver, when questioning on the existence of internal memoranda.

2. Counsel for Lehigh stated at the hearing that the alleged change in CRA policy "was developed between 2000 and July 2007, when the CRA announced the new policy."

3. Counsel for Lehigh stated at the hearing that he did not think there would be many memoranda concerning the new policy. He only expected there to be three or four memoranda.

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

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

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

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

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

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

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

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

1. The disputed documents led directly to the Crown's position in the underlying appeal.

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

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

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

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

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

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

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

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

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

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

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

1. Opinions expressed by CRA officials outside of the context of a particular taxpayer's situation are irrelevant.

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

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

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

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

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

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

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

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

[30] First, I believe that the general purpose of oral discovery has not changed. Justice Hugessen described that purpose in the following terms in *Montana Band v. Canada,* 1999 CanLII 9366 (FC), [2000] 1 F.C. 267 (T.D.) at paragraph 5:

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

[emphasis added]

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

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

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

6. We indicated at the hearing that we disagreed with counsel's argument. Although obviously not synonyms, the words "relating" and "relevant" do not have entirely separate and distinct meanings. "Relating to" in Rule 82(1) necessarily imparts an element of relevance, otherwise, the parties would have licence to enter into extensive and futile fishing expeditions that would achieve no productive goal but would waste judicial resources. The well established principles that give rise to the relatively low relevance threshold at the stage of discovery, as opposed to the higher threshold that will be required at trial for the admission of evidence, are well known. We simply do not believe that the Tax Court ever had the intention of abandoning those principles any more than this Court could have had such an intention when, in 1990, it changed the word "related" to "relevant" in revising its corresponding provisions, namely subsections (1) and (2)(a) of Rule 448.[emphasis added and footnotes omitted]

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

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

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

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

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

64. Furthermore, the Prothonotary's reference to a fishing expedition in paragraph 19 of her Reasons was one where a party was required to disclose a document that might lead to another document that might then lead to useful information which would tend to adversely affect the party's case or to support the other party's case. In my view, limiting the "train of inquiry" test in this manner is consistent with the test described in *Peruvian Guano, supra*, and applied by this Court in *SmithKline Beecham Animal Health Inc. v. Canada*, 2002 FCA 229 (CanLII), [2002] 4 C.T.C. 93 (F.C.A.), where, at para. 24 of her Reasons for the Court, Madam Justice Sharlow wrote:

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

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

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

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

[39] The Gulliver memorandum makes the following points:

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

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

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

3. Footnote 11 to the above passage stated:

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

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

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

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

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

1. The question is hypothetical.

2. The purpose of the question is to elicit from the Crown details pertaining to its legal argument.

3. The question is a pure question of law.

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

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

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

Costs and Conclusion

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

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

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

[49] Lehigh has not established exceptional circumstances that would warrant departure from the principle that solicitor-client fees are generally awarded only where there has been reprehensible, scandalous, or outrageous conduct on the part of one of the parties. See *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at paragraph 77. The willingness of one party to incur significant expense on an issue cannot by itself transfer responsibility for that expense to the opposing party. The question then becomes, what is the appropriate contribution to be made to Lehigh's costs if the appeal is dismissed?

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

"Eleanor R. Dawson"

J.A.

"I agree

John M. Evans J.A."

"I agree

Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-263-10

STYLE OF CAUSE: HER MAJESTY THE QUEEN v.

LEHIGH CEMENT LIMITED

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: March 3, 2011

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: EVANS J.A.

LAYDEN-STEVENSON J.A.

DATED: March 31, 2011

APPEARANCES:

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Geneviève Léveillée	
Warren J.A. Mitchell, Q.C.	FOR THE RESPONDENT
Mathew G. Williams	
Natasha Reid	

SOLICITORS OF RECORD:

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TAB 3

Canada v. Thompson, 2022 FCA 119 (CanLII)

Date: 2022-06-20
File number: A-65-21; A-66-21; A-68-21; A-67-21

Date: 20220620

Dockets: A-68-21 (Lead)

A-65-21

A-66-21

A-67-21

Citation: 2022 FCA 119

CORAM: **PELLETIER J.A.**

WEBB J.A.

RIVOALEN J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LARRY THOMPSON and THOMPSON BROS. (CONSTR.) LTD.

Respondents

Heard by online video conference hosted by the registry on March 22, 2022.

Judgment delivered at Ottawa, Ontario, on June 20, 2022.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: PELLETIER J.A.

RIVOALEN J.A.

Date: 20220620

Dockets: A-68-21 (Lead)

A-65-21

A-66-21

A-67-21

Citation: 2022 FCA 119

CORAM: **PELLETIER J.A.**

WEBB J.A.

RIVOALEN J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LARRY THOMPSON and THOMPSON BROS. (CONSTR.) LTD.

Respondents

REASONS FOR JUDGMENT

WEBB J.A.

[1] These are appeals from the Order of the Tax Court of Canada (2021 TCC 15) requiring the Crown to respond to a number of follow-up questions posed by Larry Thompson and Thompson Bros. (Constr.) Ltd. (collectively the Thompsons) following the examination for discovery of the Crown's nominee.

[2] The Thompsons had reported losses arising from the alleged trading in certain foreign currency forward contracts involving themselves and ODL Securities Ltd. (ODL). One of the bases upon which the Thompsons were reassessed was that their purported trading was a sham.

[3] One of the main issues in these appeals is whether information contained in the Canada Revenue Agency's (CRA) files related to audits of other taxpayers (who also reported losses arising from trading in foreign currency forward contracts involving Tim Hodgins, John Hodgins and ODL) is relevant, for the purposes of discovery, in the Thompsons' appeals to the Tax Court.

[4] The other main issue is whether the Crown should be compelled to answer follow-up questions related to a report (the RSD Solutions report) prepared for the CRA concerning trading in foreign currency forward contracts.

[5] For the reasons that follow, I would allow these appeals in relation to the issue of whether the Crown should be compelled to disclose the information in the CRA's files concerning audits related to other taxpayers. I would dismiss these appeals in relation to the issue of whether the Crown should be compelled to answer questions concerning the RSD Solutions report. As a result, the Crown will not be required to answer the questions related to the information in the CRA's files concerning the other taxpayers but will be required to answer the questions related to the RSD Solutions report.

[6] The Order dated April 12, 2021 consolidated these four appeals and designated the appeal in file A-68-21 as the lead appeal. These reasons will be filed in file A-68-21 and a copy thereof will be placed in each of the other files.

I. Background / Decision of the Tax Court

[7] The underlying appeals before the Tax Court relate to the Thompsons' 2008 and 2009 taxation years. In those years, the Thompsons claimed significant losses arising from a number of reported trades in foreign currency forward contracts. The losses were allocated to the Thompsons as members of certain partnerships.

[8] According to the Thompsons, the trading took place with ODL, a brokerage based in London, United Kingdom. Tim Hodgins was a trader with ODL. John Hodgins is described as a promoter in the reply filed with the Tax Court.

[9] In reassessing the Thompsons, the Minister of National Revenue asserted that the trading contracts were a sham. In paragraph 7 of the Crown's memorandum, the Crown submits:

> that the documents relating to the claimed trading were a sham, in that:
>
> (a) no trading was ever authorized, contemplated, or actually took place;
>
> (b) the intention of all the parties involved was to give the appearance that the partnerships were engaged in trading so that the [Thompsons] could claim tax losses;
>
> (c) there was no offer and no acceptance respecting the trading contracts;
>
> (d) no business activity was carried on with an expectation of profit; and
>
> (e) the partnerships were not formed for the purpose of carrying on a business with a view to profit.
>
> [footnotes omitted]

[10] On February 24, 2016, the Crown's nominee, Christine Cheng, was examined on discovery. Ms. Cheng was not the CRA auditor who audited the transactions in question. Zul Lila was the CRA auditor involved in this file. However, he retired from the CRA in September 2014.

[11] The Crown agreed to a number of undertakings at the examination for discovery of Ms. Cheng. In particular, there were three undertakings that are relevant in this appeal – undertakings 12, 18 and 21. These undertakings were described in the transcript of the examination for discovery of Ms. Cheng as follows:

• UNDERTAKING NO. 12:

To produce any previous audit work or documentation relied upon by Mr. Lila in determining that trades were a sham.

• UNDERTAKING NO. 18:

(Under advisement) to provide a copy of the RSD Solutions report that Zul quotes from.

• UNDERTAKING NO. 21:

(Under advisement) to produce any records made by the CRA related to any meeting with ODL Securities in London.

[12] Following the Crown's responses to these three undertakings (which included providing a copy of the RSD Solutions report to the Thompsons) the Thompsons posed further questions. This led to further responses and even further questions. Eventually, there were several unanswered questions that were the subject of the motion brought by the Thompsons to the Tax Court. The Tax Court Judge numbered the questions 1 to 8. Question 5 incorporated, indirectly, four other questions. The questions that were the subject of the motion before the Tax Court (using the same numbering and wording of the questions as adopted by the Tax Court Judge) are set out in the Appendix attached to these reasons.

[13] The Tax Court Judge began his analysis by referring to a number of decisions of the Tax Court that confirmed that the question of relevance is to be broadly and liberally construed at the discovery stage and that the threshold is lower than it would be at trial. However, as he also noted, this does not mean that a party can conduct a fishing expedition in the guise of an examination for discovery.

[14] In particular, the Tax Court Judge relied on the earlier decision of the Tax Court in *Paletta v. The Queen*, 2017 TCC 233 (*Paletta*). In that case, the taxpayer was seeking an order compelling the Crown to answer certain questions in relation to a tax appeal also involving trading transactions conducted through ODL. The Tax Court Judge, in relying on *Paletta*, described the factual circumstances in *Paletta*, in paragraph 6 of his reasons, as ""having more than passing similarity to the present matter"".

[15] The Tax Court Judge found that since the respondent before the Tax Court is the Crown and not the CRA auditor, the questions did not necessarily have to be limited to what the CRA auditor reviewed or relied upon. As a result, the Tax Court Judge ordered the Crown to respond to the questions 1 through 7, as numbered by the Tax Court Judge.

[16] For question number 2, the Tax Court Judge, in his reasons, indicated that the Crown should respond to this question in the following fashion:

> [20] Consequently, I direct further that Question 2 should be responded to in the following fashion, if and to the extent not already done. The Respondent should make all reasonable efforts to locate or generate copies of the destroyed emails and produce same to the Applicants, as part of the requested copy of the audit file. These reasonable efforts would include, but not necessarily be restricted to, the searching of relevant CRA computer servers to generate copies of any such emails and provide any such copies to the Applicants. As well, likely CRA recipients and originators of relevant emails from and to the auditor, including team leaders and CRA head office personnel, should be identified and contacted to ascertain if they have (and if so provide to the Applicants) copies of relevant email correspondence. I anticipate but do not know with certainty whether at least some such reasonable efforts already have been expended.

[17] The Crown was not required to answer question number 8.

[18] The Crown is not appealing the part of the Order of the Tax Court requiring it to respond to question number 2, and, therefore, the above guidance on how to respond to this question remains in place. There is also no cross-appeal in relation to the part of the Order stipulating that the Crown is not required to answer question number 8.

[19] As a result, the questions 1, 3, 4, 5, 6 and 7 are in issue in these appeals.

[20] With respect to the questions concerning information obtained or reports prepared in relation to the audits of other taxpayers, the Crown's response was that while Mr. Lila may have been able to access the position papers prepared by other auditors, there is nothing to indicate that he relied on these position papers. The Crown also submitted that Mr. Lila did not have access to the shared drive that contained documents concerning related audits. The Crown also indicated ""there was no compiling of information from the various audits into a database containing information regarding ODL … or the Hodgins … for example"".

[21] The ""RSD Report"" is a report prepared for the CRA by RSD Solutions Inc. on foreign currency transactions undertaken by various Canadian partnerships. A copy of this report is attached as Exhibit C to the affidavit of Doreen Prasad that was filed by the Thompsons as part of their motion record. The conclusions are set out at the end of this report:

> The trading strategy undertaken by the partnerships cannot be to hedge an expected currency transaction or series of transactions incidental to an enterprise's business (e.g. purchase of oil in US dollars or sale in Euros to a German customer) as there is no business other than foreign currency forward trading in the partnerships.
>
> Nor can the strategy be considered as part of a currency speculation business. The transactions are undertaken in offsetting pairs with cash payments upon value dates deferred such that the pairs act as hedges for each other. Hedging can have a place with currency speculators, but that would generally be ongoing management of changing positions subsequent to initial trading; it would not be done for all trades on the trade dates in the way the partnerships have done. That would be incompatible with an expectation of profit.

> Cash settlement for amounts of losses has not been made by payment from the partnerships to the brokers on value dates. This is contrary to our experience of market practice when there would be full exchange of currencies at the contracted exchange rates on the value date or, depending on agreement between the parties, a cash payment representing the difference between the contracted and spot rates on the value date. For the subject transactions, amounts due are carried forward as owing to the broker until there are offsetting gains from transactions with later value dates.
>
> The strategy is only ever likely to break even (less the relatively small cost of a bid/ask spread). Thus the only apparent purpose of the strategy is to create timing differences between the recognition of profits and losses. The reversal of the losses can be deferred as long as the trading strategy continues, but discontinuation will result in the recognition of profits by the time that all contracts mature.
>
> Our examination of the documentation and trades we have seen revealed no reason to believe there are any major deficiencies rendering the documentation ineffective (although this would need to be confirmed by a legal opinion). There are a number of anomalies (e.g. cancelled or replaced contracts, items appearing on statements for different dates than the trade dates) that may be due to clerical errors, unusual in our experience to this extent from a professional brokerage, or backdating/replacing trades.
>
> The trading is all done in Canadian dollars, US dollars and Euros, all strong and highly liquid. They are also relatively stable currencies in terms of interest rates and spot and forward rate fluctuations. Therefore, the scheme under examination could be fairly reliably structured to produce the desired result fairly closely with adjustments made as necessary over the life of the forward instruments. The desired result is to create losses of a certain magnitude in one or more particular accounting periods followed by nearly corresponding gains in later periods, the difference being remuneration to the broker facilitating the trading.

[22] In responding to the questions concerning the RSD Solutions report, the Crown stated that it did not intend to rely on this report and that the RSD Solutions report did not deal with the transactions at issue in the Thompsons' appeals.

II. Issue and Standard of Review

[23] The issue in these appeals is whether the Tax Court Judge erred in compelling the Crown to answer the questions that are still in issue in these appeals. In particular, the issue is whether the Tax Court Judge failed to address the relevance of the questions in relation to the only underlying issue that the parties indicated was relevant in this matter, *i.e.* whether the transactions were a sham.

[24] Any question of fact or mixed fact and law (where there is no extricable question of law) will be reviewed on a palpable and overriding error standard. Any question of law will be reviewed on the correctness standard (*Housen v. Nikolaisen*, 2002 SCC 33).

III. Analysis

[25] In this case, the only issue arising from the pleadings filed with the Tax Court that the parties identified as being relevant in relation to the unanswered questions is the allegation of the Crown that the transactions in issue in the Thompsons' tax appeals were a sham. Neither party suggested nor argued that the issue of relevance of the questions is to be decided in light of any other issue that may be raised in their pleadings.

[26] The Tax Court Judge correctly determined that a key issue in relation to whether a party should be compelled to answer a question is the relevance of the question. However, there is no analysis or discussion in the Tax Court Judge's reasons of how the questions that are the subject of this motion are relevant in relation to the only issue that was identified by the parties – whether the transactions were a sham.

[27] The Supreme Court of Canada in *Minister of National Revenue v. Cameron* (1972), 1972 CanLII 188 (SCC), [1974] S.C.R. 1062, at page 1068, and in *Stubart Investments Ltd. v. The Queen*, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, at page 572 adopted the following definition of sham as stated by Lord Diplock in *Snook v. London & West Riding Investments, Ltd.*, [1967] 1 All E.R. 518 (C.A.), at page 528:

> ... it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

[28] Therefore, in the Thompsons' appeals to the Tax Court, the issue will be whether the trading transactions ""are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create"". The focus will be on the transactions completed, or purported to be completed by the Thompsons, and not on transactions completed, or purported to be completed, by other taxpayers.

[29] The scope for questions on discovery in an appeal to the Tax Court is set out in Rule 95 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a (*Tax Court Rules*):

"**Scope of Examination** "	"**Portée de l'interrogatoire** "

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

> [30] In *Canada v. Lehigh Cement Limited*, 2011 FCA 120, this Court determined that a question is relevant for discovery purposes if the answer might assist the asking party in advancing its case or damage the case of the other party:
>
> > 34 The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute....

[31] This principle was reiterated in *Madison Pacific Properties Inc. v. Canada*, 2019 FCA 19, at paragraph 23.

[32] The questions that are in issue in this appeal can be divided into two groups. The questions numbered 1, 3, 4, 6 and 7 all request additional documents or information obtained or prepared by the CRA in relation to audits of other taxpayers who claimed trading losses arising as a result of alleged transactions involving ODL. The questions arising under question number 5 are all related to the RSD Solutions report.

A. Questions that Request Documents in the Files for Other Taxpayers

[33] The Crown's nominee, in response to the questions that requested the additional documents in the CRA files maintained for other taxpayers, confirmed that none of those documents were considered by or relied upon by the CRA auditor in this matter. The position papers that are referenced in the questions were prepared by the Edmonton Tax Services Office (TSO) and the Vancouver TSO. These position papers were not prepared in relation to the transactions involving the Thompsons, but rather in relation to transactions involving other taxpayers. There is no indication that the auditor in this particular case had accessed either one of these position papers or that he had relied on them.

[34] At the hearing of this appeal, when questioned as to why a document related to another taxpayer would or could be relevant to the issue of whether the transactions involving the Thompsons and ODL were a sham, the only response from counsel for the Thompsons was that the Thompsons would like to know if any of the other taxpayers, who had claimed losses arising from similar transactions with ODL, had stated that the transactions were a sham. However, if such a document existed, it presumably was not disclosed by the Crown in its list of documents. Otherwise, the Thompsons would know that it exists.

[35] If such a document exists and it is not disclosed by the Crown in its list of documents, the Crown would need either a direction from the Tax Court or the consent of the Thompsons to introduce such a document at the Tax Court hearing, as provided in Rule 89 of the *Tax Court Rules*:

"89 (1) Unless the Court otherwise directs, except with the consent in writing of the other party or where discovery of documents has been waived by the other party, no document shall be used in evidence by a party unless "	"89 (1) Sauf directive contraire de la Cour, ou sauf si les autres parties ont renoncé au droit d'obtenir communication de documents ou ont consenti par écrit à ce que des documents soient utilisés en preuve, aucun document ne doit être utilisé en preuve par une partie à moins, selon le cas : "
"(*a*) reference to it appears in the pleadings, or in a list or an affidavit filed and served by a party to the proceeding, "	"*a*") qu'il ne soit mentionné dans les actes de procédure, ou dans une liste ou une déclaration sous serment déposée et signifiée par une partie à l'instance; "
"(*b*) it has been produced by one of the parties, or some person being examined on behalf of one of the parties, at the examination for discovery, or "	"*b*") qu'il n'ait été produit par l'une des parties, ou par quelques personnes interrogées pour le compte de l'une des parties, au cours d'un interrogatoire préalable; "

"(*c*) it has been produced by a witness who is not, in the opinion of the Court, under the control of the party. "	"*c*"") qu'il n'ait été produit par un témoin qui n'est pas, de l'avis de la Cour, sous le contrôle de la partie. "
"(2) Unless the Court otherwise directs, subsection (1) does not apply to a document that is used solely as a foundation for or as part of a question in cross-examination or re-examination. "	"(2) Sauf directive contraire de la Cour, le paragraphe (1) ne s'applique pas au document utilisé uniquement comme fondement ou comme partie d'une question dans un contre-interrogatoire ou en réinterrogatoire. "

[36] If such a document exists and it is disclosed as a result of the examination for discovery then there would be no restriction under Rule 89 (as a result of paragraph (1)(b)) on the Crown introducing such document at the hearing.

[37] The Thompsons, in their memorandum, submitted that:

> A question is relevant when:
>
> (i) There is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary; or
>
> (ii) The question fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary.
>
> Whether this test is satisfied will depend on the allegations the questioning party seeks to establish or refute.

[38] It is far from clear how a statement by another taxpayer that their transactions involving ODL were a sham (if such a statement exists) would assist the Thompsons or damage the case of the Crown.

[39] Counsel for the Thompsons was unable to provide any other rationale or explanation for why documents involving other taxpayers would be relevant in determining whether the transactions in issue were a sham.

[40] This case can also be distinguished from *Paletta*. In *Paletta*, the taxpayers were also seeking an order compelling the Crown to disclose certain documents and answer certain questions related to other taxpayers who were involved with ODL. First, it should be noted that in *Paletta*, the relevant issue from the pleadings was not restricted to simply the argument that the transactions were a sham. There were other issues that were relevant in *Paletta*.

[41] The Tax Court Judge in *Paletta* also noted, in paragraph 37, that the CRA auditor ""had significant interaction with officials at CRA headquarters in Ottawa and with CRA auditors at other local CRA offices"" and, in paragraph 51, the auditor ""indicates in her Audit Report that when drafting the paper she relied heavily on positions developed by the Vancouver TSO"". There is no indication that the CRA auditor who was auditing the Thompsons had any significant interaction with officials at CRA headquarters or that he had relied on positions developed by other TSOs.

[42] If the requested documents were in the CRA auditor's files or considered in the audit of the Thompsons, then the relevance of the documents would have been established (*Canada v. Superior Plus Corp.*, 2015 FCA 241, at para. 8). However, since the requested documents were not in the CRA auditor's files nor considered by him, the relevance of the documents must be otherwise established. Furthermore, the request cannot simply be a fishing expedition.

[43] Counsel for the Thompsons submitted that the Thompsons were searching for a possible admission by another party to similar transactions that their transactions were a sham. In light of this submission, there is no basis to find that the questions seeking disclosure of documents acquired in the audits of other taxpayers or prepared in relation to those audits would elicit a response that would assist the Thompsons in advancing their case or damage the case of the Crown. If such a document exists, it would not assist the Thompsons in advancing their case or damaging the case of the Crown but rather, if it could assist any party, the only party it could assist would be the Crown. It would also be expected that if the Crown had such a document and wanted to use it, it would be disclosed in the Crown's list of documents. This line of questioning is a fishing expedition.

[44] It also should be noted that it is far from clear on what basis the questions following undertaking number 12 (of which one remains in dispute in these appeals) arise from that undertaking. The undertaking was to produce any audit work that the particular auditor relied upon in determining that the trades were a sham. As part of the follow-up questions, the Thompsons noted that ""[w]e have reason to believe (i.e. Paletta v. R., "2017 TCC 233") that CRA headquarters and the Commissioner's office were involved in the CRA's audit project with respect to foreign currency forward contract trading, of which the audit of [the Thompsons] is but one"".

[45] The nominee of the Crown was examined on February 24, 2016, and the decision in *Paletta* was released on November 23, 2017. The questions do not arise as a result of the response to the undertaking provided by the Crown, but rather from other information which was acquired by the Thompsons approximately 21 months after the examination for discovery was completed. Rule 93(1) of the *Tax Court Rules* provides that an adverse party may only be examined once, except with leave of the Tax Court. Therefore, leave of the Tax Court would have been required to allow questions arising following the release of the decision in *Paletta*, as these questions amount to a second examination of the witness.

[46] The Thompsons were unable to identify a sufficient link between the transactions involving other taxpayers and ODL with the transactions involving the Thompsons and ODL that would make such line of inquiry relevant to the issue of whether the transactions involving the Thompsons and ODL were a sham. This line of inquiry is a fishing expedition.

B. The RSD Solutions Report (Question Number 5)

[47] The RSD Solutions report has been disclosed to the Thompsons. The Thompsons posed a number of follow-up questions related to the RSD Solutions report. This report can be distinguished from the other documents that are being sought, as the auditor (who was auditing the Thompsons) relied on this report and he included excerpts from it in his position paper.

[48] From the reasons of the Tax Court Judge, it is far from clear what information the Thompsons were seeking in relation to the RSD Solutions report. In order to understand the exact questions that are unanswered, it is necessary to examine the context in which the final questions as cited by the Tax Court Judge, were posed. The first unanswered question under this category is 5a(ii):

> #5(a)(ii) Does the [Crown] disagree with the answer provided by RSD? If so what are all of the reasons why the [Crown] disagrees?

[49] The question posed by the CRA and the answer provided by RSD to which the Thompsons are referring are as follows:

> **Question:** What types of contracts, derivatives or trades are being entered into with ODL? Discuss and explain.
>
> **Answer:** As noted above, from the evidence provided to us, the contracts have the characteristics of OTC forward contracts. They are straightforward ("plain vanilla") in this respect with no complex or exotic features.

[50] The second unanswered question is 5(b)(ii):

> #5(b)(ii) Does the [Crown] agree with RSD's response that ODL was able to act as broker and counterparty in the context of the foreign currency forward contract trading being examined in the Report? If not, what are all of the reasons why the [Crown] disagrees?

[51] This question does not require any further explanation or reference to any other question and answer.

[52] The third question in this group is as follows:

> #5(c)(ii) Does the [Crown] agree with RSD's response? If not, what are all the reasons why not?

[53] This question arose in relation to the following question that was posed by the Thompsons:

> c(i) At page 8 of Appendix I, do you agree that RSD states their understanding that it is permitted by the UK Securities Commission for a broker such as ODL to act as a counterparty in the context of the foreign currency forward contract trading? If not, why not?

[54] The last question in this group is the following:

> #5(d)(ii) Does the [Crown] disagree with the answer provided by RSD? If so, what are all of the reasons why the [Crown] disagrees?

[55] The question and answer which gave rise to this follow-up question are the following:

> **Question:** The taxpayers in dealing with ODL close-pout [*sic*] an open position by entering into an opposite position have [*sic*] the same contract value and value date. The forward rate may be different because the opposite contract is entered into at a subsequent time.
>
> **Answer:** It is common practice to close a position economically by doing an opposite transaction in this way. A company may want to [*sic*] this, for example if a previously forecast currency need is no longer likely. They may also do it because their view on future exchange rates indicates it would be advantageous.
>
> For forwards with the same currencies, amounts and value dates, a profit or loss is locked in upon execution of the second contact [*sic*]. Normally the profit or loss would be settled upon the value (or settlement) dates of the contracts. The amount of settlement would be based upon market spot rates 1 or 2 days before the value date as appropriate. In the event of upfront or earlier settlement, the expectation would be that the amount would be discounted an applicable interest rate from the value date back to the settlement date to reflect the time value of money. This would be equivalent to the net mark to market valuation of both contracts at the earlier date. See Appendix V regarding marking to market for further explanation.

[56] All of the questions included under number 5 are in relation to certain answers provided in the RSD Solutions report. This report addresses transactions similar to those that the Thompsons claim were entered into with ODL. Since the RSD Solutions report was relied upon by the auditor in this case, the Crown should be compelled to provide the answers to these questions. To the extent that the questions include questions of law, as noted in *Canada v. CHR Investment Corporation*, 2021 FCA 68, the discovery rules in the *Tax Court Rules* permit questions on discovery to explore a particular party's position on the law.

IV. Conclusion

[57] As a result, I would allow the appeal in relation to questions 1, 3, 4, 6 and 7 and dismiss the appeal in relation to number question 5. I would set aside the Order provided by the Tax Court Judge and, giving the order that the Tax Court Judge should have given, I would order the Crown to answer questions 2 and 5 and I would otherwise dismiss the motion of the Thompsons to compel the Crown to answer questions 1, 3, 4, 6, 7 and 8. Since the result is mixed, I would not award costs at the Tax Court or on this appeal.

"Wyman W. Webb"

J.A.

"I agree

J.D. Denis Pelletier J.A."

"I agree

Marianne Rivoalen J.A."

Appendix

Questions Classified as Arising from Undertaking Number 12:

Question Number:	Question
1.	Did CRA headquarters or the Commissioner's office maintain a file or files regarding these [FCF] contract trading audits? If CRA headquarters or if the Commissioner's office maintained a file or files regarding the series of audits of [FCF] contract trading involving [ODL], Tim Hodgins or John Hodgins, of which the audit of the appellants here was but one, please produce the complete files.

Question Number:	Question
2.	In general, we note that the audit file provided appears as though it may not be complete. Please conform that you have provided us with the complete audit file with respect to the appellants, including any electronic portion of the file or communications and, if you have not done so, please provide us with those documents.

Questions Classified as Arising from Undertaking Number 18:

Question Number:	Question
3.	Please provide us with a copy of the documents maintained on the shared drive.

Question Number:	Question
4.	In preparing his position paper regarding the appellants, did the auditor have access to a position paper guideline prepared by David LeBlanc out of the Edmonton TSO, working papers or position papers prepared by auditors on other files involving ODL or Tim and John Hodgins, or a lengthy foreign exchange position paper prepared by the Vancouver TSO? Please provide these documents to the extent they are not part of the shared drive.

Question Number:	Question
5.	With respect to your Answers 5a(ii), 5b(ii), 5c(ii) and 5d(ii), the questions posed are relevant and the RSD report was plainly relied on by CRA and the auditor in issuing the reassessments at issue in these appeals. What is irrelevant is whether the respondent now intends to rely upon the RSD Report. Please answer the questions posed. #5(a)(ii) Does the respondent disagree with the answer provided by RSD? If so what are all of the reasons why the respondent disagrees? #5(b)(ii) Does the respondent agree with RSD' [*sic*] response that ODL was able to act as a broker and counterparts [*sic*] in the context of the [FCF] contract trading being examined in the Report? If not, what are all of the reasons why the respondent disagrees?

Question Number:	**Question**
	#5(c)(ii) Does the respondent agree with RSD's response? If not, what are all the reasons why not? #5(d)(ii) Does the respondent disagree with the answer provided by RSD? If so, what are all of the reasons why the respondent disagrees?
6.	Aside from information or documents already provided, please provide any information or documents received by CRA in respect of this audit or the related [FCF] forward trading audits, regarding whether the trading activities undertaken by ODL, Tim or John Hodgins were a sham or regarding whether the [FCF] trading contracts were legally effective.

Questions Classified as Rising from Undertaking Number 21:

Question Number:	Question
7.	Please provide any documents or information in possession of the respondent from ODL, John or Tim Hodgins regarding foreign currency trading audits undertaken by CRA, other than trading statements or account opening statements.
8.	Please provide any position papers or proposal letters in respect of audits involving foreign currency trading in ODL, John or Tim Hodgins.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE TAX COURT OF CANADA

DATED FEBRUARY 26, 2021, CITATION NO. 2021 TCC 15

DOCKET:	A-68-21
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. LARRY THOMPSON et al.
PLACE OF HEARING:	Heard by online video conference hosted by the registry
DATE OF HEARING:	March 22, 2022

REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	PELLETIER J.A.
	RIVOALEN J.A.
DATED:	jUNE 20, 2022

APPEARANCES:

Ron D.F. Wilhelm	For The Appellant
Eric Brown	
Robert A. Neilson	For The Respondents
Jeremy L. Comeau	

SOLICITORS OF RECORD:

A. François Daigle Deputy Attorney General of Canada	For The Appellant
Felesky Flynn LLP Edmonton, Alberta	For The Respondents

TAB 4

The Commissioner of Competition v Live Nation Entertainment, Inc, 2019 CACT 3 (CanLII)

Date: 2019-04-05

File number: CT-2018-005; 84

Competition Tribunal / Tribunal de la concurrence

Reference: *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2019 Comp Trib 3

File No: CT-2018-005

Registry Document No: 84

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

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

BETWEEN:

The Commissioner of Competition

(applicant)

and

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

(respondents)

Date of hearing: April 2, 2019

Before Judicial Member: D. Gascon J. (Chairperson)

Date of Order and Reasons for Order: April 5, 2019

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

[5] The Respondents brought this Refusals Motion in the context of an application made against them by the Commissioner ("**Application**") under the deceptive marketing practices provisions of the *Competition Act*, RSC 1985, c C-34 ("**Act**"). In his Application, the Commissioner is seeking orders pursuant to section 74.1 of the Act regarding conduct allegedly reviewable under paragraph 74.01(1)(a) and section 74.05 of the Act. More specifically, the Commissioner alleges that one or more of the Respondents engaged in deceptive marketing practices by promoting the sale of tickets to the public on certain internet websites and mobile applications ("**Ticketing Platforms**") at prices that are not in fact attainable, and then supplied tickets at prices above the advertised price on these platforms. The Commissioner's Notice of Application alleges that the reviewable conduct dates back to 2009, and continues until today. The relief sought by the Commissioner includes a prohibition order and administrative monetary penalties.

II. LEGAL PRINCIPLES

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

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

> **[8]** Relevance is the key element to determine whether a question is proper and should be answered. At the discovery stage, relevance is a generous and flexible standard (*Apotex Inc v Sanofi-Aventis*, 2011 FC 52 at para 19). Doubts on the issue of relevance are to be resolved in favour of disclosure, and questions will typically need to be answered unless they are clearly improper. In *Lehigh* at paragraph 34, the Federal Court of Appeal noted the broad scope of relevance on examinations for discovery:
>
> The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary.

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

[10] That being said, even when questions do meet the standard of relevance, courts have nonetheless delineated some boundaries to the type of questions that may be asked on examinations for discovery. A party can properly ask for the factual basis of the allegations made by the opposing party and for the facts *known* by such party, but it cannot ask for the facts or evidence *relied on* by the party to support an allegation (*VAA* at paras 20, 27; *Montana Band v Canada*, 1999 CanLII 9366 (FC), [2000] 1 FC 267 (FCTD) ("***Montana Band***") at para 27; *Can-Air Services Ltd v British Aviation Insurance Company Limited*, 1988 ABCA 341 at para 19). In *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, aff'd 2005 FCA 144 ("***Apotex***"), the Federal Court further established that witnesses are not to testify on pure questions of law: a fundamental rule is that an examination for discovery may seek only facts, not law. Accordingly, the following types of questions have generally been found not to be proper subject matters for discovery: (i) questions seeking expert opinion, (ii) questions seeking the witness to testify as to questions of law, (iii) questions seeking law or argument, as opposed to facts, and (iv) questions where the witness is being asked "upon what facts do you rely for paragraph x of your pleading" (*Bard Peripheral Vascular, Inc v W.L. Gore & Associates, Inc*, 2015 FC 1176 at para 19).

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

III. CATEGORY 1 QUESTIONS

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

> **[13]** I agree with the Respondents that, in the context of this Application, questions relating to the 2009-2010 investigation and to what the Commissioner had previously reviewed are generally relevant in light of the Respondents' pleading on estoppel and waiver and on the issue of remedy. It cannot be said that these questions are totally unrelated to the issues in dispute. Moreover, I observe that facts surrounding the Competition Bureau's prior investigation of the Respondents' conduct have been referred to by the Commissioner in his own materials. The Commissioner has produced, as relevant documents in the Commissioner's documentary production in this Application, some customer complaints from the 2009 period, as well as records relating to the Competition Bureau's investigation of certain Ticketing Platforms in 2009 and 2010. Indeed, the questions in dispute in this first category relate to particular factual issues emanating from specific documents produced by the Commissioner, such as Exhibit 114.

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

> **[15]** The Commissioner further argues that, since the Category 1 Questions relate to the "conduct" of the 2009-2010 investigation, they need not be answered. I disagree. In light of the estoppel defence raised by the Respondents, the Commissioner's conduct in the investigation is clearly at play in this Application, as well as the timing and dates of the Competition Bureau's actions in that respect. Contrary to the situation in *Canada (Director of Investigation and Research) v Southam Inc*, 1991 CanLII 2396 (CT), [1991] CCTD No 16, 38 CPR (3d) 68, at paragraphs 10-11, the conduct of the Commissioner is one of the issues before the Tribunal, and it is directly relevant to the present proceedings on the basis of the pleadings.

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

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

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

IV. CATEGORY 2 QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

[24] However, the Commissioner argues that, as formulated, the Category 2 Questions go one step too far and in fact ask for a "legal interpretation" to be made by the witness, as they would require Ms. Nikolova to assess whether the facts sought by the Respondents effectively qualify as "acting in concert", "acting jointly" or "acting separately", or as "making" or "permitting" to make the impugned representations. The Commissioner submits that questions asking a witness to testify on questions of law or to provide argument as to what is relevant in order to prove a given plea are improper as examinations for discovery may only seek facts, not law (*Apotex* at para 19). The Commissioner pleads that the questions asked by the Respondents would in fact force Ms. Nikolova to think of the law applicable or relied upon for the Commissioner's allegations, and to select facts in accordance with her understanding of the law.

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

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

[27] There is, of course, no question that examinations on discovery are designed to deal with matters of fact. However, the line of demarcation between seeking a disclosure of facts and asking for evidence relied upon for an allegation is often hazy. Likewise, there is always a fine line between questions asking for facts *relied on* by a party in support of an allegation (which are always improper) and

questions seeking facts *known* to a party that underlie an allegation (which are proper even when they may contain certain elements of law in them). Similarly, it is also difficult to distinguish between facts and law, and the boundary between them is often not easy to draw (*Montana Band* at paras 20, 23).

[28] As such, determining when a question becomes a request for a legal interpretation that would be clearly improper on an examination for discovery is a highly case-specific exercise. Indeed, at the hearing, counsel for the parties have not referred to authorities providing guidance on this precise point. And I am not aware of decisions from the Tribunal or from the Federal Court addressing specifically whether, on examinations for discovery, a question about facts known to a witness that uses words with a legal connotation or legal language that is ultimately for the trier of fact to decide, such as language contained in an applicable legislation, would be improper. In my view, a distinction needs to be made between "pure" questions of law, and questions of fact that may imply a certain understanding of the law or that arise against a legal contextual background. It is well established that pure questions of law, such as questions asking a witness to provide a legal definition of words or terms or to explain a party's position in law, are not permissible on examinations for discovery. However, the facts underlying questions of law can be discoverable. In the same vein, questions on discovery may mix fact and law. Questions relating to facts which may have legal consequences remain nonetheless questions of fact and may be put to a witness on discovery (*Montana Band* at para 23).

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

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

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

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

[33] Question 847-848, on its part, seeks information in connection with individual Respondents "permitting" others to make the representations. As to question 1119, it specifically asks about the individual Respondents that are "said to make the price representations" or "said to permit others to make" them (emphasis added). I acknowledge that these two questions specifically refer to terms found in the deceptive marketing practices provisions at issue in this Application: the term "make" is expressly used in paragraph 74.01(1)(a) of the Act and it includes "permitting a representation to be made" pursuant to subsection 52(1.2) of the Act.

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

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

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

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

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

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

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

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

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

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

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

DATED at Ottawa, this 5 day of April 2019.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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TAB 5

Rogers-Shaw - Reasons for Order and Order on Motions to Compel Answers to Questions Refused on Examinations for Discovery, 2022 CanLII 135601 (CT)

Date: 2022-09-15

File number: CT-2022-002

Tribunal de
Competition Tribunal la
concurrence

PUBLIC VERSION

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.* , 20 22 Comp Trib 16

File No.: CT- 2022-002

Registry Document No.: 589

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

BETWEEN:

Commissioner of Competition

(applicant)

and

Rogers Communications Inc.
Shaw Communications Inc.

(respondents)

and

Attorney General of Alberta

Videotron Ltd.

(intervenors)

Date of hearing: September 13, 2022

Before: Justice Andrew D. Little (Chairperson)

Date of oral reasons for order and order: September 15, 2022

REASONS FOR ORDER AND ORDER ON MOTIONS TO COMPEL ANSWERS TO QUESTIONS REFUSED ON EXAMINATIONS FOR DISCOVERY

(Public Version of Reasons rendered orally on September 15, 2022)

I. iNTRODUCTION

[1] This proceeding concerns the proposed acquisition by Rogers Communications Inc. ("**Rogers**") of Shaw Communications Inc. ("**Shaw**") (the "**Proposed Transaction**"). In general terms, the application by the Commissioner of Competition (the "**Commissioner**") claims that the Proposed Transaction has and will likely lessen or prevent competition substantially under section 92 of the *Competition Act*, RSC 1985, c C-34 as amended (the "**Act**"), by removing Shaw as a competitor in certain markets for the provision of certain services described by the Commissioner.

[2] By Notices of Motion dated September 7, 2022, the Commissioner filed motions to compel Rogers and Shaw to answer questions refused at examinations for discovery.

[3] By Notice of Motion dated September 7, 2022, Rogers and Shaw filed a motion to compel the Commissioner to answer questions refused at examinations for discovery.

[4] On September 12, 2022, the parties served and filed responding motion records.

[5] On September 13, 2022, the Tribunal heard the parties' motions and reserved its decisions.

[6] Follow-up discoveries were scheduled for September 15 and 16, 2022.

[7] As a result of discussions amongst counsel for all the parties, the issues originally raised in the Notices of Motion have narrowed. The remaining motions seek Orders:

(a) requiring answers to questions 40-46, 47-48, 49-53, 61-63, 64-66 and 67, and question 1155, asked at the examination for discovery of Mr. Dean Prevost on behalf of Rogers;

(b) requiring answers to questions 23-28 asked at the examination for discovery of Mr. Paul McAleese on behalf of Shaw; and

(c) requiring answers to questions 164, 165, 197, 199, 205, 206, 234, 265, 266, 294, 572 and 614-616 asked at the examination for discovery of Ms. Kristen McLean on behalf of the Commissioner.

[8] The issues on these motions require consideration of the relevance of certain questions at discovery and whether litigation privilege attaches to certain documents of the Commissioner.

[9] For the reasons that follow, the motions will be dismissed.

II. THE COMMISSIONER'S MOTIONS

A. Questions at Discovery

[10] Rules 240 and 242 of the *Federal Courts Rules*, SOR/98-106 apply to examinations for discovery in Tribunal proceedings:

"**Scope of examination** "	"**Étendue de l'interrogatoire** "
"**240** "A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that " "(a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or " "(b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action "	"**240** "La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui : " "a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge; " "b) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action "
Objections permitted **242** (1) A person may object to a question asked in an examination for discovery on the ground that (a) the answer is privileged; (b) the question is not relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; (c) the question is unreasonable or unnecessary; or (d) it would be unduly onerous to require the person to make the inquiries referred to in rule 241.	"**Objection permise** " "**242** "(1) Une personne peut soulever une objection au sujet de toute question posée lors d'un interrogatoire préalable au motif que, selon le cas : " "a) la réponse est protégée par un privilège de non-divulgation; " "b) la question ne se rapporte pas à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire ou par la partie qui l'interroge; " "c) la question est déraisonnable ou inutile; " "d) il serait trop onéreux de se renseigner auprès d'une personne visée à la règle 241. "
Objections not permitted (2) A person other than a person examined under rule 238 may not object to a question asked in an examination for discovery on the ground that (a) the answer would be evidence or hearsay; (b) the question constitutes cross-examination" "	" ""**Objection interdite** " "(2) À l'exception d'une personne interrogée aux termes de la règle 238, nul ne peut s'opposer à une question posée lors d'un interrogatoire préalable au motif que, selon le cas : " "a) la réponse constituerait un élément de preuve ou du ouï-dire; " "b) la question constitue un contre-interrogatoire."" "

[11] All parties agreed that the Federal Court of Appeal established the applicable legal test for relevance in *Canada v Lehigh Cement Limited*, 2011 FCA 120, at para 34. It was recently confirmed in *Canada v Thompson*, 2022 FCA 119, at para 30.

[12] The Tribunal has adopted this approach and other principles from *Lehigh* in several cases: *Commissioner of Competition v Secure Energy Services Inc*, 2022 Comp Trib 3, at para 6; *Commissioner of Competition v Live Nation Entertainment, Inc,* 2019 Comp Trib 3, at para 8; *Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("***VAA***"), at paras 41-46.

[13] The *Lehigh* principle is a general and flexible standard. Doubts as to relevance will be resolved in favour of disclosure: *Live Nation*, at para 8.

[14] Earlier this year in *Secure*, Justice Phelan set out the following quotations from *Live Nation*, at para 6:

[6] … It is now well-recognized that a liberal approach to the scope of questioning on discovery should prevail (*Lehigh* at para 30). What the parties and the Tribunal are both trying to achieve with examinations for discovery is a level of disclosure sufficient to allow each side to proceed fairly, efficiently, effectively and expeditiously towards a hearing, with sufficient knowledge of the case each party has to meet (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("VAA") at para 46). If a party does not disclose relevant facts or information known to it until trial, the other side will be unfairly disadvantaged.

[7] … FC Rule 240 provides that a person being examined for discovery must answer, to the best of the person's knowledge, information and belief, any question that is relevant to the unadmitted facts in the pleadings.

[8] … At the discovery stage, relevance is a generous and flexible standard (*Apotex Inc v Sanofi-Aventis*, 2011 FC 52 at para 19). Doubts on the issue of relevance are to be resolved in favour of disclosure, and questions will typically need to be answered unless they are clearly improper.

…

[10] That being said, even when questions do meet the standard of relevance, courts have nonetheless delineated some boundaries to the type of questions that may be asked on examinations for discovery. A party can properly ask for the factual basis of the allegations made by the opposing party and for the facts known by such party, but it cannot ask for the facts or evidence relied on by the party to support an allegation (*VAA* at paras 20, 27; *Montana Band v Canada*, 1999 CanLII 9366 (FC), [2000] 1 FC 267 (FCTD) ("*Montana Band*") at para 27; *Can-Air Services Ltd v British Aviation Insurance Company Limited*, 1988 ABCA 341 at para 19). In *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, aff'd 2005 FCA 144 ("*Apotex*"), the Federal Court further established that witnesses are not to testify on pure questions of law: a fundamental rule is that an examination for discovery may seek only facts, not law. Accordingly, the following types of questions have generally been found not to be proper subject matters for discovery: (i) questions seeking expert opinion, (ii) questions seeking the witness to testify as to questions of law, (iii) questions seeking law or argument, as opposed to facts, and (iv) questions where the witness is being asked "upon what facts do you rely for paragraph x of your pleading" (*Bard Peripheral Vascular, Inc v W.L. Gore & Associates, Inc*, 2015 FC 1176 at para 19).

[11] … The scope of permissible discovery will ultimately depend "upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles" (*Lehigh* at paras 24-25; see also *VAA* at paras 41 46).

[15**]** Justice Phelan also noted, at paras 7-8 and 15-16:

• the Commissioner is a unique litigant in proceedings before the tribunal, as a non-participant in the markets. All of the facts or information in the Commissioner's possession power or control arise from what he has gathered from market participants in the course of his investigation. He and his representatives do not have direct and primary knowledge of the facts supporting the application;

• expeditiousness and considerations of fairness are two fundamental elements of the Tribunal's approach and proceedings. Proceedings before the Tribunal attract a high level of procedural fairness;

• the guiding principles for discovery are relevance and fairness;

• there is no magic formula for determining whether a question should be answered. It requires a review of the question as posed, subject matter and the context; and

• the discovery stage of the litigation generally favours disclosure.

[16**]** Justice Phelan also stated at paragraph 14:

As with all motions regarding refusals, one must examine the questions at issue, the context, and their true nature. The Tribunal must determine the true nature of the question posed and ensure that questions are not a disguised manner of trying to obtain that which is not permitted. As acknowledged at para 63 of *VAA*, requiring the Commissioner to outline the facts and sources cannot be a disguised way of requiring disclosure of the "fact[s] relied upon" by the Commissioner.

[17**]** I will now address the two issues that remain from the Commissioner's motions.

B. Issue 1: Internal Analyses of Synergies and Efficiencies

[18**]** The Commissioner requested an Order that Rogers and Shaw each provide additional documents containing analysis of the expected synergies and efficiencies claimed in respect of the anticipated transaction that will integrate the two companies' businesses and related to the proposed divestiture to Videotron Ltd ("**Videotron**"). The questions posed by the Commissioner at discovery sought documents prepared by Rogers [or Shaw] and their respective contractors, other than testifying experts. The questions were therefore restricted to records created by Rogers's and Shaw's respective personnel who were working (as members of so-called "clean teams") and their contractors, but not including experts retained and working on efficiencies issues for this proceeding.

[19] The timeframe for these documents is after April 20, 2022, when an examination occurred in relation to such synergies and efficiencies.

[20] In the questions posed to Rogers, the Commissioner referred to documents containing "analysis" and "calculations", whereas the questions posed to Shaw referred to "analysis".

[21] Rogers provided an explanation for its refusal to provide additional documents, advising that it had produced many of the documents on which it will rely for purposes of its efficiencies claims and that it was producing additional documents related to efficiencies elsewhere in its answers to undertakings. Rogers's explanation for its refusal also advised that it will comply with its continuing production obligations and that a complete set of documents on which it intends to rely for its efficiencies claims will be included in its expert report when that is delivered on September 23, 2022.

[22] One of the Commissioner's questions also asked for facts underlying a statement from Rogers's pleading, related to avoided costs relating to network infrastructure and related assets in British Columbia, Alberta and/or Ontario. Rogers provided an answer that included a statement that such costs were being investigated and that any supporting documents will be the subject of continuing production obligations and/or produced with its expert report on September 23, 2022.

[23] In oral argument, the Commissioner pointed to evidence from the examination for discovery indicating that as many as XXXXXXX people have been working on the integration, implying that it was unlikely that such personnel have not created any (or very few) responsive documents. The Commissioner provided examples of spreadsheets mentioned in documents produced, which spreadsheets have not themselves been produced.

[24] Also in oral submissions, Rogers advised that it had produced nine spreadsheets and that additional documents would be produced this week. Rogers also advised that these documents consisted of all of the information that Rogers has that is responsive to the Commissioner's questions.

[25] Shaw adopted a slightly different position in response to the Commissioner's motion. Shaw advised that it was only asked at discovery for records containing its "analysis" and that it was not conducting any "analysis" of the integration. Shaw was, effectively, only providing data and information to Rogers for its use. It therefore had nothing to produce in response to the Commissioner's questions at discovery at issue on this motion.

[26] With respect to the Commissioner's motion against Rogers, I conclude that the motion must be dismissed.

[27] I accept that there is a distinction between the disclosure and production requirements at the discovery stage based on a broad relevance standard from *Lehigh* and this Tribunal's cases, and the narrower class of documents on which Rogers and its expert will rely to support a claim for efficiencies under section 96 of the Act: see for example, *VAA*, at para 20 and the cases cited there. However, from the evidence in the motion records to which the Tribunal was directed in argument, it appears that there is only a small number of documents that are both responsive to the questions as posed by the Commissioner at the examination for discovery and over which Rogers has not asserted litigation privilege.

[28] The exchange at the discovery between counsel for the Commissioner and Rogers made it clear that some Rogers documents related to claimed efficiencies that came into existence since April 2022 were subject to a claim by Rogers for litigation privilege. However, there was no list before the Tribunal of the documents created and the issue of litigation privilege attaching to those documents has not been argued.

[29] Rogers also acknowledged the existence of its continuing production obligations. In a complex and fast-tracked Tribunal proceeding such as this one, those obligations necessarily include an expectation that parties will do so in a very timely manner.

[30] Through counsel, Rogers advised the Commissioner that it was to produce additional documents this week related to the questions posed at discovery about analysis and calculations related to efficiencies and synergies. It may have already done so since the hearing of these motions on Tuesday.

[31] Rogers advised that documents would also be produced with its expert report on September 23, 2022 – in about a week.

[32] In my view, Rogers's answers to the questions at discovery and in writing were not improper. The Commissioner's motion is therefore dismissed. Having said that, in light of the Commissioner's motion and the evidence on this motion, it may be beneficial to this proceeding for Rogers to confirm or reconfirm to the Commissioner that it has complied with its acknowledged continuing production obligations on these topics. Any additional production of non-privileged and relevant records should not wait until the exchange of evidence and expert reports on September 23, 2022.

[33] The Commissioner's motion against Shaw must be dismissed. There is insufficient basis in the record for an Order to produce documents created by Shaw that analyze efficiencies or synergies because, on the evidence to which the Tribunal was directed, Shaw has not created any such documents. It appears to me from the transcript that the reference to the existence of additional documents was to documents prepared by an outside expert firm for the purposes of the mediation in early July.

C. Issue 2: Unredacted Copies of Certain Rogers Letters

[34] The Commissioner requested an Order that Rogers provide unredacted copies of two letters dated July 22, 2022 and August 22, 2022, from Rogers to the Canadian Radio-television and Telecommunications Commission. The Commissioner advised that Rogers unilaterally redacted portions of the letters. The Commissioner also noted that the question posed at discovery also requested all documents provided to governmental and regulatory bodies and that Rogers did not answer the portion of the question concerning submissions to other such bodies.

[35**]** On the latter topic, Rogers advised at the hearing that there were no such other documents sent to governmental and regulatory bodies. If that answer has not been provided formally by Rogers's discovery representative, that should be done.

[36**]** With respect to the redacted parts of the letters, Rogers's written submissions on this motion explained its reasons for the redactions (at paragraph 12, which has been designated Confidential). The explanation was not the subject of an affidavit, nor did counsel refer to any specific evidence on this motion for further information. Rogers also requested the opportunity to seek amendments to the amended Confidentiality Order in this proceeding, if any of the information currently redacted were to be disclosed. I made a suggestion on a possible path to resolve the issue during the hearing, which did not succeed.

[37**]** In the circumstances, I am sympathetic to Rogers's general concern, including as mentioned in paragraphs 12(a) and (b) of its written submissions. Paragraph 12(c) appears to concern information relevant to issues in this proceeding which may already have been provided (or could be, if it has not). The information noted in the first sentence of paragraph 12(b) could be provided in another manner (i.e., not by disclosing the non-redacted letters). It is possible that some information arising in relation to the first sentence of paragraph 12(a) could be relevant, although no argument was made on the topic on this motion. In addition, some questions related to the issues in these three paragraphs may also have already been asked and answered.

[38**]** Because there will be additional follow-up discovery in this matter tomorrow, counsel are invited to consider their positions with the guidance above. Careful questions and answers should be able to elicit relevant (if confidential Level A) information that does not intrude upon the general concern raised by Rogers.

[39**]** With that in mind, the Commissioner's motion for unredacted copies of the letters will be dismissed.

III. the respondents' Motion

[40**]** At the examination for discovery of the Commissioner's representative, Rogers asked questions about internal communications within the Competition Bureau related to the assessment of two divestiture remedies that would, according to Rogers, address the Commissioner's concerns under section 92 of the Act. Rogers moved for an Order that the Commissioner be compelled to answer 15 questions refused on the basis of irrelevance or litigation privilege. Rogers submitted that the Commissioner's refusals were improper.

[41**]** In its written submissions, Rogers characterized the questions as seeking production of:

(a) a written recommendation from Bureau staff to the Commissioner about the proposed divestiture of Freedom Mobile to Videotron, setting out the facts and analysis on which the Commissioner rejected this remedy; and

(b) The underlying facts and documents relied on in support of that recommendation, including any recommendation on earlier remedy proposals received by the Bureau from XXXXXX.

[42**]** Two of Rogers's 15 questions at discovery concerned XXXXXX, and the rest related to the proposed divestiture to Videotron. The written recommendation was a memorandum of less than 30 pages, and a number of attachments.

[43**]** Rogers essentially argued that no sustainable claim of litigation privilege could attach to the recommendation because it was made to fulfil the Commissioner's statutory obligation under subsection 102(2) of the Act to consider the proposed remedy in good faith, separate and apart from any litigation. Rogers also argued that the best evidence of the Commissioner's concerns arising from his investigation are recorded in the recommendation, distilled succinctly. Thus, according to Rogers, production of the recommendation would be of great assistance to the Tribunal and the process, as well as to parties and their experts. With the support of Shaw, Rogers contended that its disclosure is also important to ensure that the respondents are aware of the case they have to meet as a matter of procedural fairness -- particularly in light of the Federal Court of Appeal's decision in *Vancouver Airport Authority v Commissioner of Competition*, [2018] 3 FCR 633, 2018 FCA 24.

[44**]** The Commissioner disagreed. The Commissioner submitted that the questions were improper and the answers to them were irrelevant and privileged. According to the Commissioner, the respondents' motion seeks to discern the advice received by the Commissioner about their proposals to avoid or end this litigation. The Commissioner also submitted that the questions were improper because they sought to know what the Commissioner relied upon in deciding not to resolve the litigation (citing the Tribunal's reasons in *VAA*, at para 20 and *Montana Band v Canada*, 1999 CanLII 9366 (FC), [2000] 1 FC 267). On relevance, the Commissioner submitted that a proceeding under section 92 of the Act is different from a judicial review application and, in substance, the recommendations to the Commissioner do not go to the decision that must be made by the Tribunal under sections 92 and 96, but only to the decision made by the Commissioner about proceeding ahead with the litigation.

[45**]** On privilege, the Commissioner submitted that evidence in the record, including an affidavit from the principal author of the written recommendation, demonstrates that litigation privilege attached to the recommendations made to the Commissioner. According to the Commissioner, the respondents' motion seeks a roadmap to the Commissioner's case and strategy that is privileged in a written memorandum prepared with input from Competition Bureau team, including economists and lawyers from the Department of Justice.

[46**]** After considering all of the parties' submissions on this motion, I have reached the following conclusions.

[47**]** First, the questions posed by Rogers were relevant as contemplated in *Lehigh* and the Tribunal cases that follow it. They concern matters raised in the pleadings that are at issue in the proceeding, namely, whether any substantial lessening or prevention of competition in a market(s) would be addressed by the respondents' proposed divestitures.

[48**]** I am mindful that the recommendation memorandum on the proposed divestiture was an internal communication and not a document collected from a market participant. In addition, the main recommendation memorandum at issue was made in late June 2022 (the earlier one was in April 2022). They were both made at a point in time after the Commissioner had been investigating the proposed merger for more than a year, but before discoveries in this proceeding, including documentary and oral discovery of the intervenor, Videotron. In my view, neither of these points renders the subject matter irrelevant in principle under the *Lehigh* test.

[49**]** Second, I agree with the Commissioner that the recommendations and associated communications were litigation privileged.

[50**]** Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation: *Lizotte v Aviva Cie d'assurance du Canada*, [2016] 2 SCR 521, 2016 SCC 52, at para 19.

[51**]** The purpose of litigation privilege is to ensure the efficacy of the adversarial process: *Blank v Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39, at para 27; *Lizotte,* at para 22. It maintains a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate: *Lizotte*, at para 24; *Blank*, at paras 32 and 34. To achieve the purpose of ensuring the efficacy of the adversarial process, parties to litigation, whether represented by legal counsel or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure: *Blank*, at para 27.

[52**]** Litigation privilege covers only those documents whose "dominant purpose" was litigation and not those for which litigation was a "substantial" purpose: *Lizotte*, at para 23.

[53**]** Litigation privilege is also a class privilege; once the conditions for its application are met, that is, once there is a document created for the dominant purpose of litigation, and the litigation in question or related litigation is pending or may be reasonably apprehended, there is a presumption of inadmissibility, i.e., immunity from disclosure: *Lizotte*, at paras 33-34.

[54**]** Documents and communications may be subject to litigation privilege, even if a lawyer is not involved: *Lizotte*, at para 22; *Blank*, at paras 27, 32 and 34.

[55**]** There are two elements to assess in order to determine whether litigation privilege attaches: (a) whether litigation is pending or reasonably apprehended, and (b) whether the document or group of documents was created for the dominant purpose of litigation:: *Lizotte*, at para 33; *Canada v Tk'emlúps te Secwépemc First Nation*, 2020 FCA 179, at para 37. This two-part approach is not in dispute on this motion.

[56**]** The cases also contemplate that either an individual document, or a group of like documents, may be considered under this test: *Alberta v Suncor Energy*, 2017 ABCA 221 ("***Suncor***"), at paras 35 and 43; *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289, at para 87; *Canada v Husky Energy Inc*, 2017 SKQB 383, at para 47.

[57**]** This proceeding was commenced by Notice of Application filed on May 9, 2022. The Commissioner concurrently filed an application for relief under section 104 of the Act, which included lengthy affidavits and expert reports that addressed the divestiture remedy proposed at the time (to XXXXXX).

[58**]** On this motion, the Commissioner filed the affidavit of Ms. McLean. She was the Commissioner's representative at the examination for discovery. Ms. McLean is the Team Lead for the Bureau team reviewing the Proposed Transaction, and is responsible for making recommendations to the Commissioner about proposed remedies.

[59**]** Ms. McLean's affidavit advised:

• XXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXX XXXXXXXXXX XXXXXXXXXXXXXXX XXXXXXXXXXXXXX XXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX ZXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

• Work on the materials for the section 104 application began as early as January 2022.

• XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

• XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

• The evidence the Commissioner relied upon in support of the efficacy of the XXXXXX remedy was included with materials the Commissioner filed in support of the section 104 application.

• On June 17, 2022, Rogers advised the Commissioner that Rogers and Shaw had entered into a letter of agreement for the sale of Freedom Mobile to Videotron.

• In mid-August 2022, Rogers provided the Commissioner with a copy of the resulting Share Purchase Agreement.

[60] Ms. McLean's affidavit also stated that she had reviewed the chart of refusals that are the subject of Rogers's present motion. The affidavit confirmed that the "dominant purpose for all those documents and all the information sought by Rogers was to prepare for the litigation under sections 92 and 104" of the *Competition Act*. The affidavit further stated that Rogers's questions pertain to recommendations that were the joint work of the Department of Justice Canada and the Competition Bureau, who worked together on making these recommendations.

[61] Ms. McLean's affidavit further stated that in view of the differences in the divestitures as proposed by Rogers and Shaw and the XXXXXXXXXXXXX XXXX XXXXXXX XXXXXXXX XXXXXXXX XXXXXXXX XXXXXXXXX X, the Bureau's consideration of the requests made for advance ruling certificates ("**ARC**") under section 102 of the Act in connection with the XXXXXX and Videotron transactions "were always subordinate to the dominant purpose of preparing for the litigation with Rogers and Shaw". For context, Videotron had requested that the Commissioner issue an ARC under section 102 of the Act approximately three days before the recommendation memorandum in late June 2022.

[62] I turn now to the two elements of the legal test. On the first element, the present litigation was filed and pending more than six weeks before the creation of the main document at issue in this motion. In addition, I find on the evidence that litigation was reasonably apprehended by the time the XXXXXX recommendation document was created XXXXXXXXXX. I am also satisfied that the related documents requested at discovery that fed into or "speak to" the issues in the recommendations fall into the same category as satisfying the first element of the legal test for litigation privilege.

[63] The second element is whether the document, or group of documents, at issue were created for the dominant purpose of litigation. The written recommendation made to the Commissioner about the Videotron divestiture was made with Ms McLean as the lead author. Others were involved, including in drafting some recommendations. It was reviewed by Ms. Sonley, as Ms. McLean's direct supervisor. Ms. McLean delivered the recommendation to the Commissioner and met with him to discuss it.

[64] Ms. McLean testified that all documents and information requested on this motion were for the dominant purpose of litigation, and that other purposes (including to fulfill a statutory duty under section 102 of the Act) were subordinate.

[65] Rogers noted that a request for an ARC was made under section 102 of the Act by letter dated June 24, 2022, a few days before the recommendation to the Commissioner in late June 2022. With respect to dominant purpose, Rogers argued that the written recommendation was made to satisfy the Commissioner's mandatory obligation under subsection 102(2) to consider any request for an ARC under section 102 "as expeditiously as possible". (Rogers took the same view in its submissions about the XXXXXX remedy.) Rogers also pointed to evidence from Ms. McLean's examination for discovery that the Commissioner had a good faith obligation, quite apart from the litigation, to analyze any remedy proposal put forward by the merging parties. Following this argument, Rogers submitted that the recommendation would have been made regardless of the litigation, following the request for an ARC on June 24, 2022.

[66] Rogers also argued that the evidence of dominant purpose was essentially a bald allegation without sufficient detail to support it (citing *PMG Technologies v Transport Canada*, 2018 FC 344, at para 18, which quoted from two British Columbia decisions: *Gichuru v British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259, at para 32; *Keefer Laundry Ltd v Pellerin Milnor Corp et al*, 2006 BCSC 1180, at paras 96-99). Rogers submitted that the Commissioner's evidence did not meet the required standard for proof of a dominant purpose.

[67] I do not agree. In saying so, I am mindful of the passages relied on by Rogers, not only to guide the Tribunal's expectations for supporting evidence to show dominant purpose, but also the care that a party must take to avoid revealing information that may accidentally or inadvertently waive the privilege that is being claimed. See also *Husky Energy*, at para 28.

[68] The decided cases contemplate that in determining the existence of litigation privilege, the Tribunal may consider both evidence from the creator of a document (or someone with sufficient knowledge of the circumstances) and evidence of the broader context and circumstances: see *PMG Technologies*, at paras 23 and following; *Husky Energy*, at paras 48 and following; *Walsh Construction Company Canada v Toronto Transit Commission*, 2019 ONSC 5537, at paras 43 and following, and 53.

[69] In this case, there is evidence from Ms. McLean, who was the principal author, Team Lead for the Bureau's investigation team and the person who has the most knowledge about the creation of the key recommendation memorandum. The context and circumstances include the XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX from the Proposed Transaction, the filed and pending litigation, and the disclosures about the Commissioner's position in the section 104 application, as set out above and in the record. I find the evidence in the record sufficient to discharge the onus to show the dominant purpose of the documents at issue was litigation, including, in particular, the written recommendations to the Commissioner.

[70] The law recognizes that a document may be created for multiple or mixed purposes: see e.g. *Husky Energy*, at paras 26 and 47. There may well have been more than one purpose to the recommendations to the Commissioner. Another purpose for the recommendation document may have been to fulfil the Commissioner's obligation under subsection 102(2) of the Act, as appears to be implicit in the last sentence of Ms. McLean's affidavit. However, the existence of a statutory duty to create a document does not preclude litigation privilege attaching to that document: *Suncor*, at paras 38 and 42, citing the Supreme Court's decisions in *Lizotte* and *Alberta (Information and Privacy Commissioner) v University of Calgary* [2016] 2 SCR 555, 2016 SCC 53. While subsection 102(2) did not expressly require the creation of a report (as was required in *Suncor*), the same principle should also apply to a memorandum or recommendation to the Commissioner prepared to respect the statutory obligation to consider a request for an ARC under subsection 102(2). The evidence may show that the dominant purpose of the memorandum or written recommendation was litigation. In this case, it does.

[71] I have considered Rogers's submissions that Ms. McLean's evidence at discovery and in her affidavit contained inconsistencies and should not be relied upon. Looking at her evidence, including the evidence mentioned by the Commissioner during his submissions, I find insufficient reason to have concerns about the contents of her testimony related to dominant purpose. I note that Rogers did not cross-examine Ms. McLean on her affidavit evidence or ask for a short adjournment to do so.

[72] For these reasons, I conclude that litigation privilege attached to the recommendation documents and the information requested by Rogers in its questions to the Commissioner's representative at discovery. It is not necessary to address the Commissioner's other submissions.

[73] For clarity, I note that this conclusion does not change the privileged or non-privileged status of any document attached to the recommendation memorandum. Presumably, any relevant, non-privileged document was listed in the Commissioner's affidavit of documents and has been produced. If not, appropriate steps should be taken to do so in accordance with all parties' continuing production obligations, already mentioned.

[74] The third and final conclusion on the respondents' motion is that I am not prepared to make an Order, at this time and on this motion, that the Commissioner provide a list of reasons why Rogers's proposed divestiture remedy is inadequate, or for a list of the documents relied upon to support that conclusion. I am conscious of the respondents' submissions about procedural fairness and knowing the case they have to meet. However, considering the focus of this motion on the narrower issue of production of specific communications existing more than two months ago and prior to discoveries, including the discovery of Videotron; the pleadings; the communications between the parties before and after this proceeding was commenced; and the volume of materials exchanged between them during the litigation, I find that such an alternative Order was not canvassed on this motion sufficiently for me to render a just decision. In reaching this conclusion, I make no comment at all on the potential merits, one way or the other. The present Order is simply made without prejudice to any motion or other process on that issue.

IV. CONCLUSION

[75] The Commissioner's motions are dismissed. The respondents' motion is dismissed. Costs will be in the cause.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[76] The Commissioner's motions are dismissed.

[77] The respondents' motion is dismissed.

[78] Costs of all three motions are in the cause.

DATED at Ottawa, this 15th day of September, 2022.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little

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TAB 6

Secure Energy Services Inc. - Reasons for Order and Order regarding the Respondent's Motion to compel answers to refusal on discovery, 2022 CanLII 9498 (CT)

Date: 2022-02-15

File number: CT-2021-002

Competition Tribunal / Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Secure Energy Services Inc.*, 2022 Comp Trib 3

File No.: CT-2021-002

Registry Document No.: 100

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

BETWEEN:

The Commissioner of Competition

(applicant)

and

Secure Energy Services Inc.

(respondent)

Date of hearing by video-conference: January 28, 2022

Before Judicial Member: Phelan, J.

Date of order: February 15, 2022

REASONS FOR ORDER AND ORDER REGARDING THE RESPONDENT'S MOTION TO COMPEL THE COMMISSIONER TO PROVIDE PROPER AND COMPLETE ANSWERS TO REFUSALS ON DISCOVERY

I. NATURE OF MATTER

[1] This is Secure Energy Services Inc.'s [Secure/Respondent] motion [Secure's Motion] following the discovery of the Commissioner's representative. It was heard along with the Commissioner's motion to compel Secure to answer certain questions. The Tribunal has ruled on the Commissioner's motion. Ultimately Secure's Motion comes down to whether some or all of the questions identified in Schedule A to Secure's Motion should be answered. This Order will address the specific questions to be answered as well as the applicable principles regarding the types of questions. Many of the disputed questions related to information arising from the Commissioner's investigation of the Tervita/Newalta merger previously described in the Tribunal's decision related to the Commissioner's discovery motion.

[2] The Commissioner has taken the position that it is only required to answer questions about facts learned related to the Tervita-Newalta merger whereas Secure takes the position that the Commissioner has a broader obligation to answer questions based on the Commissioner's ""information, knowledge and belief"" – the usual discovery standard.

[3] Secure recognizes, properly I add, that certain types of questions are improper to ask of the Commissioner including those seeking expert opinion and analysis – sometimes a difficult distinction. Secure does not ask for new analyses to be performed but says that the Commissioner's refusals relate to the Commissioner's existing knowledge, information and belief about a completed transaction involving one of the merging parties in (arguably) the same product and geographic market.

[4] The Tervita/Newalta merger's relevance or potential relevance to the Secure/Tervita Merger [Merger] is obvious from the facts in issue and from the pleadings in the litigation. The Commissioner does not seriously dispute the relevance of the Tervita/Newalta merger to the issues in this case. It just seeks to shield itself from disclosing some of what it learned from its review of that merger.

II. considerations

[5] Generally Secure's position better reflects the discovery obligations of a party in a Tribunal matter – including the Commissioner's. The Tribunal has taken a broad approach to the discovery obligation and has provided guidance, which I adopt, in *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2019 Comp Trib 3 [*Live Nation*], and *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 [*VAA*].

[6] The following quotes from *Live Nation* reflect the Tribunal's approach to the discovery obligation:

> [6] … It is now well-recognized that a liberal approach to the scope of questioning on discovery should prevail (*Lehigh* at para 30). What the parties and the Tribunal are both trying to achieve with examinations for discovery is a level of disclosure sufficient to allow each side to proceed fairly, efficiently, effectively and expeditiously towards a hearing, with sufficient knowledge of the case each party has to meet (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("VAA") at para 46). If a party does not disclose relevant facts or information known to it until trial, the other side will be unfairly disadvantaged.
>
> [7] … FC Rule 240 provides that a person being examined for discovery must answer, to the best of the person's knowledge, information and belief, any question that is relevant to the unadmitted facts in the pleadings.
>
> [8] … At the discovery stage, relevance is a generous and flexible standard (*Apotex Inc v Sanofi-Aventis*, 2011 FC 52 at para 19). Doubts on the issue of relevance are to be resolved in favour of disclosure, and questions will typically need to be answered unless they are clearly improper.
>
> …
>
> [10] That being said, even when questions do meet the standard of relevance, courts have nonetheless delineated some boundaries to the type of questions that may be asked on examinations for discovery. A party can properly ask for the factual basis of the allegations made by the opposing party and for the facts known by such party, but it cannot ask for the facts or evidence relied on by the party to support an allegation (*VAA* at paras 20, 27; *Montana Band v Canada*, 1999 CanLII 9366 (FC), [2000] 1 FC 267 (FCTD) ("*Montana Band*") at para 27; *Can-Air Services Ltd v British Aviation Insurance Company Limited*, 1988 ABCA 341 at para 19). In *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, aff'd 2005 FCA 144 ("*Apotex*"), the Federal Court further established that witnesses are not to testify on pure questions of law: a fundamental rule is that an examination for discovery may seek only facts, not law. Accordingly, the following types of questions have generally been found not to be proper subject matters for discovery: (i) questions seeking expert opinion, (ii) questions seeking the witness to testify as to questions of law, (iii) questions seeking law or argument, as opposed to facts, and (iv) questions where the witness is being asked "upon what facts do you rely for paragraph x of your pleading" (*Bard Peripheral Vascular, Inc v W.L. Gore & Associates, Inc*, 2015 FC 1176 at para 19).
>
> [11] … The scope of permissible discovery will ultimately depend "upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles" (*Lehigh* at paras 24-25; see also *VAA* at paras 41 46).

[7] In outlining the broad scope of discovery applicable to parties, it is important to recognize the somewhat unique status of the Commissioner. This was touched upon at *VAA*, paras 43-44:

> [43] **Other factors colour the examination for discovery process in Tribunal matters. First, the Commissioner is a unique litigant in proceedings before the Tribunal. The Commissioner is a non-market participant and his representatives have no independent knowledge of facts regarding the market and behaviour at issue. Rather, all of the facts or information in the Commissioner's possession, power or control arise from what he has gathered from market participants in the course of his investigation of the matter at stake. The Commissioner and his representatives do not have the direct and primary knowledge of the facts supporting the Application. This means that it may typically be more difficult and challenging for a representative of the Commissioner to exhaustively describe "all facts known" to the Commissioner.**
>
> [44] **Second, expeditiousness and considerations of fairness are two fundamental elements of the Tribunal's approach and proceedings.** Subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) directs the Tribunal to conduct its proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit". Ensuring both expeditious litigation and adequate protection of procedural fairness is thus a statutory exigency central to the Tribunal's functions. The Tribunal endeavours to make its processes quick and efficient and, at the same time, never takes lightly concerns raised with respect to the procedural fairness of its proceedings. Furthermore, as I have indicated in the *VAA Privilege Decision*, since proceedings before the Tribunal are highly "judicialized", they attract a high level of procedural fairness (*VAA Privilege Decision* at para 159). It is well-established that the nature and extent of the duty of procedural fairness will vary with the specific context and the different factual situations dealt with by the Tribunal, as well as the nature of the disputes it must resolve (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 25-26; *VAA Privilege Decision* at paras 165-170).
>
> [Tribunal's emphasis]

[8] The guiding principles for this discovery obligation are relevance and fairness as reflected in para 46 of *VAA*.

[9] While the Tribunal has recognized the limits on the source of the Commissioner's knowledge, information and belief, the Commissioner has the obligation to meet the discovery disclosure standard subject to usual issues of relevance, privilege and proportionality to name a few.

[10] In respect of relevance, discovery cannot be used as a tool to review the Commissioner's conduct of another merger investigation. The issue before the Tribunal is not the ""reasonableness"" of the Commissioner's decision to challenge this merger – it is not judicial review nor is it a review of the Commissioner's decision not to challenge the other related merger or any other merger. It is not about how the Commissioner conducted its investigations or the techniques used in those investigations. Whether they were proper and well conducted or botched is of no relevance to the Tribunal's consideration of the alleged substantial lessening of competition of this Merger.

[11] That being said, recognition that the Commissioner is not a typical litigant does not support the proposition that the Commissioner can be insulated from the basic tenets of discovery or of the examination for discovery process (See *Canada (Director of Investigation and Research) v NutraSweet*, [1989] CCTD No 54 at para 35 [*NutraSweet*]).

[12] An important aspect of oral discovery is that of obtaining admissions from the opposing party. This process can involve probing inquiry of matters and issues (*VAA*, para 41).

[13] As explained in *NutraSweet* and in *The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp Trib 17, Secure is entitled to be provided with the relevant factual information underlying the Commissioner's application and the allegations therein, to know the case it has to meet, to obtain sufficient information respecting specific facts in issue.

[14] As with all motions regarding refusals, one must examine the questions at issue, the context, and their true nature. The Tribunal must determine the true nature of the question posed and ensure that questions are not a disguised manner of trying to obtain that which is not permitted. As acknowledged at para 63 of *VAA*, requiring the Commissioner to outline the facts and sources cannot be a disguised way to requiring disclosure of the ""fact relied upon"" by the Commissioner.

[15] There is no magic formula for determining whether a question should be answered. It requires a review of the question as posed, the subject matter and the context.

[16] In keeping with the underlying principles of discovery including that ultimate relevance and weight will be determined by the hearing tribunal, this stage of the litigation favours disclosure.

[17] It is not a realistic premise that if there is true surprise by matters which should have been disclosed, an adjournment can be granted to allow the surprised party time to consider their position. While such remedy does exist, in these scheduled and time managed proceedings, the process of stopping the hearing and restarting is inefficient, disruptive and difficult for the parties and the Tribunal itself. Adjournment is a last resort, not a ""going in"" proposition.

III. questions in issue

A. Customer based approach

[18] Q 156 asks whether the Commissioner used ""the customer based"" approach and more directly phrased, Secure is seeking an admission as to the Commissioner's knowledge which is a proper line of questions.

[19] Q 157, on the other hand, seeks to question the Commissioner's decisions during the inquiry process which is not pertinent and need not be answered.

B. Product/Geographic Markets

[20] Q 332 seeks an admission that the Tervita/Newalta merger involves the same products and market as the Secure/Tervita Merger. The question could have been approached in stages of identifying the products of each and then comparing the answers. The question posed is a more efficient way to secure an admission on a relevant issue.

[21] Q 332 includes a follow-up question seeking any differences. Both aspects should be answered within the context of the Commissioner's knowledge, information and belief.

[22] Q 332 asks questions directed at how the Commissioner dealt with product markets internally. As such, it seeks information about how the Commissioner conducted the Tervita/Newalta merger review. The Commissioner's manner of conduct is not the issue in this litigation and the question need not be answered.

[23] Q 333: for the same reasons as Q 332, it need not be answered.

[24] Q 334: as this relates to geographic markets in the same way Q 332 related to product markets, it must be answered.

[25] Q 335 is directed at the internal workings of the Commissioner's office and is irrelevant.

C. Tervita/Newalta Merger

[26] Q 339 asks about the Commissioner's post Tervita/Newalta closing conduct and is irrelevant.

[27] Q 350 to 354 asks about how the Commissioner conducted his analysis of aspects of the Tervita/Newalta merger. It is not relevant. The current litigation is not a process of comparing investigative activities as between merger reviews.

D. Dead Weight Loss

[28**]** Q 355-358: the series of questions focuses on dead weight loss analysis. Dead weight loss is a key defence in this litigation. Apparently the Commissioner has knowledge, information or belief of aspects of dead weight loss in what is arguably the same product and geographic markets. To the extent that the questions do not require the production of expert opinion or engage privileged communication, the information is producible.

E. Other

[29**]** Q 359 – 361 raises similar questions in respect to demand elasticity and for the same reasons and subject to the same caveats as above, they are to be answered.

[30**]** Q 362 inquires into how the Commissioner conducted the Tervita/Newalta merger review and is irrelevant.

[31**]** Q 363 inquires into efficiencies considered in the Tervita/Newalta merger and to the extent that the Commissioner has knowledge, information and belief on this subject and Secure is seeking an admission, the Commissioner is to answer. The fact that there may be expert opinion on a topic does not, in and of itself, form a valid grounds of refusal.

ORDER

FOR THE REASONS GIVEN, the Tribunal orders the following questions to be answered:

Q 156, 332, 334, 355 to 358, 359 to 361 and 363

DATED at Ottawa , this 15th day of February, 2022

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

(s) Michael Phelan

COUNSEL OF RECORD:

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TAB 7

The Commissioner of Competition v Vancouver Airport Authority, 2017 CACT 16 (CanLII)

Date: 2017-10-26

File number: CT-2016-015; 135

Citation:
The Commissioner of Competition v Vancouver Airport Authority, 2017 CACT 16 (CanLII), <https://canlii.ca/t/hmros>, retrieved on 2025-10-06

Most recent
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Tribunal de
Competition Tribunal la
concurrence

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16

File No.: CT-2016-015

Registry Document No.: 135

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

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

BETWEEN:

The Commissioner of Competition

(applicant)

and

Vancouver Airport Authority

(respondent)

Date of hearing: October 13, 2017

Before Judicial Member: D. Gascon J. (Chairperson)

Date of Order and Reasons for Order: October 26, 2017

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

I. OVERVIEW

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

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

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

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

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

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

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

II. background

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

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

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

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

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

[10] As part of the proceedings, the Commissioner produced to VAA summaries of the facts obtained by him from third-party sources during his investigation leading up to the Application and contained in the records for which the Commissioner has claimed public interest privilege ("**Summaries**"). The first version of the Summaries was produced on April 13, 2017. As it was not satisfied with the level of detail provided in the Summaries, VAA brought a motion to challenge the adequacy and accuracy of the Summaries. Prior to the hearing of that motion, on June 6, 2017, the Commissioner delivered revised and reordered Summaries to VAA. The Summaries are divided into two documents on the basis of the level of confidentiality asserted and total some 200 pages.

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

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

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

III. ANALYSIS

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

A. Category A Requests

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

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

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

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

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

Further, and as described in a 30 August 2017 letter from counsel to the Commissioner to counsel to VAA, the Commissioner refuses to issue code the documents and information that the Commissioner has already produced to VAA. This question is improper and, in any event, disproportionally burdensome.

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

[20**]** It is not disputed that VAA's Category A Requests relate to all facts *known by* the Commissioner, as opposed to facts *relied on by* the Commissioner. The distinction is important as it is well-recognized by the jurisprudence that, in an examination for discovery, a party can properly ask for the factual basis of the allegations made by the opposing party, but not for the facts or evidence relied on to support an allegation (*Montana Band v Canada*, [2000] 1 FCR 267 (FCTD) ("***Montana Band***") at para 27; *Can-Air Services Ltd v British Aviation Insurance Company Limited*, 1988 ABCA 341 at para 19). I am also satisfied that the Category A Requests pose questions relating to topics and issues that are *relevant* to the litigation between the Commissioner and VAA in the context of the Application. Again, relevance is a primary factor in determining whether a question should be answered in an examination for discovery (*Apotex Inc v Wellcome Foundation Limited*, 2007 FC 236 at paras 16-17; *Federal Courts Rules*, SOR/98-106 ("**FCR**"), subsection 242(1)).

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

a. The questions effectively asked by VAA

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

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

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

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

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

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

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

[29] I acknowledge that there could be situations where the volume and complexity of the documentation produced reach such a level that the specific identification of every document may become necessary (*NutraSweet* at para 29). Some courts have indeed held that, where documentary production is voluminous, a party may be required to identify which documents contained in its productions are related to or support particular allegations (*Rule-Bilt Ltd v Shenkman Corporation Ltd et al* (1977), 1977 CanLII 1167 (ON SC), 18 OR (2d) 276 (ONSC) ("***Rule-Bilt***") at paras 27-28; *International Minerals & Chemical Corp (Canada) Ltd v Commonwealth Insurance Co*, 1991 CanLII 7792 (SKSB) ("***International Minerals***") at paras 6-10). However, I am not persuaded that, in this case, VAA has established or demonstrated the existence of such a voluminous or complex document production so as to require the Commissioner to identify every specific reference to documents or portions of summaries. I note that, when VAA's own productions and the catering pricing records are removed, the Commissioner's Documentary Productions amount to 1,158 records and that the Summaries add up to some 200 pages. In my opinion, and in the absence of any evidence demonstrating the contrary, this cannot be qualified as onerously voluminous or inherently complex, having particular regard to VAA's access to an electronic index and electronic data search function for these materials.

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

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

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

b. The issue of proportionality

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

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

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

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

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

c. The "reformulated" questions asked by VAA

[38**]** I now consider VAA's "reformulated" Category A Requests, namely the questions asking for "all the facts that the Commissioner knows" with respect to a particular issue or allegation without necessarily referencing specific bullets in the Summaries or specific documents in the Documentary Productions. Of course, I understand that, as restated, these Requests were not actually put to Mr. Rushton during his examination for discovery and that neither Mr. Rushton nor the Commissioner has yet had an opportunity to consider them and to respond to them. In this regard, I accept that the responses already given by the Commissioner to VAA's initial Category A Requests, including his "stock answer", cannot simply be assumed to reflect what Mr. Rushton and the Commissioner would effectively respond to the "reformulated" version of these Requests. In fact, I do not exclude the possibility that the overly broad nature of the Category A Requests formulated by VAA and of the "stock undertaking" used at Mr. Rushton's examination for discovery may have contributed to polarize the Commissioner's responses and to prompt him to reply with the "stock answer" he resorted to. In that context, Mr. Rushton and the Commissioner certainly deserve to be afforded the opportunity to effectively respond to the "reformulated" Category A Requests before the Tribunal can determine whether or not such questions have been properly and sufficiently answered.

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

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

i. Examinations for discovery

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

[42**]** It is also generally recognized that courts have taken a liberal approach to questions seeking "all facts known" by a party and that, in examinations for discovery, the relevant facts should be provided with sufficient particularity so that the information is not being buried in a mass of documentation or information. A sufficient level of specificity contributes to render the trial process fairer and more efficient. As such, a party will typically be entitled to know not only which facts are referred to in the pleadings but also where such description of facts is to be found (*Dek-Block Ontario Ltd v Béton Bolduc (1982) Inc* (1998), 1998 CanLII 7918 (FC), 81 CPR (3d) 232

(FCTD) at paras 26-27). Providing adequate references to relevant facts and their description in the documentary productions may require work, time and resources from the party on whom the burden falls but, in large and complicated cases, the fact that "the marshalling of facts and documents may require a great deal of work is something with which the parties simply have to live" (*Montana Band* at para 33). It remains, however, that answers to questions on examination for discovery will always depend on the facts of the case and involve a considerable exercise of discretion by the judge.

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

[44] Second, expeditiousness and considerations of fairness are two fundamental elements of the Tribunal's approach and proceedings. Subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2 Supp) directs the Tribunal to conduct its proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit". Ensuring both expeditious litigation and adequate protection of procedural fairness is thus a statutory exigency central to the Tribunal's functions. The Tribunal endeavours to make its processes quick and efficient and, at the same time, never takes lightly concerns raised with respect to the procedural fairness of its proceedings. Furthermore, as I have indicated in the VAA Privilege Decision, since proceedings before the Tribunal are highly "judicialized", they attract a high level of procedural fairness (*VAA Privilege Decision* at para 159). It is well-established that the nature and extent of the duty of procedural fairness will vary with the specific context and the different factual situations dealt with by the Tribunal, as well as the nature of the disputes it must resolve (*Baker v Canada (Minister of Citizenship and Immigration*), 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 25-26; *VAA Privilege Decision* at paras 165-170).

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

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

ii. The "stock answer" of the Commissioner

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

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

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

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

[50] While I accept that requesting the Commissioner to "issue code" his documentary productions and summaries of third-party information and to identify every relevant document or piece of information in his materials is generally improper in the context of examinations for discovery in Tribunal proceedings, I find that simply responding that all relevant facts are contained somewhere in his documentary productions and summaries, without detail or direction, is equally an improper answer from the Commissioner. Neither of these two extremes is an acceptable option (*International Minerals* at para 7). I use the term "generally" as I am mindful that the disclosure requirements in an examination for discovery will vary with the circumstances of each case and that the decisions of the Tribunal on motions to compel answers always involve an exercise of discretion by the presiding judicial member seized of the refusals.

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

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

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

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

[54] First, I accept that, like any other litigant, VAA has the responsibility to build and prepare its own case. It is not for the Commissioner to do the work for VAA. It is VAA's task to review and organize the materials produced by the other side, and the Commissioner does not have to give VAA a precise roadmap to find documents in the AODs or relevant extracts in the Summaries. To a certain extent, it is incumbent upon the recipient of a documentary disclosure to comb through it and sort it out. The Commissioner has acknowledged that it has already produced all documents in its power, possession or control that could answer VAA's Requests, and both VAA and the Commissioner are in a position to perform the work of identifying the facts and sources underlying the various allegations made by the Commissioner. To some extent, the Commissioner is in no better position than VAA to do the work.

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

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

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

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

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

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

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

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

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

iv. Specific assessment of the "reformulated" questions

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

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

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

Request 24 (recent in-flight catering business changes)[2][2];

Request 30 (West-Jet's switching to in-flight catering);

Request 47 (double-catering);

Request 49 (factors considered by airlines when deciding whether to operate at an airport);

Request 50 (VAA's ability to dictate terms upon which it supplies access to the airside);

Request 57 (whether VAA participates in the market for galley handling other than sharing in revenue);

Request 58 (VAA's competitive interest in the market for galley handling);

Request 61 (exchange between a supplier and VAA about the supplier's renting requirements);

Request 62 (VAA having a competitive interest in the market for supply of galley handling);

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

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

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

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

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

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

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

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

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

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

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

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

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

Request 96 (access issues raised by VAA);

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

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

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

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

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

Request 21 (market definition that does not include catering);

Request 25 (geographic market definition being characterized solely as VIA);

Request 48 (whether VIA competes with other airports);

Request 53 (land rents charged to in-flight catering firms by VAA compared to other North American airports);

Request 56 (VAA's latitude in determining prices and non-price dimensions for the supply of galley handling at VIA);

Request 66 (whether concession fees charged by VAA are constrained by competition with other airports);

Request 71 (whether the business of certain catering suppliers at VIA are profitable);

Request 81 (market power of VAA in relation to galley handling affected by tying of airside access to leasing land at airport);

Request 100 (impact at VIA of reduction from two caterers to one);

Request 104 (scale and scope economies in catering and galley handling and how they would cross over from catering to galley handling);

Request 105 (competition between certain suppliers for galley handling and catering at VIA); and

Request 106 (how prices for catering/galley handling at VIA compare to prices at airports where new entry is not limited).

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

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

B. Category B Requests

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

[73**]** I disagree.

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

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

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

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

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

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

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

[81**]** The second element I evoked in the VAA Privilege Decision was another mechanism available to VAA to challenge the public interest privilege of the Commissioner, namely by demonstrating the presence of "compelling" circumstances allowing one to circumscribe the reach of the Commissioner's public interest privilege (*VAA Privilege Decision* at paras 88-91). The public interest privilege of the Commissioner is not absolute and can be overridden by "compelling circumstances" or by a "compelling competing interest". But this requires clear and convincing evidence proving the existence of circumstances where the Commissioner's public interest privilege could be pierced, and it is a high threshold. As I had mentioned in the VAA Privilege Decision, Madam Justice Dawson

notably expressed the test as follows: "public interest privilege will prevail unless over-ridden by a more compelling competing interest, and fairly compelling circumstances are required to outweigh the public interest element" (*Commissioner of Competition v Sears Canada Inc*, 2003 CACT 19 (CanLII), 2003 Comp Trib 19 at para 40).

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

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

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

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

[86**]** As to Request 117, I also find that it needs not be answered by the Commissioner for another reason: it is premature at this stage of the proceedings. The Commissioner does not have to identify his witnesses prior to serving his documents relied upon and his witness statements (*Southam* at para 13). When the Commissioner does so on November 15, 2017 (as mandated by the scheduling order issued by the Tribunal), the third safeguard mechanism will require the Commissioner to waive his public interest privilege on relevant documents and communications from witnesses providing will-say statements, if he wants to rely on that information. The Commissioner does not have to identify his witnesses prior to that time and, if VAA believes that the Commissioner does not comply with his obligations when he serves his materials on November 15, 2017, it will be able to raise the issue with the Tribunal at that time.

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

C. Category C Requests

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

IV. Conclusion

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

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

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

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

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

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

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

DATED at Ottawa, this 26 day of October 2017.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL:

For the applicant:

The Commissioner of Competition

Antonio Di Domenico
Jonathan Hood
Katherine Rydel
Ryan Caron

For the respondent:

Vancouver Airport Authority

Calvin S. Goldman, QC
Michael Koch
Julie Rosenthal
Ryan Cookson
Rebecca Olscher

TAB 8

Commissioner of Competition v. Sears Canada Inc., 2003 CACT 19 (CanLII)

Date: 2003-10-06
File number: CT2002004
Other citations: 2003 Comp Trib 19 — 28 CPR (4th) 385

Reference: *Commissioner of Competition v. Sears Canada Inc.*, 2003 Comp. Trib. 19

File no.: CT2002004

Registry document no.: 0085

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

AND IN THE MATTER OF an inquiry pursuant to subparagraph 10(1)(*b*)(ii) of the *Competition Act* relating to certain marketing practices of Sears Canada Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.01 of the *Competition Act*.

B E T W E E N :

The Commissioner of Competition

(applicant)

and

Sears Canada Inc.

(respondent)

Date of hearing: 20030926 and 20031003

Member: Dawson J. (presiding)

Date of Order: 20031006

Date of Reasons: 20031017

Order signed by: Dawson J.

REASONS FOR ORDER REGARDING RESPONDENT'S MOTION FOR LEAVE TO AMEND RESPONSE AND DIRECTING THE COMMISSIONER TO PRODUCE DOCUMENTS

[1] The respondent Sears Canada Inc. ("Sears") filed a notice of motion, dated September 8, 2003, seeking an order granting leave to amend the responding statement of grounds and material facts filed on its behalf, as well as an order directing the Commissioner of Competition ("Commissioner") to produce the following documents which Sears deems necessary to respond to the Commissioner's application: Exhibit C to the affidavit of Mr. Jim King, Director, National Consumer Sales, Bridgestone/Firestone Canada Inc. ("Bridgestone"), sworn April 24, 2001, and Schedule B-4 to the affidavit of production of records and responses by Michelin North America (Canada) Inc. ("Michelin") dated November 30, 2000, and also any records completing Schedule B-4 which may have been attached to the letter dated April 20, 2001, from Michelin. The motion was heard on September 26 and October 3, 2003. These are my reasons for issuing an order on October 6, 2003 dismissing the request to amend Sears' responding statement of grounds and material fact and allowing, on a condition of confidentiality, the request for production of the two documents.

[2] This motion arises in the context of an application brought by the Commissioner under the ordinary selling price provisions of subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C-34 ("Act") against Sears. The Commissioner alleges that Sears employed deceptive marketing practices which constituted reviewable conduct in connection with the promotion and sales of five lines of tires during three sales events in 1999.

[3] With respect to Sears' motion to amend its response, Sears argues that it has condensed the response from its original 114 pages to a document approximately 45 pages in length in order to promote an expeditious and efficient hearing of this matter. Sears further argues that the Commissioner will not be prejudiced by the proposed amendments, which Sears describes to be largely stylistic in nature and not substantive. Sears submits on the motion to compel production of documents that the Commissioner has disclosed the existence, but refused to produce the requested documents; that Sears is unable to obtain these documents through other sources; that the production of the documents is required in the interests of natural justice and fairness in order for Sears to respond to the allegations levied against it in these proceedings; that the production of documents will not delay or increase the expense of the proceedings; and that no prejudice arises from the production of the necessary documents that cannot be addressed through sealing orders or such other orders as the Tribunal may find appropriate in the circumstances.

[4] The Commissioner argues that the motion should be denied, because granting Sears leave to amend its responding statement of grounds and material facts would result in prejudice to the Commissioner that could not be compensated by costs; would result in the withdrawal of certain admissions; would result in a delay in the proceedings; and would violate the common law principle of procedural fairness. The Commissioner further argues that, contrary to Sears' arguments, the amendments would not expedite the hearing of this matter and Sears would not suffer any prejudice if the amendments were not allowed. The Commissioner opposes disclosure of the two exhibits. He argues that he does not intend to rely upon the documents and that Sears has not met the standard for discovery of the documents. Further, the Commissioner submits that the documents are protected by public interest privilege.

(i) The motion as it relates to leave to amend Sears' response

[5] No affidavit evidence was filed by Sears in support of its request for leave to file a fresh as amended response, although an affidavit in reply was filed, sworn by a law clerk employed by counsel for Sears. The reply affidavit dealt with the advice given by counsel for Sears to counsel for the Commissioner as to when the draft amended response would be available and exchanges between counsel in July and August of 2003. In its written submissions in support of the motion Sears simply submitted that "the draft Fresh As Amended Response proposed by Sears will assist in expediting the fair hearing of the matter, and will not prejudice the Commissioner".

[6] In oral argument counsel for Sears characterized the nature of the amendments as follows:

In terms of the amendment which I will perhaps like to deal with first, let me just say by way of overview that basically what happened was that as we got into the preparation for the hearing in the spring and particularly the summer of this year, we, and by we I mean primarily I, I think, came to the conclusion that it might be useful and beneficial and indeed necessary to amend our response such that the document which was ultimately before the court was not only shorter because our initial response was 120-odd pages, but clearer with respect to the framing of the issues.

I say those things carefully because I was certainly conscious of not wanting to raise at the last minute new substantive arguments. Having said that, however, my submission to Your Honour is that it would be perfectly within my right to do that. It would be perfectly within the right of any counsel to do that, no matter how late the hour.

[...]

I didn't want to set off a hornet's nest and it may or may not be relevant to your assessment of our motion to your ruling, but I can say to you that we were not trying to fundamentally change the nature of the arguments raised by Sears, but we were trying to make them better and clearer.

[7] As to the impact upon Sears if the amendment was not granted, counsel argued:

If leave were to not be granted, the prejudice to Sears would really be quite significant and I think I can perhaps say irreparable insofar as Sears would have been deprived of an opportunity to put its best foot forward and put it forward in the best manner possible, as it deems it possible.

Your Honour, I stand by what I have said to Mr. Syme throughout, that we were not trying to substantively change the legal framework, but we definitely were trying to present Sears ['] arguments in a better manner. Where that is particularly so, as I say, is in respect of the arguments raised on interpretation of section 74.01. That is the prejudice that will result to Sears if leave were not granted.

THE CHAIRPERSON: Why is it not possible for Sears to make its argument as persuasively as undoubtedly you will on the basis of the pleadings? I mean the pleadings are not your legal argument. The pleadings define relevance, issues of relevance.

Why do they have to be changed for you to present a cogent opening statement and a cogent closing statement and cogent examination and cross-examination of witnesses?

MR. McNAMARA: Well, there would always be the possibility that my friend might say "That wasn't pleaded. That interpretation of section 74.01 is not in the response and this is something new. We are taken by surprise. It's too late to raise that argument."

THE CHAIRPERSON: But you are telling me that you are not changing any substantive legal position.

MR. McNAMARA: That's correct, Your Honour. I realize it's a fine line to tread, but the reality is that while we are not changing it in a fundamental way, we are making it -- we are presenting it in a much better way.

I think because this is an area that is nouveau -- it's not new in terms of time, but this is, as I understand, the first time that section 74.01 will have been actually litigated as opposed to dealt with on a plea basis or a settlement basis.

I think it important and I thought it important to present those arguments as best I possibly can and in my judgment, the initial response didn't achieve that objective all the way. It was a good effort and I don't mean to be critical of work that I and others did at the time, but it is not as good as the proposed amended version.

I very much want to be able to proceed at the hearing on the basis of the amended version.

[8] There is no specific provision in the rules of the Competition Tribunal that allows for the amendment of pleadings. Rule 72(1) of the *Competition Tribunal Rules,* SOR/2002-62 ("Rules") provides that where a question arises as to the practice or procedure to be followed in cases not provided for by the Rules, the practice and procedure set out in the Federal Court Rules should be followed with such modifications as the circumstances require. I therefore turn to the Rules of the Federal Court.

[9] Rule 75(1) of the *Federal Court Rules, 1998,* SOR/98-106 provides that before a hearing commences the Federal Court may, on motion, at any time allow a party to amend a document on such terms as will protect the rights of all parties.

[10**]** In *Canderel Ltd. v. Canada*, 1993 CanLII 2990 (FCA), [1994] 1 F.C. 3, the Federal Court of Appeal considered the principles to be applied when an amendment is sought. The Court articulated the principles in the following terms at paragraph 9 of its reasons:

[...] that while it is impossible to enumerate all the factors that judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

[11**]** Before turning to the application of these principles to the present motion, it is necessary to consider the nature of the proposed amendments. They reduce the length of Sears' response by some 70 pages. It is fair to characterize the amended pleading as being a re-written document that transcends the simple deletion or addition of some paragraphs. As noted in the affidavit filed on behalf of the Commissioner in opposition to the amendment, some paragraphs have been deleted in their entirety, some whole new paragraphs have been added and parts of some paragraphs have been deleted with the remainder being merged with other paragraphs. Detailed factual information has been deleted from the response. For example, Sears has: deleted information as to the geographic regions in which its retail automotive centers were defined for sales and marketing purposes; deleted information with respect to the national uniformity of its advertising and the national nature of the media utilized; deleted a detailed analysis of the time test required by paragraph 74.01(3)(*b*) of the Act; and deleted details of the volume of each tire line sold at the regular price. In oral argument counsel for Sears did not take the position that admissions were being withdrawn. Instead counsel submitted that Sears was not changing its position with respect to matters of fact and that paragraphs had been removed in order to bring in the pleading to a more manageable length.

[12**]** Turning to the application of the relevant principles to the facts, Sears failed to satisfy me that the proposed amendments would help determine the real questions in controversy.

[13**]** The purpose of the pleading is to define the issues between the parties. As the legal and factual issues, I am told, remain the same, the proposed pleading does not, in my view, assist in determining the real questions in controversy. Indeed, to the extent that the pleading no longer contains admissions of a factual nature the effect of the proposed amendment would be to lengthen the duration of the hearing because the Commissioner will have to lead evidence on those matters and the parties advise that they have not entered into an agreed statement of fact.

[14**]** Moving to consideration of the issue of non-compensable prejudice, factors to be considered include the timeliness of the motion to amend, the extent to which the proposed amendments would delay the expeditious hearing of the matter, the extent to which the position of the opposite party would be undermined, and whether the amendments would facilitate consideration of the true substance of the dispute. See: *Yeager v. Canada (Correctional Service)*, [2000] F.C.J. No. 537 (T.D.); *Scanner Industries Inc. (Receiver of) v. Canada* (1994), 1993 CanLII 17163 (FC), 69 F.T.R. 310 (T.D.) aff'd (1994) 172 N.R. 313 (F.C.A.).

[15**]** In the present case, the motion to amend was not brought on a timely basis. Sears' original response was filed on September 18, 2002 and the Commissioner's reply was filed on October 21, 2002. The motion to amend was filed on September 18, 2003, some six weeks before the hearing of this matter is to commence. Affidavit evidence was not filed as to why the motion was not brought at an earlier time, although I accept counsel's explanation made in oral argument and set out above.

[16**]** The Commissioner adduced evidence that his reply, case strategy, case presentation and expert case were developed in contemplation of the original response (and I would expect that to be the case). The Commissioner also adduced evidence that if the amendment was to be allowed the following would result:

1. The Commissioner would have to serve and file an amended reply.

2. The Commissioner's experts would have to review the amended response and likely revise their reports accordingly.

3. The Commissioner would have to review the amended response to determine the significance of any changes for his case strategy and case preparation generally.

4. The Commissioner would have to determine whether he would seek discovery.

5. The Commissioner has allotted time for his case preparation, including expert affidavits, rebuttal expert affidavits, confidentiality designations and interlocutory litigation based on the schedule set by the Tribunal's scheduling order. All of the extra work resulting from an amended response would have to take place during this time.

6. Diverting the Commissioner's resources to address the amended pleading would have a significant impact on the Commissioner's ability to meet other aspects of the pre-hearing procedures schedule.

7. Because the amended pleading is so substantially different from the original response, the Commissioner "would have to 'catch' all the changes, and their significance to all aspects of his case and case preparation, and make changes as a result". It may not be possible for the Commissioner to "catch" all of the changes and then to make the resulting changes to the reply and to his case strategy in the limited time available.

8. As a result of a significant amount of extra work that would result from the amended pleading, the Commissioner's ability to properly prepare for the hearing would be prejudiced.

[17**]** In my view, the nature and the extent of the proposed amendments would be likely to lead to those results.

[18**]** Together, I am satisfied that the evidence establishes that the Commissioner would be prejudiced if the amendments were allowed. As to whether such prejudice could be remedied, Mr. Justice Rothstein, then a member of the Competition Tribunal, noted in *Canada (Director of Investigation and Research, Competition Act) v. D & B Companies,* [1994] C.C.T.D. No. 17, that the Commissioner (then the Director of Investigation and Research) has the responsibility to protect the public interest in respect of matters within his jurisdiction under the Act. Mr. Justice Rothstein refused to adjourn a hearing before the Tribunal, in part on the basis that a strong case existed that to adjourn the hearing might well cause irreparable harm to the public interest.

[19**]** Similarly, in this case I conclude that the public interest in the fair and expeditious hearing of this matter would not be served by allowing the amendment. The Commissioner has satisfied me that the effect of the amendment would be either to prejudice his ability to prepare properly for the hearing or to require that the hearing be adjourned.

[20**]** Further, and importantly, I have not been satisfied that refusing the amendment would result in any prejudice to Sears. If its response suffers from being prolix, counsel can adequately explain Sears' case through the opening statement, the direct and cross-examination of witnesses and final argument. Sears does not argue that the present pleading limits its ability to lead evidence or to address argument to the Tribunal.

[21**]** On balance, therefore, after weighing these factors, in the exercise of my discretion, I concluded that it is more consonant with the interests of justice that the amendment be refused.

(ii) <u>The motion as it relates to disclosure</u>

[22**]** This is Sears' second request for disclosure. In November of 2002 it sought leave to conduct wide ranging discovery. Specifically, Sears sought:

(i) an order directing all non-expert witnesses who will testify at the hearing of the application at the request of the Commissioner, to attend individually for examination for discovery, or, alternatively, for cross-examination by counsel for the respondent on their will-say statements served by the Commissioner;

(ii) an order directing a Compliance Officer with the Competition Bureau, Industry Canada, who has been involved in gathering and analysing the information relied on by the Commissioner in respect of this application to attend for examination for discovery or, alternatively, for cross-examination on his will-say statement, if any, served by the Commissioner herein; and

(iii) an order directing a representative of Bridgestone, and of Michelin to attend for cross-examination on their affidavits identified in the disclosure statement served by the Commissioner on August 6, 2002 herein, by counsel for the respondent, at Toronto, Ontario.

In the alternative, Sears sought an order requiring the Commissioner to produce to it meaningful written summaries of all relevant information gathered in the context of the inquiry conducted by the Commissioner, to the extent that such information did not come from Sears.

[23**]** When that earlier motion was brought no specific attack was made on the adequacy of the Commissioner's disclosure statement as it related to the allegations of reviewable conduct. Further, at that time the Commissioner agreed to provide will-say statements to Sears in respect of the affidavits provided on behalf of Bridgestone and Michelin.

[24**]** Sears' earlier motion was dismissed on the ground that Sears had not established on the record then before the Tribunal that the broad discovery it sought was warranted. At paragraph 19 of my reasons dismissing the motion, reported at [2003] C.C.T.D. 1, I wrote that:

19. The disclosure provided by the Commissioner in his pleadings and disclosure statement and in the documents and will-say statements to be provided has not been shown to fall short of disclosing to Sears the case it has to meet. The affidavit filed in support of Sears' motion for discovery was sworn by a lawyer with the firm of solicitors representing Sears in this matter. It was confined to describing the procedural steps in the investigation which led to this application and in this application. The affidavit did not focus on specific information or documents said to be necessary for the defence of the application, did not state that Sears is unable to obtain this information without discovery, did not allege any actual unfairness if Sears has to proceed to hearing without specific evidence, and did not deal with the delay or expense which would flow from granting the requested discovery. These are things which in my view are relevant considerations when assessing whether discovery is warranted by the circumstances.

[25] The production which Sears now seeks is limited to two documents which, as noted above, are each exhibited to affidavits sworn on behalf of Bridgestone and Michelin. Those entities manufacture four of the five relevant tire lines and each was required to provide certain records and information relevant to the Commissioner's inquiry pursuant to section 11 of the Act. Counsel advise that Mr. King of Bridgestone and a representative of Michelin are expected to testify at the upcoming hearing as part of the Commissioner's case.

[26] In his disclosure statement the Commissioner, as he was required to do, specified the documents he was relying upon. With respect to the King affidavit, the Commissioner listed the affidavit as a document relied upon and then, after describing the affidavit by deponent and date, wrote "including the following Exhibits". There followed a list consisting of Exhibits A, B, D and G. With respect to the Michelin affidavit, the disclosure statement again described the affidavit by deponent and date and then specified that it included Schedules A1, A2, A3, A4 and also documents subsequently submitted completing Schedules A1, A2, A3 and B4.

[27] Sears now asserts that, having disclosed the existence of the affidavits, the Commissioner is obliged to disclose each in its entirety. Alternatively, Sears argues that the two omitted exhibits should be available to Sears on the basis that discovery of the documents is warranted within the contemplation of paragraph 21(2)(*d.1*) of the Rules.

[28] In resisting disclosure or discovery of the documents counsel for the Commissioner observed that Sears' motion was "on the cutting line or the intersection between the disclosure tract and fairness". Counsel argued that the Commissioner has not disclosed the exhibits in the disclosure statement because a fair reading of the disclosure statement shows the intent to exclude the exhibits from disclosure. The exhibits in question were said to be severable from the portions of the affidavits relied upon because the affidavits provided pursuant to section 11 of the Act are "a matrix within which information provided by the parties is set out and attached" as opposed to being a narrative affidavit. Discovery of the exhibits was said not to be warranted under the Rules because the primary consideration should be whether the disclosure provided enables a respondent to know the case to be met so as to have a meaningful opportunity to present its case. It was also said that the evidence before the Tribunal on this motion fails to establish that Sears does not know the case it has to meet.

[29] Notwithstanding the submission of counsel for the Commissioner, I am satisfied on the record now before me that discovery of the exhibits in question is warranted. I reach that conclusion on the basis that, in my view, it is not sufficient simply to ask whether the disclosure provided falls short of disclosing to Sears the case it has to meet.

> **[30]** In *Commissioner of Competition v. Canada Pipe Company*, 2003 CanLII 90068 (CT), 2003 Comp. Trib. 15 Mr. Justice Blanchard was required to consider whether the Rules as they relate to disclosure by the Commissioner violate a respondent's right to a fair hearing. After analysing the content of the duty of fairness in light of the five factors set out by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, Mr. Justice Blanchard wrote , at paragraph 53, that a respondent's "right to a fair hearing [before the Tribunal] would be fulfilled by a process that provides a respondent the right to know the case against it and the right to have a meaningful opportunity to present evidence supporting its own case". [underlining added]

> **[31]** In my view, this is consistent with the previous order in this case which refused the discovery sought at that time on the ground that Sears failed to show that the disclosure provided fell short of disclosing the case to be met by Sears and failed to show that specific information or documents were "necessary for the defence of the application" or that there would be "any actual unfairness if Sears has to proceed to hearing without specific evidence".

[32] These decisions are in my further view consistent with the decision of the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 (CanLII), [2002] 2 S.C.R. 522 where the Court observed that the right to a fair hearing includes the right to make full answer and defence.

[33] Applying those principles to the present motion, I am satisfied that the right to make full answer and defence carries with it the right to know all of the information provided to the Commissioner in the affidavits upon which the Commissioner has chosen to rely, particularly where the withheld information is relevant to issues such as the definition of the geographic market.

[34] The Commissioner also resists production of these documents on the ground that they are the subject of public interest privilege.

[35] Public interest privilege is supported by the policy considerations that the Commissioner must be able to obtain information from the relevant industry in performing his function under the Act. To gain co-operation from people in the industry the Commissioner must be able to gather information in confidence.

[36] In *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.,* [1991] F.C.J. No. 1021 (F.C.A.) the Federal Court of Appeal quoted with approval the following application of the principles of public interest privilege as originally stated by Reed, J. in *Canada (Director of Investigation and Research) v. Southam Inc.* (1991), 1991 CanLII 2396 (CT), 38 C.P.R. (3d) 68:

> The Director refuses to provide the specific interview notes, to identify the individuals interviewed, when they were interviewed and who they were interviewed by. At the same time, he has agreed to give the respondents a summary of what was said. In the competition law area, at least in merger and abuse of dominant position cases, the individuals who are interviewed may be potential or actual customers of the respondents, they may be potential or actual employees. They may fear reprisals if they provide the Director with information which is unfavourable to the respondents. Many of them are likely to be in a vulnerable position vis-a-vis the respondents. It is in the public interest to keep the interview notes confidential except when the interviewees are called as witnesses in a case or otherwise identified by the party claiming privilege. In addition, the Director is not required to prepare the respondents' case by identifying potential witnesses for them. ...The public interest in keeping the details of the interviews confidential outweighs any benefit that the respondents might obtain from them. This is particularly so given the fact that the Director has agreed to provide summaries of the relevant information. [underlining added]

[37**]** To similar effect were the comments of the Federal Court of Appeal in *Canada (Director of Investigation and Research, Competition Act) v. D & B Companies of Canada Ltd.*, 1994 CanLII 19674 (FCA), [1994] F.C.J. No. 1643 (F.C.A.) where the Court wrote at paragraphs 2 and 3:

2 McKeown J., presiding judicial member refused to order production on the grounds that such documents had been held by the Tribunal in previous cases to be protected from disclosure by a public interest privilege. He repeated the policy considerations which support this privilege: namely that the 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, his informants not being identified unless of course they are called as witnesses in a proceeding before the Tribunal. He also noted that the appellant had been given ample opportunity to learn of the nature of these documents and of the case which it has to meet, without having the actual documents. The Director had provided the appellant with summaries of all these documents including the information obtained from those in the industry but excluding names of sources. The Tribunal offered to arrange for a judicial member not sitting on this case to review the documents and the summaries to ensure the accuracy of the latter, if the appellant so requested. It has not so requested. Apart from this information, the appellant has had examination for discovery and discovery of documents of both the Director and of the complainant. It also has been given a list of witnesses and summaries of their anticipated evidence three weeks prior to their appearance, all in accordance with Tribunal orders.

3 I am satisfied that the learned presiding judicial member correctly followed and applied previous Tribunal decisions in finding such documents to be within a privileged class.

[38**]** In the present case, the rationale which supports public interest privilege is absent to the extent that the Commissioner has completed his investigation, named the two relevant affiants/informants, and disclosed to Sears the affidavits and most of the exhibits provided by the affiants.

[39**]** It is arguable that the extent of this disclosure is sufficient to outweigh any public interest in the protection of the two withheld exhibits now at issue, as contemplated in the passage from *Hillsdown Holdings* quoted and underlined above. However, it is not necessary for me to reach a final conclusion on the existence of public interest privilege in this case because I am satisfied that even if the two exhibits are subject to public interest privilege this is a suitable case for such privilege to be over-ridden on condition that the documents be protected by a confidentiality order.

[40**]** In this regard, public interest privilege will prevail unless over-ridden by a more compelling competing interest, and fairly compelling circumstances are required to outweigh the public interest element. See: *Canada (Competition Act, Director of Investigation and Research) v. Canadian Pacific Ltd.,* [1997] C.C.T.D. No. 39 and *Canada (Director of Investigation and Research) v. Washington*, [1996] C.C.T.D. No. 24. The factors which, in my view, in this case justify over-riding any remaining public interest privilege in the two documents are as follows. First, very little of the information remains confidential. The source of the information is known, as is the nature of the information contained in the two exhibits. The exhibits contain a list of the top 20 dealers or customers of Bridgestone and Michelin by region. Secondly, each deponent is to testify at the hearing and questions as to their dealers by region may then be put to them on cross-examination. Proceedings before the Tribunal are to be dealt with as expeditiously as the circumstances and considerations of fairness permit. Prior release of this information will promote an expeditious and fair hearing. Third, in my view, it is not consistent with the interests of fairness to permit the Commissioner to selectively disclose exhibits to affidavits on the basis that the Commissioner only intends to rely upon a portion of the evidence available from a witness in circumstances where the omitted exhibits contain material that appears to be relevant to issues before the Tribunal.

[41**]** As to the basis on which such discovery should be, and was, granted, Sears advised that it is content that access to the exhibits be given only to external counsel for Sears, such counsel's staff that are directly involved in the application and, on a need to know basis, to Sears' independent experts. Accordingly the documents were ordered to be produced and treated on

that basis as more specifically provided for in the Tribunal's interim confidentiality order of April 28, 2003.

DATED at Ottawa, this 17 day of October, 2003.

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

(s) Eleanor R. Dawson

Appearances

For the applicant:

The Commissioner of Competition

John L. Syme

Arsalaan Hyder

For the respondent:

Sears Canada Inc.

William W. McNamara

Phillip J. Kennedy

Martha A. Healey

TAB 9

Cineplex - Reasons for Order and Order, 2024 CanLII 93716 (CT)

Date: 2024-09-23
File number: CT-2023-003
Other citation: 2024 Comp Trib 5

Competition Tribunal / Tribunal de la concurrence

REVISED PUBLIC VERSION[1][3]

Reference: *Canada (Commissioner of Competition) v Cineplex Inc* , 20 24 Comp Trib 5

File No.: CT-20 23-003

Registry Document No.: 84

IN THE MATTER OF an Application by the Commissioner of Competition for an order under sections 74.01 and 74.1 of the *Competition Act*, RSC 1985, c C-34.

BETWEEN:

Commissioner of Competition

(applicant)

and

Cineplex Inc

(respondent)

Dates of hearing: February 14-16, 20-21 and 28-29, 2024

Before: Mr Justice Andrew D. Little (Chairperson)

Date of Reasons for Order and Order: September 23, 2024

REASONS FOR ORDER AND ORDER

Table of Contents

3. Revised as of February 14, 2025, pursuant to the Errata Note published on same day.

[1] This proceeding concerns the deceptive marketing provisions of the *Competition Act*, RSC, 1985, c C-34. The central question posed by the Commissioner of Competition’s application is whether Cineplex Inc makes price representations to the public that are false or misleading in a material respect.

[2] For the reasons that follow, the Commissioner’s application succeeds.

I. The Parties

[3] The Commissioner is responsible for the administration and enforcement of the *Competition Act*.

[4] The parties agreed that Cineplex is a “top-tier Canadian brand that operates in the film entertainment and content, amusement and leisure, and media sectors” and that it is “Canada’s largest and most innovative film exhibitor”. As of December 31, 2023, Cineplex owned, leased or had a joint venture in 1,631 screens in 158 theatres from coast to coast.

[5] Cineplex’s website is located at cineplex.com. It displays information about Cineplex’s film entertainment offerings. Cineplex also has a mobile application – the App – that displays similar information. Consumers may purchase movie tickets online via the website (whether on a computer or a mobile phone, at cineplex.com) and on the App (on mobile phones), or in-person at Cineplex theatres (at a box office, a concession or a kiosk).

II. The Application

[6] The Commissioner filed an application dated May 17, 2023. The Commissioner alleged that Cineplex engages in reviewable conduct under section 74.01 of the *Competition Act* by making representations to the public that are false or misleading in a material respect. According to the Commissioner, Cineplex promotes movie tickets to the public on its website and on its App at prices that are not attainable, because consumers purchasing such movie tickets online must also pay a fixed obligatory fee – the Online Booking Fee – in addition to the price represented for the ticket. The Commissioner relied on both the longstanding deceptive marketing provision in the *Competition Act* on false or misleading representations to the public in paragraph 74.01(1)(*a*) and the recently enacted provision on so-called “drip” pricing in subsection 74.01(1.1).

[7] Cineplex filed a Response dated June 30, 2023. The Response pleaded that the Commissioner’s application resulted from a mischaracterization of the website and App purchase process, and a misapprehension and misapplication of the law. Briefly stated, Cineplex’s position was that the ticket prices as they first appear on the website and the App are attainable because the consumer may purchase the movie tickets at these prices in-person at the theatre. The Online Booking Fee is only applicable if the consumer purchases the movie tickets online (that is, on the website or the App). If purchased online, Cineplex argued that information about the Online Booking Fee is readily shown on the Tickets Page of the website or the App, as the Online Booking Fee is automatically included in the subtotal price displayed on a “floating” ribbon on the screen. As a result of this “instantaneous” display after a consumer selects one or more tickets, Cineplex’s position was that the Online Booking Fee cannot be said to be “hidden” from the customer. The added fee, Cineplex pleaded, allows the consumer to benefit from selecting and reserving the seat(s) of their choice at the time of the online purchase. In addition, certain categories of membership consumers are either not subject to the Online Booking Fee or subject to a lesser fee.

[8] The Commissioner’s Reply dated July 14, 2023, alleged that contrary to Cineplex’s assertions, the Online Booking Fee is fixed and obligatory for consumers who purchase their movie tickets online. The Commissioner denied the relevance of Cineplex’s disclosures on the website and App related to the Online Booking Fee *after* the impugned representations are made. The Commissioner pleaded that Cineplex’s representations remain false or misleading in any event.

III. The Evidence

A. The Witnesses

[9] Before the hearing, and consistent with the *Competition Tribunal Rules*, the parties served and filed witness statements for their proposed fact witnesses, and affidavits with attached reports for proposed expert witnesses under a Scheduling Order dated August 31, 2023. At the hearing, the witnesses adopted their respective documents as their evidence.

[10] At the hearing, the Commissioner called six witnesses.

[11] Mr Adam Zimmerman is a senior competition law officer who conducts investigations at the Competition Bureau. He provided evidence relating to Cineplex's website and App, including nine video recordings of Mr Zimmerman moving through the website or the App and photographs from several Cineplex locations in Ottawa (ON) and Gatineau (QC).

[12] Three other officers working at the Competition Bureau provided witness statements attaching photographs from Cineplex locations in Vancouver (BC), Toronto (ON) and Montreal (QC), which were admitted into evidence on consent and without their attendance at the hearing for cross-examination.

[13] The other two witnesses for the Commissioner were proposed as expert witnesses. Mr Jay Eckert and Dr Vicki Morwitz each filed affidavits attaching expert reports and reply reports that responded to Cineplex's proposed expert.

[14] The Commissioner also filed read-in evidence from the examination for discovery of Cineplex's representative, including documents. The Commissioner's read-in evidence was updated to include additional related discovery evidence identified by Cineplex after reviewing the Commissioner's read-ins.

[15] Cineplex called two witnesses. The first was Mr Daniel McGrath, who serves as Chief Operating Officer of Cineplex. The second witness was Dr On Amir, who filed an affidavit attaching an initial expert report in response to Mr Eckert's and Dr Morwitz's initial reports. By Order dated February 9, 2024, the Tribunal granted Cineplex leave to file an "Addendum" to Dr Amir's report, which was in substance a sur-reply expert report.

[16] Mr Zimmerman and Mr McGrath filed affidavits supporting the Commissioner's and Cineplex's respective claims of confidentiality over certain documents and information. These affidavits were accepted into evidence and neither one was the subject of cross-examination.

[17] Near the end of the fact portion of the hearing, the parties advised that they were continuing to work towards an agreed statement of facts. They subsequently filed an Agreed Statement of Facts dated February 23, 2024.

B. Assessment of Fact Witnesses

[18] Mr Zimmerman provided careful and objective evidence in his written statement dated January 8, 2024, in the videos attached to his statement and during his oral testimony. He was straightforward and responsive to questions and provided credible and reliable evidence to the Tribunal.

[19] Mr McGrath provided a witness statement dated January 12, 2024 and testified at the hearing. Mr McGrath's witness statement advised that he had personal knowledge of the matters set out in it, and that in preparing it, he had relied on information from Cineplex's business records and a number of other Cineplex employees. All of this information was "typical of and consistent with the type of information [he] would use on a routine regular basis to make decisions in the normal course of [his] duties". His statement also acknowledged that Mr McGrath oversaw the conceptualization, decision making and implementation processes for the Online Booking Fee at issue in this proceeding.

[20] Mr McGrath was appropriately diligent in many of his responses at the hearing, often checking his written statement before answering questions. He also acknowledged that his witness statement did not disclose certain facts about the preparation of his video evidence, including that he had not prepared the video himself. However, there were also several occasions in cross-examination when Mr McGrath was reluctant to acknowledge certain things or did not respond to the question posed. He instead made an argument or a counterpoint back to counsel. In one instance, counsel asked a question several times before getting a direct and responsive answer. Cross-examination also revealed that some pertinent facts were left out of his witness statement – for example, that some statements relating to the online environment were equally applicable at the theatre. In addition, some aspects of Mr McGrath's witness statement amounted to a statement of Cineplex's corporate position in this proceeding.

[21] Having read Mr McGrath's witness statement closely and considered his testimony, I find that I must approach his evidence with some caution and care.

C. Assessment of Video Evidence

[22] Mr Zimmerman's witness statement, which he adopted as his evidence at the hearing, attached (among other things) nine videos, which depicted his movement on a mobile phone and on a computer through cineplex.com and the App. The voiceover in the videos describes the settings used and the steps Mr Zimmerman took through both the website and the App. In some videos he did not scroll to the bottom of webpages, whereas in other videos he did scroll down, which showed the contrast in what a user would see in each circumstance. I find the videos attached to Mr Zimmerman's witness statement to be helpful and accurate in depicting what a user would see in the circumstances of each video.

[23] Mr McGrath's witness statement attached a video. He provided the voiceover during the video. The images in the video exhibit became an issue at the hearing, because they did not reflect what a consumer would see during a visit to the Cineplex website or while using the App. The video was also not prepared by Mr McGrath but by others including members of the Cineplex legal team. The video began as an apparent "live" visit to the website and through its webpages, but stopped to introduce static screenshots of the user's screen

into the video. The screenshots were also zoomed out to show more of the webpages than what had previously been depicted. After the inserted screenshots returned to the "live" depiction of the website, the video's view of the webpage was zoomed out to 50% compared with the previous "live" depiction so that more of a webpage appeared on the video – in one instance the video introduced screenshots and immediately after returned to depict the "live" website, without advising the viewer of the change. Without the changed zoom, the website user would have had to scroll down to see some of the information on a webpage. These changes were not identified by Mr McGrath in his voiceover during the video or in Mr McGath's witness statement, but were identified in the reply expert report of Mr Eckert delivered before the hearing. Some evidence about those changes emerged during Mr McGrath's evidence in chief, and more was revealed during cross-examination.

[24] Cross-examination also revealed that Mr McGrath's video did not depict what a mobile phone user would see either on the mobile version of cineplex.com or when using the App, yet a majority (approximately 75%) of movie tickets purchased online are sold on mobile phones, using the Cineplex mobile website or the App. Cineplex sought to address this omission by introducing evidence about the App, including the process of ticket purchasing on it, during Mr McGrath's re-examination (through highly directed or leading questions). That evidence was recorded on counsel's phone and became Exhibit P-R-0042.

[25] I am mindful that in some respects, the contents and order of the webpages on cineplex.com or on the App are things I can and did observe for myself during the hearing. That said, the objectivity of the overall presentation of the website experience in Mr McGrath's video exhibit contrasted markedly with the video exhibits attached to Mr Zimmerman's witness statement.

[26] In this light, I find that the video attached as Exhibit "A" to Mr McGrath's witness statement is not reliable evidence and, in particular, it is not reliable evidence of a consumer's experience of visiting the Cineplex website.

[27] For its part, Exhibit P-R-0042, the recording of the App made during Mr McGrath's re-examination at the hearing, warrants diminished weight as it contains Cineplex's counsel's narrative and emphasis of what was depicted.

D. The Expert Witnesses

(1) Legal Test for Admissibility

[28] Expert opinion evidence may be admitted under a two-stage test: White Burgess Langille Inman v Abbott and Haliburton Co, 2015 SCC 23, [2015] 2 SCR 182, at paras 19, 23-24; *R v Mohan,* 1994 CanLII 80 (SCC), [1994] 2 SCR 9, at p. 20 and following; *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18 ("*P&H*"), at paras 113-115; *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 ("*VAA*"), at paras 105-106.

[29] The first stage is the threshold stage for admissibility. The party proposing the expert evidence must establish, on a balance of probabilities, that it satisfies four requirements: (i) logical relevance, (ii) necessity in assisting the trier of fact, (iii) the absence of an exclusionary rule, and (iv) a properly qualified expert. If the expert's opinion is based on novel or contested science or science used for a novel purpose, there is a fifth requirement: the reliability of the underlying science for that purpose must be established.

[30] At the first stage, the issue is logical relevance: *White Burgess,* at para 23; *R v Bingley,* 2017 SCC 12, [2017] 1 SCR 170, at para 15; *R v Abbey*, 2009 ONCA 624, 97 OR (3d) 330, at para 82. The threshold is the same for any evidence at a hearing and is low: *R v J-LJ,* 2000 SCC 51, [2000] 2 SCR 600, at para 47.

[31] In considering necessity as a threshold requirement, expert evidence must provide information that is considered "outside the experience and knowledge" of the Tribunal: *White Burgess,* at para 23; *Mohan,* at p. 23; *P&H,* at para 114; *VAA,* at para 108. While mere helpfulness is insufficient, necessity is not to be judged too strictly: *Mohan,* at p. 23; *P&H,* at para 114.

[32] The second stage for admissibility is a gatekeeping stage. It involves a discretionary weighing of the benefits, or probative value, of admitting evidence that meets the preconditions to admissibility, against the potential risks or "costs" of its admission, including considerations such as consumption of time, prejudice and the risk of causing confusion. This assessment is done on a case-by-case basis. If the costs outweigh the benefits, the proposed evidence may be inadmissible even if it meets the four requirements.

[33] At this second stage, evidence may not be legally relevant if it is not sufficiently probative to warrant its admission into evidence or if the evidence is irrelevant as a matter of law: *Mohan,* at p. 21; *Abbey,* at paras 82-85; *R v Sekhon,* 2014 SCC 15, [2014] 1 SCR 272, at para 49.

[34] The Tribunal must also ensure that expert evidence does not usurp its role as fact-finder or distort the fact-finding process: *Mohan,* at pp. 21, 24-25; *P&H,* at para 115; *VAA,* at para 109.

[35] In *Commissioner of Competition v Sears Canada Inc*, 2005 Comp Trib 2, the Tribunal admitted expert evidence from a marketing professor on marketing and consumer behaviour as it related to pricing and other stimuli: see paras 80, 139. Justice Dawson used the evidence in a variety of ways, including on a *Canadian Charter of Rights and Freedoms* challenge, the characteristics of the product at issue in that case (tires), market definition, the time reference period, and aspects of whether the respondent had established that the price representations were not false or misleading in a material respect under the then subsection 74.01(5): see paras 341-342, 347, 361-362, 366-367.

(2) The Commissioner's Experts

[36] Cineplex challenged the admissibility of the evidence provided by the Commissioner's experts. Cineplex's position was that Mr Eckert's evidence was neither relevant nor necessary. According to Cineplex, Dr Morwitz did not provide independent and objective evidence to the Tribunal and therefore should not be qualified to give opinion evidence to the Tribunal as an expert.

(i) Mr Eckert

[37**]** The Commissioner proposed to qualify Mr Eckert as an expert in website design and development, with core areas of expertise including website strategy development, user experience design, conversion rate optimization and user interface design (user experience and user interface) for software on computerized devices, including websites and mobile applications.

[38**]** Mr Eckert's report described user interface design principles and their application to Cineplex's website and App. His reply report responded to Dr Amir's report, including Dr Amir's critique that Mr Eckert did not use analytical information from Cineplex or account for users' zoom levels.

[39**]** Mr Eckert is the founder and creative director at Parachute Design Group Inc. He leads website design projects from conception to final deployment and provides ongoing analysis of website performance and conversion rate optimization to offer continued modifications and adaptations of websites to improve user experience and overall performance. His core areas of expertise include user experience design – the method of determining which information the web user will see and when they will see certain specific information in their journey throughout a website to optimize conversions (i.e., to increase the percentage of users who perform a desired action on a website – such as, in the present case, to turn mere "visitors" into movie ticket purchasers). His expertise also includes user interface design, which (as concerns this proceeding) is the process that designers use to build interfaces for websites and mobile applications – that is, what the users see and interact with.

[40**]** Cineplex did not challenge Mr Eckert's professional qualifications, proposed areas of expertise or the specific scope of his testimony or his written reports. Rather, Cineplex submitted that Mr Eckert's evidence was not relevant or necessary to the Tribunal's determinations under subsection 74.01(1.1) and that his opinion related only to web design rather than the elements of drip pricing in that subsection.

[41**]** The Commissioner submitted that Mr Eckert's evidence easily satisfied the four requirements in *Mohan* for admissibility, and that the benefits of admitting his evidence outweigh any costs (citing *VAA*, at paras 105-106).

[42**]** The Commissioner argued that Mr Eckert's evidence was relevant to the issues before the Tribunal, including (i) whether the disclosure of the existence and the amount of the Online Booking Fee is made in a place on the Tickets Page where consumers are likely to see it or become aware of it; (ii) user interface design concepts such as "call to action" prompt buttons and "false floors" (that is, an apparent end of the webpage, creating an illusion of completeness); (iii) whether consumers are likely to scroll down on the Tickets Page; and (iv) whether the website could have been designed in a manner that did not result in drip pricing.

[43**]** With respect to necessity, the Commissioner submitted that Mr Eckert had unique and specialized knowledge necessary to assist the Tribunal on matters outside its ordinary experience and knowledge. The Commissioner argued that his evidence was reasonably necessary to assist the Tribunal in understanding that, even though there are a large number of different sized screens that consumers use, the disclosure and the existence and amount of the Online Booking Fee is not visible for the majority of computer screens and is not visible without scrolling on any mobile phones.

[44**]** Lastly, the Commissioner submitted that Mr Eckert was properly qualitied to testify in the proposed areas of expertise. The Commissioner contended that website design and development includes the use of analytics to understand consumer behaviours, technologies and expectations when using websites and mobile applications. Further, he has an in-depth understanding of how web users in Canada consume content on a webpage or a mobile application, which is a fundamental principle of user experience design. His experience extends to issues involving standard screen dimensions and what information will typically not be readily visible on-screen whether on the website or the App, unless one scrolls down.

[45**]** I agree with the Commissioner that Mr Eckert's evidence is admissible expert evidence. Applying the threshold test for admissibility, Mr Eckert's evidence is relevant and necessary and he is properly qualified to provide the Tribunal with opinion evidence. His evidence as a whole is relevant to the issues identified by the Commissioner and, more broadly, to the general impression which the Tribunal is required to take into account under section 74.01: see subsection 74.03(5). The contents of Mr Eckert's evidence fall outside the Tribunal's ordinary experience and knowledge. Neither party raised any applicable exclusionary rule. Mr Eckert's expertise is well established through his background, training and his industry experience spanning more than twenty years as a founder and leader of his business. The areas of expertise for opinion evidence as proposed by the Commissioner at the hearing are supported by his professional expertise and reflected the contents of his reports and oral testimony. In the words of *Mohan,* he has acquired special or peculiar knowledge through years of experience concerning the matters on which he provided evidence: *Mohan,* at p. 25. While neither party's submissions referred to any costs of his testimony for the second stage of the assessment, I find that the benefits of admitting his evidence outweigh any costs.

[46**]** Mr Eckert testified in a straightforward and helpful manner. His testimony was responsive to questions, careful and candid. He made appropriate admissions about his opinions during cross-examination. His written reports were well-presented. He did not shade his evidence to favour either party. I have no concerns about his integrity or ability to perform his professional duty to the Tribunal.

[47**]** For these reasons, I conclude that Mr Eckert's expert opinion evidence is admissible and that he was a credible witness. As will be seen, I also accept the evidence in his reports and oral testimony.

(ii) Dr Morwitz

[48**]** The Commissioner proposed to qualify Dr Morwitz as an expert in marketing, consumer psychology and behavioural economics, with a specialized knowledge in consumer behavioural aspects of pricing, including drip and partitioned pricing. The Commissioner argued that Dr Morwitz is the leading expert in her field, whose early work put her at the forefront of a branch of behavioural economics that deals with pricing.

[49**]** Dr Morwitz's initial report focused on two questions:

• How does the manner of presenting pricing information by merchants impact consumers? In particular, how does "drip pricing" (or similar pricing practices) affect consumers in terms of (i) their perception of the price to be paid for a given product, and (ii) their behaviour?

• What impacts could Cineplex's representations with respect to the sale of movie tickets on its website and in the App be expected to have on consumers': (i) perception of the price to be paid for movie tickets, and (ii) behavior, including purchase decisions?

[50**]** Dr Morwitz's report described concepts such as drip pricing, partitioned pricing and shrouded attributes in the academic literature, and provided Dr Morwitz's observations and conclusions about the likely impact of how Cineplex presents price information.

[51**]** Dr Morwitz's reply report responded to Dr Amir's report, including to Dr Amir's conclusions that (i) firms will not use drip pricing when they aim to build a positive reputation, (ii) consumer complaints are relevant considerations, and (iii) the Cineplex website and App provide clear information and an itemization of the Online Booking Fee.

[52**]** Dr Morwitz is the Bruce Greenwald Professor of Business and Professor of Marketing at Columbia Business School at Columbia University. Before July 2019 she was the Harvey Golub Professor of Business Leadership and Professor of Marketing at the Stern School of Business, New York University. She holds a bachelor of science degree in computer science and applied mathematics from Rutgers University, and an MSc in operations research from Polytechnic University (now the Tandon School of Engineering at New York University). She also holds an MA in statistics and a PhD in marketing from the Wharton School at the University of Pennsylvania. She has numerous publications in scholarly journals, has served as editor on the editorial boards of peer review journals including the *Journal of Consumer Research*, and has received numerous awards and distinctions including being named a Fellow of the Society for Consumer Psychology. She has taught courses at the Stern School to undergraduate, MBA, executive MBA, and doctoral students in marketing management, marketing research, and judgment and decision making. At Columbia University since 2019, she has taught Behavioral Economics and Decision Making to MBA and executive MBA students and a course on Mastering Customer Insights to executives. As is apparent, Dr Morwitz has impressive academic credentials in the subject matter for which she was proposed to provide opinion evidence. She has acquired special or peculiar knowledge through study and experience that enable her to provide opinions to this Tribunal: *Mohan*, at p. 25.

[53**]** Cineplex submitted that Dr Morwtiz's evidence did not meet the legal requirements for admissibility, because:

(a) it was not relevant, specifically to the Tribunal's determination of the issues under subsection 74.01(1.1);

(b) it was not necessary, again specifically to the Tribunal's determination of the issues under subsection 74.01(1.1);

(c) it did not meet the threshold test for admissibility in *White Burgess* because it was not impartial or objective and was biased; and

(d) it was not reliable.

[54**]** Each of these arguments will be assessed in turn.

(a) Relevance and Necessity

[55**]** The arguments on the issues of relevance and necessity were related, so it is convenient to deal with them together. Cineplex argued that Dr Morwitz's evidence was irrelevant because the questions she was asked to answer do not help to determine any of the elements under subsection 74.01(1.1), including "attainability" and whether the Online Booking Fee is "fixed or obligatory". Cineplex's position was that these are questions of fact that opinion evidence does not assist the Tribunal to determine. With respect to necessity, Cineplex submitted that the Tribunal could come to a satisfactory conclusion without the assistance of opinion evidence. Particularly given the specialized nature of the Tribunal, an opinion about whether certain prices are appropriately displayed on the Cineplex website is not necessary to enable the Tribunal to make findings of fact. In this respect, Cineplex referred to *Mohan,* at pp. 23-24.

[56**]** The Commissioner submitted that Dr Morwitz's evidence was relevant to the behaviour of consumers and necessary as it is outside the Tribunal's scope of knowledge of consumer behaviour. According to the Commissioner, "[b]ecause consumers do not act to maximize their utility as traditional economics would predict, the Tribunal requires assistance in understanding how consumers actually act and why". The Commissioner submitted that Dr Morwitz could provide expertise to assist the Tribunal understand drip pricing and how it impacts consumer behaviour, and evidence to assist the Tribunal concerning how behavioural biases affect consumers' switching behaviour, how website design impacts consumers' purchasing decisions, whether online pricing representations are misleading (due to, for example, a shrouded attribute), and materiality.

[57**]** I agree substantially with the Commissioner. Dr Morwitz's evidence meets the required logical relevance for admissibility under the *Mohan* criteria. It is relevant to whether Cineplex's price representations are false or misleading under paragraph 74.01(1)(*a*). Dr Morwitz's evidence meets the necessity criterion for the reasons indicated by the Commissioner and generally assists the Tribunal to appreciate why consumers may not behave as traditional economics would predict. It is appropriate to have an evidentiary basis in this area.

(b) Impartiality, Objectivity and Alleged Bias

[58**]** Cineplex's main position about the admissibility of Dr Morwitz's evidence concerned impartiality, objectivity and alleged bias. The impartiality, objectivity and alleged bias issues are best addressed under one heading, before turning to Cineplex's position on the reliability of her evidence. Cineplex did not argue that Dr Morwitz lacked independence and there is nothing in the evidence to suggest that Dr Morwitz's reports (or the testimony at the hearing) contained opinions that were not her own.

[59**]** Cineplex's arguments on impartiality and objectivity were, in summary, that Dr Morwitz's evidence was not admissible because it did not provide a balanced or objective review of the literature she relied on and of Cineplex's website design.

[60] Cineplex argued that the purpose of opinion evidence was to assist the court to make an impartial and objective decision. Referring to the description of impartiality in judicial decision making in *R v S (RD),* 1997 CanLII 324 (SCC), [1997] 3 SCR 484, at paras 104-105, Cineplex maintained that expert opinion evidence must meet that same standard of impartiality or objectivity in order to assist the Tribunal. Counsel acknowledged that this proposition has not been the subject of commentary in the decided case law.

[61] Cineplex argued as follows in its written submissions:

An expert opinion at a very basic level, must report accurate and impartial results of the science or other basis upon which the opinion is based. Leaving out results from an experiment, a survey or a scientific literature review that would benefit the opposing party could not be considered an impartial or objective opinion evidence and cannot serve the decision making of the court or tribunal. Similarly, reporting on experiments and not pointing out the applicability of exceptions to the application of the experiment, cannot be considered impartial or objective and cannot serve the decision making or the court or tribunal. If there are two sides to an issue they must both be reported to the court or tribunal. If there are exceptions that are applicable to the issue they must be reported to the court or tribunal.

[62] To support its position, Cineplex identified the following in Dr Morwitz's evidence:

(a) There were mixed results in her own research and mixed results in the academic literature that she said she relied upon.

(b) There were exceptions, or "moderators" (such as the size of the surcharge), noted in the research studies and academic literature that Dr Morwitz stated she relied upon, but she did not bring those exceptions or moderators to the attention of the Tribunal.

(c) She did not acknowledge the existence of "researcher bias" because the opinions were based on her own subjective review of the website and the App.

(d) She did not note that her opinion evidence did not rely upon any scientific information, empirical data or any scientific review of the website or the App or that she could have undertaken such an empirical or scientific review. She also did not note in her expert opinion that a study of Cineplex's website and Cineplex's consumers would need to be undertaken in order to test the opinion evidence she provided and that without such testing, her opinion was no more than one hypothesis regarding the opinions she provided in her report.

[63] Cineplex also identified a list of facts or points in the evidence that were not mentioned in Dr Morwitz's evidence, which Cineplex connected to opinions she "purported" to provide on consumer behaviour on the Cineplex website. One such omission was that the "call to action" prompt button had a feature that Cineplex dubbed a "lockout feature", which prevented consumers from advancing into the online purchase process until they had made a ticket selection.

[64] According to Cineplex, all of these alleged failures related to the academic literature and the website design tainted the objectivity and impartiality of Dr Morwitz's evidence, rendering it inadmissible.

[65] The Commissioner's responses were:

(a) No one reading Dr Morwitz's reports could come to the conclusion that additional details were needed to explain her opinion.

(b) Dr Morwitz's report provided a comprehensive review of the literature. She also referred to academic papers with "mixed results" and described her findings with appropriate language that conditioned the certainty of her opinion (such as "on average" and "overall").

(c) Dr Morwitz did not fail to refer to a recent academic study (a meta-analysis) that discussed moderators that showed different results. She cited it in her first report. In addition, it did not in any way invalidate her previous work or literature review. Moreover, some of the moderators could actually strengthen her opinion when applied to the present case.

(d) Cineplex's criticism that Dr Morwitz's report did not include the findings of all studies ever done, or some studies with results that differed with her conclusion, does not logically imply that her overall opinion is biased.

(e) The Tribunal should look at Dr Morwitz's instructions, that is, the questions she was asked to answer. Dr Morwitz was asked to provide her expert opinion in response to two questions – a general one related to consumer behaviour in association with pricing representations, and a specific one related to the application of the knowledge of behavioural economics to the pricing representations made by Cineplex on its website and App. The Commissioner argued that Cineplex's critiques were based on a faulty premise because Dr Morwitz was not asked to quantify how many consumers were actually misled or what their actual price perceptions were.

(f) The Commissioner noted that some of the criticisms of Dr Morwitz's evidence, if accurate, applied equally to Dr Amir's evidence (such as the one concerning "researcher bias", as each provided an opinion based on their own review of the Cineplex website; and neither mentioned the so-called "lockout feature" on the Tickets Page).

[66] Cineplex also contended that Dr Morwitz's evidence was "biased", owing to the failings in literature and evidence reviews (set out above) and because she had assumed the role of an advocate, consistent with her advocacy for laws and rules for drip pricing. Cineplex noted that in *White Burgess,* the Supreme Court stated that expert opinion "must be unbiased in the sense that it does not unfairly favour one party's position over another": *White Burgess,* at para 32.

[67] During the hearing, including in its opening statement, Cineplex also took the position that Dr Morwitz was an advocate because she had, on invitation from the US National Economic Council, attended a gathering of experts at the White House on "junk fees" and spoke on a panel. Counsel referred to her statement (Exhibit P-A-0019) in which she said, "I'm very excited to be here" and, on the panel, addressed partitioned pricing and drip pricing. Despite its prominence in opening and during cross-examination of Dr Morwitz, this position appeared principally through footnotes in Cineplex's closing submissions. Cineplex did rely on Dr Amir's sur-reply report, which argues that one "crucial bias" ignored by Dr Morwitz was "her role as an advocate for stronger laws and rules against drip pricing". After

describing his understanding of Dr Morwitz's participation on the panel and some statements made by the US Federal Trade Commission, Dr Amir advised that Dr Morwitz did not consider that her role as a contributor to policies regulating hidden fees "could very well lead to biases (even if unconsciously) in her evaluation of the Cineplex Website".

[68] The Commissioner's position on alleged bias is captured above in relation to the review of the academic literature. The Commissioner also submitted that in this proceeding, the first contested case on drip pricing in Canada, the Commissioner sought out the foremost expert on the subject and Cineplex was attempting to turn her expertise around and into an argument about bias. The Commissioner referred to (i) the Tribunal's decision in *VAA,* which admitted expert evidence despite the expert's close business relationship with one of the parties: *VAA,* at paras 104, 126; and (ii) Justice Perell's analysis admitting expert evidence in *Wise v Abbott Laboratories, Limited,* 2016 ONSC 7275, at paras 37-83.

[69] I conclude that Dr Morwitz's evidence is admissible.

[70] The Supreme Court addressed the issue of inadmissibility of an expert opinion based on impartiality, lack of objectivity and bias in *White Burgess*. Justice Cromwell, speaking for the Court, addressed the expert's duty to the court at paragraph 32:

Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: [citation excluded]. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

[71] At paragraph 46 of *White Burgess,* the Court endorsed the statement that "expert witnesses have a duty to assist the court that overrides their obligation to the party calling them" and confirmed that the expert witnesses must be "aware of this primary duty to the court and able and willing to carry it out". Justice Cromwell discussed the onus on the parties with respect to this threshold requirement and stated at paragraph 49:

This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. […] an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[Emphasis added]

See also *dTechs EPM Ltd v British Columbia Hydro and Power Authority,* 2023 FCA 115, at para 49.

[72] The process contemplated by the Supreme Court in *White Burgess* is as follows. An expert's attestation or testimony recognizing and accepting the duty to the Tribunal will generally be sufficient to establish that the threshold test has been met. The burden is then on the litigant opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable or unwilling to comply with his or her duty. If the opponent meets this burden of showing such a realistic concern, then the litigant proffering the witness must demonstrate that the expert is impartial, independent and unbiased. If that is not done, the expert's evidence, or those parts of it that are tainted by a lack of independence or by impartiality, should be excluded. See *White Burgess,* at paras 46-49; *Wise v Abbott Laboratories,* at para 61.

[73] This is not one of the rare cases in which an expert's evidence is inadmissible as alleged by Cineplex. Cineplex has not raised realistic concerns about Dr Morwitz's ability or willingness to perform her duties to the Tribunal.

[74] With respect to the legal test, the Tribunal must apply the standard in the appellate cases that are binding on it, which is that the expert's opinion must be "impartial in the sense that it reflects an objective assessment of the questions at hand". I do not accept Cineplex's position that an expert witness must be as impartial as a judicial decision maker in order to assist the Tribunal. Cineplex did not refer to any decided cases that applied any different, or higher, standard for impartiality. It did not cite any court decision or academic treatise to support its argument in principle or that criticized the statements made in *White Burgess* as inadequate.

[75] Dr Morwitz signed an acknowledgement that she would comply with the Tribunal's code of conduct for expert witnesses and expressly acknowledged that an expert has a duty to assist the Tribunal impartially on matters relevant to her expertise, that this duty overrides any duty to a party to the proceeding including the party retaining the expert, that the expert is to be independent and objective, and that an expert is not an advocate for a party. The form of this acknowledgement followed the Tribunal's Notice on *Acknowledgement of Expert Witnesses* (December 2010).

[76] Dr Morwitz understood and performed her obligation to the Tribunal. As she testified at the hearing, "… I understand my duty to provide impartial assistance to the Tribunal on the matters that are relevant to this case". She did not display, either in her reports or during her oral testimony, an unwillingness or inability to perform her duty to the Tribunal to be impartial and objective.

[77] Dr Morwitz's evidence was her own professional objective assessment of the questions posed to her and the issues she discussed that are relevant to this proceeding. In addition, her opinions were the product of her independent judgment. I am not at all persuaded that they were influenced by her retainer by the Commissioner or by the outcome of this litigation.

[78**]** Cineplex's critiques of Dr Morwitz's evidence were topics that were available to be raised in cross-examination. However, those points are pertinent, at most, to the weight of her opinions. They fall well short of concerns that warrant a conclusion of inadmissibility based on a lack of independence or impartiality.

[79**]** With respect to alleged bias, I have reviewed the authorities cited and the evidence, listened to and observed Dr Morwitz's testimony and that of Dr Amir, and considered the relevant paragraphs of Dr Amir's sur-reply report. I find no merit in Cineplex's position on inadmissibility based on alleged bias. Dr Morwitz's views in this proceeding did not unfairly favour one party's position over another. Her evidence meets the requirements described by Justice Cromwell in *White Burgess*.

[80**]** I do not accept Cineplex's argument, and Dr Amir's comments that seem to support it, that Dr Morwitz's "advocacy" for stronger laws on drip pricing or partitioned pricing implies that she unfairly favours one party's position over another, or that her opinion would change in this proceeding depending on which party hired her. To the contrary, I am confident that Dr Morwitz's opinions in relation to the matters on which she testified would be unaltered by which side requested her views.

[81**]** In reaching these conclusions, I find specifically that Dr Morwitz's participation on a panel at the White House – its existence, her reaction to it (including being "thrilled" that the scholarship in her field was viewed as helpful), and the evidence about what she said – do not give rise to a bias in her reports or testimony in this matter. She provided opinions that complied with her obligations to the Tribunal and that were well within the boundaries of what is realistically expected in adversarial litigation: see *White Burgess,* at para 32; compare *Wise v Abbott Laboratories,* at paras 51, 81-82.

[82**]** I will add the following observations. In my view, Cineplex's position on bias arising from Dr Morwitz's visit to the White House – at its highest – does not properly distinguish the appropriate provision and defence of genuinely-held professional views by an expert witness, on one hand, from inadmissible "purchased advocacy" (a phrase used by Justice Perell in *Wise v Abbott Laboratories,* at paragraph 81) such as a "hired gun" witness, on the other hand. Genuine experts provide opinions on matters on which they have developed specialized knowledge or expertise, through years of study and experience. Their role in a courtroom is precisely to provide those opinions. Their views are of special assistance because they fall outside of the experience of the court or the Tribunal. Their evidence supports the broader objective of truth-seeking, so the decision maker can better appreciate the evidence and resolve the dispute between the litigating parties. The test in *White Burgess* recognizes that an expert will be compensated for their work. The test excludes the "expert" who does not provide a genuine, independent, impartial and unbiased opinion about the matter, while recognizing the realities of adversarial litigation. *White Burgess* instructs that only in clear and rare cases will a proposed expert's opinion be inadmissible. The legal test weeds out the kind of purchased advocacy that is not permitted. In that context, it is natural and entirely expected that people with sufficient expertise to be qualified to provide opinion evidence will have genuine and well-considered views on matters of policy related to their fields. Those views may be helpful to legislators and policy- and rule-makers, particularly if the person with expertise is expressly asked to provide those views. Doing so is not irrelevant to the admissibility of a proposed expert's opinion, but is equally not determinative of bias. In the present case, Dr Morwitz's statement at the White House and her testimony about her visit do not support a finding of an impermissible bias in her opinion evidence in this proceeding.

(c) Allegations Related to Reliability

[83**]** Cineplex submitted that the reliability of proposed expert evidence concerns both the relevance of the evidence as well as being an exclusionary rule (at the third stage of the threshold test for admissibility). Cineplex's written submissions referred to *White Burgess,* at paragraph 121, to contend (rather summarily) that Dr Morwitz's evidence was novel scientific evidence and was not supported by a statistical review or scientific study; instead, it was the subjective conclusions of Dr Morwitz. In oral argument, Cineplex acknowledged that behavioural economics principles were not novel, but contended that the ideas on what partitioned pricing means and the results of testing on consumer behaviour were novel in that the outcome is not consistent. Cineplex relied on the cross-examination of Dr Morwitz and on Dr Amir's report, which argued that "the very literature Dr Morwitz cites can be used to draw exactly the opposite conclusion", including her own research (which Dr Amir stated yielded mixed predictions about overall impact) and that a meta-analysis concluded that the impact of partitioned prices is contradictory and may have divergent effects on consumers.

[84**]** I agree that the reliability of opinion evidence is a component of admissibility (as with all evidence): see *R v Trochym,* 2007 SCC 6, [2007] 1 SCR 239, at para 27, cited in *White Burgess*, at paras 21, 23. I also agree that in the case of an opinion based on novel or contested science or science used for a novel purpose, the proponent of expert evidence must establish the reliability of the underlying science (in addition to the four *Mohan* criteria): *White Burgess,* at paras 16, 23; *R v J-LJ,* at paras 33, 35-36, 47.

[85**]** I cannot conclude that Dr Morwitz's evidence is based on such novel or contested science that it cannot be admissible owing to a lack of reliability.

[86**]** In her oral testimony, Dr Morwitz acknowledged that the academic literature shows mixed results as to whether partitioned pricing increases demand and revenue. Dr Morwitz's report referred to a 2018 meta-analysis article (i.e., a study of studies), relied on by Cineplex in cross-examination, and the paper's conclusion of the positive effect of partitioned pricing on consumer preference and that the results of their meta-analysis suggested that, on average, the use of partitioned pricing leads to a 9% increase in consumer preference over the use of all-inclusive pricing: at para 65. Dr Morwitz advised in cross-examination that this was a marginally significant result. Her report stated that overall, the literature on partitioned pricing suggests that partitioned pricing will lead consumers to underestimate total prices and be more likely to buy a product than when all-inclusive pricing is used.

[87**]** There were some aspects of the testing outcomes in the academic literature that Dr Morwitz did not mention expressly in her report. She acknowledged during cross-examination that she did not advise in the body of her report that certain moderators would impact consumers' pricing perceptions and did not say expressly that there were mixed results in some studies relating to the effects of moderators. She also acknowledged that the academic literature included both positive and negative effects of partitioned pricing on consumer perceptions.

[88] I pause to note that the meta-analysis article used in cross-examination considered when, according to the academic literature, partitioned pricing with certain combinations of moderators may lead to "favorable consumer preferences" (or as characterized in Dr Morwitz's report, an "inclination toward the target product") – in other words, advantageous outcomes for firms selling goods to the public.

[89] Dr Morwitz advised in re-examination that for partitioned pricing, the academic literature shows by and large (i) decreased price perceptions (the price appears cheaper than all-inclusive pricing) which was not included in the meta-analysis paper; and (ii) an increase in demand. In addition, she advised that certain moderators made the effects bigger while others made the effects smaller or go in the opposite direction. She considered them in providing her opinion to the Tribunal.

[90] Finally, Dr Morwitz testified that the meta-analysis article examined what she calls "transparent partitioned pricing". It did not look at drip pricing or at price obfuscation, or either of them in combination with partitioned pricing. The article examined how consumers react when all information is put before and made salient to them.

[91] From a review of her reports and entire testimony, Dr Morwitz showed in a balanced way that there are nuances in the literature. While the issues raised in cross-examination and in Dr Amir's report were appropriately raised, I am not persuaded that they render Dr Morwitz's report and testimony unreliable or so novel as to be inadmissible. Nor do these issues show that Dr Morwitz is not objective or impartial, or that her testimony was biased.

[92] The legal requirements to exclude Dr Morwitz's evidence as set out in *White Burgess* are not met.

(d) Dr Morwitz's Testimony

[93] Dr Morwitz's testimony provided candid responses to questions. She conceded appropriate points in both her reply report and cross-examination. She was careful, pausing to think before answering or checking her report. Overall, Dr Morwitz was a very good and credible witness.

(3) Cineplex's Expert

[94] Cineplex tendered Dr Amir's affidavits and attached a responding report and a sur-reply report. Dr Amir testified at the hearing.

[95] At the hearing, Cineplex proposed that Dr Amir be qualified to provide opinion evidence about marketing, consumer behaviour and psychology, business analytics and market research and surveys. At the hearing, after cross-examining him on several topics, the Commissioner confirmed that he had no issues with these proposed qualifications.

[96] Dr Amir is the Wolfe Family Presidential Endowed Chair in Life Sciences, Innovation, and Entrepreneurship, and Professor of Marketing at the Rady School of Management at the University of California, San Diego. He holds a bachelor of science in computer science from Israeli Open University, Tel Aviv, and a PhD in Management Science and Marketing from the Massachusetts Institute of Technology. He has taught Marketing Management, Pricing, Consumer Behavior, Business Analytics, Marketing Strategy, Market Research, Applied Market Research, Lab to Market, and Data Driven Decision Making at the MBA and Executive levels, and specific programs for major corporations (both nationally and internationally). He has also taught MBA Marketing Management courses at Northwestern University's Kellogg School of Management, Yale School of Management, Recanati School of Business of Tel Aviv University, IDC Herzliya, and Cheung Kong Graduate School of Business in Shanghai, China. He is the Chief Behavioural Science Officer at Fiverr Inc and serves on the advisory board of several companies. Dr Amir has published articles in marketing, management, and psychology journals and designed and conducted consumer surveys for his academic research and consulting work.

(a) The Commissioner's Objection to Dr Amir's Proposed Area of Expertise Related to "User Design" Best Practices

[97] The Commissioner's position was that paragraphs 26 to 32 of Dr Amir's report were not admissible. The Commissioner submitted that they contained opinion evidence that Dr Amir was not qualified to give related to "user design" best practices. The Commissioner noted that in those paragraphs, the supporting citations were from 1980 and from a marketing textbook that did not discuss user design principles. According to the Commissioner, Dr Amir's knowledge of online consumer behaviour along with unspecified publications related to interface and consumer psychology was not sufficient to provide him with "special or peculiar knowledge through study or experience" in respect of the principles of user design.

[98] During oral argument at the end of the hearing, Cineplex took the position that it proposed to qualify Dr Amir in the areas of user design interface and website design interface as a rebuttal witness to Mr Eckert.

[99] Dr Amir characterized his areas of expertise as including "consumer behaviour, website design interface, and online purchase decision making" in both his affidavit and in his first report dated January 12, 2024. At paragraph 10 of the report, he summarized his conclusions as follows:

Principles of marketing dictate that firms are incentivized to design transparent and user-friendly online interfaces to enhance the consumer experience and gain consumer loyalty. My review of the Cineplex Website and Mobile Appl found that Cineplex's ticket buying experience was clear and streamlined, reflecting these user design best practices.

[100] Elsewhere in that same report, Dr Amir discussed the design of Cineplex's online ticket sales process, including passing comments on the role of user interface design and the incentives for online sellers to provide a "purchasing flow that is streamlined and intuitive while providing consumers with all the relevant information they need to make informed purchase decisions": at paragraph 23. He stated that Cineplex's website design, the consumer flow and the presentation of the Online Booking Fee were consistent with "marketing and user design best practices as well as industry standards and norms" and that the Online Booking Fee was "presented in a transparent manner that is consistent with user design best practices": at paragraph 65. He also stated that "the initial ticketing page design makes it clear that the Online Booking Fee is not a mandatory or fixed charge".

[101**]** Dr Amir provided his response to Mr Eckert's reports in Part VIII of his initial report and in his sur-reply report. The latter report reaffirms Dr Amir's view that the Cineplex ticket buying experience reflects user design best practices.

[102**]** Dr Amir confirmed in cross-examination that he had no degree, diploma or accreditation in graphic design and had not taught courses or consulted for companies in website design or user interface design. At the time of the hearing, he had not published papers on website design, best practices for website design or user interface, nor had he published papers on the impact of drip pricing. His publications and research on marketing, consumer behaviour and consumer psychology inform website designs, designers, and user interface. He testified that businesses use his knowledge, expertise and advice to design their websites and interfaces because of his expertise on how consumers behave online and how consumers respond to different information presented to them online.

[103**]** Dr Amir agreed during re-examination that the comments in his report about Dr Eckert's report were related to "consumer behaviour with design" and that he advises industry on consumer behaviour related to design.

[104**]** At the hearing, Cineplex did not expressly propose to qualify Dr Amir as an expert in website design, user interface design, or in the best practices related to either one. It only did so expressly during oral argument at the end of the hearing. However, Dr Amir stated that he had expertise in website design interface in his initial report and the Commissioner cross-examined on that potential area of expertise during the hearing. Despite the omission from the proposed areas of expertise at the hearing, I find that the Commissioner had sufficient substantive notice, as did the Tribunal, that Dr Amir's proposed evidence would include opinions on website design interface or user interface design. This finding does not condone counsel's failure to mention it when proposing Dr Amir's areas of expertise at the hearing.

[105**]** In Dr Amir's report, the heading for paragraphs 26 to 32 is "The Cineplex User Experience Reflects User Design Best Practices". In those paragraphs, he explained his view that Cineplex's website's "consumer flow" (as described earlier in his report) was well-engineered and exhibits user design best practices, as well as transparent and intuitive user experiences. He outlined five stages of consumer decision making process and how the consumer flow on cineplex.com is an example of an interface that follows these stages. After a discussion of the steps on the website, with particular reference to the Tickets Page, Dr Amir concluded that the structure and design of the website and the App fit the five steps of the consumer decision process. He found that the presentation of prices was logical, intuitive and consistent with prevailing marketing and online norms.

[106**]** I conclude that paragraphs 26 to 32 of Dr Amir's report are admissible opinion evidence as they mostly concern the application of marketing principles to the Cineplex website, something within his expertise. However, where Dr Amir's reports provided opinions and comments on website design, website design interface or user design interface issues, and specifically on whether the Cineplex website or App reflects best practices in those areas, he went beyond the scope of his core expertise (at least as was demonstrated in this proceeding). Despite the sworn statements about expertise in "website design interface" in his affidavit and in paragraph 6 of his initial report, Dr Amir has much less expertise and experience, when compared with Mr Eckert, to assist the Tribunal in these areas. In these areas, Mr Eckert's evidence must be preferred.

(b) Dr Amir's Testimony

[107**]** Dr Amir testified in a clear and direct manner. He made a number of appropriate concessions during cross-examination. For instance, he acknowledged during cross-examination that he had not reviewed all of the Commissioner's proposed evidence and the transcripts of Cineplex's discovery before he delivered his reports (they were not provided to him). He also acknowledged that some of his figures that he alleged depicted the Cineplex website did not accurately show what a user would experience (e.g., he had to scroll or to zoom out to capture what was actually depicted). His description of the consumer flow did not mention that Cineplex requires a consumer to first create an account with Cineplex and then log in before pricing information is displayed.

[108**]** I find Dr Amir's reports and testimony to be less objective and less helpful than the reports and testimony of Dr Morwitz and Mr Eckert. Recognizing that Dr Amir was retained to respond to the Commissioner's expert witnesses, his two reports contain material contents that were, in both substance and tone, more argument than objective expert opinion.

[109**]** Accordingly, I give diminished weight to Dr Amir's evidence overall, and particularly as it concerns his response to Mr Eckert's evidence in Part V.B. at paragraphs 26-32, and Part VIII of Dr Amir's initial report and in his sur-reply report.

[110**]** I note finally that there was an internal inconsistency in Dr Amir's reports that raises concerns about objectivity. While he was sharply critical of Dr Morwitz for providing an opinion based on her own personal review of Cineplex's website and for failing to conduct empirical studies of how consumers interacted with the website, Dr Amir's own reports provided opinions about the website and App based on his own interactions with the website and without an empirical study of his own. Dr Amir did not recognize this point in either of his reports. He only acknowledged it during direct examination at the hearing (that his own review of the website was subjective like Dr Morwitz's and involved "researcher bias"). The submission that Dr Amir's opinion was rebuttal evidence does not answer this internal inconsistency in his evidence, nor does the "caveat" Dr Amir offered during his testimony that he used "two empirical facts" in his report. Indeed, Cineplex acknowledged during oral argument that if Dr Morwitz's evidence were excluded for providing conclusions based on personal reviews and failing to conduct empirical studies, so too must Dr Amir's. While neither expert's evidence is inadmissible for this reason, these circumstances further adversely affect the objectivity of Dr Amir's evidence.

IV. Factual Findings

[111**]** The Tribunal makes the following findings of fact, having considered all the admissible, reliable evidence presented at the hearing.

[112**]** Cineplex operates its website and App, which members of the general public may visit for information about, among other things, movies playing at Cineplex theatres across Canada and to purchase movie tickets. Users do not initially need to log in or enter a password to get access to the website or the App.

A. Tickets and Seat Selection

[113] Consumers are able to purchase tickets to movies showing at Cineplex theatres online, via the website and on the App. Consumers may also purchase their movie tickets in-person at Cineplex's theatres (at a box office, concession or kiosk).

[114] A seat selection must be made when making either an online purchase or an at-theatre purchase of movie tickets. In other words, the booking of a ticket goes hand in hand with the attribution of a seat; if all seats are booked, no ticket can be sold. Historically, whether ticket holders had purchased their tickets in-person at the theatre or online (meaning, regardless of the medium of purchase), they would simply walk-in the theatre and sit wherever a seat was available. This practice changed with the COVID-19 pandemic. Cineplex began offering "advance" seat selection in all of its theatres to help ensure social distancing during the pandemic, commencing in or around June 2020. Cineplex did not charge consumers to reserve seats from June 2020 until mid-June 2022.

[115] Consumers' ability to purchase movie tickets as close to, or as far in advance of, a movie's showtime is the same, whether the purchase is made in-person at the theatre or online using the website or the App.

B. Cineplex Connect Account, Scene+ and CineClub

[116] To purchase a movie ticket on Cineplex's website or App, a consumer must have a Cineplex Connect Account, created by the user with Cineplex by providing their name, email address and phone number.

[117] Before the website or the App displays any ticket prices (i.e., any pricing information) for movies, the user must log into their Cineplex Connect Account and enter an authentication code that is either texted to their mobile phone or shared by automated voice message on their phone. Ticket prices are then displayed on the Tickets Page on both the website and the App.

[118] Cineplex is a partner in Scene+, Canada's largest entertainment and lifestyle loyalty program. There is no monetary fee to join. Scene+ members earn points through purchases at various retailers or by using associated credit cards. Members earn points on a variety of movie, entertainment, refreshment and other purchases at Cineplex theatres across Canada. Points can be redeemed for products, including tickets for Cineplex movie theatres.

[119] Cineplex also offers a movie subscription program called CineClub. Launched in the third quarter of 2021, CineClub provides benefits to its members such as one free movie ticket every month, discounts on purchases at concessions and no payment of the Online Booking Fee when a ticket is purchased online on the website or the App. CineClub members currently pay a monthly fee of $9.99 plus applicable taxes or an annual fee of $119.88 plus applicable taxes. A consumer must be a Scene+ member to join CineClub.

C. The Online Booking Fee

[120] In February 2022, Cineplex was looking at ways to drive – i.e., increase – its revenue and margin. One option was to implement a service fee for online ticket purchases. The ensuing assessment of different revenue sources led to the implementation of the Online Booking Fee in June 2022.

[121] An internal Cineplex slide deck dated February 1, 2022, entitled "Admission Pricing Initiatives", contained information gathered by way of "peer review" from Cineplex's competitors about service fees on a per-ticket basis. This slide deck confirms that by that time, Cineplex was considering implementing a service fee of $1.50 per ticket, with a discount for loyalty consumers (Scene+ members) and waivers for CineClub subscribers. The slide deck set out net revenue projections for a service fee in two scenarios, one for Digital Channels and a second for All Channels. A separate slide provided an All Programs Comparison with net revenue projections for both digital and all channels.

[122] The same slide deck advised that through research with Scene+ members, Cineplex had assessed the "switching" impact of $1-$2 adjustments in base pricing in three scenarios. Given the challenge of assessing whether members would be willing to pay more, the research was framed as a potential discount XXXXXXXXXXXXXXXXXXXXXX. XXXXXXXXXXXXXXX
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[123] Cineplex introduced the Online Booking Fee effective June 15, 2022. The Online Booking Fee is $1.50 per ticket. It is discounted for Scene+ members (who pay $1.00) and it is waived for CineClub members (who pay a monthly or annual fee to join). The quantum of these Online Booking Fees has not changed since June 2022.

[124] In other words, every consumer who is not a CineClub member must pay an Online Booking Fee per ticket if they wish to purchase tickets online, whether on the website or the App.

[125] Within a single online transaction, the Online Booking Fee is capped to a maximum of four tickets. Data shows that a very substantial majority of online ticket purchases (Xx%) are for four tickets or fewer, and so are subject to Online Booking Fees.

[126] A key distinction among the various purchasing options is that the Online Booking Fee does not apply to movie tickets purchased in-person at Cineplex's theatres (at a box office, a concession or a kiosk).

[127] The implementation of the Online Booking Fee had the practical effect of raising prices for movie tickets purchased online – that is, the amount paid by consumers who have to pay it. Cineplex recognized that it was a price increase at the time it was implemented. Mr McGrath testified on behalf of Cineplex at discovery (read into the record at the hearing) that he hoped the fee would go "under the radar" with the news media when it was introduced, but it did not. He had to answer questions from a board member about it, including

its impact on Scene+ members. Mr McGrath testified that Cineplex did not put out a press release about the Online Booking Fee: "[w]e, generally, wouldn't put out a press release when we are increasing the price of movie tickets or concessions. That's not standard practice for us."

[128**]** In dollars, in 2022 – the year it was introduced – the Online Booking Fee generated $11,678,336, and a total of $27.3 million in 2023 (approximately $5.2 million during the first quarter, $7 million during the second quarter, $9.9 million during the third quarter, and $5.2 million during the fourth quarter).

D. Movie Ticket Sales

[129**]** In 2022, close to half (48%) of all movie tickets were purchased in-person at theatres. The rest were purchased online.

[130**]** Approximately three-quarters of Cineplex's online ticket sales occur through mobile devices (through the website or the App), while the remainder are purchased on a computer. Put another way, 75% of online ticket purchases are done using mobile phones and 25% of online ticket purchases occur on a computer. Of the 75%, half are mobile website purchases and half use the App. Accordingly, about 37.5% of purchasers visit the Tickets Page on the App.

[131**]** CineClub members represent a very small minority of online ticket purchases and of overall ticket purchases (approximately X% as of June 2022).

E. Relevant Contents of cineplex.com and the App

[132**]** The following description of a user's navigation through the website and the App is based on the reliable evidence before the Tribunal, with particular reference to the exhibits attached to Mr Zimmerman's witness statement. The findings below concern the structure and design of Cineplex's website and App, recognizing that there may be other ways to navigate to particular webpages on each.

[133**]** On arrival on the cineplex.com homepage or upon launching the App, the user is presented with information about movie titles. The user may then navigate through webpages that provide information about the films currently being shown and upcoming, theatre locations, different types of film-watching experiences (e.g., premium seating or different sizes of screens), the date and time that a film will be shown, and more – all before reaching the Tickets Page. The Tickets Page is where ticket prices are displayed. As previously stated, only after a user has logged into their Cineplex Connect Account can the user see ticket prices.

[134**]** After selecting the category and number of tickets on the Tickets Page, a "floating" ribbon appears at the bottom of the page displaying certain information. Akin to the concepts of a "false floor" or a "floating floor", the floating ribbon creates the illusion that the webpage is complete. The ribbon remains visible to the users at the bottom of the webpage, regardless of scrolling up or down on the page. Users who click on the PROCEED button in the floating ribbon on the Tickets Page proceed to the Seat Selection Page. After selecting their seat(s), users who click on the PROCEED button in the floating ribbon on the Seat Selection Page proceed to the Payment Options Page. Those who click on the PROCEED button in the floating ribbon on the Payment Options Page move to the Payment Page.

[135**]** There are a number of important features of the process leading to the Tickets Page and ultimately to a ticket purchase by a consumer, which may be likened to a funnel (or as Dr Amir described it, a "consumer purchase funnel").

[136**]** Cineplex's ticket prices are not uniform across all theatres and films. The user's choices of film, type of experience, theatre location, date and time affect the ticket prices displayed on the Tickets Page.

[137**]** En route to the Tickets Page, and after a movie is selected, the user may advance by clicking "Get Tickets" (in a rectangular blue box) on the website (whether on a mobile phone or computer) or by clicking dates and showtimes under the heading "Buy Tickets" on the App. Both display (automatically) the Cineplex theatre closest to the user where the movie is playing. The user has options to select the date and time of the showing. There is also an opportunity to preview seats, which takes the user to a different webpage where seats for the movie, both already booked and still available, are displayed. On that webpage, users may click "Get Tickets" from that location, which takes the user to the Tickets Page. A user does not have to log into their Cineplex Connect Account to preview seats on a seat map.

[138**]** As noted, ticket prices are displayed on the Tickets Page. In order to see ticket prices, a user must first log into their Cineplex Connect Account. To log in, the user enters their email address and password. Cineplex then texts or shares by automated voice message a six-digit code to the user's phone, which the user must then enter for authentication. The website and the App recognize if a user is a Scene+ member (if the user has provided that information) and whether a user is a CineClub member. In other words, a user must log into their Cineplex Connect Account before the website or App displays prices.

[139**]** The Tickets Page, on the website and on the App, is the first webpage where Cineplex advertises movie ticket prices. When users reach the Tickets Page, they have an opportunity to click to select the category and number of tickets they wish to add to their online shopping cart. When they do so, the display on the Tickets Page changes to provide additional information that reflects the ticket selection(s). However, no new webpage is opened; all changes are updated automatically and instantaneously on same webpage. The following description of the Tickets Page is therefore divided into two sections.

[140**] Tickets Page (A) – What a user sees when no ticket is yet selected:** When a logged-in user arrives on the Tickets Page, the webpage displays information about the film, location, date and time of the showings as selected by the user. The heading across the top of the webpage on both the website and the App says Tickets > Seats > Payment.

[141**]** The Tickets Page displays distinct prices for three categories of consumers: General Admission, Seniors and Children. Beside each option, to the right, it reads ADD in a rectangular blue box. One may click that box to add a desired ticket.

[142**]** Below the prices, users are advised that applicable taxes will be added at checkout.

[143] On the Tickets Page of its website (in the top right if viewed on a computer, and in the middle of the page if viewed on a mobile phone), Cineplex advertises the benefits of joining CineClub, including the waiving of any Online Booking Fee. The advertisement states "Instantly save on your ticket" and, below, in the third bullet point: "No Online Booking Fees". The advertisement does not disclose the amount of that fee (i.e., the savings for joining CineClub). There is a white space outlined in blue to click to JOIN CINECLUB.

[144] This CineClub advertisement does not appear on the App. Thus, about 37.5% of movie ticket purchasers – those who navigate the Tickets Page on the App – do not see the CineClub advertisement and therefore do not see the reference to "No Online Booking Fees".

[145] Across what appears to be the bottom of the Tickets Page, there is the floating ribbon (as described above) that did not appear on the previous webpages, which displays additional information. On the left of the floating ribbon is a timer that descends starting at 5 minutes and reads "Time Left". On the right side of the floating ribbon is displayed "Subtotal: CA$0.00" (because no ticket has yet been added to the online shopping cart), and the button PROCEED, again in a rectangular blue box.

[146] A user may or may not scroll down on the Tickets Page. As mentioned earlier, scrolling down does not affect the floating ribbon; it remains visible at all times at the bottom of the user's window.

[147] Also on the same Tickets Page are other kinds of information. There is an opportunity to enter a user's Scene+ identification and/or a "Certificate or Promo code", each by clicking to do so and entering the required information. And at the bottom of the Tickets Page is information about the Online Booking Fee. There is a blue encircled "i" that may be clicked, which links to additional information about the fee in a pop-up window, further detailed below. On that webpage, one can read: "Booking fee is discounted for Scene+ members and waived when you're a CineClub member. Applicable taxes will be calculated at checkout". At this stage of the process, the amount of the Online Booking Fee is not displayed; the subtotal still reads "CA$0.00" because no ticket has yet been selected.

[148] Clicking the blue "i" button opens a pop-up window. Under the heading "**Online Booking Fee**" is "**$1.50 per movie ticket** – Non-Refundable", and indicates that the "Online booking fee is capped at a maximum of 4 tickets per transaction." It states "0 Movie Tickets x $1.50 = **$0.00**". (Bolding is in original.)

[149] This information about the Online Booking Fee on the Tickets Page at this stage is, according to Mr Eckert's evidence, "below the fold": in other words, it means that for a majority of users, one must scroll down to see it. I will return to this point shortly.

[150] Tickets Page (B) – What a user sees once a ticket is selected: If a user selects a ticket, some information displayed on the Tickets Page and the floating ribbon updates. When clicked once, the blue ADD space to the right of a category of ticket disappears and the number "1" appears, between the symbols "+" or " – " which are inside circles. A user can change the number of tickets by clicking "+" or "–" (plus or minus) to add or subtract tickets of any of the three categories. The webpage then displays the number of tickets chosen. The process is substantially the same on the mobile website and the App.

[151] When a user adds one or more tickets to her online shopping cart, the number to the right of the word "Subtotal" on the floating ribbon changes from "CA$0.00" to display an amount equal to the sum of the price of the ticket(s) plus any applicable Online Booking Fee for the ticket(s). For example, if a user clicked to select one General Admission ticket at a price of CA$15.25, the subtotal on the floating ribbon will read "CA$16.75", or "CA$16.25" for a Scene+ member who has advised the website or App of this status, or "CA$15.25" if the website or App recognizes the user as a CineClub member.

[152] After one or more tickets are selected, the information on the floating ribbon does not change to provide an explanation for how the subtotal is determined. In other words, the floating ribbon does not advise the user that the subtotal reflects the aggregate of the price of tickets and the applicable Online Booking Fees. The user must therefore notice by herself that the subtotal is not the product of the number of tickets multiplied by the applicable ticket price or prices, by doing the mental math to work that out. A user must add up the ticket prices and deduct that sum from the stated subtotal to determine the amount of the Online Booking Fee(s) that were added. The floating ribbon does not break out the aggregate cost of the tickets and the aggregate cost of the Online Booking Fees.

[153] At this stage, if one scrolls down, near the bottom of the Tickets Page on the website and on the App, the information displayed to the right of the words Online Booking Fee has changed from "CA$0.00" to reflect the sum of any applicable fee. For one ticket, the Online Booking Fee display reads "CA$1.50", unless the user is a Scene+ member ("CA$1.00") or CineClub member ("CA$0.00"). For a user who is not a Scene+ or CineClub member and who purchases four tickets or more, the Online Booking Fee will show "CA$6.00".

[154] Clicking the blue "i" button again opens a pop-up window on top of the Tickets Page. Under the heading "**Online Booking Fee**" is "**$1.50 per movie ticket** – Non-Refundable", and indicates that the "Online booking fee is capped at a maximum of 4 tickets per transaction." This pop-up window now states the number of movie tickets and the total Online Booking Fee, for example "4 Movie Tickets x $1.50 = **$6.00**". (Bolding is in original.)

[155] To see the aggregate amount of the Online Booking Fees on this webpage without doing the mental math, described above, a user must scroll down, or scroll down and click "i" for additional information.

[156] A user cannot proceed with an online movie ticket purchase without first clicking the ADD button to select at least one movie ticket on the Tickets Page. If a consumer clicks the PROCEED button without clicking the ADD button to select a movie ticket, a warning pop-up appears, and the consumer may not proceed with the transaction until a movie ticket is selected. Cineplex characterized this feature as a "lockout" that prevents a user from going forward on the website or App to the next step of seat selection until at least one ticket is selected.

[157] However, once tickets are selected, a user is <u>not</u> required to scroll to the bottom of the Tickets Page (where the information about the Online Booking Fee is located) before being able to advance by clicking the PROCEED button.

[158] Mr McGrath testified that Cineplex very specifically designed the Tickets Page to have the total online price (that is, the subtotal – i.e., the aggregate price of the tickets plus any applicable Online Booking Fees, but excluding applicable taxes) right beside the PROCEED button, to ensure consumers see the online price before proceeding to the next page.

[159] Seat Selection Page: Moving on to the next step, the user is prompted to select seat(s) for the movie at the theatre chosen. On arrival at the seat selection page, the information on the floating ribbon changes from the Tickets Page. It now shows a "Total" cost, which is an aggregate amount representing the sum of the price of all tickets, plus the sum of any applicable Online Booking Fees, plus applicable taxes. After selecting seats, the user then clicks the PROCEED button to arrive at the Payment Options Page.

[160] Payment Options Page: The Payment Options Page is where the user selects the method of payment. The total on the floating ribbon is still the tickets price plus any applicable Online Booking Fees plus applicable taxes. The user makes the payment type selection and then clicks the PROCEED button to arrive at the Payment Page (discussed below).

[161] The Payment Options Page on the website (again, whether on a computer or a mobile phone) and the App displays an Order Summary, which shows the number of movie tickets selected and their aggregate cost, the Online Booking Fees and their aggregate cost, applicable taxes in aggregate, and a total. A blue "i" button is available beside Online Booking Fee to click for information (doing so yields the same information as on Tickets Page (B) discussed above (at paragraph 154)). Importantly, the Order Summary is only visible on the website or the App if a user scrolls down to see it.

[162] Below the Order Summary, it says: "By continuing past this page, you agree to our TERMS & CONDITIONS."

[163] The floating ribbon remains at the bottom of the Payment Options Page on both the website and the App, with the countdown timer ("Time Left") on the left side and, on the right side, the total price and the clickable blue box to proceed with the purchase.

[164] A user can click the PROCEED button and move to the next page without scrolling down to see either the Order Summary or the statement about the TERMS & CONDITIONS.

[165] Payment Page: Once a user lands on the Payment Page on a computer, the floating ribbon displays a countdown timer, restarted at 15:00 ("Time Left"). The webpage shows the selected movie, the date and time and location selected, and enables the user to "Review Your Order," above the total cost of the order. It provides spaces to input credit card or other payment information, and once a user has scrolled down on the webpage, there is a blue rectangular box to click to proceed with the purchase. On the mobile phone website and on the App, the information on the Payment Page is essentially the same, although there is no floating ribbon with a countdown timer.

F. Scrolling, and Information Above and Below the Fold

[166] There are webpages on the website and the App where a user may scroll, or needs to scroll, to advance forward. A user's desired movie may not immediately appear on the screen and the user may have to search for it by scrolling down the webpage. Or the user may be interested in seeing some movie but has not yet selected which one, and browses the website or App to find one of interest. Another example is on the App, where, after selecting a movie, a user arrives at a webpage with the "Buy Tickets" heading and selects a day to see the movie. The user must then scroll down to click a show time on that date at the location chosen, which advances the user to the Tickets Page.

[167] Mr McGrath and Dr Amir confirmed that on the Tickets Page, after adding a ticket to the online shopping cart, a mobile website or App user does not have to scroll to the bottom of the Tickets Page before being able to advance by clicking PROCEED.

[168] Mr McGrath confirmed that a floating ribbon on the App means a user can click the PROCEED button without ever scrolling to the bottom of the webpage.

[169] Dr Amir confirmed that on all mobile phones, a user can go through the online purchase process without ever seeing the information that is disclosed below the fold with respect to the Online Booking Fee.

[170] Dr Amir also testified that websites used to be designed to require consumers to scroll to the bottom before clicking a button to advance to the next page, but people did not find the button at their convenience. Dr Amir suggested that it was more convenient for people to have the button allowing to proceed available at any point, as it currently appears on the floating ribbon. In other words, the current design (which does not require a consumer to scroll down and therefore see all pricing information prior to proceeding with the purchase) is a deliberate design choice that Cineplex preferred. Cineplex could elect to require consumers to scroll down to the bottom of the page to click the PROCEED button if it wanted to.

[171] As detailed below, Mr Eckert provided significant context and understanding for this and other evidence, and I accept Mr Eckert's evidence.

[172] Mr Eckert's report explained that, akin to the display of newspapers on a newsstand, the concept of a "fold" on a webpage also applies to digital marketing and website design. Because webpages do not fold the way newspapers do, the fold line refers to the point at the bottom edge of the screen where the web browser cuts off the content and requires users to scroll down to view the rest of the page content. Everything after that scroll point is considered below the fold.

[173] The fold is important because scrolling is an extra action that users must take to access content. Regardless of what screen size or type of device is used, online marketing best practices suggest that "anything of primary importance is placed in that first viewable area of the web page before the user has to scroll down to reveal more information". Mr Eckert referred to research, based on quantitative evidence by the Nielsen Norman Group, finding a dramatic drop-off in user attention at the position of the page fold – the information immediately above the fold was viewed 102% more than the information immediate below it.

[174] Mr Eckert's report advised that when users fail to see information of value, they stop scrolling. In addition, users scroll when there is a reason to do so.

G. The Countdown Timer on the Floating Ribbon

[175] There is a countdown timer on the left side of the floating ribbon, starting at the Tickets Page. The timer resets when a user moves to the next webpage, but users are not advised that it will do so.

[176] Mr McGrath testified that there were "backend" reasons for the countdown timer related to "resource management" – effectively, to ensure that abandoned or otherwise incomplete transactions do not clog up the communications between the website and the ticketing system (which includes individual theatres). He testified that a timer is part of the underlying architecture of the Vista software Cineplex purchased to drive its online ticketing engine and that the countdown timer has been part of the purchase flow long before the introduction of the Online Booking Fee. In other words, according to Mr McGrath, the countdown timer is independent from the implementation of the Online Booking Fee and is geared towards a different purpose.

[177] However, tickets do not come out of inventory (that is, they do not become unavailable) until the user clicks the PROCEED button after selecting at least one ticket and moves to the Seat Selection Page.

H. Conversion Pages

[178] Mr Eckert described two principles of webpage design configuration, known as the F pattern and the Z pattern. The Z pattern is used for conversion pages that serve the single purpose of converting users into consumers, such as the Tickets Page on the website and the App.

[179] As Mr Eckert's report advised, conversion pages "are designed to quickly move the user from initial page load to making a selection and advancing to the next step the website owner wants them to take in the sales funnel." On a conversion page, the "call to action" prompt button is placed at the end of the Z (i.e., the bottom right corner), as the Cineplex website has done by placing the PROCEED button on the floating ribbon in that position.

[180] Mr Eckert agreed in cross-examination that if the issue were whether Cineplex adequately showed the total price clearly to the consumer, it did a good job. He also agreed that if a user scrolled down, the user would see the Online Booking Fee broken out from the price of tickets in the subtotal on the floating ribbon.

[181] However, Mr Eckert's report also advised as follows with respect to obscuring content:

36. Conversion pages are usually the most important pages in a website and are carefully designed to optimize conversions, whether the goal is to increase leads, or drive sales through the website. Understanding the user's screen dimensions in these scenarios is paramount to the overall success of the web page design to place the call to action in the optimal position on the user's screen above the page fold.

37. To ensure the user sees the primary call to action above the fold, Cineplex.com uses a floating ribbon along the bottom edge of the browser to ensure the timer and primary call to action are always in view. This approach introduces two notable issues that impact the user's experience by obscuring other content on the web page related to understanding the additional fees associated with purchasing tickets online, referred to as the Online Booking Fee. The first is the creation of a false floor. The second is discouraging the user from scrolling down the page by implementing a timer and floating call to action button above the fold.

[Emphasis added.]

[182] Mr Eckert described the "false floor" user experience issue as occurring when the design of a webpage above the fold creates the "illusion of completeness", which can interfere with scrolling. When the primary "call to action" prompt button is also included above the fold, it encourages users to convert (that is, to proceed with the transaction) without scrolling down the webpage any further. With the addition of a countdown timer, a placement of a "call to action" prompt button (here, the PROCEED button on the Tickets Page of the website and the App) above the page fold "discourages scrolling as users can select their tickets and convert without having to scroll down".

[183] Mr Eckert testified at the hearing that the false floor encourages the user to proceed without scrolling because there is no need to scroll further. According to him, the consumer has all the information needed to proceed forward, presented above the fold.

[184] I accept Mr Eckert' evidence on conversion pages as just outlined.

I. What Website Users See

[185] Mr Eckert's report also discussed standard screen dimensions and resolutions, based on industry-wide accepted screen resolution metrics. The underlying source was public data from a source that provides real-time screen resolution metrics based on over 5 billion webpage views per month across more than 1.5 million websites. He noted at the hearing that the source monitors over 5 billion clicks (visits to webpages) per month and that there was no reason to suspect that Cineplex's patrons were any different from other people. His firm uses these global statistics when they do not have analytics from a client's website, a practice that is paramount throughout the professional web design industry and published on agency websites and professional grade website testing platforms.

[186] Mr Eckert advised that based on statistics from November 2023, website designers will note that 69.33% of all users of the Internet use a maximum screen resolution with a fixed height of up to 1,080 pixels or smaller, while 2.97% of web users have a maximum resolution of 1,440 pixels or smaller (with the remaining 28.13% undetermined). On cineplex.com, the placement of the Online Booking Fee on the Tickets Page is well beyond what common web browsers can display above the page fold, positioned 1,330 pixels below the top of the browser.

[187] In addition, based on the same common screen resolution data from November 2023, Mr Eckert demonstrated that over 69% of viewers using computers would not readily see the Online Booking Fee information located below the fold near the bottom of the Tickets Page on cineplex.com. For users using the mobile version of the website and the App, the Online Booking Fee is also beyond the maximum viewable area of contemporary mobile phones, without scrolling down. Mr Eckert showed that over 63% of mobile viewers

would not see the Online Booking Fee information located below the fold near the bottom of the Tickets Page on the App without scrolling down. One of Dr Amir's screen captures of the App showed that what he saw on the Tickets Page was consistent with Mr Eckert's evidence.

[188**]** Mr Eckert referred to two studies by the Nielsen Normal Group (which he characterized as "world-renowned user experience researchers" at the hearing), in 2010 and 2018, on how web users consume webpage content and how often users scroll down to view beyond the initially displayed webpage. These studies showed that users spent more than half of their time viewing content located above the fold. Both showed a sharp decrease in attention below the fold.

[189**]** Mr Eckert concluded at paragraph 48:

The design of the Cineplex.com Tickets page, which features a floating ribbon at the bottom including a countdown timer and a primary call to action button, creates a false floor on both the website and the mobile applications. The layout places important information regarding the additional fees charged for booking online below the maximum screen depth limitations of nearly all contemporary technologies. It is my opinion that the Cineplex.com Tickets page does not encourage users to scroll down below the fold. The floating ribbon is designed so that users can convert without scrolling down the page to uncover additional information.

[Emphasis added.]

[190**]** I accept Mr Eckert's evidence.

[191**]** Dr Amir's reports did not address the concept of a false floor. At the hearing, however, he testified that the industry refers to a "floating floor" (rather than a false floor) and that it helps users see a "call to action" prompt button. He advised that people scroll because they want to find information that is relevant. While he referred orally to his studies with companies showing that a floating floor does not inhibit consumers from scrolling (instead it helps people see the "call to action" prompt button), Dr Amir did not elaborate on his study and did not do a study of the Cineplex website or App himself. Dr Amir criticized Mr Eckert's reports for failing to measure empirically whether his views accurately reflected consumer behaviour and argued in his initial report that Mr Eckert's conclusion that consumers using the Cineplex website were discouraged from scrolling downwards remained "entirely hypothetical and thus misleading". His sur-reply report argued that Mr Eckert's report was unsupported by an empirical study on whether Cineplex consumers scrolled or not. However, Dr Amir did not provide a reasoned basis to disagree with Mr Eckert's opinion on website design and, unlike Mr Eckert, did not refer to any external evidence to support his position. Mr Eckert's evidence was neither hypothetical nor misleading.

[192**]** Dr Amir did not comment on Mr Eckert's use of the external studies on screen dimensions and resolutions, or what a user would see, apart from his view that Mr Eckert failed to apply his descriptions to actual Cineplex consumers and failed to describe their experiences.

[193**]** Cineplex's evidence at discovery (read into the record at the hearing) was that it does not track users' scrolling on its webpages or App. Cineplex did not adduce analytics or other evidence about actual consumer use patterns on its website and specifically, adduced no evidence on information consumption above and below the fold or on scrolling behaviour on the Tickets Page. Nor did Cineplex provide evidence about its website design or expected user experience and behaviour from anyone directly involved in the design and strategy of cineplex.com or the Tickets Page.

J. Website Statistics

[194**]** Cineplex has some data about visits and visitors to its website on computers and mobile phones. Cineplex does not track similar traffic on the App.

[195**]** According to the data collected, in the last six months of 2022, users visited the Cineplex website approximately 97 million times. There are no data available for the number of actual or unique visitors to the website. Of the website traffic (visits, not visitors), approximately 11.8% reached a user's online shopping cart on the Tickets Page. Of those, approximately 42% (or about 5% of initial visits) completed an online purchase of tickets. The remaining 58% left without purchasing a ticket.

[196**]** Cineplex's website data for the calendar year 2022 ("Ticketing Funnel by Page Views") shows the ticketing process by page views and by consumer group. For that period, overall, approximately 52% of consumers who reached the Tickets Page selected a quantity of tickets (which went into their online shopping cart), approximately 28% of consumers reached seats section, approximately 14% viewed the payment options and 6.5% reached the order stage. The numbers are also broken down by consumer groups (showing the numbers and proportion of CineClub members, Scene+ members and regular consumers reaching each stage of ticketing). From the Tickets Page on the website, Cineplex data for the calendar year 2022 about both the App and the mobile website (entitled "Ticketing Funnel Comparison – Fallout") also shows a marked drop-off of visitors as they progress through them.

[197**]** According to Cineplex data, from start to finish, it takes consumers an average of three minutes and one second to complete a transaction on its website and two minutes and 34 seconds to complete the transaction on the App.

K. Other Aspects of Mr McGrath's Evidence Related to the Website and the App

[198**]** Mr McGrath acknowledged that there were other ways to design certain webpages and that additional information could have been included on certain pages. For example, Cineplex could display the all-inclusive price (although Mr McGrath believed it would be misleading) or it could add a blue link next to the preview seats option where the in-theatre ticket prices could be displayed.

[199**]** Mr McGrath testified that in his view, it would be misleading to consumers to provide an all-inclusive price (that is, the "base price" of the ticket plus the Online Booking Fee) on the Tickets Page, because in his view, consumers pay for two separate products when they pay the theatre ticket price and the Online Booking Fee.

[200] Mr McGrath testified that there are "two separate products being purchased in the online booking system": (i) the ticket for the showing, and (ii) the guaranteed advance seat selection for that showing. He noted that these products have separate value and a separate price. He explained that purchasers obtain the certainty of seat selection of their choice and a guaranteed seat from the online purchase, booked from wherever a user may be at a given moment (rather than having to go to the theatre to proceed with the purchase of tickets and to book their seat). Purchasers get a digital copy of the ticket, which can be shared with others attending the movie. Dr Amir provided his opinion that advance seat selection has value to consumers in the "certainty of knowing you have a seat and picking good seats"**.**

[201] However, as was made clear at the hearing, purchasers cannot buy a ticket to a movie without a seat selection, either online or in-person at the theatre. This circumstance was an apparent departure from paragraph 60 of Mr McGrath's witness statement, which advised that

… consumers may purchase movie tickets at theatres or via the advance online purchase process on the Website or through the App. Both latter methods allow consumers to purchase tickets in advance and immediately select and reserve their preferred seats.

[Emphasis added.]

[202] While the underlined words leave the impression that at-theatre ticket purchases are different from online purchases, that is not the case. Mr McGrath confirmed in cross-examination that one can also purchase advance tickets at the theatre, hours or days in advance of a showing and immediately select and reserve a preferred seat. Buying tickets at a theatre in advance causes a seat to be held for the consumer and that seat is no longer available for those purchasing tickets either in-person at the theatre or online. Whether one purchases tickets online or at the theatre, Cineplex relies on the same seat reservation system (Vista software). In both cases, if the consumer who purchases tickets in advance does not come to the show, the seat remains empty. To the extent there is a material difference between the purchase methods, it is that the user who proceeded online paid the associated Online Booking Fee, whereas the consumer who bought the tickets at the theatre did not.

[203] While Cineplex's internal booking system may treat a movie ticket and the corresponding seat selection as distinct, in all practical terms, the movie ticket and the seat to watch that movie are obviously bound up together. Whether one purchases tickets online or in-person at the theatre, one cannot attend a Cineplex movie without a seat in the theatre and one cannot acquire a seat without purchasing a movie ticket. Cineplex does not offer two separate products to consumers that can be separately purchased or used.

L. The Start of the "Purchase Process" on the Website and the App

[204] The parties spent considerable time at the hearing drawing out evidence related to where the "purchase process" begins on cineplex.com and on the App. The Commissioner's eventual position during argument at the end of the hearing was that the purchase process begins on the homepage. Cineplex's position, supported by Mr McGrath's statement and testimony, was that the purchase process begins on the Tickets Page, at the moment when a consumer selects a product (that is, a movie ticket) by clicking the ADD button. (See Tickets Page (B) above.)

[205] I have not been persuaded that much (if anything) turns on the issue of where the purchase process begins on the website or the App in this case. There is no requirement for or reference to being in a "purchase process" in the language of either paragraph 74.01(1)(*a*) or subsection 74.01(1.1) of the *Competition Act*. Cineplex advised during its oral submissions that the issue was not relevant to subsection 74.01(1.1) and does not fit within the statute. There was also reference to discussions about the purchase process arising in relation to possible rules proposed by the US Federal Trade Commission.

[206] Nonetheless, I will make the following factual findings and observations in the event that the start of the purchase process is meaningful to the outcome of this case.

[207] Viewing the evidence as a whole, I find no persuasive basis to conclude that the purchasing process "begins" on any particular webpage, or anywhere specific on the App, other than perhaps the homepage. The website and the App as a whole serve as a funnel designed to convert visitors into ticket purchasers. The entire process of clicking through the website or App is designed to encourage users to select a show (i.e., a film to watch at a location, date and time) and then buy a ticket to see that show.

[208] To identify where the purchase process begins, there was considerable focus on the contents of and user actions on the Tickets Page. Yet much of the website and the App as a whole, starting with the homepage, contains some information relevant to the purchase of movie tickets. There is no express statement asking the user to enter the purchase process, or advising the user that they are doing so. In my view, there are at least four different stages at which one could argue the purchase process begins.

[209] Before reaching the Tickets Page, a log in process is required through which the user must self-identify and input an authentication code. At least one webpage before the Tickets Page has express content that suggests a user's intention to buy tickets, as the user must click a button that reads "Get Tickets" on the website (or the heading "Buy Tickets" on the App) to advance to the next page. On the App, the heading "Buy Tickets" appears before a user selects a date, time and location to see their chosen movie. One must click on that button to get to the Tickets Page. The display of "Get Tickets" / "Buy Tickets" and then clicking to move past these webpages on the website or the App could be indications that a user has entered the purchase process.

[210] The Tickets Page itself has the heading Tickets > Seats > Payment and it displays prices and the ability to click to add one or more tickets to the user's online shopping cart. The mere display of this information could serve as an indication that a user has entered the purchase process (before clicking to add a ticket).

[211] On the Tickets Page, the user may click on the ADD button to add one or more tickets to the online shopping cart, which could be an indication that a user has entered the purchase process. A subtotal of ticket prices plus the associated Online Booking Fee is then displayed. However, no tickets are actually taken from inventory at this point.

[212] Clicking forward to the Seat Selection Page could be an indication that a user has entered the purchase process. Tickets are taken from inventory and held temporarily for the user at this point, but a large number of users drop off (i.e., abandon the purchase process and leave the website) at the point of seat selection. Because no ticket may be purchased without making a specific seat selection – which the user has not yet done on arrival at this webpage – the tickets are then released back in the inventory if the user drops off.

[213] If the user elects to continue forward, the user then moves to the Payment Options Page, and then the Purchase Page, if a purchase is completed.

[214] On this evidence, I see no persuasive basis on which to identify a specific webpage or moment when the purchase process begins on the website or the App, other than perhaps the homepage where the user is presumed to land first.

[215] The data evidence supports Cineplex's observation that a substantial majority of website user visits do not reach the Tickets Page. Cineplex argued that this evidence should lead to a finding that the webpages before the Tickets Page were for consumers to gather information, before commencing the ticket purchase process by clicking the ADD button on the Tickets Page. However, it is also true that the drop-off of users continues on each page after the Tickets Page. Only a very small percentage of those who make it to the Tickets Page eventually buy tickets on the website. The evidence shows no clear delineation before and after the moment a user clicks the ADD button on the Tickets Page.

[216] I accept that the Tickets Page has been designed as a "conversion" page, which encourages the user to click the PROCEED button to advance. But that design does not imply that the user is necessarily converted to a purchaser, or that the purchase process necessarily begins with the click of the ADD button, owing to the contents of the webpages before the Tickets Page, the contents of the Tickets Page (A) and the website user data.

[217] Considering all of the above factors together, it would be artificial to conclude that the webpages before the Tickets Page are for information purposes only and that the purchase process only begins at the Tickets Page upon clicking the ADD button.

V. Relevant *Competition Act* Provisions

A. Provisions Related to Reviewable Conduct

[218] Section 74.01, specifically through paragraph 74.01(1)(*a*) and subsection 74.01(1.1), defines certain conduct related to representations to the public that constitutes reviewable conduct under section 74.1.

[219] Subsection 74.03(4) provides that "for greater certainty", in proceedings under section 74.01, it is not necessary to establish that any person was deceived or misled.

[220] Subsection 74.03(5) provides that in proceedings under section 74.01, the "general impression conveyed by a representation as well as its literal meaning" shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.

[221] Cineplex did not argue that it exercised due diligence under subsection 74.1(3).

B. Objectives of the *Competition Act* and the Deceptive Marketing Provisions in section 74.01

[222] This proceeding raises the overall objectives of the *Competition Act* and of the deceptive marketing provisions in Part VII.1, and specifically subsections 74.01(1) and (1.1).

[223] In their submissions, the parties referred to the overall objectives of the *Competition Act* and the purposes of subsections 74.01(1) and (1.1). The Commissioner's written submissions implied that the objective of subsection 74.01(1.1) is "consumer protection", which the Commissioner refined during oral submissions to better reflect what he alleged to be the objectives of the provisions.

[224] Like its predecessor the *Combines Investigation Act*, the *Competition Act* is intended to promote vigorous and fair competition in Canada and to discourage certain forms of commercial behaviour that are viewed as detrimental to Canada and the Canadian economy: see *General Motors of Canada Ltd v City National Leasing*, 1989 CanLII 133 (SCC), [1989] 1 SCR 641, at p. 676; *R v Wholesale Travel Group Inc,* 1991 CanLII 39 (SCC), [1991] 3 SCR 154, at pp. 190, 198, 199 (*per* Chief Justice Lamer) and pp. 256-257 (*per* Justice Iacobucci); *Alex Couture Inc v Canada (Attorney General)* (1991), 1991 CanLII 3120 (QC CA), 38 CPR (3d) 293 (Qué CA), at pp. 320, 321*b*, 324c-*d*.

[225] Section 1.1 of the *Competition Act* sets out the objectives of the statute:

"Purpose and Interpretation "	"Objet et définitions "
"Purpose "	"Objet "
Purpose of Act" "	**Objet**" "

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.“ ”	**1.1** La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l’adaptabilité et l’efficience de l’économie canadienne, d’améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d’assurer à la petite et à la moyenne entreprise une chance honnête de participer à l’économie canadienne, de même que dans le but d’assurer aux consommateurs des prix compétitifs et un choix dans les produits.“ ”

[226**]** In prior cases, appellate courts and this Tribunal have commented on these stated objectives and how they related to specific provisions in the statute: see, e.g., *R v Stucky,* 2009 ONCA 151, at paras 39-40; *Canada (Commissioner of Competition) v Superior Propane Inc,* 2001 FCA 104, [2001] 3 FC 185, at paras 85-93. There have also been other implicit goals identified in the case law: see *Shah v LG Chem Ltd,* 2018 ONCA 819, at paras 36-38 and the cases cited there.

[227**]** The Federal Court of Appeal has stated that the objective of the deceptive marketing provisions in section 74.01 is to “incite firms to compete based on lower prices and higher quality”, in order to achieve the objective in section 1.1 of providing consumers with competitive prices and product choices: *Canada (Commissioner of Competition) v Premier Career Management Group Corp,* 2009 FCA 295, [2010] 4 FCR 413 (“*Premier Career Management Group FCA*”), at para 61. Discussing both the overall goals of the statute and the purposes of the deceptive marketing provisions, Justice Sexton stated:

[61] […] Importantly, the deceptive marketing provisions—unlike many other provisions of the Act—do not list actual harm to competition as an element of the offence. Since harm to competition is not listed as an element of the offence in this case, but it is a truism that the Act always seeks to prevent harm to competition, it is presumed that whenever the elements of paragraph 74.01(1)(a) are made out, there is *per se* harm to competition.

[62] When a firm is permitted to make misleading representations to the public, putative consumers may be more likely to choose the inferior products of that firm over the superior products of an honest firm. When consumer information is distorted in this manner, firms are encouraged to be deceitful about their goods or services, rather than to produce or provide higher quality goods or services, at a lower price. Therefore, as the appellant contends, when a firm feeds misinformation to potential consumers, the proper functioning of the market is necessarily harmed, and the Act is rightly engaged, given its stated goals.

[63] As the appellant submits, the proper focus of analysis in deceptive marketing cases is the consumer. While the respondents correctly state that the Act is not a consumer protection statute, they are wrong to suggest that this interpretation of the deceptive marketing provisions is tantamount to interpreting the Act as a consumer protection statute. On the contrary, as the foregoing analysis indicates, a focus on the consumer is not indicative of the objective of the scheme, but is a consideration antecedent to the ultimate objective: maintaining the proper functioning of the market in order to preserve product choice and quality.

[228**]** Similar statements are found in the Tribunal’s decision (*Commissioner of Competition v Premier Career Management Group et al,* 2008 Comp Trib 18 (“*Premier Career Management Group CT*”), at para 187) and in a publication quoted by Justice Simpson in that case: Department of Consumer and Corporate Affairs Stage 1, Competition Policy, Background Paper of April 1976, at p. 38. In *Commissioner of Competition v Gestion Lebski inc,* 2006 Comp Trib 32, Justice Blanchard found that the purpose of the deceptive marketing provisions was “to ensure the quality and accuracy of commercial information and to prevent deceptive marketing practices”: at para 264. He also accepted that consumer protection was an underlying objective of paragraph 74.01(1)(*b*): at para 97.

[229**]** In Commissioner of Competition v Imperial Brush Co Ltd And Kel Kem *Ltd (cob as Imperial Manufacturing Group)*, 2008 Comp Trib 02, the Tribunal (*per* Justice Phelan) commented as follows in a proceeding under paragraph 74.01(1)(*b*):

[76] […] the general underlying rationale of paragraph 74.01(1)(*b*) is the decrease of deceptive advertising. The word “deceptive” in this case, however, does not refer to “false” advertising, but to unsubstantiated, unsupported or speculative representations about the performance, efficacy or length of life of the product. The objective is to prevent certain unsubstantiated representations. The deception being addressed is that these representations are grounded in some objective testing. A representation that a product will perform in a specific way is designed to convince the purchaser that there is some objective basis upon which the purchaser can rely.

[77] Also, the provision sets out a substantiation requirement, the proof of which lies on the seller. The paragraph thus seeks to redress the imbalance of knowledge between the consumer and the seller. It protects the consumer by ensuring that she can rely on statements regarding the performance, efficacy or length of life of a product since those statements are to be based on proper and adequate tests.

[…]

[79] The improvement of consumer information benefits, in turn, consumers, firms selling competing products, and the proper functioning of the market. The Royal Commission on Prices Spreads noted that measures for consumer protection also benefit sellers.

[80] On the basis of the evidence before the Tribunal, I therefore conclude that the objective of paragraph 74.01(1)(*b*) is the protection of consumers, competitors and the proper functioning of the market from the harm caused by unsubstantiated representations about the performance, efficacy or length of life of a product.

[Emphasis added.]

See also paragraph 74.

[230**]** In *Sears,* the Tribunal (*per* Justice Dawson) made the following comments about the purposes of the ordinary price provision in subsection 74.01(3):

[82] [...] The Act seeks to encourage and maintain competition and the objective of the impugned legislation is to do this by improving the quality and accuracy of marketplace information and by discouraging deceptive marketing practices.

[...]

[97] In *Irwin Toy, ...* Chief Justice Dickson found that there could be no doubt that a ban on advertising directed to children was rationally connected to the objective of protecting children from advertising because the "governmental measure aims precisely at the problem identified". I am similarly satisfied on the basis of common sense and logic that the impugned legislation, by sanctioning OSP representations that are materially misleading, aims directly at the objectives of the impugned legislation. Put another way, sanctioning materially false or misleading OSP representations promotes the protection of consumers from deceptive OSP representations, protects businesses from their anti-competitive effects, and protects competition from their anti-competitive effects and inefficiencies.

[Emphasis added.]

[231**]** Prior to the enactment of the deceptive marketing provisions in 1999, a consultative panel provided a report to the Commissioner that referred to harm to the "competitive process, including consumers, competitors and others": E. Ratushny, Q.C., Chair, "Report of the Consultative Panel on Amendments to the *Competition Act*" dated March 6, 1996, p. 18.

[232**]** Consistent with these decisions, the Federal Court has observed that the protection of consumers is one of the "underlying purposes" of the *Competition Act*: *Lin v Airbnb, Inc,* 2019 FC 1563, at para 57 (appeal dismissed following settlement: 2022 FCA 3).

[233**]** In sum, the *Competition Act* is not a consumer protection statute. Instead, the statute has broader economic objectives, as are expressly stated in section 1.1. The focus of the deceptive marketing provisions of the *Competition Act* is the consumer. Those provisions are designed to support the statutory objective of providing consumers with competitive prices and product choices. The provisions have several specific aims that focus on the informational integrity of markets. The aims are: to enhance and protect the proper functioning of markets, so markets are not distorted by misinformation; to protect consumers from purchasing goods or services based on inaccurate information; to encourage competition on the merits by incenting firms to provide accurate and truthful information to the public, particularly as to the price of goods and services, for the benefit of both consumers and honest competitors; and to support the production and supply of higher quality goods and services at lower prices.

C. The Burden of Proof and the Nature of Reviewable Conduct in Part VII.1 of the *Competition Act*

[234**]** The standard of proof in this proceeding is the civil standard of proof on a balance of probabilities: *Gestion Lebski inc,* at paras 53, 152, 191; *Tervita Corp v Canada (Commissioner of Competition),* 2015 SCC 3, [2015] 1 SCR 161, at para 66; *Toronto Real Estate Board v Canada (Commissioner of Competition),* 2017 FCA 236, [2018] 3 FCR 563, at paras 48, 87; *FH v McDougall,* 2008 SCC 53, [2008] 3 SCR 41, at paras 45-46, 49.

[235**]** Some of the parties' submissions referred to the reviewable conduct in section 74.01 as an "offence" or "reviewable offence". The word "offence" has been used in some contexts: see *Premier Career Management Group FCA,* at para 61. Historically, like today, there has been an offence in the *Competition Act* relating to the knowing or reckless making of a representation to the public that is false or misleading in a material respect: see section 52.

[236**]** However, section 74.01, through section 74.1, does not create an "offence" in the sense of the criminal law provisions in Part VI (including section 52) or the offences in section 66 of the *Competition Act*. The Tribunal concluded in *Gestion Lebski inc* that proceedings under paragraphs 74.01(1)(*a*) and (*b*) are not criminal proceedings, that the sanctions provided for in subsection 74.1(1) are not true penal consequences, and that a person against whom the Commissioner initiates a proceeding under paragraphs 74.01(1)(*a*) and (*b*) is not a person "charged with an offence" within the meaning of section 11 of the *Charter*: *Gestion Lebski inc,* at paras 43-70. The Tribunal acknowledged that reviewable conduct has some conceptual similarity to strict liability offences (e.g., that neither one required proof of a mental element), but confirmed that the standard of proof for reviewable conduct matters is on a balance of probabilities, not proof beyond a reasonable doubt as in criminal proceedings: *Gestion Lebski inc,* at para 53.

[237**]** In my respectful view, it is preferable to refer to the reviewable practices in section 74.01 as civil provisions (*Premier Career Management Group FCA,* at paras 27, 39; *Gestion Lebski inc,* at paras 50-55, 152, 264) and to leave the term "offences" to refer to the criminal law provisions of the *Competition Act* that prohibit conduct and involve penal consequences.

VI. The Representations

A. Representations on the Cineplex Website and the App

[238**]** The Commissioner alleged that Cineplex makes representations about the price of movie tickets on its website that are false or misleading in a material respect under paragraph 74.01(1)(*a*). The Commissioner claimed that Cineplex's ticket price representations are not attainable due to fixed obligatory charges or fees under subsection 74.01(1.1).

[239**]** The price representations relate to the price for individual tickets for movies (General Admission, Seniors or Children) displayed on the Tickets Page of the website and the App, before a consumer clicks the ADD button to select one or more tickets to a movie (i.e., at the stage of Tickets Page (A) described above). The Commissioner maintained that these unattainable price representations continue to be displayed on the Tickets Page even after the ADD button is clicked and the Online Booking Fee is added to the cost for consumers (i.e., at the stage of Tickets Page (B), described above).

[240**]** The Tribunal finds that these displays on Cineplex's website constitute a "representation" to the public under paragraph 74.01(1)(*a*) and a "representation of a price" under subsection 74.01(1.1).

B. Literal Meaning and General Impression of the Representations

[241**]** Subsection 74.03(5) requires the Tribunal, in proceedings under section 74.01, to take into account both the literal meaning and the general impression conveyed by a representation.

(1) Applicable Legal Tests

(a) Literal Meaning

[242**]** The literal meaning of a representation is conceptually uncontroversial: it is what it says on its face, interpreted in its ordinary sense: *Richard v Time Inc*, 2012 SCC 8, [2012] 1 SCR 265, at para 47; *Sears,* at paras 327, 330-331.

(b) General Impression – Parties' Positions on the Appropriate Legal Test

[243**]** The parties disagreed about the legal test to be applied to determine the general impression conveyed by the impugned representations. The Commissioner advocated for the "credulous and inexperienced consumer" based on *Richard,* while Cineplex supported the "average consumer" as the appropriate perspective from which to determine general impression.

[244**]** The Commissioner submitted that the Tribunal should consider the general impression conveyed by the representation to the "credulous and inexperienced consumer" as adopted in *Richard*: at paras 63-78; *Canada (Commissioner of Competition) v Chatr Wireless Inc,* 2013 ONSC 5315 ("*Chatr 2013*"), at paras 123-132; *Bell Canada v Cogeco Cable Canada,* 2016 ONSC 6044, at paras 25-26.

[245**]** In oral submissions, the Commissioner noted that the attributes of the consumer looking at the advertisement are a fundamental issue in any misrepresentation case. The Commissioner submitted that prior to *Richard,* the test for general impression was the "average consumer", who has an average level of intelligence, scepticism and curiosity. The Commissioner contended that on the basis of *Richard,* one can no longer consider the average consumer who is prudent and well-informed, but instead must consider a consumer who is a step below – a consumer who is credulous and inexperienced in detecting misrepresentations.

[246**]** The Commissioner observed that in *Chatr 2013,* the Ontario Superior Court applied a "credulous and technically inexperienced" consumer standard. The Commissioner argued that the standard was correct but that the Ontario court erred by interpreting "inexperienced" as meaning inexperienced with the product or with technology in that case, as opposed to being inexperienced in detecting falsehoods and subtleties in consumer commercial representations (citing *Richard,* at para 71). The Commissioner also noted that the Federal Court referred to the *Chatr 2013* standard in *Canada (Commissioner of Competition) v Canada Tax Reviews Inc,* 2021 FC 921, at paras 82-85; and *Energizer Brands, LLC v Gillette Company,* 2023 FC 804, at para 178.

[247**]** For its part, Cineplex relied on the "average consumer" (citing the Tribunal's decision in *Premier Career Management Group CT*, at para 208; Anita Banicevic, "Assessing General Impression under the *Competition Act*: The Credulous Man Who Was Never There", 29 *Canadian Competition Law Rev* 57 (2016)). Citing several cases, Cineplex argued that in deciding whether a representation was false or misleading, courts consider the attributes of the intended audience and focus on what could reasonably be understood by the average consumer. The average consumer varies depending on the audience to which the advertisement is directed.

[248**]** For the reasons that follow, I agree in part with each of the parties on the legal standard. I also conclude that both parties are correct that the attributes of the intended audience can be important and should be considered in each case.

[249**]** As I will explain, the appropriate perspective for assessing the general impression of a representation under section 74.01 is that of the ordinary citizen. In most cases, the ordinary citizen will be the ordinary consumer to whom the representation is made, directed or targeted. Applying the analytical approach contemplated by *Richard,* the ordinary citizen or consumer standard is more consistent with the statutory objectives in the *Competition Act,* section 1.1, and with the purposes of the deceptive marketing provisions. This standard is able to respond to the specific circumstances of each case through the attributes of the ordinary consumer to whom the representation is made, directed or targeted, as the decided case law determining liability under sections 74.01 and 52 of the *Competition Act* shows.

(i) General Impression – Cases before *Richard*

[250**]** Prior to *Richard,* the Federal Court of Appeal held that, when construing representations to the public, the proper perspective under paragraph 74.01(1)(*a*) of the *Competition Act* was that of the "ordinary citizen", possessing ordinary reason and intelligence and common sense: *PCMG FCA,* at para 72, quoting *R v Kenitex Canada Ltd et al* (1980), 1980 CanLII 4577 (ON SC), 51 CPR (2d) 103 (Ont Co Ct), at p. 107 (appeal by individual accused allowed (1981), 1981 CanLII 1949 (ON CA), 34 OR (2d) 665 (CA))**.**

[251**]** The Tribunal had previously applied the same standard: *Sears,* at paras 325-327; *Gestion Lebski inc,* at paras 153, 191. In both cases, the Tribunal quoted the full passage from *Kenitex*, as follows:

> The ordinary citizen is, by definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal. In the last analysis, therefore, it is for the trier of fact to determine what impression any such representation would create, not by applying his own reason, intelligence and common sense, but rather by defining the impression that that fictional ordinary citizen would gain from hearing or reading the representation.

(ii) General Impression – Cases after *Richard*

[252**]** Since *Richard,* the Federal Court of Appeal has not determined whether the "credulous and inexperienced" consumer standard in *Richard* should be applied under section 74.01. The Court of Appeal for Ontario left the question open in *Rebuck v Ford Motor Company,* 2023 ONCA 121, at para 26 (leave to appeal denied, SCC Court File 40698, November 2, 2023).

[253**]** Courts at first instance have taken into account the attributes of the intended audience in their analyses. None of those decisions binds the Tribunal, but they are persuasive authority.

[254] In *Chatr 2013,* the Ontario court noted that the difference between the purposes of the Quebec's *Consumer Protection Act* (the "CPA") and the purposes of the *Competition Act* was a relevant consideration in determining the proper consumer perspective to be applied to the representations in that case: *Chatr 2013,* at paras 126-127. Justice Marrocco adapted the perspective of the credulous and inexperienced consumer in *Richard* to the consumers to whom the representations were directed, concluding that the proper consumer perspective was that of a "credulous and technically inexperienced consumer of wireless services": *Chatr 2013,* at paras 128-132. I observe in passing that the court in *Kenitex* described the ordinary citizen as "lacking any relevant expertise".

[255] The Commissioner referred to *Bell Canada v Cogeco Cable Canada,* in which Justice Matheson issued an interlocutory injunction restraining the defendant from making representations. At the first stage of the injunction test, she found a serious issue to be tried concerning a representation on the defendant's homepage that it provided the "best Internet service in your neighbourhood", based in part on the general impression conveyed to the ordinary citizen or average consumer: see paras 24-25. Justice Matheson adopted the consumer perspective of the "credulous and technologically inexperienced consumer of Internet services": *Bell Canada v Cogeco Cable Canada,* at para 25 (citing *Chatr 2013*, at paras 128-132).

[256] In *Canada Tax Reviews,* Chief Justice Crampton assumed, for the purposes of that decision, that this standard applied: at para 83.

[257] In *Energizer,* Justice Fuhrer found that the determination of the general impression of an advertisement included consideration of the nature of the particular portion of the public to whom it is directed. She added that the general impression is to be assessed from the perspective of a consumer to whom the representation is targeted, which was a "credulous and technically inexperienced consumer of batteries in the sense that their lack of experience relates to the technical information in the comparative performance claims": *Energizer,* at paras 176, 178. Put another way, Justice Fuhrer found that the relevant perspective for general impression is the "ordinary, hurried customer "who take[s] no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement" and not the perspective of a careful and diligent consumer": *Energizer,* at para 180, quoting *Richard,* at paras 66-67. She also noted the connection to the test for trademark confusion: at para 183.

[258] The appropriate audience perspective has been the subject of academic commentary both before and after *Richard*: see Banicevic, at pp. 58, 61-68; Adam Newman, "Richard v Time: The Return of the Credulous Man?", 26 *Canadian Competition Law Rev* 275 (2013), at pp. 278-280; George N. Addy, "Deceptive Marketing Practices", in R.S. Khemani and W.T. Stansbury, eds., *Canadian Competition Law and Policy at the Centenary*, (Halifax: Institute for Research on Public Policy, 1991), at pp. 391-392; M.E. Rice and M.D. Rice, "Section 52(1)(a) of the *Competition Act*: Who is the Average Person?", 15 *Can Bus Law Rev* 97 (1989); Vaughan Black, "A Brief Word about Advertising", 20 *Ottawa Law Rev* 509, at pp. 528-534.

[259] Given the parties' competing positions and the state of the case law, I turn to the Supreme Court's analysis in *Richard* and first principles.

(iii) The Supreme Court's Decision in *Richard v Time Inc*

[260] The Supreme Court's decision in *Richard* did not overrule or refer to the "ordinary citizen" standard in *Premier Career Management Group FCA* or *Kenitex,* nor did it comment directly on the proper consumer perspective under section 74.01 (or section 52) of the *Competition Act*. However, the Court did provide guidance on how to identify the appropriate approach to general impression.

[261] In *Richard,* the Supreme Court interpreted a provision of Quebec's CPA relating to the prohibited practice of making a false or misleading representation to a consumer by any means whatsoever. Section 218 of the Quebec CPA set out the approach to determine whether a representation was a prohibited practice. Its wording was "based to a large extent on" subsection 52(4) of the *Combines Investigation Act* (now subsection 52(4) of the *Competition Act)*: *Richard*, at para 45.

[262] In the Quebec CPA, like the other statutes, both the literal meaning and the general impression must be taken into account: *Richard,* at paras 44-45; see *Competition Act,* subsections 52(4) and 74.03(5), as originally enacted by 23-24 Eliz II, c. 76, s. 18 (1976); 46-47-48 Eliz II, c. 2, subss. 12(2) and 22 (1999). The Supreme Court's analysis recognized the interconnections between the general impression test in the statutes and the case law under the *Combines Investigation Act* and the Quebec CPA: see *Richard,* at paras 44-45, 69.The Court also noted the connection between the proper approach for general impression and the test used to determine confusion under the *Trademarks Act* to determine whether a trademark causes confusion: *Richard,* at para 57.

[263] The Supreme Court in *Richard* noted that in recent decisions, Quebec courts had used the expression "average consumer" to describe the relevant consumer perspective under the Quebec CPA. The Court described that consumer as "the product of a legal fiction personified by an imaginary consumer to whom a level of sophistication that reflects the purpose of the C.P.A. is attributed": at para 62.

[264] Importantly, the Court stated that the "crux of the issue [was] whether the level of sophistication of the average consumer conceptualized by the Court of Appeal is consistent with the objectives of the C.P.A.": *Richard,* at para 62.

[265] After setting out the parties' positions, the Court observed that the Quebec CPA is one of a number of statutes enacted for the protection of consumers and that courts applying the statutes have often used the "average consumers test": at para 65. The Court referred to the "ordinary hurried consumer" test in the *Trademarks Act*: at para 66. At paragraph 68, the Court stated:

Obviously, the adjectives used to describe the average consumer may vary from one statute to another. Such variations reflect the diversity of economic realities to which different statutes apply and of their objectives. The most important thing is not the adjectives used, but the level of sophistication expected of the consumer.

[266] The Court concluded:

[71] Thus, in Quebec consumer law, the expression "average consumer" does not refer to a reasonably prudent and diligent person, let alone a well-informed person. To meet the objectives of the C.P.A., the courts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations.

[72] The words "credulous and inexperienced" therefore describe the average consumer for the purposes of the C.P.A. This description of the average consumer is consistent with the legislature's intention to protect vulnerable persons from the dangers of certain advertising techniques. The word "credulous" reflects the fact that the average consumer is prepared to trust merchants on the basis of the general impression conveyed to him or her by their advertisements. However, it does not suggest that the average consumer is incapable of understanding the literal meaning of the words used in an advertisement if the general layout of the advertisement does not render those words unintelligible.

[267**]** The Supreme Court in *Richard* was clear that the objectives of different statutes may vary, and that adjectives to describe the characteristics of the "average consumer" also may vary from one statute to another to meet the objectives of each statute. In the paragraphs quoted above, the Court was also clear to restrict its analysis to the objectives of the Quebec CPA. In disagreeing with the standard for the consumer's perspective used by the Quebec Court of Appeal, the Supreme Court established a legal standard to reflect and implement the legislature's intentions in the Quebec CPA: see paras 73, 78.

(iv) The Proper Test for General Impression under section 74.01 and subsection 74.03(5) of the *Competition Act*

[268**]** In this case, consistent with the directions in *Richard*, the proper consumer perspective in the general impression test for section 74.01 and subsection 73.03(5) should reflect the overall objectives of the *Competition Act,* the purposes of the deceptive marketing provisions, the breadth of section 74.01, and the diversity of circumstances in which representations to the public may arise under section 74.01.

[269**]** The analysis starts with the objectives of the *Competition Act* and the deceptive marketing provisions, particularly subsection 74.01(1). As discussed above, section 1.1 of the *Competition Act* provides that the purpose of the *Competition Act* is to maintain and encourage competition in Canada in order to achieve four objectives, one of which is to "provide consumers with competitive prices and product choices". The purposes of the deceptive marketing provisions have already been articulated. The focus is on the consumer and the provisions are concerned with the proper functioning of markets, without distortion from false or misleading representations, for the benefit of consumers and honest competitors and to incite firms to compete on the basis of price and quality.

[270**]** The reviewable conduct in subsection 74.01(1) concerns a range of commercial representations. The chapeau language of the provision captures representations promoting (directly or indirectly) the supply or use of a product, or for the purpose of promoting (directly or indirectly) any business interest, "by any means whatever". In paragraph 74.01(1)(*a*), the reviewable conduct is the making of a materially false or misleading representation "to the public".

[271**]** Retailers and other vendors make representations to the public about their goods and services in many different media, including television, as pop-ups during the streaming of live events, on websites and mobile applications, in social media, on billboards and bus shelters, orally on radio or online or in person, and of course in print advertisements. Representations come in all shapes and sizes. They may include words, images, sounds, or a mix. Words may be capable of more than a single meaning (of which one may be accurate and another not). The words may also be literally true but the accompanying images convey a misleading impression.

[272**]** A representation may be made to the public at large, or be directed at a specific segment of the public. For example, a representation may be made to highly sophisticated consumers (members of the public) who are well informed about the subject matter of the representations and not easily deceived or misled. Another representation could be made to a group of vulnerable and easily misled individuals. In addition, the nature and attributes of the product may be important: for example, some goods and services may have unfamiliar technical qualities, be expensive, or be only purchased infrequently by consumers, further refining the characteristics of the targeted public members.

[273**]** In this context, section 74.01, including the general impression test, must be able to respond to the broad diversity of price and other representations made to the public – or some subset of the public, as in *Premier Career Management Group FCA* – according to the nature of the representation, the context in which it was made, and the characteristics of the members of the public to whom the representations may be made, targeted or directed, with a view to protecting and enhancing such undistorted markets and honest competition.

[274**]** Courts' and the Tribunal's analyses of general impression show that the characteristics of the audience are not immutable or pre-defined in the case law. In some cases, it has not been necessary to expressly consider the characteristics of the audience: see, e.g., *Commissioner of Competition v PVI International Inc,* 2000 SCC 67 (CanLII), 2002 Comp Trib 24; *Commissioner of Competition v Yellow Page Marketing,* 2012 ONSC 927, in which the representations were sent to thousands of businesses, individuals and organizations across Canada. In other cases, the nature of the representation and the specific characteristics of the audience have been expressly considered in the assessment of the general impression of the representation, and more generally in whether the representation was false or misleading in a material respect. See *Chatr 2013,* at paras 123-132; *Maritime Travel Inc v Go Travel Direct Inc.,* 2008 NSSC 163, at paras 42-44, 68, 86 ("*Maritime Travel Inc NSSC*") (aff'd 2009 NSCA 42, at paras 25, 127, 130, 132); *Purolator Courier Ltd v United Parcel Service Canada Ltd,* 1995 CanLII 7313 (Ont Ct (GD)), at paras 40, 55, 58; *Premier Career Management Group CT*, at paras 211-212 (aff'd *Premier Career Management Group FCA*, paras 18-19, 72, 74-78); *Sears,* at paras 203-212, 213-217, 341.

[275**]** Some examples in the case law will help to illustrate. The Supreme Court of Nova Scotia considered the characteristics of the intended audience for advertisements about travel packages in *Maritime Travel Inc NSSC*. To determine the general impression of one advertisement, Justice Hood considered the sophistication of the intended audience and the care that the reader would use to read the advertisement, as well as the medium used and disclaimers in the advertisement: at paras 42-44. Justice Hood found that a person contemplating spending $700 to $1,000 per person for four people to go on a southern vacation would be a "literate person of average intelligence": at para 43. The court held that the person would read the advertisement carefully before committing to spend the required money and would realize the significance of the words "up to", as those words were commonly found in advertisements. Because the impugned representations were made in a newspaper advertisement, the court concluded that the consumer would have "ample opportunity to consider it and its wording with care". In the same decision, Justice Hood considered the same intended audience for

other advertisements for vacation packages: at paras 68, 86. The Nova Scotia Court of Appeal approved of Justice Hood's consideration of the intended consumer audiences for the advertisements: *Go Travel Direct.Com Inc v Maritime Travel Inc*, 2009 NSCA 42, at paras 25, 127, 130, 132.

[276**]** In *Premier Career Management Group CT,* the Tribunal considered the average prospective client of the company, who was likely to have some post-secondary education, some work experience and access to the funds necessary to pay PCMG's fees. They "were not normally gullible" but were "likely to accept what was reasonably implied without critical analysis because, to varying degrees, they were needy": at paras 211-212. The quoted excerpts appear in the Federal Court of Appeal's description of the Tribunal's decision on whether the representations were false or misleading: *Premier Career Management Group FCA*, at paras 18-19. The appeal court concluded that the Tribunal constructed the representations correctly, although it is clear that Justice Sexton applied the "ordinary" citizen, person or consumer standard in his analysis of the arguments on appeal: at paras 72, 74-75. The appeal court considered the "typical client" of the respondents in its analysis that rejected arguments that the Tribunal erred in determining whether the representations were false or misleading in a material respect: at paras 76-77, 79.

[277**]** Similarly, in *Sears,* the Tribunal considered the time consumers spent searching for tires, and consumers' limited ability to evaluate the intrinsic qualities of tires as it related to materiality under subsections 74.01(3) and 74.01(5): *Sears,* at paras 203-202, 213-217, 341. See also *Purolator Courier Ltd v United Parcel Service Canada Ltd,* at paras 40 (low frequency consumers were particularly susceptible to the message in the advertisements), 55 (the degree of sophistication that the public to whom the advertisement is directed exhibits), 58 (consumers were not totally naïve; they were business individuals).

[278**]** Against all of this background, I conclude that that the Tribunal should not adopt the "credulous and inexperienced" consumer in *Richard* as the legal standard for the general impression test under section 74.01 and subsection 74.03(5) of the *Competition Act*. Instead, as *Richard* contemplates, the legal standard should be appropriate for the objectives of the *Competition Act* and the purposes of the deceptive marketing provisions in it. The legal perspective for the general impression test should remain that of the ordinary consumer of the product or service, which may be refined according to the nature of the representation at issue, the characteristics of the members of the public to whom the representation was made, directed or targeted, the nature of the product or service involved, and the particular circumstances of the case.

(c) Methodology and Evidence for General Impression

[279**]** In *Richard,* the Supreme Court found that under the Quebec CPA, when dealing with a written advertisement, a court must make an objective determination of the general impression conveyed by the entire advertisement (rather than portions of it). A court should not make a minute dissection of the text, but instead read it over entirely once to determine the general impression conveyed: *Richard,* at para 56. Similarly, as the Court noted, the test to be applied for confusion under the *Trademarks Act* is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees a name (allegedly potentially confusing with the trademark) at a time when he or she has no more than an imperfect recollection of the trademark in question, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks: *Richard,* at para 57, citing *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée,* 2006 SCC 23, [2006] 1 SCR 824, at para 20; *Masterpiece Inc v Alavida Lifestyles Inc,* 2011 SCC 27, [2011] 2 SCR 387, at para 41.

[280**]** The question of general impression under the *Competition Act,* including the characteristics of the audience, is a matter for the Tribunal to determine: *Sears,* at paras 327-332; *PVI International Inc,* at paras 11-12, 15, 25, 46, 50-51; *Gestion Lebski inc,* at paras 167, 216, 247, 249-50. This approach has been adopted by the Supreme Court and the appeal and trial-level courts of provinces: *Richard,* at paras 84-87; *Rebuck,* at paras 21-22, 26; *Maritime Travel Inc NSCA*, at paras 15-26; *Bell Mobility Inc v Telus Communications Company,* 2006 BCCA 578, at paras 20, 28; *Energizer,* at paras 184, 203, 215; *Yellow Page Marketing,* at paras 36-37 (aff'd 2013 ONCA 71); *Drynan v Bausch Health Companies Inc,* 2021 ONSC 7423, at paras 98-104 [objective determination under the Ontario CPA]. This approach is consistent with older appellate decisions concerning prosecutions under the former *Combines Investigation Act* relating to false or misleading representations, which also undertook their own assessments of the impugned representations to the public: see *Regina v RM Lowe Real Estate Ltd and Pastoria Holdings Ltd,* 1978 CanLII 2500, 40 CCC (2d) 529 (Ont CA), at p. 531; *The Queen v Viceroy Construction Co Ltd,* 1975 CanLII 606, 11 OR (2d) 485 (CA). Both *Combines Investigation Act* cases cited by the Supreme Court in *Richard* also did so: *R v Imperial Tobacco Products Ltd,* 1971 ALTASCAD 44 (CanLII), [1971] 5 WWR 409 (Alta SC, AD), at paras 16, 51-54, 56; *R v Colgate-Palmolive Ltd,* 1969 CanLII 1005 (ON SC), [1970] 1 CCC 100, at p. 103.

[281**]** I note that in some circumstances, the Tribunal has used expert evidence to analyze whether a representation is false or misleading in a material respect: see, e.g., *PVI International Inc,* at paras 190-191, 213-219, 247-249; *Sears,* at paras 203, 211, 341. I do not exclude the possibility that expert evidence may assist with general impression in some cases, as it may be used in determinations of trademark confusion under the *Trademarks Act*: see *Richard,* at para 57 and the cases cited therein. However, there is no suggestion in the case law determining liability under section 74.01 (or section 52) of the *Competition Act* that expert evidence is necessary or required for these purposes.

[282**]** I also note that neither party in this case pointed to a decision in which a court or this Tribunal required survey or other empirical data to determine general impression under subsections 74.01(1) and 74.03(5) of the *Competition Act*. Indeed, neither party adduced evidence by way of surveys, or analytics from the website or the App, to show the general impression of actual Cineplex consumers.

[283**]** I return now to the representations in the present case.

(2) Application of the Legal Tests

(a) Literal Meaning

[284**]** The literal meaning of the price representations, on both the Tickets Page of the website and the App, is that tickets for a selected movie at a selected time, date and theatre location can be purchased at the per-ticket prices for General Admission, Seniors and Children as displayed on the Tickets Page. On its face, the Tickets Page does not distinguish between at-theatre and online ticket prices and does not state expressly either that the prices are "at-theatre" prices or "online" prices. The Tickets Page does not otherwise draw the consumer's attention to the fact that prices may vary depending on the medium used for the purchase.

(b) General Impression

[285**]** The general impression test considers the representations on the Tickets Page from the perspective of the ordinary consumer – the ordinary moviegoer navigating the website or the App. Those representations are the price per movie ticket for General Admission, Seniors or Children. The quantum of each one does not include the Online Booking Fee.

[286**]** Overall, based on the evidence, I conclude that the general impression of the ordinary citizen moviegoer navigating Tickets Page (A) is that they can purchase tickets on the website and the App for the stated prices on that page. Put another way, the ordinary citizen would form the impression that Cineplex is offering movie tickets for online purchase, both on the website and on the App, at the per-ticket prices represented on the Tickets Page beside each of General Admission, Seniors and Children. The general impression of an ordinary consumer would be that the stated ticket prices are the whole or entire price charged by Cineplex (subject to applicable taxes). The general impression conveyed to the ordinary consumer is consistent with the literal meaning of the displayed prices.

[287**]** In support of this conclusion, I will address a number of issues raised by the parties with respect to general impression, and make additional findings on them.

[288**]** First, the Commissioner submitted that Cineplex's price representations convey the general impression that a ticket is available for purchase at a price lower than what Cineplex actually charges – that is, that the price shown on the Tickets Page for the tickets the consumer selects is the price that they will in fact pay. The Commissioner also argued that consumers on the website or App are credulous and:

> ready to believe the initial price representations they can see on the screen and … have no reason to be curious about what is below the false floor, and the consumer is inexperienced at detecting the falsehoods or subtleties found in commercial representations. [Consumers are] not going to meticulously pay attention to the subtotal to see if it is consistent with the ticket prices, and it means they're not going to scroll, because Cineplex gives them no reason to scroll.

[289**]** These submissions contain a mix of submissions on several issues, including the attributes of a member of the targeted audience.

[290**]** I have already disagreed with the Commissioner's position on the legal starting point for general impression, which he argued should consider the general impression conveyed by the representation to the "credulous and inexperienced consumer". The Commissioner did not point to any evidence that an ordinary consumer on the Cineplex website has any unusual characteristics related to credulity or readiness to believe on-screen representations, and I find none.

[291**]** Second, Cineplex did not make extensive submissions directed at the characteristics of the audience for general impression purposes. It did not suggest that the consumers using the Cineplex website or App had any special characteristics, higher sophistication or vulnerabilities, or that the price representations targeted any particular group or subset of the Canadian population that might affect the perspective the Tribunal should consider in assessing the price representations. It did suggest that everyone knows how to and does scroll on websites and mobile applications, including the App.

[292**]** Third, neither party attempted to distinguish the audience viewing the representations on a computer from those seeing the representations on the mobile website or the App on their mobile phones. While different movies may attract audiences with different demographic characteristics, the allegations and evidence in this proceeding were premised on the overall class of price representations on the Tickets Page rather than on individual representations concerning ticket prices for specific shows at identified locations.

[293**]** Fourth, the following circumstances of the making of the price representations are relevant for general impression purposes:

(a) Cineplex's movie ticket price representations were made on its website, which is an interactive medium somewhat different from a static print advertising or a mailing. Cineplex has control over its website and each of its webpages, including the information presented, the order in which it is presented, the flow as the user moves through it, the design of each page, and what is presented above and below the fold.

(b) As a commercial website, cineplex.com is designed as a "funnel" with the objectives that include assisting users to identify a movie of interest and then converting them into consumers by purchasing one or more tickets. The website was designed to facilitate a user's easy and speedy movement through it and to encourage the user's conversion into a ticketholder.

(c) The presence of a countdown timer on the floating ribbon, starting on the Tickets Page, suggests some degree of urgency or the necessity to proceed swiftly with the transaction to the ordinary consumer.

(d) A user who purchases tickets on the website spends about three minutes in total on the site.

(e) In contrast to *Maritime Travel Inc NSSC,* the amount of money involved is relatively small: under $20 per ticket, even including the Online Booking Fee. The maximum aggregate amount of Online Booking Fees per transaction is $6, i.e., $1.50 for the first four tickets.

[294**]** These circumstances would not cause the ordinary consumer to scrutinize carefully or pay any heightened attention to the represented ticket prices or any other information displayed on the Tickets Page. In particular, the ordinary consumer would not pause to carefully consider or analyze the price representations and the other information on Tickets Page (A). In addition, the ordinary

consumer would not pause on Tickets Page (B) to do the mental math upon seeing the subtotal on the floating ribbon to ensure the accuracy of the total amount before clicking the PROCEED button to move to the Seat Selection Page. (I note that at discovery and at the hearing, even Mr McGrath could not readily do the mental math upon being spontaneously asked to calculate the subtotal (including the Online Booking Fee) of the amount that a consumer buying a certain number of tickets of different age categories would be paying.)

[295**]** Fifth, for general impression purposes, what does the ordinary consumer see on the Tickets Page?

[296**]** The Commissioner's position was that the information to be used to determine the average consumer's general impression is the information seen on the consumer's screen on the Tickets Page at stage (A) – that is, the information located above the fold. The Commissioner referred to *Bell Canada v Cogeco Cable Canada,* in which Justice Matheson stated:

[26] In the Internet context, there is an issue regarding what constitutes looking at the advertisement as a whole. That question need not be finally resolved now. However, for the purpose of this motion, I do not accept Cogeco's submission that I should proceed on the basis that the entirety of what a consumer can scroll down to or link to should be considered. The Cogeco homepage consists of five pages of text, graphics and hyperlinks and two pages of terms and conditions in the seemingly inevitable fine print. Cogeco asks me to proceed on the basis that the consumer would or should view all of this material. As I indicated at the hearing, I have some difficulty with that proposition. This sort of Internet homepage is not comparable to an ad published within a single page of a print newspaper or magazine: e.g., *Richard v. Time Inc.,* 2012 SCC 8, [2012] 1 S.C.R. 265.

[27] It is at least arguable that, for the purposes of s. 52, the court should consider what the consumer would see on a single screen, including the labels on the hyperlinks on that screen. I recognize that the amount of content presented on the screen could depend to some extent on the size of the screen on the device chosen by the consumer. Even taking that into account, much of what Cogeco seeks to rely upon would not appear on that first screen.

[297**]** Cineplex made little argument about general impression (apart from the legal standard) but did take the broader position that the entire Tickets Page should be considered (both above and below the fold). After all, it argued, "everyone scrolls" on computers and mobile phones. Cineplex also focused on the information on Tickets Page (B), that is, after the consumer has selected one or more tickets. Cineplex referred to *Bell Mobility Inc v Telus Communications Company,* in which the British Columbia Court of Appeal stated that the general impression "is determined by the average consumer's perception of the information contained within the four corners of the impugned advertisements": *Bell Mobility Inc v Telus Communications Company,* at para 20. See also *Maritime Travel Inc NSSC*, at paras 39 (#3), 42-46. To Cineplex, the four corners of the advertisement in this case included the entire Tickets Page, including the contents after scrolling down to the bottom.

[298**]** I accept the Commissioner's position on this issue. The general impression of the ordinary consumer should be determined by using the information located above the fold – what is visible to most consumers on arrival at the Tickets Page, before selecting a ticket. First, Mr Eckert's evidence demonstrated, with recent, reliable and publically-available global webpage viewing statistics in support, that a solid majority (about two-thirds) of website and App users would see what is on their screens – the information that appears above the fold – when landing on the Tickets Page where they are presented with ticket pricing information for the first time. Second, I accept Mr Eckert's evidence that consumers scroll down on a webpage or on the App if given a reason to do so. To the ordinary consumer, there is no obvious reason to do so on Cineplex's Tickets Page. Third, I find on the evidence that Cineplex's website was designed to dissuade (and, on a balance of probabilities, likely had the effect of dissuading) the ordinary consumer from scrolling down. Instead, the website enables and encourages the ordinary consumer to click the PROCEED button on the floating ribbon and to continue with the purchase of movie tickets without scrolling down – therefore, without seeing the information about the Online Booking Fee located below the fold once tickets are selected on the Tickets Page.

[299**]** In sum, for the purposes of the general impression of the ordinary consumer, the information within the "four corners" of the advertisement is what the ordinary citizen sees on the Tickets Page, above the fold and without scrolling.

[300**]** Sixth, what would the price representations on the Tickets Page convey to the ordinary consumer about online versus at-theatre ticket prices?

[301**]** Cineplex submitted that the price displayed on Tickets Page (A) was "price advertising", that is, a representation of the ticket price for the specific theatre selected if purchased in-person, on site. According to Cineplex, at this stage on the Tickets Page, the displayed prices are the "at-theatre" prices if the website user were to purchase tickets at the theatre box office, a concession or a kiosk. To Cineplex, the consumer has two options at this point – a "fundamental choice": the consumer can go in person to the theatre and pay the at-theatre prices for the selected movie tickets (i.e., the amount displayed on the webpage), or the consumer can click the ADD button and go ahead with an online purchase. After a consumer clicks the ADD button to select one or more tickets, Cineplex submitted that the consumer has entered the online purchasing process and the "advertised" price becomes a "base price" on Tickets Page (B) – which will be subject to the applicable Online Booking Fee. At that point, the Tickets Page immediately displays the all-inclusive aggregate price of the ticket or tickets as the subtotal on the floating ribbon, beside the PROCEED button.

[302**]** I do not agree with Cineplex's position that the prices displayed on Tickets Page (A) are a representation of the at-theatre price only. I find that an ordinary citizen would view the ticket prices displayed on the Tickets Page on the Cineplex website and the App to be the price of a ticket for the show playing at the selected theatre at the selected time, without any qualifier about where the ticket is purchased. The consumer must already be logged in, and has already clicked either "Get Tickets" on the website or "Buy Tickets" on the App. The headline on the Tickets Page and the ADD button make it clear that tickets are available in those two online channels. The prices on the Tickets Page would convey to the ordinary consumer that movie tickets are available at that price in those channels, that is, where the consumer sees the representations. As witnesses confirmed, there is no indication on the Tickets Page that the displayed pricing is only the "at-theatre" price. Looking at the Tickets Page objectively and neutrally, the natural impression conveyed is that movie tickets are available for purchase at the represented prices on the website or the App where the consumer sees them.

[303**]** Put another way, Cineplex argued that the price representations on its Tickets Page concern tickets for the show if purchased at the selected theatre. To an ordinary consumer, the price representations on the Tickets Page is more likely to concern the price for tickets for the show to see it at the selected theatre – not the price if the consumer decides to buy their tickets in-person at that theatre. As Cineplex has already told the consumer that she can buy tickets on the website or the App where the prices are being represented and where the consumer sees those prices, the general impression is that tickets can be purchased in those online channels for the prices displayed on the Tickets Page.

[304**]** Seventh, what is the effect of the advertisement for CineClub in the top right corner on Tickets Page (A) of the website (which, as previously indicated, does not show on the App)? Based on the evidence of the F and Z patterns of website viewing (discussed above in section H), agreed to by both Mr Eckert and Dr Amir, an ordinary citizen would likely notice the advertisement. From it, some consumers could pause long enough to notice the third bullet point referring to an Online Booking Fee. However, the ordinary consumer would see no information about the quantum of the Online Booking Fee or how it affects movie ticket prices for the vast majority of moviegoers (as according to Cineplex website data, only a small number of visitors who reach the Tickets Page are CineClub members). The advertisement provides only a small morsel of information about the Online Booking Fee.

[305**]** Having made detailed factual findings and findings related to general impression, I turn to the issues for decision under section 74.01.

VII. Did Cineplex Engage in Reviewable Conduct?

A. Issues for Decision under section 74.01

[306**]** Cineplex does not contest that the representations on its website and the App were made for the purpose of promoting its business interests (as contemplated by the chapeau language of subsection 74.01(1)), and that the representations on its website were made "to the public" for the purposes of paragraph 74.01(1)(*a*). Cineplex also does not take the position that the Online Booking Fee represented "only an amount imposed by or under an Act of Parliament or the legislature of a province" under subsection 74.01(1.1).

[307**]** The parties disagreed about whether Cineplex made a representation that was "false or misleading in a material respect". Most of their submissions focused on the proper interpretation and application of subsection 74.01(1.1).

[308**]** To determine whether Cineplex engaged in reviewable conduct, the Tribunal must resolve the following issues:

• Does subsection 74.01(1.1) apply to the present case?

• Were the representations on the Tickets Page "false or misleading" under paragraph 74.01(1)(*a*), without applying subsection 74.01(1.1)?

• Were the representations false or misleading "in a material respect"?

B. The Parties' General Positions concerning subsection 74.01(1.1)

[309**]** Paragraph 74.01(1)(*a*) and subsection 74.01(1.1) provide as follows:

"Deceptive Marketing Practices "	"Pratiques commerciales trompeuses "
"Reviewable Matters "	"Comportement susceptible d'examen "
Misrepresentations to public" "	**Indications trompeuses**" "
74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever" "	**74.01 (1)** Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques" : "
(a) makes a representation to the public that is false or misleading in a material respect;" "	"**a)**" ou bien des indications fausses ou trompeuses sur un point important"; "
[…]" "	[…]" "
Drip pricing" "	Indication de prix partiel" "
(1.1) For greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the obligatory charges or fees represent only an amount imposed by or under an Act of Parliament or the legislature of a province." "	**(1.1)** Il est entendu que l'indication d'un prix qui n'est pas atteignable en raison de frais obligatoires fixes qui s'y ajoutent constitue une indication fausse ou trompeuse, sauf si les frais obligatoires ne représentent que le montant imposé sous le régime d'une loi fédérale ou provinciale." "

[310**]** The parties were in general agreement that subsection 74.01(1.1) concerns "drip" pricing, described at a high level as a retailer advertising a product or a service at a stated price, but then adding one or more additional amounts to that price so the consumer actually has to pay more than the originally advertised amount to purchase the product or service. Beside subsection 74.01(1.1), the phrases "Drip pricing" and "*Indication de prix partiel"* appear as marginal notes, but are for convenience of reference only and form no part of the enactment: *Interpretation Act,* RSC, 1985, c I-21, section 14.

[311**]** The parties otherwise disagreed on the overall effect of subsection 74.01(1.1) as it relates to paragraph 74.01(1)(*a*), the meaning of individual words and phrases in it and its application to the facts in this proceeding. Both parties took the position that the provision was clear and unambiguous – yet they disagreed on its meaning.

[312**]** The Commissioner's general position on subsection 74.01(1.1) was that Cineplex's price representations on the Tickets Page are not attainable due to a fixed obligatory charge or fee, namely the Online Booking Fee. The Commissioner submitted that the *Competition Act* deems Cineplex's conduct to be false or misleading pursuant to subsection 74.01(1.1). The Commissioner contended that the price represented on the Tickets Page is not "attainable" due to the Online Booking Fee, which is a fixed obligatory charge or fee as contemplated by that provision. Cineplex maintained that the prices it represented on the Tickets Page are attainable and that the Online Booking Fee is neither a "fixed" nor an "obligatory" charge or fee under subsection 74.01(1.1). The Commissioner and Cineplex also made legal submissions about the proper interpretation of subsection 74.01(1.1).

[313**]** According to the Commissioner, on the evidence, the price representations made on the website and the App are not attainable because if consumers purchase tickets online, they must pay an Online Booking Fee to complete the transaction unless they have subscribed to a Cineplex membership.

[314**]** Cineplex's general position on subsection 74.01(1.1) was that the Commissioner's position was based on a mischaracterization of the website and App purchase process and a misapprehension and misapplication of the law. Cineplex characterized subsection 74.01(1.1) as a "complete code" to describe drip pricing.

[315**]** On the evidence, Cineplex maintained that the prices displayed on its website and App were attainable, not "fixed", and not "obligatory". Consumers can purchase tickets either in-person (at the theatre) or online (using the website or the App.) The Online Booking Fee does not apply to movie tickets purchased in-person at Cineplex's theatres (at the box office, a concession or a kiosk). What Cineplex characterized as the "base price" displayed on the Tickets Page of the website and the App is therefore attainable.

[316**]** Overall, Cineplex submitted that there is no price advertised by Cineplex that is not attainable. The base prices are attainable at the theatre chosen by the consumer, as displayed on the Tickets Page. The Online Booking Fee is therefore not obligatory because consumers can avoid paying it by purchasing tickets in-person at the theatre.

[317**]** Cineplex argued that its ticket prices are not fixed. There is no single price for a movie ticket, whether purchased in-person or online. There is multiple variability: prices vary according to the age of the moviegoer, the theatre experience (e.g., IMAX, VIP, regular), the day of the week, the theatre location, whether the moviegoer is a member of either CineClub or the Scene+ loyalty program, and whether the consumer wants to purchase a ticket at the theatre or proceed with an online purchase.

[318**]** Cineplex also stated that the elements of subsection 74.01(1.1) including "attainability" and whether the fee in question is "fixed" and "obligatory" are questions of pure fact for which opinion evidence, particularly the opinion evidence of Dr Morwitz and Mr Eckert, do not assist the Tribunal. All of the issues raised by Dr Morwitz and Mr Eckert were argued to be outside of the issues and facts necessary for a determination of whether the prices shown on the website or the App are attainable and whether they are fixed or obligatory.

[319**]** By contrast, the Commissioner argued at the hearing that Mr Eckert and Dr Morwitz's evidence was relevant and necessary for subsection 74.01(1.1), for all the reasons in his written argument.

C. The Proper Interpretation of subsection 74.01(1.1)

[320**]** Parliament enacted subsection 74.01(1.1) in 2022 by the *Budget Implementation Act, 2022*, S.C. 2022, c. 10, s. 258. There are no decided cases that apply subsection 74.01(1.1), so its interpretation and application are a matter of first impression for the Tribunal.

(1) Legal Principles

[321**]** The Tribunal interprets a statutory provision by applying the modern principle of statutory interpretation. The words in the provision must be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and the object of the legislation, and the intention of Parliament: *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65, [2019] 4 SCR 653, at paras 117-118, citing *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at para 21 and *Bell ExpressVu Limited Partnership v Rex*, [2002] 2 SCR 559, 2002 SCC 42, at para 26; *Pioneer Corp v Godfrey*, [2019] 3 SCR 295, 2019 SCC 42, at para 42; *Canada (Commissioner of Competition) v Secure Energy Services Inc,* 2022 FCA 25, at para 49.

[322**]** The interpretation process generally involves an analysis of the text of the provision in the context of the statutory scheme and the purpose(s) of the statute. Parliament's intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: *Vavilov,* at para 118. Although the relative effect of ordinary meaning, context and purpose in the interpretation of a statute may vary from one case to another, one must seek, "in all cases", to read the provisions of a piece of legislation "as a harmonious whole": *Canada (Attorney General) v National Police Federation,* 2023 FCA 75, at para 47, citing *Canada Trustco Mortgage Co v Canada*, [2005] 2 SCR 601, 2005 SCC 54, at para 10.

[323**]** In *Canada Trustco*, the Supreme Court held that if the words of a provision are precise and unequivocal, their ordinary meaning plays a dominant role in the interpretive process. If the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. However, in all cases, the Court must seek to read the provisions of the legislation as a harmonious whole: *Canada Trustco,* at para 10; *9354-9186 Québec inc v Callidus Capital Corp*, [2020] 1 SCR 521, 2020 SCC 10, at para 60.

[324**]** The English and French versions of subsection 74.01(1.1) are equally authoritative. As a matter of statutory interpretation, the two versions must be read together and one must search for their shared meaning. If there is discord or the two versions seem irreconcilable, there are rules to resolve the situation. See *Canadian Charter of Rights and Freedoms,* subsection 18(1); *Canada (Attorney General) v Redman,* 2020 FCA 209, at para 22; *R v Daoust,* 2004 SCC 6, [2004] 1 SCR 217, at paras 26-27; *Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited,* 2017 Comp Trib 10, at para 182.

[325**]** Section 12 of the *Interpretation Act* provides:

"Enactments Remedial "	"Solution de droit "
"**Enactments deemed remedial** "	"**Principe et interprétation** "
12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." "	**12** Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet." "

[326**]** Parliamentary debates may inform the interpretation process, but with certain caveats including that such extrinsic evidence is not more important than the legislative text: see, e.g., *R v Khill,* 2021 SCC 37, at para 111; *MediaQMI inc v Kamel,* [2021] 1 SCR 899, 2021 SCC 23, at paras 37-38. In the present case, the excerpts from Hansard filed by the parties are inconclusive on the meaning of the words and phrases in subsection 74.01(1.1). While they refer to "drip" pricing generally, there is little to assist the Tribunal to interpret the provision.

[327**]** I am aware that the Commissioner entered into a number of consent agreements related to "drip" pricing that were registered with the Tribunal under section 105 of the *Competition Act*. However, neither party referred to them and neither argued that they were relevant to the interpretation of subsection 74.01(1.1).

(2) Interpretation of subsection 74.01(1.1), including Text, Context and Purpose

[328**]** Subsection 74.01(1.1) appears in the deceptive marketing provisions of the *Competition Act,* immediately after subsection 74.01(1).

[329**]** The parties disagreed on the characterization of subsection 74.01(1.1) – whether it is a "deeming" provision (according to the Commissioner), or a limiting provision or a "complete code" of what constitutes drip pricing (according to Cineplex). It might also be seen as a direction from Parliament that a specified inference be made if certain factual preconditions are met (an inference that may be mandatory and to which subsection 74.01(5) on its face does not apply).

[330**]** It is not necessary to select one of these labels or characterizations. It is enough to analyze the text of subsection 74.01(1.1), in context and in light of the purposes of the provisions and the statute and to ensure that it is interpreted in concert with other provisions and the scheme of the legislation.

[331**]** Subsection 74.01(1.1) does not create a separate reviewable practice for the purposes of section 74.1. The text of subsection 74.01(1.1), when read with its neighbour subsection 74.01(1), refers to two elements in paragraph 74.01(1)(*a*): the making of a representation, and the requirement that the representation be false or misleading. Subsection 74.01(1.1) contemplates that if certain factual conditions are met, the making of a representation of a price "constitutes" a false or misleading representation, unless other conditions apply.

[332**]** More precisely, subsection 74.01(1.1) identifies one species of representation to the public (a "representation of a price") and directs that if the conditions are met (the price is "not attainable due to fixed obligatory charges") then an element of the reviewable conduct in paragraph (1)(*a*) is met: the representation is false or misleading. It may be noted here that in proceedings under section 74.01, it is not necessary to establish that any person was deceived or misled: see *Competition Act*, paragraph 74.03(4)(*a*).

[333**]** Subsection 74.01(1.1) advances the objectives of the *Competition Act* and of the deceptive marketing provisions in two ways. First, it describes the price representations that Parliament has determined are false or misleading. Doing so expressly provides guidance about non-permissible conduct to retailers and other persons making commercial representations to the public to sell their products and services. It also seeks to engender trust by consumers in the price representations they see, through clarity and transparency. Second, subsection 74.01(1.1) provides a specific means to support the achievement of the statutory goals: it simplifies the Tribunal's assessment by removing any need to analyze and determine separately whether a price representation that meets the stated conditions is false or misleading under paragraph 74.01(1)(*a*). It also confirms that the conduct, if it meets the other elements of paragraph 74.01(1)(*a*), will constitute reviewable conduct.

[334**]** The English and French versions of subsection 74.01(1.1) have a shared and common meaning. The language in each version parallels the other in content, apart from the phrase "*qui s'y ajoutent*" in French. Comparing the language in the provision ("… a representation of a price that is not attainable due to fixed obligatory fees or charges constitutes…" and "*… l'indication d'un prix qui n'est pas atteignable en raison de frais obligatoires fixes qui s'y ajoutent constitue …*"), the phrase "*qui s'y ajoutent*" in the French version suggests that the fixed obligatory charges are added to the represented price. In my view, that is implicit in the English version: if a price representation is not "attainable" due to fixed obligatory charges or fees, those charges or fees must inherently be added in some way to a represented price.

[335**]** The parties' submissions sought to define the words "attainable", "fixed" and "obligatory" in subsection 74.01(1.1), and then applied those proposed definitions to the evidence to support their respective positions. Given the scope of paragraph 74.01(1)(*a*) and subsection 74.01(1.1) and the broad and diverse range of commercial representations to which they may apply, I do not believe the Tribunal should attempt to define these terms in the abstract or for all possible purposes. Instead, the sections that follow will explain the conclusions I have reached on the evidence in this case, and why I agree or disagree with the parties' respective positions.

(3) All-inclusive Pricing

[336**]** Before turning to the application of subsection 74.01(1.1), I pause to address an issue raised by both parties: whether subsection 74.01(1.1) contemplates all-inclusive pricing.

[337**]** The Commissioner took the position that an initially-presented price has to include any fixed obligatory charge or fee. The components of the all-inclusive price can be set out separately later in the purchase process, but the price presented initially must be the all-inclusive price. (The Commissioner clarified that he did not take the position that every price displayed online has to be all-inclusive pricing with respect to that channel. Cineplex could advertise dual pricing, so long as it is clear about it.) For its part, Cineplex submitted that subsection 74.01(1.1) requires the total all-inclusive price absent applicable taxes be disclosed and be attainable. Cineplex argued that its display on the floating ribbon on Tickets Page (B) constituted disclosure of the total cost of the tickets selected by the consumer (including any applicable Online Booking Fee).

[338**]** All-inclusive pricing provisions are found in some provincial legislation: see Quebec CPA, section 224(c); *Ticket Sales Act, 2017*, SO 2017, c 33, Sched 3, section 6; see also Kenneth Jull and Nicole Spadotto, "Digital Advertising and Purchasing: Fun or a New Type of Deception?" (2020), 33 *Canadian Competition Law Rev* 1, at p. 9. The wording of subsection 74.01(1.1) does not mirror these provincial provisions; for example, the Quebec provision states: "… the price advertised must include the total amount the consumer must pay for the goods or services". Such express wording does not appear in the *Competition Act*.

[339**]** It is not necessary in this case to determine whether or not a form of "all-inclusive" price representation is an implicit requirement of a proper interpretation of subsection 74.01(1.1). I leave that question, and what constitutes an "all-inclusive" price representation, for a future case.

D. Does subsection 74.01(1.1) Apply to the Present Case?

[340**]** For the reasons below, I conclude that the represented ticket prices are not attainable due to the Online Booking Fee, which is a fixed obligatory charge or fee that is added to the represented ticket prices.

(1) The Making of a "representation of a price …"

[341**]** The impugned representations, including their literal meaning and the general impression they convey, have been identified and described above.

[342**]** There is no dispute that Cineplex makes representations of the prices of its movie tickets on the Tickets Page of its website and App. The display of prices on the Tickets Page is a "representation of a price" under subsection 74.01(1.1), and specifically, the display is of the prices of movie tickets for General Admission, Seniors and Children.

(2) "… that is not attainable due to a fixed obligatory charges or fees …"

[343**]** I agree with Cineplex that for subsection 74.01(1.1) to apply, the representation of a price must not be not attainable "due to" fixed obligatory charges or fees. The key questions are whether the Online Booking Fee is a "fixed" and "obligatory" charge or fee.

(a) The Online Booking Fee is a "fixed" Charge or Fee

[344**]** The Commissioner contended that the Online Booking Fee is "fixed" for the purposes of subsection 74.01(1.1).

[345**]** According to the Commissioner, to decide whether a charge or fee is fixed under subsection 74.01(1.1), the question is: did the advertiser determine the amount before making the price representation? If yes, the charge or fee is fixed. Conversely, when the existence and amount of the charge or fee is unknown to the advertiser before making the price representation (such as when the charge varies depending on the method and location of delivery of a product), then the charge or fee is not fixed.

[346**]** In this case, the Commissioner's position was that Cineplex set the Online Booking Fee in 2022 for regular consumers at $1.50 and for Scene+ members at $1.00. These amounts have never varied since their implementation in June 2022. Cineplex knows the amount of the fee to be applied to a particular transaction well before a consumer first sees the price representations on the website or the App. A consumer must log in before seeing movie ticket prices. This information enables Cineplex to determine the amount of the Online Booking Fee, if any. It is therefore fixed.

[347**]** Cineplex's position was that the Online Booking Fee is not fixed. Cineplex made legal submissions on the meaning of "fixed", essentially as "not variable". According to Cineplex, the requirement that the charge or fee be "fixed" clearly distinguishes amounts caught by the provision from charges or fees that are variable and dependent on choices by the consumer. Cineplex maintained that the Online Booking Fee is variable based on the type of consumer involved (Regular, Scene+ or CineClub), how many tickets the consumers chooses, whether a promotional code or voucher applies, and because there is a cap on the overall aggregate Online Booking Fees at four tickets.

[348**]** For the following reasons, I find on the evidence that the Online Booking Fee is a "fixed" charge or fee. I believe it is unnecessary and unwise to attempt to define the word "fixed" in subsection 74.01(1.1) for all purposes, i.e., anticipating every possible kind of charge or fee that may be levied by a person making a representation of a price.

[349**]** First, on the evidence, Cineplex set the amount of the Online Booking Fee at $1.50 before its introduction in June 2022. The quantum of $1.50 has not been altered since June 2022. The vast majority of online ticket purchasers pay the full regular $1.50 Online Booking Fee. The amount of the fee for Scene+ and CineClub member was also set before June 2022 and has not varied since then. Internally, Cineplex made revenue projections based on those amounts and the projected number of moviegoers in each category. The Online Booking Fee was established and its quantum set by Cineplex for consumers in those three categories before it made any representations of a ticket price on its website and App.

[350**]** Second, the Online Booking Fee is fixed when Cineplex makes representations about the price of tickets on its Tickets Page, when the consumer sees those representations and when the consumer may begin to act upon them by clicking the ADD button. Consumers who reach the Tickets Page must already have logged into their Cineplex Connect Account. They cannot see pricing without doing so. By logging in, Cineplex is able to categorize the consumer as a regular consumer, a Scene+ member or a CineClub member. It therefore determines the quantum of the Online Booking Fee that applies to that consumer. (If the consumer has not entered their Scene+ or CineClub information into their Cineplex Connect Account, the website or App assumes the full $1.50 per ticket applies.) On arrival at Tickets Page (A), the Online Booking Fee is therefore fixed not only for each type of consumer (Regular, Scene+ and CineClub) but for the particular consumer. The website or the App knows the type into which the consumer falls and is immediately able to add the Online Booking Fee to the price of the ticket(s) selected when the consumer clicks the ADD button.

[351**]** Third, the Commissioner placed some importance on the fact that the pre-determined $1.50 Online Booking Fee is the regular amount, which in Cineplex's own advertising is discounted for Scene+ members (to $1.00) and is waived for CineClub members.

[352**]** I adopt a narrower view: the fact that some consumers pay a different, pre-determined and set amount of the Online Booking Fee does not alter the fact that the fee is "fixed" for each consumer and for each category of consumer created by Cineplex. Whether a fee may be characterized as discounted or waived, Scene+ members simply pay a different fixed amount than those who are not Scene+ members, and there is no charge or fee for CineClub members. This conclusion is consistent with the Commissioner's position that Cineplex's website and App cannot avoid the application of subsection 74.01(1.1) simply because they have created different categories of consumers for whom the fee is discounted or waived.

[353**]** I will now address Cineplex's submissions. Cineplex relied on Dr Amir's testimony that the Online Booking Fee is not fixed because its "amount can vary". Dr Amir also offered the view that the Online Booking Fee was not fixed because it varies depending on the number of tickets a consumer purchases per transaction. Mr McGrath testified to the same effect, which reflected Cineplex's corporate position. I do not accept those positions. Dr Amir acknowledged that he was not asked to provide an opinion on the interpretation of subsection 74.01(1.1) or of any word in it, which is outside his purview as an expert. In any event, the fact that the aggregate total of Online Booking Fees "varies" with the number of tickets purchased does not affect the applicable per-ticket fixed charge or fee that is added by Cineplex to the represented price for each ticket. The cap on the aggregate Online Booking Fees at four tickets does not affect whether the fees are "fixed" as explained above – which cap, in any event, only benefits a very small percentage of online ticket purchase transactions.

[354**]** Cineplex's legal submission was that "fixed" charges or fees in subsection 74.01(1.1) are, by definition, charges or fees that are not "variable". Cineplex maintained that the "clear Parliamentary intent was to avoid restricting sellers who advertise products which may have variable or optional fees such as shipping charges, insurance for the products purchase or in auction situations like eBay, [and] variable commission rates".

[355**]** However, Cineplex's legal argument sought to define "fixed" by what it is not – "not variable". Parliament did not use the phrase "not variable" in subsection 74.01(1.1). Cineplex adduced no edifying evidence as to Parliament's intent in using the word "fixed" in subsection 74.01(1.1). The excerpts from Hansard filed by the parties shed no light on this issue. Neither the evidence nor legal argument have shown that charges or fees that are "not variable" are always "fixed", or that "fixed" charges and fees are always "not variable". I decline to decide or comment on whether fees such as shipping charges are by definition not "fixed", as Cineplex's position suggested, as it is not an issue in the present case.

[356**]** Cineplex also submitted that its fees were not fixed because they are dependent on choices made by a consumer. That proposition, without more, is too broad and amorphous to be accepted when considering the legal meaning of a "fixed" charge or fee in this statutory provision.

[357**]** Lastly, Cineplex's position on the allegedly "variable" Online Booking Fee undermines, rather than advances, Parliament's purposes in enacting subsection 74.01(1.1) as part of the deceptive marketing provisions in the *Competition Act* generally and in subsection 74.01 specifically. Nothing in the wording of subsection 74.01(1.1) or the evidence suggests that one may avoid the application of the provision merely by creating two or more levels of fixed charges or fees and charging them to different categories of consumers. Nor is there any language or evidence to suggest that Parliament intended that subsection 74.01(1.1) not apply merely because a consumer purchases more than one item and must therefore pay two or more charges or fees. To accept Cineplex's position would imply that a retailer could easily avoid the application of the provision simply by setting one fixed obligatory charge or fee paid by some consumers and another fixed obligatory charge or fee paid by some other consumers. As the *Competition Act* is deemed to be remedial, it is hard to see how this interpretation of the provision would be consistent with the purposes of the *Competition Act* generally, or the deceptive marketing provisions in particular. See *Interpretation Act,* section 12; Canada (Director of Investigation and Research) v Air Canada, 1993 CanLII 2983 (FCA), [1994] 1 FC 154 (CA), at pp. 186-187; Rakuten Kobo Inc v Canada (Commissioner of Competition), 2018 FC 64, [2018] 4 FCR 111, at paras 102-104; Bédard v Canada (Attorney General), 2007 FC 516, at para 39; Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited, at paras 118-123; Commissioner of Competition v Direct Energy Marketing Limited, 2015 Comp Trib 2, at paras 39-40.

[358**]** I therefore find that the Online Booking Fee is a "fixed" charge or fee for the purposes of subsection 74.01(1.1).

(b) The Online Booking Fee is an "obligatory" Charge or Fee

[359**]** The Commissioner's position was that the Online Booking Fee is obligatory because it must be paid by those consumers to whom it applies (regular consumers and Scene+ members). It is not optional. Payment of the fee is obligatory for all consumers to whom it applies who want to complete the purchase of movie tickets on the website or the App. A consumer can never purchase a movie ticket online without paying the Online Booking Fee unless they are a CineClub member, in which case it is waived. To complete a ticket purchase online, the consumer must therefore pay the applicable fee.

[360] The Commissioner confirmed in oral argument that according to him, the relevant question on "obligatory" under subsection 74.01(1.1) is: for whatever channel the consumer happens to be purchasing the product in, is the Online Booking Fee obligatory for the consumer to purchase in that specific channel? Simply put, once the consumer starts the purchase process, a charge or fee is mandatory if it must be paid to complete the purchase process in that channel.

[361] Cineplex's position was that the Online Booking Fee is not obligatory for the purchase of tickets at Cineplex theatres. It is "completely avoidable" by purchasing a movie ticket in-person at the theatre. Cineplex submitted that at any time, a consumer can decide to leave the website or App – therefore avoiding to pay the Online Booking Fee – and complete the transaction in-person at the theatre. To Cineplex, the existence of that alternative ends – or should end – the inquiry and analysis.

[362] Cineplex sought to distinguish its position from situations in which no "bricks & mortar" location is available to purchase the desired product, and from instances when fees are added "at the counter" after a consumer concludes a reservation online or on arrival at a location (such as a "resort" fee).

[363] Cineplex made submissions on the broader theme of consumer choice and whether the displayed ticket prices were attainable, backed by passages in Mr McGrath's witness statement. Mr McGrath stated that on the Tickets Page, a consumer faces an "important choice" and trade-off with respect to pricing and convenience: the "consumer has the choice of purchasing the tickets at theatres at the base price, or alternatively, the consumer can select the number of tickets the consumer wishes to purchase online at the online price". This "base price" is the ticket price before the consumer makes any selection of tickets (i.e., it is the price displayed on Tickets Page (A)). According to Mr McGrath's witness statement, tickets are "obtainable, either at the base price or at the online price, based on the consumer choice whether to purchase at theatres or to purchase online". (He noted that the base price can be obtained online by CineClub members.)

[364] According to Cineplex, the choice it offers to consumers is consistent with the objective in section 1.1 of the *Competition Act* to "provide consumers with competitive prices and product choices". Cineplex's position was that subsection 74.01(1.1) uses both the words "attainable" and "obligatory", which underscores the requirement that an alternative is not available to the consumer.

[365] I conclude on the evidence that the Online Booking Fee on Cineplex's website and App is an "obligatory" charge or fee under subsection 74.01(1.1).

[366] To start, as a matter of fact, payment of the Online Booking Fee is required for all consumers who complete the purchase of movie tickets on the website or the App, unless they are CineClub members. Mr McGrath and Dr Amir both testified that every consumer who is not a CineClub member must pay the Online Booking Fee if they wish to purchase tickets online. (This was the question that Mr McGrath was asked several times in cross-examination before answering directly – see paragraph 20, above.) There is no evidence that since its implementation on June 15, 2022, any consumer has purchased a ticket on the website or the App without paying the Online Booking Fee, other than CineClub members. For context, I note that online sales represent just over half of the tickets sold by Cineplex. It may also be recalled that the Online Booking Fee generated the considerable amounts of $11,678,336 in 2022 and $27.3 million in 2023 for Cineplex.

[367] I am not persuaded that the Online Booking Fee is not obligatory simply because a consumer may abandon their online tickets purchase and attend the theatre to purchase a ticket, therefore avoiding it. I agree with the Commissioner's position that the question is whether the charge or fee is obligatory for consumers who want to complete a purchase of a movie ticket on the website or the App. The answer is: yes, it is obligatory.

[368] The display of prices on the Tickets Page would lead an ordinary consumer to believe that the prices they are seeing on the website or the App are the online ticket prices to be paid. As previously mentioned, the website and the App do not display ticket prices as "in-theatre" prices and do not advise consumers on the Tickets Page that the represented ticket prices (that is, without the Online Booking Fee) are only available if they abandon the online purchase process and proceed with the purchase in-person at the theatre.

[369] Cineplex's position is not supported by the contents of the Tickets Page evidence. The consumer may be aware that tickets can be purchased at the theatre; the relevant question, however, is whether the consumer is aware that she has a choice to buy online and pay the additional fee, or buy at the theatre without paying it. The latter question properly reflects the objectives of the statute and the purposes of the deceptive marketing provisions. The Tickets Page does not make that choice clear.

[370] While Cineplex and Mr McGrath's witness statement characterized the tickets prices as a "base price" that can be obtained at the theatre, Tickets Page (A) does not advise a consumer that the displayed prices are the "at-theatre" prices, or are "base prices" to which an additional fee will be added for online purchases. Nor does that webpage advise that there is a difference between the at-theatre price and the online price. Cineplex does not advise consumers that to purchase tickets online, an Online Booking Fee may apply, or – after the consumer has already logged into their Cineplex Connect Account – that an Online Booking Fee will apply to that particular consumer if she purchases tickets online.

[371] The subtotal on the floating ribbon does not inform the consumer about the option of purchasing tickets at the theatre without paying the Online Booking Fee or, as explained elsewhere in these reasons, inform the consumer about that fee given the required mental math. Although Mr McGrath and Dr Amir testified in cross-examination that there is no evidence that consumers became aware of the Online Booking Fee and then decided to abandon their online ticket purchase to buy tickets at the theatre instead, there are numerous reasons why a consumer might end their use of the website or the App without completing the purchase of a movie ticket, as many consumers do. Cineplex did not adduce any evidence to show that consumers were actually aware of the relevant choice.

[372] It is fair to say that online ticket purchasing promotes consumer choice by enabling them to purchase tickets in advance of a show without attending at a theatre location. The evidence confirmed that consumers can purchase movie tickets on the website and the App days or longer in advance of the show time. Mr McGrath testified that Cineplex believes consumers find value in being able to purchase movie tickets in advance, an intuitively attractive proposition that was also supported by Dr Amir.

[373**]** However and importantly, Cineplex's position on the "important choice" gains little traction under subsection 74.01(1.1) due to the absence of a properly informed consumer – someone who is made aware of the choice being offered, including the real cost of both options. The absence of materially relevant information on the Tickets Page, as just discussed, undermines Cineplex's submission.

[374**]** Lastly, and returning to the obligatory nature of the fee, the Online Booking Fee has an aggregate maximum per transaction (based on four tickets). However, only a very small number of tickets purchased online exceed this cap limit. The fact that the Online Booking Fee has a maximum quantum for regular consumers and Scene+ members does not affect whether it is obligatory.

[375**]** Accordingly, I conclude that the Online Booking Fee is "obligatory" under subsection 74.01(1.1).

(3) The Representations of Movie Tickets Prices are "not attainable" due to the Online Booking Fee

[376**]** The Commissioner submitted that Cineplex's price representations were not attainable due to the Online Booking Fee. Specifically, the prices represented on Tickets Page (A) of the website and the App were not attainable for purchases on the website and the App due to the Online Booking Fee.

[377**]** Cineplex disagreed, arguing that the price of a ticket, including a ticket purchased in advance with a seat selection, is always attainable by attending the selected theatre to purchase it. On this view, the base price displayed on the Tickets Page of the website and on the App is therefore attainable. Cineplex noted that nearly half of all movie tickets are purchased at theatres at the base ticket price. Similarly and as noted above, Cineplex submitted that there is no price advertised by Cineplex that is unattainable: the prices are attainable either at the theatre chosen by the consumer as displayed on the Tickets Page, or online at the total price shown on the floating ribbon (the subtotal), which includes any Online Booking Fee if the consumer chooses to purchase a ticket online.

[378**]** Cineplex relied on Mr Zimmerman's evidence in cross-examination. He admitted that the prices displayed on the Tickets Page are attainable if purchased at the theatre and that the prices are also attainable online if the consumer is a CineClub member. Mr McGrath and Dr Amir noted that consumers who use certain promotional coupons are also not charged the Online Booking Fee.

[379**]** I agree with the Commissioner. When considering whether Cineplex's representations of a price are "not attainable due to" the Online Booking Fee under subsection 74.01(1.1), the analysis focuses on the impugned price representations, the channel in which the representations are made and where consumers see them, and whether consumers pay a fixed obligatory charge or fee to complete a purchase in that same channel.

[380**]** Cineplex makes the impugned price representations about the price of tickets on the website and in the App. Whether viewed from the perspective of the ordinary consumer, or through the eyes of the Tribunal with the benefit of the very detailed review of the Tickets Page during the hearing, the displayed prices on the website and the App are represented to be the prices consumers must pay to purchase a ticket in those same channels in which the price representation is made, is seen and may be acted upon. The website and App do not state otherwise, expressly or impliedly; they give no indication that the displayed prices do not apply in the very medium in which the representations are made and in which consumers see them and can purchase tickets. Equally, neither the literal meaning nor the general impression conveyed by the price representations suggest that the displayed price is only an at-theatre price.

[381**]** Accordingly, the fact that the represented prices of movie tickets on the website or the App is attainable if a consumer buys them in-person at the theatre is not relevant to the determination of whether or not they are "attainable" under subsection 74.01(1.1) in another channel where a price representation is made and tickets may be purchased.

(4) "… unless …"

[382**]** There is no debate that the Online Booking Fee does not represent an amount imposed by or under an Act of Parliament or a provincial legislature.

(5) Conclusion on the Application of subsection 74.01(1.1)

[383**]** Accordingly, applying subsection 74.01(1.1), Cineplex's representations of ticket prices on its website and App constitute false or misleading representations.

E. Were the Representations on the Tickets Page "false or misleading" under paragraph 74.01(1)(*a*)?

[384**]** In the event that Cineplex's representations of tickets prices do not constitute false or misleading representations as a result of subsection 74.01(1.1), the question is whether they are false or misleading under paragraph 74.01(1)(*a*).

(1) Is subsection 74.01(1.1) a "Complete Code"?

[385**]** Cineplex submitted that subsection 74.01(1.1) constitutes a "complete code". It pointed to the phrase "[f]or greater certainty" and contended that the provision is exhaustive of what constitutes "drip" pricing under the *Competition Act*. On this view, the Tribunal cannot in law determine whether Cineplex's alleged "drip" price representations are false or misleading under paragraph 74.01(1)(*a*) alone, without subsection 74.01(1.1).

[386**]** Cineplex characterized the Commissioner's position under paragraph 74.01(1)(*a*) as his "residual" position that drip pricing is materially misleading when the consumer is not aware of the amount of the Online Booking Fee. According to Cineplex, subsection 74.01(1.1) leaves no room for the residual argument of the Commissioner because the words "[f]or greater certainty" make it clear that drip pricing as set out in subsection 74.01(1.1) is "definitional and complete". On this approach, it is straightforward and clear that drip pricing only applies when the total price (excluding applicable taxes) is not attainable and *only then* is it misleading under section 74.01. If this were not the case, the phrase "[f]or greater certainty" would be unnecessary. Cineplex submitted that the converse is therefore that

if the product is attainable at the total price, then that total price is not misleading under the drip pricing provisions. According to Cineplex, the residual argument of the Commissioner is contrary to subsection 74.01(1.1) itself and contrary to the clear objectives of Parliament.

[387**]** In response, the Commissioner argued that subsection 74.01(1.1) is not a complete code, as it only relates to one element of the reviewable conduct in paragraph 74.01(1)(*a*) – whether the representation is false or misleading. It is not a standalone provision that defines reviewable conduct. According to the Commissioner, subsection 74.01(1.1) neither expands nor limits the scope of the application of paragraph 74.01(1)(*a*) but simply clarifies that certain types of price representations are deemed to be false or misleading. The purpose of subsection 74.01(1.1) is to facilitate proof of one of the elements of paragraph 74.01(1)(*a*). The Commissioner argued that to prevent the Tribunal from assessing whether the price representations are false or misleading independently from subsection 74.01(1.1) would lead to an absurd result contrary to statutory interpretation principles: a company could make "wildly misleading price representations as long as it does not meet the requirement of [subsection 74.01(1.1)] – for example, adding an extra variable charge disclosed in miniscule font or requiring the consumer to click on an obscured link".

[388**]** I am unable to conclude that subsection 74.01(1.1) is a complete code or that it precludes a separate analysis under paragraph 74.01(1)(*a*). First, subsection 74.01(1.1) does not define reviewable conduct separately from paragraph 74.01(1)(*a*). The Commissioner could not simply prove the requirements of subsection 74.01(1.1) and seek a remedy. Rather, Parliament has determined that certain kinds of price representations are false or misleading. The other elements of reviewable conduct under paragraph 74.01(1)(*a*) must still be shown to prove that a respondent has engaged in reviewable conduct.

[389**]** Second, the language of the provisions does not support a legal rule that precludes any inquiry under paragraph 74.01(1)(*a*) in every case that the evidence satisfies subsection 74.01(1.1). The representations captured by the two provisions are not coextensive: paragraph 74.01(1)(*a*) is not limited to price representations, whereas subsection 74.01(1.1) expressly refers to a representation as to price. In addition, there is no reason why Parliament cannot define more than one way that a representation is false or misleading for the purposes of reviewable conduct. A representation could be false or misleading by meeting the requirements of subsection 74.01(1.1) and also false or misleading for another reason under paragraph 74.01(1)(*a*).

[390**]** Although Cineplex's argument is essentially that subsection 74.01(1.1) has "occupied the field" to describe all circumstances in which a price representation is false or misleading and constitutes "drip" pricing, it is not clear what "field" has been occupied. Parliament may have described one species of false or misleading representation in enacting subsection 74.01(1.1), or it may have identified one species of drip or partitioned pricing (i.e., where the price is made up of more than one element) that will support a finding of reviewable conduct.

[391**]** Third, the mere enactment of subsection 74.01(1.1) does not mean that the false or misleading conduct it is meant to catch was not already caught by paragraph 74.01(1)(*a*). That is, enacting subsection 74.01(1.1) does not imply that Parliament changed the law in 2022. Subsection 45(2) of the *Interpretation Act* provides:

"**Amendment does not imply change in law** "	**Absence de présomption de droit nouveau**" "
45 (2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended." "	**45 (2)** La modification d'un texte ne constitue pas ni n'implique une déclaration portant que les règles de droit du texte étaient différentes de celles de sa version modifiée ou que le Parlement, ou toute autre autorité qui l'a édicté, les considérait comme telles." "

[392**]** In addition, subsection 45(3) provides that a repeal or amendment does not declare the previous state of the law:

"**Repeal does not declare previous law** "	**Absence de présomption de droit nouveau" "**
45 (3) The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law." "	**45 (3)** La modification d'un texte ne constitue pas ni n'implique une déclaration portant que les règles de droit du texte étaient différentes de celles de sa version modifiée ou que le Parlement, ou toute autre autorité qui l'a édicté, les considérait comme telles." "

See *Premier Career Management Group FCA,* at para 57.

[393**]** For these reasons, the Tribunal is not precluded from considering paragraph 74.01(1)(*a*).

(2) Were the Representations "false or misleading"?

[394**]** As the focus of both parties' evidence and legal argument was on subsection 74.01(1.1), they gave significantly less attention to whether the price representations were false or misleading under paragraph 74.01(1)(*a*).

[395**]** The Commissioner's position was that the website and App were designed in such a way that disclosure of the existence and amount of the Online Booking Fee is hidden from view, "below the fold" and off-screen for the vast majority of consumers. According to the Commissioner, consumers will not see the information about the Online Booking Fee disclosed below the fold for all phone users, and for most consumers purchasing tickets through their computer. The Commissioner maintained that the design of the website

incorporates a "call to action" prompt button whose effect is to attract the focus of the consumer to proceed to the next step of the purchase process without further exploring the rest of the webpage. According to the Commissioner, Cineplex presents the Online Booking Fee in a manner that is somewhat shielded, which in turn increases the likelihood that consumers will purchase a ticket online and lowers their perception of the ultimate cost of the ticket purchased online. The Commissioner noted that nothing about the Online Booking Fee is disclosed until after a consumer acts on the price representations made by Cineplex. The Commissioner relied on Dr Morwitz's evidence, in particular her opinions about "shrouded attributes" and partitioned or drip pricing.

[396**]** Owing to its various positions already described, Cineplex made few submissions that went solely to whether its price representations were false or misleading under paragraph 74.01(1)(*a*). Cineplex emphasized that its pricing was not misleading because the total all-inclusive price payable for tickets is shown on the floating ribbon beside the word "Subtotal" at the bottom of the screen on Tickets Page (B) as soon as a consumer clicks the ADD button to add a ticket. Cineplex also argued that the existence and quantum of the Online Booking Fee is disclosed throughout the purchasing process through the CineClub advertisement on the Tickets Page, the information at the bottom of Tickets Pages (A) and (B), and the availability of additional information by clicking on the blue encircled "i" button.

[397**]** I conclude that the price representations are false or misleading under paragraph 74.01(1)(*a*). The displayed ticket prices are not accurate because "more" must be paid up to four tickets per transaction on the website or App. In addition, as is explained immediately below, the consumer is deceived or led astray by the contradictory and incomplete information on the Tickets Page after clicking the ADD button to add one or more tickets.

[398**]** As previously indicated on several occasions, the Tickets Page displays ticket prices without concurrent display of an additional fee to make a purchase on the website or the App. Because the existence and quantum of that additional component of the price is not displayed to the consumer on Tickets Page (A), the individual may complete the purchase of tickets without ever realizing that they must pay – or have paid – an additional fee for the tickets. After adding a ticket and seeing Tickets Page (B), the displayed ticket price per ticket does not change, but the subtotal on the floating ribbon shows the aggregate sum of the displayed price of the selected tickets plus any applicable Online Booking Fee. The ordinary consumer (who does not pause to do the mental math, as already discussed) is misled as there is no indication that the subtotal is anything other than the sum of the displayed price of the selected tickets – yet the subtotal is in fact a higher amount. Even a consumer who successfully does the mental math and notices a discrepancy immediately sees and feels the deception of the displayed ticket price.

[399**]** The existence and quantum of the Online Booking Fee is obfuscated by placing some information about it at the bottom of the Tickets Page, but without any indication in the viewable area of the page that the information is available by scrolling down. Consumers will not scroll unless they need to do so, are told they must do so, or at minimum something suggests that they should do so to get more information. The Tickets Page does none of these: consumers can click PROCEED to the next page without scrolling down (and in practical terms are encouraged to do exactly that), they are not prevented from advancing to the next page without scrolling to the bottom (although they could be), and they are not given any indication that more information on the price is available by choosing to scroll down (again, some indication could be provided).

[400**]** Before the consumer clicks to add a ticket to the online shopping cart, the quantum of the Online Booking Fee is not displayed above the fold. To find out the quantum, one must scroll to the bottom of the page and click on the blue encircled "i", which opens a pop-up window with information and the quantum. After the consumer clicks to add a ticket to the online shopping cart (resulting in the appearance of Tickets Page (B)), the existence and quantum of the fee component of the price is obfuscated. At this point the aggregate Online Booking Fees is embedded within the dollar amount of the subtotal shown on the floating ribbon, but the consumer is not informed about the fee and the floating ribbon does not break down the amount displayed or explain how the subtotal is calculated.

[401**]** On the next page where the consumer may proceed with seat selection, the subtotal on the floating ribbon changes to show a total cost, which is an aggregate amount representing the sum of the price of all tickets, plus the sum of any applicable Online Booking Fee, now also including applicable taxes. While this change shows the total amount the consumer will ultimately have to pay, it does nothing to advise the consumer about the existence or quantum of any Online Booking Fee that may be included.

[402**]** Advancing to the Payment Options Page on the website or on the App, the consumer can locate an Order Summary, which shows the number of movie tickets purchased and their aggregate cost, the Online Booking Fee and its aggregate cost, applicable taxes in aggregate, and a total amount. However, that Order Summary is not visible above the fold on the website or on the App, and a consumer must scroll down to see it. Again, there is no requirement or need for a consumer to scroll prior to completing the purchase.

[403**]** Thus, as Mr McGrath and Dr Amir acknowledged, a consumer can get through the process without becoming aware that any Online Booking Fee is payable. Indeed, a consumer may complete a purchase of tickets without realizing that they ultimately paid more than the originally represented ticket price, plus applicable taxes.

[404**]** I note that this overall analysis concerns the making of representations about ticket prices. It is not founded on the non-disclosure of the Online Booking Fee but on two related instances of inaccurate and misleading information displayed on the Tickets Page. The initial display of ticket prices is inaccurate or deceptive on its face. The Tickets Page remains misleading even after the subtotal is displayed on the floating ribbon because the subtotal appears inaccurate when viewed with the per-ticket displayed prices, without additional information about the quantum per ticket of the Online Booking Fee. The inaccuracy of the represented ticket prices on Tickets Page (A) and the deceptive and unexplained gap between the sum of the represented per-ticket prices and the represented subtotal on Tickets Page (B) are both related to Cineplex's omission of information about the Online Booking Fee on the Tickets Page (both above the fold and at all).

[405**]** As such, the present case is easily distinguished on its facts from cases that rely solely on non-disclosure of a defect and do not involve clear representations to the public: see, e.g., Arora v Whirlpool Canada LP, 2013 ONCA 657, at paras 50-51; Palmer v Teva Canada Ltd, 2022 ONSC 4690, at para 253 (aff'd Palmer v Teva Canada Limited, 2024 ONCA 220, at paras 94-96); Rebuck, at para 45; Hoy v Expedia Group Inc, 2022 ONSC 6650, at para 117; Gaudette c Whirlpool Canada, 2020 QCCS 1423, at para 61. The present case is

closer to Vallance v DHL Express (Canada), Ltd, 2024 BCSC 140, at paras 55-56, 58-61, but stronger on its facts than Vallance. It is not necessary to consider the circumstances in which a partial statement of facts or similar omission can, on its own, constitute a representation under paragraph 74.01(1)(*a*).

[406**]** Beyond this analysis of the factual evidence, Dr Morwitz's expert opinion provides support for the finding of representations that are false or misleading under paragraph 74.01(1)(*a*). She testified that the Online Booking Fee is a "shrouded attribute" according to the academic literature. It is a fee separated from the price of the ticket and presented sequentially (i.e., the ticket price is presented first, and the fee is added later). She identified the shrouding or obfuscation of the fee owing to the number of steps that a consumer has to take to find or learn information about the per-ticket Online Booking Fee. She referred to: (i) the need to click on the ADD button for fee information to be displayed, (ii) the absence of any reference to a fee next to the displayed ticket price, (iii) the placement of Online Booking Fee information at the bottom of the Tickets Page (below the fold) and that consumers have to scroll down to find it, (iv) having to do mental math about the subtotal to otherwise become aware of the fee, (v) the font used to display it, (vi) the need to click the blue encircled "i" to get information about the added fee, and (vii) the use of the countdown clock to create a sense of urgency.

[407**]** Dr Morwitz described the effect on consumers of separating different elements of the overall price to be paid. In particular, her opinion was that the way in which the ticket prices and the Online Booking Fee are presented on the website and the App lowers consumers' perceptions of the total price of the tickets and affects their buying behaviour by leading them to underestimate the total price of purchasing the tickets.

[408**]** Dr Morwitz provided a summary of the academic literature and provided her own analysis of the situation on the Cineplex website and App. As discussed when analyzing Cineplex's objections to the admissibility of her evidence, I find that her opinions on these issues were not materially altered or compromised at the hearing. I also recognize that Dr Morwitz did not conduct a study to determine whether actual consumers were misled by the Cineplex website or App, or whether the partitioned pricing in fact led to altered perceptions of the ticket price or changed buying behaviour. As the Commissioner noted, she was not asked to do so (nor was the Commissioner required to demonstrate so under the *Competition Act*).

[409**]** Cineplex relied on Dr Amir's evidence that virtually no consumer was misled by the Online Booking Fee. I agree that evidence of this nature, if properly supported, could be relevant to the Tribunal's assessment, acknowledging again that the Commissioner is not required to adduce evidence to show that anyone was actually deceived: see paragraph 74.03(4)(*a*).

[410**]** In his report, Dr Amir testified that there were 97 million consumer visits to the Cineplex website in 2022. By contrast, only seven complaints were submitted to the Competition Bureau, all of which were after the Commissioner filed the Notice of Application in this matter, about a year after the Online Booking Fee was introduced. This represented 0.0000072 percent of visits to the "Cineplex Consumer Flow" (as Dr Amir described it). This suggested to Dr Amir that, "from a scientific perspective, virtually all consumers of the Cineplex Website did not find the Online Booking Fee misleading". Dr Amir did not find this surprising, given his analysis that "Cineplex's website design, the Consumer Flow of a ticket, and presentation of the Online Booking Fee are consistent with marketing and user design best practices as well as industry standards and norms".

[411**]** At the hearing, Dr Amir testified that it was his "scientific conclusion" that virtually all consumers of the Cineplex website did not find the Online Booking Fee misleading.

[412**]** I do not accept this position. It is neither scientific nor reliable. Cross-examination demonstrated that the numerator used by Dr Amir (i.e., the number of complaints to the Competition Bureau) was inaccurate and unreliable as a measure of actual persons who were deceived or misled. In addition, the denominator used by Dr Amir was significantly overstated. Cross-examination revealed that the premise (97 million visits to the website) did not reflect actual visitors. The number of website visitors is necessarily some unknown lower number, which Dr Amir agreed was significantly less than 97 million. In addition, the time period for the number of visits used by Dr Amir was calendar 2022, but the Online Booking Fee was not implemented until June 15, 2022, meaning that the number of "visits" is overstated by using the first 5.5 months in the calendar year.

[413**]** Further, it is apparent that to obtain a reasonable understanding of consumers who were or were not misled by Cineplex's display of pricing information, one would have to consider only those who were exposed to the ticket prices on the Tickets Page. A user cannot see pricing information without logging in, and, as Dr Amir recognized in his report, about 85.7 million of the "visits" did not reach the Tickets Page. Only 11.8% got to the Tickets Page, and an even smaller number got past the Tickets Page to the next page.

[414**]** Lastly, Dr Amir's analysis considered visits to the Tickets Page through the website but did not consider visits through the App, although about 37.5% of purchasers visit the Tickets Page on the App.

[415**]** I give no weight to Dr Amir's analysis on website visits and consumer complaints, including the inference drawn from it that virtually no one was misled. That the conclusion is consistent with other aspects of Dr Amir's report is of no consequence given the limited extent of his expertise to testify about website user design and best practices.

[416**]** The factual evidence before the Tribunal leads to the conclusion that the ticket price representations on the Cineplex website and the App were false or misleading. That conclusion is also supplemented and supported by the expert opinion from Dr Morwitz.

[417**]** The Commissioner has established the "false or misleading" element under paragraph 74.01(1)(*a*).

F. Were the Representations False or Misleading "in a material respect" under paragraph 74.01(1)(*a*)?

[418**]** A representation is material under paragraph 74.01(1)(*a*) if it is "so pertinent, germane or essential that it could affect the decision to purchase": Apotex Inc v Hoffman La-Roche Ltd (2000), 195 DLR (4th) 244 (Ont CA), 2000 CanLII 16984, at para 16. See also Premier Career Management Group FCA, at paras 20 (quoting Apotex), 65, 80; Sears, at paras 333-336 (a "material influence on the mind of a consumer"); Gestion Lebski inc, at paras 154, 163, 288; Yellow Page Marketing, at para 34.

[419**]** The representations at issue in this case were material. They related to the price of movie tickets. While I do not agree with the Commissioner that the Tribunal should adopt a presumption that price representations are material because they always affect the decision to purchase, it will very often be the case – as it is here. The representations constituted a material influence on the mind of consumers and their decision to purchase movie tickets. The Online Booking Fee constitutes a significant proportion of displayed ticket prices. Cineplex's own consumer research in the months before it adopted the Online Booking Fee assessed the "switching" impact of $1-$2 adjustments in base ticket pricing, and showed that $1-2 was material to consumers (in that it was enough to influence consumer behaviour). Cineplex set the Online Booking Fee at $1.50. Cineplex was also aware on implementation that the fee was, in reality, a price increase. Further, Dr Morwitz's evidence indicated that partitioning the price likely increased the prospect that consumers would purchase tickets online (and pay the Online Booking Fee). For the reasons already discussed, the display of the subtotal on the floating ribbon (which incorporates any applicable Online Booking Fee) does not rescue the situation.

G. Conclusion

[420**]** The Commissioner has established that the ticket price representations on Cineplex's website and App constitute reviewable conduct under paragraph 74.01(1)(*a*) of the *Competition Act*.

VIII. Remedy

A. The Parties' Positions

[421**]** The Commissioner requested that the Tribunal order behavioural and monetary remedies, including a Canada-wide prohibition order, and either an order for restitution or a "significant" administrative monetary penalty – an AMP.

[422**]** The Commissioner submitted that Cineplex had collected approximately $40 million from its deceptive conduct. According to the Commissioner in his opening submissions at the hearing, the quantum of the AMP should be "at least" $40 million. His written argument in closing argued that the AMP should be "the amount Cineplex has gained from engaging in the misleading conduct". The Commissioner observed that an AMP of $40 million is "not even close" to the maximum AMP that the Tribunal may order under paragraph 74.1(1)(*c*) of the *Competition Act*.

[423**]** With respect to an AMP, the Commissioner referred to the following aggravating and mitigating factors under subsection 74.1(5):

(a) The misrepresentations were frequent and extensive: they have occurred since June 15, 2022, and have affected consumers purchasing millions of tickets across Canada;

(b) The misrepresentations were material and affected consumers' purchasing behaviour, which increased the likelihood that a consumer would purchase tickets;

(c) Cineplex received significant revenue, approximately $39 million, from charging Online Booking Fees as of December 31, 2023;

(d) Cineplex is Canada's largest film exhibitor and as of December 31, 2023, owned, leased or had a joint venture in 1,631 screens in 158 theatres;

(e) In 2023, Cineplex's revenue was approximately $1.4 billion dollars. Since the pandemic, Cineplex has returned to profitability for the last two years;

(f) Cineplex is unlikely to change its conduct voluntarily: it could have ceased its conduct long before the Commissioner filed the application to this Tribunal. Cineplex commenced its conduct the same month as subsection 74.01(1.1) was enacted; and

(g) Cineplex has not relied on the existence of an effective corporate compliance program as a mitigating factor, nor did it seek an advisory opinion from the Competition Bureau related to its conduct or otherwise adduce evidence of any legal advice it received that its conduct complied with the *Competition Act*.

[424**]** The Commissioner also argued that the Tribunal may order Cineplex to give people their money back under paragraph 74.1(1)(*d*) and that there were compelling reasons to order "restitution instead of an AMP" in this case. The Commissioner submitted:

(a) The amount of the Online Booking Fees charged to consumers is not in dispute;

(b) The amount of the money paid by consumers is directly linked to the reviewable conduct;

(c) Cineplex accounts for the revenues from Online Booking Fees separately from other streams of revenue in its annual and quarterly reports, such that the total amount to be paid to consumers is ascertainable;

(d) The affected consumers can be identified, as every consumer who purchased tickets online first had to create a Cineplex Connect Account, which included at a minimum providing Cineplex with an email address and a phone number. As Mr Zimmerman's evidence showed, one must log into that account before one can see prices or purchase tickets on the website or the App;

(e) Cineplex tracks each consumer's purchase history since before the Online Booking Fee was implemented so that the consumers can be identified and such fees can be refunded; and

(f) Cineplex admitted on discovery that restitution is technically possible.

[425**]** During his submissions, the Commissioner noted that before Cineplex displays ticket prices to the consumer, the consumer must have logged into their Cineplex Connect Account and selected a movie, location, time, and experience type. Cineplex knows that the consumer, if not a CineClub member, will have to pay at least one Online Booking Fee to complete the purchase. However, Cineplex fails to tell this to the consumer and instead waits for the consumer to act on the price representations before adding the Online Booking Fee to the cost of the ticket purchase.

[426**]** While Cineplex denied wrongdoing under the *Competition Act*, it submitted in the alternative that the Tribunal should not impose an AMP as this is the first case heard by the Tribunal involving subsection 74.01(1.1), the first interpretation of that provision and a novel case. Cineplex's brief written submissions on remedy argued that the Commissioner's approach to the provision was "beyond the clear or obvious interpretation of the provision and beyond any guidance the Commissioner provided to the business community". Cineplex did not link its submissions to the evidence of Competition Bureau presentations on drip pricing (or to past consent agreements registered with the Tribunal). However, if the Tribunal were inclined to award an AMP, Cineplex contended that the amount should be no more than $500,000 as ordered in *Canada (Commissioner of Competition) v Chatr Wireless Inc,* 2014 ONSC 1146 ("*Chatr 2014*"), at para 77.

[427**]** With respect to aggravating and mitigating factors for an AMP, Cineplex submitted as follows:

(a) Cineplex has not been found to have engaged in any unlawful conduct under the *Competition Act* (which I take to refer to the absence of any previous reviewable conduct under the *Competition Act*);

(b) The evidence is uncontroverted that Cineplex's intention was to provide a choice to consumers which is welfare enhancing (relying in part on Dr Amir's evidence that consumers are able to select the experience they wish at different prices, or else decide whether they want to pay more to get the value of pre-booking);

(c) The consumers who purchase online obtained value for their purchases, including the value of the advance seat selection;

(d) There were no complaints that would have alerted Cineplex to the concerns raised by the Commissioner; and

(e) The evidence is uncontroverted that Cineplex believed that its webpage was fully compliant with the *Competition Act* and that it provided consumers with all relevant information, including locking consumers out from the online purchase process until they had selected tickets and seen the total price to be paid, including any Online Booking Fee (subject to applicable taxes).

[428**]** Cineplex submitted that a restitution order would not be appropriate in this case, because consumers received the advantages that the Online Booking Fee provided, meaning a movie ticket with an online seat selection. According to Cineplex, "[t]his is not a junk fee where no value was received for the fee in question".

[429**]** Cineplex referred to subsection 74.1(4), which provides that the terms of an order made against a person under paragraphs 74.1(1)(*b*), (*c*) or (*d*) – which include orders for a monetary penalty and restitution – "shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment".

B. Determination on Remedies

(1) An Order under paragraph 74.1(1)(*a*)?

[430**]** I agree with the Commissioner that the Tribunal should make an order under paragraph 74.1(1)(*a*) requiring Cineplex not to engage in the reviewable conduct or substantially similar reviewable conduct. The Commissioner did not provide proposed language for this part of the Tribunal's order. It will be drafted in accordance with paragraph 74.1(1)(*a*) and provide Cineplex with sufficient notice having regard to the potential implications for its future conduct: see section 66**.**

[431**]** As contemplated by subsection 74.1(2), this part of the Tribunal's order shall apply for a period of ten (10) years. Cineplex did not argue otherwise.

(2) Provisions Affecting an Order under paragraphs 74.1(1)(*b*), (*c*) and (*d*)

[432**]** Section 74.1 includes guidance about the purpose of an order under paragraphs 74.1(1)(*b*), (*c*) and (*d*) and imposes certain limitations.

[433**]** Subsection 74.1(4) provides that the terms of an order made against a person under paragraph (1)(*b*), (*c*) or (*d*) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of Part VII.1 of the *Competition Act*. The same subsection expressly proscribes that a remedy be imposed with a view to punishment of the respondent.

[434**]** The remedies that may be imposed by the Tribunal are also limited in quantum by subparagraph 74.1(1)(*c*)(ii) and the language in paragraph 74.1(1)(*d*). For an order that is not a "subsequent order" (as is the case here; there is no prior order) the maximum AMP payable by a corporation is the greater of $10 million, and three times the value of the "benefit derived from the deceptive conduct" if that amount can be reasonably determined: clause 74.1(1)(*c*)(ii)(B). The amount to be distributed under paragraph 74.1(1)(*d*) shall not exceed the total of the "amounts paid to the [respondent] person for the products" in respect of which the conduct was engaged in. It may be observed that in both cases, the quantum is related to the financial amount obtained by the respondent through the reviewable conduct.

[435**]** There are three additional comments at the outset. First, the *Competition Act* contains indications that the remedies under paragraphs 74.1(1)(*b*), (*c*) and (*d*) can and should work together – they must achieve a common purpose under subsection 74.1(4), and one factor to take into account in determining the amount of an AMP under paragraph 74.1(1)(*c*) is any decision in relation to an application for an order under paragraph 74.1(1)(*d*): see paragraph 74.1(5)(*j*).

[436**]** Second, both paragraphs 74.1(1)(*c*) and (*d*) contemplate that the Tribunal has discretion in how to fashion its order. A respondent may be ordered to pay an AMP under paragraph (*c*) "in any manner that the court specifies", subject to the quantum limitations. Paragraph (*d*) contemplates an order to pay an amount to be distributed "in any manner that the court considers appropriate".

[437**]** Third, to promote conduct in conformity with the *Competition Act* as subsection 74.1(4) contemplates, the Tribunal may in appropriate circumstances make an order under paragraphs 74.1(1)(*c*) and/or (*d*) with a view to ensuring that a respondent does not profit or otherwise reap a financial gain from its false or misleading conduct.

[438**]** I will elaborate on this third point. The purposes of Part VII.1 have been described above. The focus is on the consumer and on the accuracy of representations to the public to preserve the informational integrity of markets and to avoid the *per se* harm to competition that follows from false or misleading information: *Premier Career Management Group FCA*, at para 61. In my view, a Tribunal order should seek to align the future incentives of a respondent with attaining the objectives of the deceptive marketing provisions and to support compliance with the *Competition Act*. In many cases, that will imply an AMP or restitution order (or a combination of both) that gives precedence to the amount obtained by the respondent through the reviewable conduct as a means to carry out the requirements of subsection 74.1(4), short of punishing the respondent. In other words, in those cases, the respondent should not keep any of the financial gains it made by its false or misleading representations.

[439**]** The Tribunal's assessment of remedial options for reviewable conduct under Part VII.1 should also consider whether the possible financial consequences of a Tribunal order would operate as a form of licence fee (e.g., where the financial gains outweigh the possible negative consequences of the reviewable conduct). A remedy for proven reviewable conduct under Part VII.1 should not be a cost of doing business. That would undermine, rather than advance, the objectives of the deceptive marketing provisions and would not promote conformity with the statute.

(3) An Order under paragraph 74.1(1)(*d*)?

[440**]** The Commissioner submitted in oral argument that an order for "restitution" is available in the *Competition Act* as a remedy to encourage compliance with the *Competition Act*. I agree that a remedy under paragraph 74.1(1)(*d*) can do so.

[441**]** Paragraph 74.1(1)(*d*) provides that the Tribunal may order a respondent:

Determination of reviewable conduct and judicial order" "	**Décision et ordonnance**" "
74.1 (1) […]" "	**74.1 (1)** […]" "
(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate." "	**d)** s'agissant du comportement visé à l'alinéa 74.01(1)a), de payer aux personnes auxquelles les produits visés par le comportement ont été vendus — sauf les grossistes, détaillants ou autres distributeurs, dans la mesure où ils ont revendu ou distribué les produits — une somme — ne pouvant excéder la somme totale payée au contrevenant pour ces produits — devant être répartie entre elles de la manière qu'il estime indiquée". "

[442**]** The Commissioner's proposed remedy under paragraph 74.1(1)(*d*) sought "restitution" based on the gain made by Cineplex while engaging in the reviewable conduct. Both parties also referred to the use of the word "restitution" in the *Competition Act*.

[443**]** Paragraph 74.1(1)(*d*) refers to payment of an "amount" to be distributed among the persons to whom the products were sold. That paragraph does not characterize the "amount" or its function, nor does it use the term "restitution". However, as Cineplex noted during oral argument, paragraph 74.1(5)(*k*) and subsection 74.1(7) refer to "restitution" ("*restitution*"), a "refund" ("*remboursement*") and "other compensation" ("*de toute autre forme de dédommagement*") as orders under paragraph 74.1(1)(*d*). These are some of the options evidently open to the Tribunal.

[444**]** The amount to be paid under paragraph 74.1(1)(*d*) shall not exceed "the total of the amounts paid to the person for the products in respect of which the conduct was engaged in". The aggregate amount paid by moviegoers to Cineplex for Online Booking Fees was $11,678,336 in 2022 and $27.3 million in 2023, for a total of $38.978 million from its implementation in June 2022 until December 31, 2023. The maximum amount that could be ordered under paragraph 74.1(1)(*d*) – on the evidence and arguments made in this case – is therefore $38.978 million.

[445**]** I agree with the Commissioner that the present case has attributes that could support an order that Cineplex pay an amount to be distributed amongst those who paid the Online Booking Fee – a refund to consumers. For example, as the Commissioner observed, the aggregate amount of the Online Booking Fees charged to consumers is not in dispute and is easily distinguished from amounts paid by consumers that are referable solely to the movie tickets. The money paid by consumers for the Online Booking Fee is directly linked to the reviewable conduct. The affected consumers can also be identified, as every consumer who purchased tickets online first had to create a Cineplex Connect Account. As Mr Zimmerman's evidence showed, one must log into that account before one can see prices or buy tickets on the website or the App. Cineplex also confirmed in answers to undertakings, which were read into the record at the hearing, that it has an online purchase history for consumers dating back to June 15, 2022, including the number of tickets purchased, the date of purchase and whether the person was a Scene+ or CineClub member at the time. Cineplex could generate information to determine who paid any Online Booking Fee since June 2022 and the total amount of such fees charged to each consumer. It would need some time to do so.

[446**]** I am not persuaded by Cineplex's submission that an order under paragraph 74.1(1)(*d*) is inappropriate on the basis that consumers got "the value that they were told they were getting", which was the benefit of the advanced seat selection. Mr McGrath and Dr Amir opined that consumers received value when they paid the Online Booking Fees because they purchased movie tickets and a reserved seat in advance, without having to travel to the theatre. In my view, this position merits little weight. If Cineplex's argument seeks to prevent an order entirely under paragraph 74.1(1)(*d*), I am unable accept it. Receipt of some "value" does not excuse reviewable conduct. Nor should it preclude any possibility of such a remedy in a case in which the consumer actually receives the product or service but paid more than the represented price. Accepting such an argument would also appear to preclude a refund or similar remedy when a displayed price is unattainable due to only a small fixed obligatory charge or fee. Alternatively, if Cineplex's argument seeks not to prevent an order under paragraph 74.1(1)(*d*) but instead to mitigate the quantum payable, it cannot succeed in this case because Cineplex did not attempt to quantify its impact on the quantum to be ordered, either in the evidence or in argument. Cineplex also did not point to any legal or principled basis to consider its argument in the context of a material representation to the public that was false or misleading.

[447**]** I pause to recognize that paragraph 74.1(1)(*d*) will often be read to enable an order determined by the aggregate amount paid for a single product purchased by many consumers. It is also true that the reasons in this case have raised doubt as to whether the movie ticket and the online seat selection were, in fact, separable into two different products, as Cineplex and Dr Amir contended. However, paragraph 74.1(1)(*d*) comfortably captures the present factual circumstances. The provision refers to "the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold". Cineplex's representations about Online Booking Fees enabled it to generate additional revenue through the sale of movie tickets online and the fee obviously refers to the online booking of movie tickets. The amounts generated by the Online Booking Fee (distinct from the price of the related movie tickets) have been readily determined in an aggregate quantum that is not contested. (Neither party contended that the products "in respect of which" the conduct was engaged in included the actual movie tickets so that the maximum "amount" under paragraph 74.1(1)(*d*) should include the aggregate paid for the tickets.)

[448**]** In light of these factors, a refund to consumers could be an appropriate and significant part of an overall order in this proceeding, to promote conduct by Cineplex that is in conformity with the purposes of the deceptive marketing provisions of the *Competition Act*. The aggregate amount to be refunded for conduct up to December 31, 2023, would be $38.978 million and Cineplex could be ordered to pay that sum under paragraph 74.1(1)(*d*).

[449**]** However, I have concluded that it is not appropriate to make an order under paragraph 74.1(1)(*d*) in this case. There are a number of interconnected factors that lead to this conclusion, in part owing to the practical implementation of such an order.

[450**]** In my view, an order under paragraph 74.1(1)(*d*) should presumptively be in the form of money returned into the hands of the affected consumers by way of refund. The question is then how the funds could be distributed to affected consumers. While the aggregate "amount" of a possible full refund was not disputed in this case, there has been no proposal or evidence on how to distribute individual refunds to consumers. We do not know precisely how many consumers are affected, but there are at least tens of thousands. Some may have paid a single Online Booking Fee and be entitled to a refund of just $1.50, while others may be regular moviegoers or consumers who paid for others' tickets (and Online Booking Fees), who would presumably be entitled to a larger refund. We have no concrete sense of the true scale of the refund process.

[451**]** The parties did not address the cost of distributing refunds to consumers. There would be costs incurred by Cineplex itself in providing data related to affected consumers. Then there is the cost of an administrator to distribute the funds to affected consumers. The Commissioner did not offer an administration protocol or any evidence on how it might work. The cost of administering the distribution to tens of thousands of consumers could well be very significant.

[452**]** Thus there is the prospect of a very large number of small refunds, and high administration costs in distributing them to consumers.

[453**]** The parties' submissions did not address the many practical issues mentioned in subsection 74.1(8) related to the implementation of an order under paragraph 74.1(1)(*d*). It appears that the Tribunal has the ability to order another hearing and to make one or more additional orders, consistent with subsection 74.1(8) and the power to require payment and distribution of an amount "in any manner that the [Tribunal] considers appropriate" under paragraph 74.1(1)(*d*). See comparably: *Commissioner of Competition v The Toronto Real Estate Board,* 2016 Comp Trib 7, at paras 769-781, 786, and the resulting order made soon after (2016 Comp Trib 8). In this case, it is clear that the Tribunal would require additional evidence and submissions on how to implement an order under paragraph 74.1(1)(*d*) and would have to convoke at least one more hearing (and perhaps several) on the logistics of a refund order. That will take up more of the parties' and the Tribunal's resources, and interfere with the finality of the Tribunal process.

[454**]** Similarly, if the Commissioner sought an order requiring Cineplex itself to make the refunds to its consumers, the evidence is still not sufficient. Assuming such an order could be made to authorize a refund (and not a credit to consumers) by a respondent itself – something not addressed by either party – there is insufficient evidence about whether it would in fact work, in practical terms, back to June 2022. For example, what would have to be done to provide a refund to credit cards or debit cards (some of which may have expired)? What role would the court or an administrator play in ensuring the refunds are actually paid and received?

[455**]** There are also concerns about whether all consumers will take up their (small) refunds. The parties would have to consider the scenario in which some of the $38.978 million is not distributed (refunded) to consumers who paid Online Booking Fees within a reasonable period of time. In class proceedings, there are statutory provisions and case law for guidance on *cy-près* issues: see, e.g., *Sun-Rype Products Ltd v Archer Daniels Midland Company,* 2013 SCC 58, [2013] 3 SCR 545, at paras 25-26; *Breckon v Cermaq Canada Ltd,* 2024 FC 225, at paras 49-54; *Sorenson v easyhome Ltd*, 2013 ONSC 4017, at paras 23-28; *Class Proceedings Act*, 1992, SO 1992, c 6, sections 24 and 27.2.

[456**]** There are a couple of other points relating to remedial fairness that affect the decision to make an order under paragraph 74.1(1)(*d*). One is that Cineplex continued to make the representations and to collect Online Booking Fees after December 31, 2023, up to the time of the hearing. There was no suggestion at the hearing that it had stopped or would stop doing so after the hearing. The evidence

justifies an inference that these amounts will have been significant in quantum, but I am loathe to estimate them with sufficient precision to make an order under paragraph 74.1(1)(*d*). Similarly, since August 2022, Cineplex has allowed consumers to redeem their Scene+ points towards the payment of Online Booking Fees. While those consumers were affected by the reviewable conduct, the Commissioner did not argue that the *Competition Act* gives the Tribunal jurisdiction to reverse those redemptions. In both circumstances, an order under paragraph 74.1(1)(*d*) that refunds some consumers but not all affected consumers, for conduct that is presumably continuing, suggests unfairness to more recent consumers and Scene+ members. (I recognize that it is not inconceivable that these issues could also be addressed by some future order or other means.)

[457**]** In all the circumstances, I will not make an order under paragraph 74.1(1)(*d*) in this case.

(4) Should the Tribunal Order an AMP?

[458**]** I turn to a possible order for an AMP. Paragraph 74.1(1)(*c*) provides that the Tribunal may order a corporation that engages in reviewable conduct to pay an AMP "in any manner that the [Tribunal] specifies", in an amount not exceeding the greater of (A) $10 million (and $15 million for each subsequent order) and (B) three times the value of the benefit derived from the deceptive conduct. If the latter amount cannot be reasonably determined, the amount in (B) is 3% of the corporation's worldwide gross revenues. Prior to the recent amendments in 2022, the maximum AMP for a corporation was set at $10 million (and $15 million for each subsequent order), before part (B) was added: see S.C. 2022, c. 10, s. 260; S.C. 2009, c. 2, subs. 424(2).

[459**]** The maximum AMP in this case is the greater of $10 million and three times the benefit derived from the reviewable conduct (three times $38.978 million or approximately $116.9 million). The possible range for an AMP is therefore $0 to $116.9 million.

[460**]** As noted, the purpose of an AMP is to promote conduct by the respondent that is in conformity with the deceptive marketing provisions: subsection 74.1(4). Subsection 74.1(5) sets out aggravating and mitigating factors, evidence of which shall be taken into account. As mentioned, one of the factors is any decision in relation to an application for an order under paragraph 74.1(1)(*d*).

[461**]** There is some guidance from prior cases in applying the factors listed by Parliament to reach an appropriate quantum. Where there is guidance, the decisions suggest that the circumstances should be analyzed to determine whether a factor is aggravating, mitigating or neutral. None of the prior decisions considered the current monetary range of AMPs enacted in 2022, and several were decided before the amendments to the *Competition Act* in 2009 that raised the maximum AMP from $100,000 to $10 million: S.C. 2009, c. 2, subs. 424(2). None of the decisions involved making or analyzing a possible concurrent order under paragraph 74.1(1)(*d*). See *Chatr 2014*, at paras 54-77; *Yellow Page Marketing*, at paras 57-69; *Commissioner of Competition v Premier Career Management Group Corp and Minto Roy,* 2010 Comp Trib 17; *Commissioner of Competition v Sears Canada Inc,* 2005 Comp Trib 13; *PVI International Inc*, at paras 65-66; *Gestion Lebski inc,* at paras 310-313, 318-319.

[462**]** In the present case, the following are important aggravating factors:

(a) The reviewable conduct occurred on the Cineplex's website and App and affected consumers across Canada and in all of Cineplex's theatres. As of December 31, 2023, Cineplex owned, leased or had a joint venture in 1,631 screens in 158 theatres.

(b) The reviewable conduct occurred every day starting in mid-June 2022 and continued up to the commencement of the hearing.

(c) The reviewable conduct affected tens of thousands of consumers.

[463**]** The representations at issue were material to consumers. As an element of the reviewable conduct, this factor is related to the amounts paid as Online Booking Fees. There is no specific evidence that the representations were material to consumers' purchase of movie tickets (distinct from materiality to the Online Booking Fee).

[464**]** There is no evidence before the Tribunal that the affected consumers had characteristics that made them vulnerable or that they were specifically exploited by the reviewable conduct. No party sought to distinguish amongst the categories of consumers represented by General Admission, Seniors and Children.

[465**]** Cineplex is a large business enterprise. It is Canada's largest film exhibitor. The Agreed Statement of Facts advised that in 2022, Cineplex had revenues of approximately $1.269 billion and in 2023, revenues of approximately $1.389 billion. Cineplex did not make submissions or refer to specific evidence on its financial position or ability to pay (despite some evidence in the record in Cineplex's Management's Discussion and Analysis for 2022 and 2023, the latter dated February 7, 2024).

[466**]** The gross revenue from sales affected by the reviewable conduct is $38.978 million up to December 31, 2023. This is very significant revenue. Absent other concerns, this amount could have been the subject of an order under paragraph 74.1(1)(*d*). The Commissioner offered no specific evidence of additional revenue from Online Booking Fees after December 31, 2023, up to the end of the hearing or the anticipated fees generated after the hearing.

[467**]** The Commissioner did not adduce evidence of adverse effects or a substantial lessening of competition in any specific competition market (recognizing that there is *per se* harm to competition from reviewable conduct under paragraph 74.01(1)(*a*): *Premier Career Management Group FCA*, at para 61).

[468**]** Cineplex submitted that it offered the online booking of seats to provide a choice to consumers, which was said to be welfare enhancing. Cineplex also argued that consumers obtained value for their purchases, including the option of choosing their preferred seats among those available at the time of purchase, in advance of their showings.

[469**]** I consider these points to favour Cineplex, but only mildly. Its position must be tempered by the fact that Cineplex began to offer the online seat bookings in 2020, well before it decided in 2022 to impose the Online Booking Fee. In addition, Cineplex implemented the Online Booking Fee after engaging in a process designed to find alternatives to drive revenue and margin. The Online Booking Fee effectively increased ticket prices, as Cineplex was aware at the time in June 2022. I am not persuaded that Cineplex's submissions on

these issues should be given much weight, particularly because of the nature of the representations and that it implemented the Online Booking Fee well after advance seat selection was available online in order to raise revenues, and in a manner that obscured their existence and quantum.

[470**]** For similar reasons, Cineplex's subjective belief on its compliance with the *Competition Act* and the absence of complaints to alert Cineplex have little weight. The responsibility to comply with the *Competition Act* was on Cineplex. With respect to complaints, Cineplex did not change its conduct after the Commissioner commenced this proceeding, so it is doubtful that it would have done anything different in response to complaints.

[471**]** The Commissioner did not suggest that Cineplex has any history of non-compliance with the *Competition Act,* which is an attenuating factor.

[472**]** Relatedly, while Cineplex continued its representations (i.e., did not self-correct) in the face of the Commissioner's application, there is no evidence that leads me to believe Cineplex will not self-correct by appropriately modifying its website and App after it learns that the Tribunal has found that it has engaged in reviewable conduct.

[473**]** As analyzed above, the Tribunal will not make an order under paragraph 74.1(1)(*d*), owing mainly to practical concerns about the implementation of such an order. The Tribunal's decision not to do so, and why, is relevant as a factor related to the amount of an AMP under paragraph 74.1(5)(*j*). In assessing an AMP, I have accounted for the facts and arguments already analyzed under paragraph 74.1(1)(*d*). In this case, these considerations complement and support an AMP in the amount of the Online Booking Fees collected by Cineplex.

[474**]** The Ontario Superior Court in *Chatr 2014* held that the amount of an AMP to be paid by a respondent must be considered through a lens of proportionality: *Chatr 2014,* at paras 12-16. Justice Marrocco stated:

[15] Proportionality also requires keeping in mind the counterbalancing effects of the respondents' reviewable conduct, such as loss of reputation. Genuine companies like the respondents are loathe to see their reputations damaged and it can be assumed they will take steps to prevent this from happening again in the future. In this way, the counterbalancing effects of reviewable conduct will generally have a conformist effect and thus will reduce the amount of the monetary penalty.

[16] In applying the principle of proportionality the court also has to keep in mind that there is no notion of general deterrence in subsection 74.1(4).

[475**]** I accept that Cineplex's reputation will be negatively affected by the outcome of this proceeding and the orders that will be made.

[476**]** The most influential factors related to an AMP are: the quantum Cineplex collected from its reviewable conduct (which could have been the subject of a concurrent order under paragraph 74.1(1)(*d*) but is not in this case, for reasons already discussed); the geographic scope, frequency, extent and duration of the reviewable conduct (including the absence of self-correction after this proceeding started) all of which are aggravating factors; and the relative size of Cineplex's business. I recognize that there is some conceptual overlap within these items (such as the geographic scope of the conduct and the size of Cineplex's business).

[477**]** Finally, I return to the Commissioner's submissions. In final argument, he submitted that the Tribunal should impose an AMP in the amount Cineplex has gained from engaging in the misleading conduct. As a matter of fairness to Cineplex during the Tribunal process, I will not impose an AMP in this case that exceeds the proven financial gains it collected through the Online Booking Fee from June 2022 to December 31, 2023.

[478**]** Considering the parties' submissions, the purpose of an order and limitations on it under subsection 74.1(4), the factors under subsection 74.1(5), and the range of minimum and maximum monetary penalty that may be ordered, I conclude that the Tribunal should impose an AMP in the amount of $38.978 million under paragraph 74.1(1)(*c*).

(5) Subsection 74.1(4) and Overall Proportionality of the Tribunal's Order

[479**]** In my view, the Tribunal's overall order is proportional and respects Parliament's directions in subsection 74.1(4). In my view, its terms are proportional to the nature of Cineplex's reviewable conduct (including its severity, frequency, duration, materiality, and geographic scope), the number and proportion of Cineplex consumers affected, the quantum of Online Booking Fees collected, and Cineplex's financial position. In addition:

(a) This is not a case in which the conduct was designed deliberately to deceive members of the public, nor were the representations directed at a vulnerable segment of the public.

(b) Cineplex will suffer harm to its reputation and, as in *Chatr 2014,* will likely take steps to end the reviewable conduct.

(c) No evidence suggested that Cineplex has any history of non-compliance with the *Competition Act*.

(d) While the reviewable conduct had been occurring for more than 19 months at the time of the hearing, Cineplex requested a prompt hearing on the merits of the Commissioner's application, which occurred.

[480**]** The order also accounts for the fact that this is the first Tribunal case that has interpreted and applied subsection 74.01(1.1), which was recently added to the *Competition Act* adjacent to the long-standing provision concerning false or misleading representations to the public in paragraph 74.01(1)(*a*).

IX. Conclusion

[481**]** The Commissioner's application will be allowed and remedies granted in accordance with the conclusions immediately above.

[482**]** The Commissioner requested a costs award. The Tribunal has described the legal principles applicable to costs in recent cases: see *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 02, at para 723; *P&H,* at paras 768-776.

[483**]** The parties agreed that the successful party should be awarded $77,000 in respect of legal fees, plus HST. They each filed written submissions on the issues that remained in dispute, which concerned disbursements for experts and other items. Most of those submissions concerned the reasonableness of Cineplex's claims for expert fees and disbursements, if Cineplex were to prevail on the merits.

[484**]** The Commissioner has succeeded. He shall have his legal costs in the amount agreed by the parties. He filed a Bill of Costs in the amount of $178,961.16. He submitted that an order of $160,000 (inclusive of tax) was a fair quantum for disbursements. Applying the principles in the case law, I agree.

[485**]** As I did on the last day of the hearing, I would like to recognize and thank both parties' lawyers, paralegals and other staff for their dedicated work both inside and outside the hearing room.

[486**]** I also commend Mr Hood and Mr Russell as senior counsel for ensuring that Ms Cybulsky and Mr Abadi had meaningful time on their feet during the hearing. Such "ice time" is essential to the development of litigation counsel early in their careers and is something that the Tribunal will encourage and expect during future proceedings.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[487**]** The application is allowed.

[488**]** For a period of ten (10) years, Cineplex:

(a) shall not make representations to the public on its website or App concerning Online Booking Fees that are false or misleading in a material respect, and

(b) shall not engage in substantially similar conduct that constitutes reviewable conduct under paragraph 74.01(1)(*a*) (including subsection 74.01(1.1)).

[489**]** Cineplex shall pay an administrative monetary penalty under paragraph 74.1(1)(*c*) of the *Competition Act* in the amount of $38,978,000, within 30 days of this Order.

[490**]** Cineplex shall pay costs to the Commissioner in the amounts of:

(a) $77,000 plus HST, in respect of legal fees, and

(b) $160,000 (inclusive of tax) in respect of disbursements.

DATED at Ottawa, this 23 day of September, 2024.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little

COUNSEL OF RECORD:

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Commissioner of Competition

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Cineplex Inc.

Robert S. Russell
Martin Abadi
Raymond Ashurov
Josh Abaki

Erin Penney (paralegal)

TAB 10

Canada (Office of the Information Commissioner) v. Canada (Prime Minister), 2019 FCA 95 (CanLII)

Date: 2019-04-24
File number: A-311-17; A-313-17
Other citation: [2019] CarswellNat 1623

Date: 20190424

Dockets: A-311-17

A-313-17

Citation: 2019 FCA 95

CORAM: **NEAR J.A.**

DE MONTIGNY J.A.

WOODS J.A.

Docket: A-311-17

BETWEEN:

THE INFORMATION COMMISSIONER OF CANADA

Appellant

and

THE PRIME MINISTER OF CANADA

Respondent

Docket: A-313-17

BETWEEN:

THE PRIME MINISTER OF CANADA

Appellant

and

THE INFORMATION COMMISSIONER OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 17, 2018.

Judgment delivered at Ottawa, Ontario, on April 24, 2019.

PUBLIC REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: NEAR J.A.

WOODS J.A.

Date: 20190424

Dockets: A-311-17

A-313-17

Citation: 2019 FCA 95

CORAM: **NEAR J.A.**

DE MONTIGNY J.A.

WOODS J.A.

Docket: A-311-17

BETWEEN:

THE INFORMATION COMMISSIONER OF CANADA

Appellant

and

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Docket: A-313-17

BETWEEN:

THE PRIME MINISTER OF CANADA

Appellant

and

THE INFORMATION COMMISSIONER OF CANADA

Respondent

PUBLIC REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Before this Court are two appeals from a decision of the Federal Court (per Justice O'Reilly), dated September 13, 2017, by which the Court allowed, in part, the application for judicial review brought by the Information Commissioner of Canada (the Commissioner) against the Prime Minister of Canada (the Prime Minister) (2017 FC 827). At issue was the denial of a reporter's 2013 request for copies of certain records held by the Privy Council Office (PCO) related to four senators. The Federal Court ultimately directed the PCO to disclose a portion of the records in question.

[2] For the reasons that follow, I am of the view that both appeals should be allowed in part.

I. Facts

[3] On August 22, 2013, a reporter made a request under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act), for the disclosure of ""[a]ny records created between March 26, 2013 to present [August 22, 2013] related to Senators Mike Duffy, Mac Harb, Patrick Brazeau and/or Pamela Wallin"".

[4] On September 20, 2013, the PCO responded to the access request. It identified 28 pages of records as responsive to the request, but withheld 27 of them. The refusal to disclose the records was justified by PCO on the basis that it contained information of a personal nature (subsection 19(1) of the Act), information covered by solicitor-client privilege (section 23 of the Act), as well as recommendations and advice to the Prime Minister (paragraph 21(1)(a) of the Act).

[5] The records pertain to [redacted]

[6]
[redacted]

[7] On October 10, 2013, the reporter sent a complaint to the Commissioner regarding PCO's refusal to disclose the requested documents and receipt of that complaint was confirmed on October 23, 2013. On November 13, 2013, the Commissioner notified the PCO that this complaint would be investigated.

[8] On February 21, 2014, PCO provided the Commissioner with written representations relating to its refusal of access. It expressed its continued reliance on the exemptions cited above, and slightly modified its position as to which provision was relied upon for each portion of the record.

[9] On May 23, 2014, in the course of its investigation, the Commissioner wrote to PCO, pursuant to paragraph 35(2)(b) of the Act, to ask for further representations in support of its refusal of access, and regarding how it exercised its discretion. The letter emphasized that the burden fell on PCO to demonstrate that the information at issue was covered by the exemptions relied upon and that, where necessary, it exercised its discretion in a reasonable manner.

[10] On June 13, 2014, PCO responded to the Commissioner's letter, confirming its reliance on the exemptions cited, and explaining how it had weighed factors for and against disclosure when exercising its discretion.

[11] On March 23, 2015, the Commissioner informed Prime Minister Harper, under subsection 37(1) of the Act, of the results of her investigation. In this letter, she explained why she felt that the complaint at issue was well-founded, and recommended that PCO facilitate partial release of the responsive records.

[12] On May 8, 2015, PCO responded that, having looked at the report, it remained convinced that the exemptions of sections 19, 21(1)(a) and 23 of the Act applied, and that it had reasonably exercised its discretion to refuse disclosure. The letter also mentioned that, following a reassessment of the application of section 25 of the Act, it was concluded that further information, such as signatures, dates, and names, could be released.

[13] On July 24, 2015, a record of decision for the final disclosure package was signed on behalf of PCO, approving mandatory exemptions under subsection 19(1) and discretionary exemptions under sections 21(1)(a) and 23 of the Act.

[14] On September 11, 2015, the Commissioner filed with the Federal Court an application for judicial review of PCO's decision. This application was made against the Prime Minister of Canada.

II. The Federal Court decision

[15] The application Judge determined that the standard of review was correctness for reviewing the exemptions applied by PCO, and reasonableness for the exercise of any residual discretion by PCO (Reasons at para. 3).

[16] With respect to section 19 of the Act, the Judge concluded that, insofar as the information at issue - that is information regarding [redacted] - related to ""discretionary financial benefits"", it fell within one of the exceptions to the exemption for ""personal information"" as defined in section 3 of the *Privacy Act*, R.S.C. 1985, c. P-21 [*Privacy Act*] (at para. 9). The Judge thus rejected the Prime Minister's arguments that [redacted] was not a benefit (at paras. 10-16), that it was not discretionary (at paras. 17-22), and that for these reasons the information pertaining to the alleged benefits should not be released.

[17] Concerning paragraph 21(1)(a) of the Act, the Judge concluded that while documents containing advice and recommendations to a government institution are exempt from disclosure, their factual basis is not (at para. 26). The ""factual portions"" of the records thus can, according to the Judge, be severed from the rest and disclosed (at para. 27). These include the following information:

- Description of [redacted];
- [redacted]
- [redacted]
- Decisions taken [redacted].

[18] As for the Prime Minister's decisions, the Judge held that they do not constitute advice or recommendations and that they can therefore be disclosed (at para. 27).

[19] The Judge also found that PCO had reasonably exercised its discretion not to disclose the information covered by the exemption under paragraph 21(1)(a) of the Act (at para. 30). While the factors favouring disclosure were not explicitly identified in its analysis, whereas the factors against disclosure were, the Judge was confident that they were implicitly considered (at para. 30). It would be a ""somewhat artificial exercise"", the Judge wrote, ""for those senior officials to set out explicitly the factors favouring public disclosure"" (at para. 31).

[20] As for section 23 of the Act, the Judge agreed with the Commissioner that some of the information withheld by the PCO ““does not fall within the scope of solicitor-client privilege”” (at para. 34). This conclusion was based on the observation that some portions of this information, which includes [redacted], ““did not involve communications … relating to the provision of legal advice that was intended to be confidential”” (*Ibid*). Relying on the decision of the Supreme Court in *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821 [*Solosky*], the Judge concluded that these portions of the record were thus not privileged. Regarding the documents which, according to the Judge, clearly fell within the privilege, he was ““satisfied that PCO reasonably exercised its proper discretion not to disclose them”” (at para. 35). Here again, the factors favouring disclosure were said to have been implicitly considered.

[21] On October 13, 2017, both the Prime Minister and the Commissioner appealed from this judgment.

III. Issues

[22] The six main questions raised by the two appeals can be summarized as follows:

A. What is the applicable standard of appellate review?

B. Was PCO authorized to refuse the disclosure of the records based on paragraph 21(1)(a) of the Act?

C. Was PCO authorized to refuse the disclosure of the records based on section 23 of the Act?

D. To the extent that PCO was authorized to refuse the disclosure of the records based on either sections 21(1)(a) or 23 of the Act, did it reasonably exercise its discretion not to disclose these records?

E. Was PCO authorized to refuse the disclosure of the records based on subsection 19(1) of the Act?

F. Did PCO reasonably exercise its discretion not to disclose the information at issue under subsection 19(2) of the Act?

[23] These questions will be considered in turn.

IV. Analysis

A. What is the applicable standard of appellate review?

[24] There has been some uncertainty in this Court as to the applicable standard of appellate review to be applied to a reviewing court's findings on the applicability of an exemption to the right of access under the Act. This confusion stems from the apparent inconsistency resulting from the decisions of the Supreme Court in *Merck Frosst Canada Ltd. v. Canada*, 2012 SCC 3, [2012] 1 S.C.R. 23 [*Merck Frosst*], and in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 [*Agraira*].

[25] In *Merck Frosst*, the Supreme Court unanimously held that a Federal Court decision pertaining to the application of an exemption under the Act ought to be reviewed pursuant to the framework set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. Justice Deschamps (concurring with the majority on this issue) explained that this exception to the ““classic process”” of judicial review stems from the peculiarities of the review process provided for in section 44 of the Act. She mentioned, notably, Parliament's intent ““to set up an independent review process””, the lack of ““adjudicatory powers”” afforded to the federal Commissioner, the fact that the government's opinion was not authoritative, as well as the Federal Court's role as ““first impartial gatekeeper”” (at paras. 249-250).

[26] Slightly more than a year after *Merck Frosst*, the Supreme Court rendered its decision in *Agraira*. Writing for a unanimous Court, Justice LeBel adopted the reasoning of this Court in *Telfer v. Canada Revenue Agency*, 2009 FCA 23 [*Telfer*], and found that the proper approach on an appeal from a judgment of a reviewing court deciding an application for judicial review of an administrative decision ““is simply [to ask] whether the court below identified the appropriate standard of review and applied it correctly”” (*Telfer* at para. 18, quoted with approval by Justice LeBel at para. 45 of his reasons in *Agraira*). While *Agraira* was admittedly decided in the context of immigration law, there is nothing in Justice LeBel's reasons suggesting, either explicitly or by implication, that his approach is to be confined to the facts of that case and should not find application more broadly whenever an appeal court deals with the decision of a reviewing court sitting on judicial review (indeed, *Telfer* was an appeal from a decision of the Federal Court sitting on judicial review of a ministerial decision made pursuant to subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5 Supp.) [*Income Tax Act*]).

[27] As pointed out by the parties, these two decisions have given rise to seemingly conflicting decisions of this Court as to the appropriate standard of appellate review concerning the applicability of an exemption provision under the Act (see *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 at para. 18 [*Canada (Information Commissioner)*]; *Blank v. Canada (Justice)*, 2016 FCA 189 at paras. 22-24 [*Blank 2016*]; *Canada (Office of the Information Commissioner) v. Calian Ltd.*, 2017 FCA 135 at paras. 26-27; *Husky Oil Operations Ltd. v. Canada-Newfoundland and Labrador Offshore Petroleum Board et al.*, 2018 FCA 10 at paras. 9-17, 59 and 61 [*Husky Oil*]; *Suncor Energy Inc. v. Canada-Newfoundland and Labrador Offshore Petroleum Board et al.*, 2018 FCA 11 at paras. 14 and 26).

[28] There is no need to rehash the diverging views on the matter nor to restate the position that I have already expressed in earlier decisions. I remain of the view that on appeal from a decision of the Federal Court disposing of an application for judicial review, the proper role of this Court is to focus on the administrative decision, or, to use the colloquial expression of Justice Deschamps in *Merck Frosst*, to ““[step] into the shoes”” of the lower court (at para. 247; *Husky Oil* at paras. 9-17). In the administrative law context, it is only in situations where the issues raised in appeal relate to decisions made by a judge of the Federal Court (such as decisions pertaining to mootness or prematurity, admissibility of evidence and remedy), as opposed to a judge's review of a decision made by an administrative decision-maker, that the applicable standard of appellate review will be the one set out in *Housen*.

[29] I readily acknowledge that the debate is far from over, and could eventually become academic if Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, 1 Sess., 42 Parl., 2017, s. 21 (as passed by the House of Commons on December 6, 2017) comes to be adopted (since a new section 44.1 would provide, ""for greater certainty"", that an application under sections 41 or 44 will be the subject of a *de novo* review).

[30] There is no dispute here that, assuming the *Agraira* framework applies, the Judge appropriately identified the correctness standard in deciding whether the exemptions claimed by the Prime Minister applied (*Blank 2016* at para. 24; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paras. 21-22 [*PM Agendas*]: *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254 at paras. 28-42 [*Telezone*]; *Blank v. Canada (Justice),* 2010 FCA 183 at paras. 16-17 [*Blank 2010*]). I am comforted in that view by the fact that one of the main contextual factors favouring a more deferential approach - the expertise of the decision-maker - is lacking here. As previously noted by this Court, it is not at all clear that the Prime Minister and the Ministers, even with the assistance of the specialized units tasked with the processing of access to information requests, have greater expertise than the Court in dealing with statutory exemptions. I believe that the importance of an independent scrutiny of access refusals militates strongly in favour of an exacting standard of review. While decided prior to *Dunsmuir*, I can only reiterate the views of then Chief Justice Richard in *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)*, 2003 FCA 257 at paragraph 13:

> Since the Minister has no greater expertise than the Court, a less deferential standard of review is warranted. The Minister, through the specialized departmental unit referred to as the Access Office, does have expertise in responding to access to information requests. However, the Access Office has no more expertise than the Court which often interprets and applies statutory exemptions. The Court is better skilled in balancing the public's right to disclosure against the individual's right to confidentiality. Further, as Evans J. aptly explained in [*Telezone*] at para. 36: "...if the Court were to confine its duty...to review ministerial refusals to access requests by deferring to ministerial interpretations and applications of the *Act*, it would, in effect, be putting the fox in charge of guarding the henhouse." The greater expertise of the Court supports less deference.
>
> (See also *PM Agendas* at paras. 21-22; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at paras. 14-19; *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, 1999 CanLII 8293 (FC), [1999] 4 F.C. 245 (C.A.) at para. 13.)

[31] I hasten to add that there is no debate between the parties with respect to the applicable standard of review to the Judge's findings on the exercise of discretion by the Prime Minister to either disclose or refuse to disclose exempted information. Discretionary decisions of administrative decision-makers are to be reviewed on a standard of reasonableness, and this is the standard that the Judge applied (see *Blank 2016* at para. 24; *Husky* at paras. 17 and 62).

[32] In the analysis below, the *Agraira* framework will be applied in the manner described above. The role of this Court, therefore, is to determine whether the Judge properly applied these standards.

B. Was PCO authorized to refuse the disclosure of the records based on paragraph 21(1)(a) of the Act ?

[33] The Prime Minister argues that some of the information severed by the Judge as being purely factual either contains normative elements of advice that should remain exempt from disclosure, is intertwined in the analysis for consideration ||||||||||||||||||||||||||||||||||||||||||||||||, or cannot reasonably be severed without directly or indirectly revealing exempt information. The Prime Minister also claims that the reasons of the Judge do not spell out clearly why certain pieces of information were severed, and that they are inconsistent with respect to what information is considered purely factual.

[34] It has been repeated more than once that the purpose of the Act is to strike a balance between democracy and effective governance. In *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403 (at para. 61), Justice La Forest (dissenting but not on this point) emphatically stressed that the overarching purpose of access to information legislation is to facilitate democracy, first by ensuring that citizens have the necessary information to participate meaningfully in the democratic process, and secondly by making sure that politicians and bureaucrats are accountable. More recently, the Supreme Court unanimously reaffirmed that rationale, stating in its opening paragraph of *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 [*Criminal Lawyers' Association*]:

> Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.
>
> (See also *PM Agendas* at paras. 15 and 78-83.)

[35] This balancing act finds expression in subsection 2(1) of the Act, which sets out the purpose of Parliament in the following terms:

"2 (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government. "	"2 (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif. "

[36] The right to access created to achieve this purpose is contained in subsection 4(1) of the Act:

"4 (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is "	"4 (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande : "
"(a) a Canadian citizen, or "	"a) les citoyens canadiens; "
"... "	"... "
"has a right to and shall, on request, be given access to any record under the control of a government institution. "	"[BLANK] "

[37] Though not absolute (see *Criminal Lawyers' Association* at para. 35; *Rubin v. Canada (Clerk of the Privy Council),* 1994 CanLII 3476 (FCA), [1994] 2 F.C. 707 at p. 712 (C.A.), affirmed 1996 CanLII 247 (SCC), [1996] 1 S.C.R. 6), the right of access is generally interpreted liberally in accordance with a purposive interpretation and the specific exceptions provided for in sections 13 to 26 of the Act receive a narrow construction (*Macdonell v. Quebec (Commission d'accès à l'information)*, 2002 SCC 71, [2002] 3 S.C.R. 661 at para. 18). There is a presumption of a right of access, and the government institution opposing disclosure bears the burden of establishing that the records at issue fall within one of the exemptions under the Act (see section 48 of the Act; *PM Agendas* at para. 22). Moreover, section 25 of the Act specifies that, where a request is made for access to a record that the institution is authorized to refuse to disclose because of the information or material it contains, there is a duty on the institution to disclose ""any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information"".

[38] It is with these principles in mind that I will now turn to the various exemptions claimed by the Prime Minister, the first of which being the exemption for ""advice or recommendations developed by or for a government institution or a minister of the Crown"" (paragraph 21(1)(a) of the Act). The rationale behind that exemption has been aptly described by Justice Evans (as he then was) in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, 1999 CanLII 8293 (FC), [1999] 4 F.C. 245 (C.A.):

> [30] ... To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.
>
> [31] It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness.

[39] This reasoning was explicitly endorsed by the Supreme Court in *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3 at para. 44 [*John Doe*], albeit in the context of the Ontario *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. Writing for the Court, Justice Rothstein added that requiring the disclosure of such advice or recommendations would be antithetical to the political neutrality of the civil service in Canada and could lead to self-censorship (at para. 45).

[40] The words ""advice"" and ""recommendation"" are not defined in the Act. The distinction between the two concepts is not readily apparent, although the former must have a distinct meaning and would appear to be broader than the latter. Justice Evans found as much in *Telezone* (at para. 50), and the Supreme Court endorsed that approach in *John Doe* (at para. 24). It would appear that a ""recommendation"" points to a suggested course of action that may or may not be accepted by the person being advised, whereas ""advice"" will not necessarily urge a specific course of action but could encompass a range of options with pros and cons for each of them without expressly advocating for one or the other (*Telezone* at paras. 61-64; *John Doe* at paras. 25-28). As broad as the term ""advice"" may be, however, it clearly does not encompass information of a largely factual and objective nature (*John Doe* at para. 26). Information of that nature must be severed and disclosed whenever reasonably practicable in accordance with section 25 of the Act.

[41] The Prime Minister agrees that paragraph 21(1)(a) of the Act only exempts opinion, policy or normative elements of advice and does not extend to the facts on which it is based, but goes on to claim that ""[m]ost internal documents that analyze a problem, starting with an initial identification of a problem, then canvassing a range of solutions, and ending with a specific recommendation are still likely to be caught within [subsection] 21(1), notwithstanding their factual components"" (Prime Minister's Appellant Memorandum of Fact and Law at para. 66). The Judge rejected that argument, and properly so, as it goes much too far and is not in keeping with the rationale underlying that provision of the Act. The categories of information found to be severable by the Judge (information such as a description of [redacted], the fact that [redacted], the identity of [redacted], and the decisions taken [redacted]) are clearly of a factual nature and would not directly or indirectly reveal exempted information.

[42] For example, the information in the Memorandum to the Prime Minister dated July 10, 2013, [redacted]

[redacted]. While the Clerk slightly reformulated [redacted] in his Memorandum, he clearly conveys the same objective information and is not offering advice or recommendation; moreover, it is not intertwined in the analysis for consideration by the Prime Minister, and as such it can reasonably be severed from the record.

[43] The same is true of the information found in the second and third bullets in the Memorandum to the Clerk, dated August 6, 2013, pertaining to the fate of [redacted] (Appeal Book, vol. 2, tab 6(11), at p. 208). This is clearly factual and objective information that is devoid of any normative element.

[44] I am of the same view with respect to the information contained in the second bullet of the Memorandum to the Clerk dated July 2, 2013 (Appeal Book, vol. 2, tab 6(11), at p. 222). Here, the information at issue is an enumeration, in the Clerk's own words, of [redacted] considered at the time of the making of the Memorandum. Once again, no recommendation or advice is offered here; it is merely a summary of the arguments made by [redacted], without any gloss. This is to be contrasted with the third bullet in the same Memorandum, where the author expressed the views of the Deputy Secretary to the Cabinet and Counsel to the Clerk with respect to [redacted]. The information in the second bullet of the July 2 Memorandum is quite different from that information, and from the one considered by the Court in the following excerpt of *Telezone*:

> [63] … a memorandum to the Minister stating that something needs to be decided, identifying the most salient aspects of an application, or presenting a range of policy options on an issue, implicitly contains the writer's view of what the Minister should do, how the Minister should view a matter, or what are the parameters within which a decision should be made. All are normative in nature and are an integral part of an institutional decision-making process. They cannot be characterized as merely informing the Minister of matters that are largely factual in nature. Nor do I think that the use in the French text of paragraph 21(1)(a) of the word "*avis*", which is generally translated into English as "opinion", conveys a narrower meaning in this context than the word "advice" in the English version.

[45] When reading the second bullet of the above-mentioned Memorandum, there is not the slightest hint as to the writer's opinion regarding what the Clerk should do or how [redacted] should be treated. The advice or recommendation is fully set out in the third bullet, where the writer addresses in turn each of [redacted]. The second bullet is completely neutral and reads as a faithful and objective description of [redacted] submissions, without even drawing attention to what could be considered the most salient or persuasive of his arguments.

[46] The only information that cannot be considered purely factual and that should have been exempted by the Judge is that found in the third bullet of the summary that is part of the Memorandum to the Prime Minister dated July 10, 2013 (Appeal Book, vol. 2, tab 6(11), at p. 212). That piece of information clearly ““relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised”” (*John Doe* at para. 23). Indeed, almost identical wording found in the body of the Memorandum has been redacted by the Judge (see Appeal Book, vol. 2, tab 6(11), p. 214, second to last bullet). I note as well that the Commissioner agrees with the Prime Minister that this information constitutes a recommendation under paragraph 21(1)(a) of the Act; although not binding on this Court, this agreement is further support for the view that it ought to have been redacted by the Judge.

C. Was PCO authorized to refuse the disclosure of the records based on section 23 of the Act?

(1) General Principles

[47] Section 23 of the Act recognizes another discretionary exemption to the broad section 4 right to access, stating that a government institution ““may refuse”” the disclosure of any record containing ““information that is subject to solicitor-client privilege””.

[48] The common law recognizes two types of solicitor-client privilege: legal advice privilege and litigation privilege. In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, the Supreme Court confirmed that the phrase ““solicitor-client privilege”” in section 23 of the Act refers to both legs of the privilege (at para. 4). In the case at bar, the Prime Minister relied only upon the legal advice privilege to exempt some of the information in the 27 pages of records at issue. The Judge accepted that some of the information that the Prime Minister sought to shield from disclosure was privileged, but for the most part found that the documents did not involve solicitor-client communications (Reasons at para. 34).

[49] The legal advice privilege attaches to all communications between a solicitor and his or her client for the purpose of obtaining or giving legal advice. The test for determining whether a document or communication is subject to that privilege was enunciated by the Supreme Court in *Solosky*. Three conditions must be met for a document to be considered as legal advice giving rise to the privilege: 1) there must be a communication made in confidence between a lawyer and his or her client; 2) that communication must be for the purpose of seeking or giving legal advice; and 3) the parties must have intended the communication to be confidential (*Solosky* at p. 837; *Blank 2016* at para. 44).

[50] The Supreme Court has often reiterated the critical importance of the solicitor-client privilege to the proper functioning of our legal system, and has gone as far as stating that it should only be set aside in the ““most unusual circumstances”” (*Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 at para. 17; see also *Alberta (Information and Privacy Commissioner) v. University of Calgary)*, 2016 SCC 53, [2016] 2 S.C.R. 555 at para. 34). That being said, a party asserting that a document is privileged bears the onus of establishing the privilege; this onus requires more than a bald assertion of privilege and will only be met if there is sufficient evidence to show that each of the three criteria of the *Solosky* test are met (see *Canada (Attorney General) v. Williamson*, 2003 FCA 361 at paras. 11-13).

[51] Solicitor-client privilege applies to communications that take place within what the case law refers to as a ““continuum of communication””. This notion was considered as follows by this Court in *Canada (Information Commissioner)*:

> [27] Part of the continuum protected by privilege includes "matters great and small at various stages … includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context" and other matters "directly related to the performance by the solicitor of his professional duty as legal advisor to the client"…
>
> [28] In determining where the protected continuum ends, one good question is whether a communication forms "part of that necessary exchange of information of which the object is the giving of legal advice" … If so, it is within the protected continuum. Put another way, does the disclosure of the communication have the potential to undercut the purpose behind the privilege - namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?

[52] The Prime Minister argues that the Judge was right to conclude that a letter dated July 31, 2013 [redacted] in various documents, were exempt from disclosure under section 23 of the Act. However, the Prime Minister is of the view that the Judge failed to apply the legal test to determine if a continuum of communications existed to protect other parts of the record; had he done so, it is submitted, he would have found the Clerk's Memorandum to the Prime Minister (Appeal Book, vol. 2, tab 6(11), at pp. 212-215), the Decision Annex (Appeal Book, vol. 2, tab 6(11), at p. 220), the two draft letters attached to the Memorandum (Appeal Book, vol. 2, tab 6(11), at pp. 217, 219) and a four-page letter dated June 18, 2013 from [redacted] to the Clerk [redacted] (Appeal Book, vol. 2, tab 6(11), at pp. 225-228), to be covered by the privilege. Needless to say, the Commissioner takes the opposite view on all of these documents.

(2) The [redacted] Letter

[53] I shall now turn to each of these documents, starting with the letter sent to the Clerk by [redacted] (Appeal Book, vol. 2, tab 6(11), at pp. 210-211). The Judge exempted that letter, without giving much explanation as to why he came to that determination. Counsel for the Commissioner argues that the Judge erred in doing so, since the letter does not meet the *Solosky* test and cannot be considered as having been routed to PCO's legal counsel for the purpose of providing the Clerk with legal advice.

[54] The second prong of this argument can be quickly disposed of. Had the letter [redacted] been sent directly to Simon Fothergill, in his capacity as counsel for the Clerk, or forwarded by the Clerk to PCO Legal Operations, that letter could plausibly have been considered as part of the legal advice ultimately given with respect to [redacted]. Since legal advice must include ascertaining or investigating the facts upon which the advice will be rendered, that letter could be considered as underlying the legal advice given to the Clerk and therefore as a communication that occurred within the framework of the solicitor-client relationship between the Clerk, [redacted], and his legal advisors within PCO. [redacted]

[55] The problem with this line of argument is that PCO officials acknowledged that [redacted] letter to the Clerk existed not only as an attachment to confidential communications between PCO's legal counsel and the Clerk, but also in the form of a stand-alone record under the control of the PCO. As such, [redacted] letter must be examined as an independent record, outside of the continuum of confidential communications between the Clerk and PCO's legal counsel. From that perspective, the mere fact that the letter was subsequently conveyed to PCO's Legal Operations for the purpose of obtaining legal advice regarding [redacted] does not retroactively make it privileged. A document that is not clothed with privilege does not become privileged simply because it goes into the hands of a lawyer (*Redhead Equipment v. Canada (Attorney General)* 2016 SKCA 115 at para. 33 (*Redhead*); also see Adam Dodek, *Solicitor-Client Privilege* (Markham, Ont.: Lexis Nexis Canada) 2014 at p. 53).

[56] What, then, of the argument that the letter from [redacted] does not meet the *Solosky* test because it was not a communication between [redacted] and his client, it was neither seeking nor providing legal advice, and it was not a confidential communication between a lawyer and his client? Relying on *Descôteaux et al. v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, 141 D.L.R. (3d) 590 [*Descôteaux*], the Prime Minister responded that the letter from [redacted] to Mr. Fothergill (directly and through the Clerk) was a communication that occurred within the framework of the solicitor-client relationship between [redacted].

[57] I agree with the Commissioner that the facts in this appeal are somewhat different from those before the Supreme Court in *Descôteaux*, where [redacted]

[58] In the case at bar, there is no doubt that [redacted] when the latter wrote to the Clerk and Mr. Fothergill. However, I do not think that this is fatal to the Prime Minister's claim that the letter from [redacted] occurred within the framework of the latter's solicitor-client relationship with [redacted].

[59] In my view, the information communicated [redacted] in support of [redacted] is as much confidential as information disclosed [redacted], and should therefore be privileged. I appreciate, as pointed out by the Commissioner, that [redacted]. However, I would note that [redacted] because of the urgency of the matter, and has asked that [redacted]

> [redacted]
>
> (Appeal Book, vol. 4, tab 7(E) at p. 530)

[60] More importantly, the communication from [redacted] was clearly related to obtaining legal advice. I agree with the Prime Minister [redacted]. As such, the Clerk's role [redacted] was central to the solicitor-client relationship [redacted] and must for that reason fall within the framework of a solicitor-client relationship. It does not matter that the information was provided to the Clerk [redacted].

[61] Moreover, the rationale behind the solicitor-client privilege is the necessity to ensure the confidentiality of the communications between a person and his or her lawyer and, thereby, the promotion of the interests of justice (*Descôteaux* at pp. 883, 893). [redacted] In both cases, the disclosure of the information would reveal privileged information about the solicitor-client relationship, and could lead directly or indirectly to the revelation of confidential solicitor-client communications [redacted]. It would permit inferences to be drawn about the instructions given, and reveal or permit accurate inferences to be drawn about the precise legal services provided.

[62] For all of the above reasons, I am of the view that the [redacted] letter ought to fall within the ambit of solicitor-client privilege; such a finding is only a logical (and incremental) extension of the [redacted] line of cases, pursuant to which all communications made within the framework of the solicitor-client relationship must be kept confidential. [redacted] The Judge therefore correctly redacted the entirety of that letter. Not recognizing the application of the solicitor-client privilege in the case at bar likely would have a chilling effect on [redacted], and would run contrary to the rationale underlying this privilege.

(3) [redacted]

[63] The second set of documents to be examined comprises those wherein the [redacted] have been ordered redacted by the Judge. This information is found in the letter from [redacted] to the Clerk (Appeal Book, vol. 2, tab 6(11), at pp. 225 and 227), in the Decision Annex (Appeal Book, vol. 2, tab 6(11), at p. 220), in the email exchanges between [redacted] and Mr. Fothergill (Appeal Book, vol. 2, tab 6(11), at pp. 229-234), and in the letter from the Clerk to [redacted] (Appeal Book, vol. 2, tab 6(11), at p. 209).

[64] I agree with the Commissioner that [redacted], which were in part publicly known, were not confidential information made for the purposes of receiving legal advice and should therefore not be exempt under section 23 of the Act. Contrary to the accounting records of notaries and lawyers at issue in *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336 at para. 74, or the billing records of the Legal Services Society in *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278, the portions of the documents at issue containing the [redacted] in the present case are not communications within the framework of the solicitor-client relationship. In addition, [redacted] in the case at bar do not reveal confidential information about the nature of the legal advice because this information was publicly known. Nor do they include information provided for the purpose of obtaining

legal advice. Indeed, a communication revealing [redacted], and nothing else, will rarely be considered legal advice exempted under section 23 of the Act (see *Canada (Minister of National Revenue) v. Revcon Oilfield Construction Inc.*, 2015 FC 524 at para. 25, affirmed 2017 FCA 22 at para. 3). As a result, the Judge erred in finding that [redacted] were covered by the section 23 exemption.

(4) Memorandum from the Clerk to the Prime Minister

[65] Turning now to the Memorandum from the Clerk to the Prime Minister regarding the [redacted] (Appeal Book, vol. 2, tab 6(11), at pp. 212-215), it is not clear from the Judge's terse reasons in relation to that matter whether he rejected the notion that the Clerk is part of the solicitor-client chain of communication or whether he did not accept the Memorandum as containing legal advice. Be that as it may, I believe the Judge erred in that respect.

[66] The evidence establishes that the Clerk was acting as an ""agent"" of the client, the Prime Minister, when he sent the Memorandum providing legal advice on the [redacted]. The Prime Minister, [redacted], was entitled to seek advice from officials, including legal advice, before making a decision ([redacted]). According to the uncontradicted affidavit of Monique Oliveira, a senior paralegal in the Legal Operations unit at PCO, an assigned counsel ([redacted]) prepared his legal advice and marked it as solicitor-client privileged. That advice was then reviewed by the Director of Legal Operations and the Assistant Secretary to the Cabinet, in conformity with standard practice at PCO and with departmental reporting lines. The legal advice was then signed off by the Clerk and communicated to the [redacted] Prime Minister Harper (see Oliveira affidavit, Appeal Book, vol. 5, tab 8, pp. 652-654, at paras. 15, 19-20).

[67] There is no doubt that the Clerk was acting, to quote from the Court of Appeal for Saskatchewan in *Redhead*, as a ""channel of communication between solicitor and client"" (at para. 45). In this respect, the Memorandum constitutes a communication made ""in furtherance of a function essential to the solicitor-client relationship or the continuum of legal advice provided by the solicitor"" (*Ibid*).

(5) Decision Annex

[68] As for the Decision Annex, which is a brief statement signed by Prime Minister Harper [redacted], the Prime Minister relies on the decision of this Court in *Canada (Information Commissioner)* for the proposition that instructions from a client on how to proceed based on the legal advice received by counsel shall be considered to form part of the protected continuum of legal advice. In my opinion, this principle finds no application in the case at bar.

[69] The Prime Minister's decision does not fall within the continuum of communications between solicitor and client for the simple reason that we are past the stage of seeking and obtaining legal advice. In my view, the Decision Annex is not the kind of document this Court had in mind when speaking of instructions on ""how certain proceedings should be conducted"" (*Canada (Information Commissioner)* at para. 29). Rather, we are now at the stage where the client has ""start[ed] to act on the advice for the purposes of conducting [his] regular business"" and the information no longer constitutes legal advice (at para. 33). The communication of that information would clearly not, to borrow the words of Justice Stratas in the above-mentioned case, ""undercut the purposes"" behind the privilege (at para. 28).

[70] Moreover, I agree with the Commissioner that even if the Decision Annex was covered by the legal advice privilege, it could be said to have been waived by the Prime Minister. When he communicated his decision [redacted], who are third parties in regard to the solicitor-client relation here, he clearly renounced any possibility to claim solicitor-client privilege over that communication.

(6) Draft [redacted] Letters

[71] Also attached to the Memorandum to the Prime Minister were two draft letters prepared by counsel, which reflected the legal advice [redacted]. Neither the Judge's reasons nor his Appendix refer to these two draft letters. In my view, these two letters (which were not ultimately sent by the Prime Minister) are clearly communications made between solicitor and client; when sharing those draft letters prepared by counsel, the Clerk was clearly acting as an agent of the client, the Prime Minister. We are therefore dealing, as was the case with the Clerk's Memorandum, with a communication made ""between solicitor and client"" (*Solosky* at p. 837).

[72] These two draft [redacted] letters also meet the second requirement of the *Solosky* test insofar as they are within the continuum of communications which entail the seeking or giving of legal advice. In *Samson Indian Nation and Band v. Canada*, 1995 CanLII 3602 (FCA), [1995] 2 F.C. 762 (C.A.), this Court has defined as follows the scope of the ""legal advice"" notion:

> [8] ... The legal advice privilege protects all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice; it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and <u>it includes advice as to what should be done in the relevant legal context</u>. (Emphasis added.)
>
> (See also *Sheldon Blank & Gateway Industries Ltd. v. Canada (Minister of the Environment)*, 2001 FCA 374 at para. 19.)

[73] In the present case, the draft response letters reflect the legal advice [redacted]. Disclosing them could therefore have the effect of revealing the nature of the legal advice that was given by counsel. As a result, they ought to be protected by solicitor-client privilege.

(7) The [redacted] Letter

[74] The last document to be examined is the four-page letter dated June 18, 2013 sent from [redacted] to the Clerk [redacted]. The Judge did not explicitly deal with that letter, but obliquely referred to it when determining that [redacted] did not fall within the scope of solicitor-client privilege (Reasons at para. 34). The Judge gave no explanation as to why this letter should receive a different treatment than the letter containing similar information sent [redacted], to Mr. Fothergill, counsel to the Clerk.

[75] In my opinion, the two letters should be treated similarly with respect to the solicitor-client privilege. The information disclosed by [redacted] to the Clerk is [redacted]. There is no principled difference between these two communications, and the rationale set out above in paragraphs 59 to 62 of these reasons as to why the latter is privileged, applies with equal force to the former. In both cases, the information communicated is of the same nature as that found to be protected in *Descôteaux*, and its disclosure could lead to inferences being drawn about the legal opinions sought and received. Accordingly, the [redacted] letter should have been exempted from disclosure under section 23 of the Act.

(8) Severance

[76] Before turning to the reasonableness of PCO's exercise of its discretion not to disclose certain records falling under paragraph 21(1)(a) or section 23 of the Act, I shall briefly address the Prime Minister's argument that the Judge improperly severed solicitor-client privileged records. Counsel argues that the Judge erred in severing large portions of the two Memoranda to the Clerk (dated July 2, 2013 and August 6, 2013 and found respectively at pp. 222 and 208 of the Appeal Book, vol. 2, tab 6(11)), despite having seemingly proceeded on the basis that they were exempt from disclosure under section 23 of the *Act*.

[77] Where a request is made to a government institution for access to a record that it is authorized to refuse to disclose, section 25 of the Act requires the head of the institution to disclose ““any part of the record that does not contain, and can reasonably be severed from any part that contains, any … information or material”” covered by an exemption. In other words, this provision ““imposes a duty to sever portions of documents which do not contain the information for which an exemption is claimed and which can reasonably be severed without disclosing the exempt information”” (*Canada v. Blank*, 2007 FCA 87 at para. 2 [*Blank 2007*]).

[78] While section 25 seemingly applies to every provision of the Act, it must nevertheless be modulated to take into account the full extent of the solicitor-client privilege. In *Blank 2007*, this Court considered the interplay between sections 23 and 25 of the Act in the following terms:

> [7] Section 25…does not require the severance from a record of material which forms part of a privileged solicitor-client communication. When considering whether disclosure has been wrongly refused, a Judge should not approach a record containing a privileged solicitor-client communication by asking whether disclosure of parts of the communication would cause harm. Such an approach would undermine a client's confidence that communications made for the purpose of requesting or giving legal advice are not subject to disclosure without the client's consent, and would deter the frankness required in this context.
>
> …
>
> [13] …[S]ection 25 must be applied to solicitor-client communications in a manner that recognizes the full extent of the privilege. It is not Parliament's intention to require the severance of material that forms a part of the privileged communication by, for example, requiring the disclosure of material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought.
>
> (See also *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)*, 1995 CanLII 3539 (FC), [1996] 1 F.C. 268 at pp. 296-298 (T.D.).)

[79] On that basis, I agree with the Prime Minister that the first two bullets and first sentence of the third bullet of the July 2, 2013 Memorandum (Appeal Book, vol. 2, tab 6(11), at p. 222) and the first four bullets of the August 6, 2013 Memorandum (Appeal Book, vol. 2, tab 6(11), at p. 208), should have been redacted like the rest of these documents. The portions of the record in question ““do not contain extraneous matter, such as policy advice or personal topics”” (*Blank 2007* at para. 12). Rather, they are information that, if disclosed, ““would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought”” (*Blank 2007* at para. 13). They are, to quote this Court in *Sheldon Blank & Gateway Industries Ltd. v. Canada*, 2001 FCA 374, ““factual statements”” that are ““inextricably linked to the legal issue under discussion”” and should thus be treated as part of the privileged communication (at para. 22).

D. To the extent that PCO was authorized to refuse the disclosure of the records based on either sections 21(1)(a) or 23 of the Act, did it reasonably exercise its discretion not to disclose these records?

[80] The Commissioner argues that the discretion accorded by paragraph 21(1)(a) and section 23 of the Act was not reasonably exercised by PCO officials, since the factors favouring disclosure were not explicitly identified when the decision to refuse disclosure was made. In that context, it is contended, the Judge similarly could not come to the conclusion that the discretion was reasonably exercised since he could not determine how the factors for and against disclosure were balanced.

[81] Before addressing that submission, it is worth reproducing what the Judge wrote in this respect:

> [30] The Commissioner has not persuaded me that the Prime Minister's discretion was improperly exercised. I find that a variety of factors were taken into account, including the harm that would result from disclosure, the sensitive and personal nature of the information, and the importance of the information to the Crown. While factors favouring disclosure were not explicitly set out, they were implicit in PCO's analysis. I am satisfied, in these circumstances, that the senior officials charged with balancing the factors for and against disclosure would be fully aware of the significant public interest in the release of information about a matter of intense public discourse.
>
> [31] In my view, it would be a somewhat artificial exercise for those senior officials to set out explicitly the factors favouring public disclosure. I am confident that they would be fully aware of the overarching public interest that would generally support release of information in government hands, especially in respect of a matter of considerable public debate, and that they would premise their analysis on the assumption that important factors tending toward public disclosure were clearly present. Where, as here, the analysis focuses mainly on the factors that militate against disclosure, one should not conclude that the factors favouring disclosure were not weighed in the balance.

[82] Having carefully considered the record that was before the Judge, I am of the view that he could reasonably infer that all the factors were duly considered and that it would be inappropriate to second-guess the PCO's discretionary decision. I wholeheartedly agree with the Commissioner that a discretion conferred by statute is never absolute, and must always be exercised consistently with the purposes underlying the grant of that discretion. It is also true, however, that courts will not lightly interfere with discretionary decisions such as the ones at issue herein (see *Blank 2016* at para. 24; *Husky* at paras. 17 and 62).

[83] In the context of the Act, the discretion that is conferred on the head of a government institution to disclose information otherwise exempted under subsection 21(1) or section 23 must obviously be exercised bearing in mind not only the factors favouring non-disclosure, but also those factors furthering the Act's underlying purpose of facilitating democracy and its operative principle of maximized public access to information. For such a decision to pass muster on judicial review, a boiler-plate declaration that the discretion was exercised and that all relevant factors have been considered will obviously not be sufficient; on the other hand, it is not necessary to provide a detailed analysis of each and every factor that has an impact on the decision and how they were weighed against each other (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 16).

[84] As this Court stated in *Leahy v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227 (*Leahy*), the requirement that administrative decisions be transparent and intelligible can only be met if the reasons provide basic information, and if the record before the administrative decision-maker sheds light on the reasons why the decision was made (at para. 121). At paragraph 141 of that decision, the Court elaborated on the type of information that may be required for a decision to be intelligible and transparent:

> …all that is needed is sufficient information for a reviewing court to discharge its role. In cases like this, this can be achieved by ensuring that there is information in the decision letter or the record that sets out the following: (1) who decided the matter; (2) their authority to decide the matter; (3) whether that person decided both the issue of the applicability of exemptions and the issue whether the information should, as a matter of discretion, nevertheless be released; (4) the criteria that were taken into account; and (5) whether those criteria were or were not met and why.

[85] In the case at bar, the Commissioner claims that not a single factor favouring disclosure was explicitly set out in the decision refusing to disclose the requested information, and that the Judge could not properly assume that important factors tending toward public disclosure were in fact properly considered by PCO officials in the exercise of their discretion. At paragraph 69 of her Memorandum of Fact and Law as Appellant, the Commissioner gives examples of factors that favoured disclosure and that were not mentioned in the decision of PCO. These include the extent to which information was in the public domain, Canadians' significant and justified interest in [redacted], the high public interest in the disclosure of information pertaining to the Senate expense scandal, and the fact that the information at issue would shed additional light on speculation in the media [redacted].

[86] It is true that neither the Clerk's letter to the Commissioner dated May 8, 2015, nor the letters sent by Mr. Fothergill (who had full delegation with respect to the exercise of discretion) in February and June of 2014, went into that level of detail. They do provide, however, a lot more information than what was before the reviewing court in *Leahy*. In that case, the decision letter merely asserted the exemptions that applied without giving any further reasons, and the material in the record did not provide even the basic information outlined in the above-noted excerpt.

[87] This is to be contrasted with the situation in the case at bar. First, the May 8, 2015 letter from the Clerk to the Commissioner makes it clear that the discretion to authorize disclosure of exempted material pursuant to sections 19(2), 21(1)(a) and 23 of the Act was duly considered (Appeal Book, vol. 3, tab 6(14)). More importantly, the justification for the decision was spelled out by Mr. Fothergill in his June 13, 2014 letter to the Assistant Commissioner (Appeal Book, vol. 2, tab 6(11)). In that letter, he did not only refer to factors supporting non-disclosure, such as the expectations of individuals involved, the sensitivity of the information, the probability of injury

and the limited extent to which information was already publicly available. It is clear that public interest in access to information and the principle of government transparency were also on his mind (Appeal Book, vol. 2, tab 6(11), at pp. 204-205). He also devoted a full page of his letter to these factors (under the heading of ""Public Interest"") in his discussion of subsection 19(2) of the Act (at pp. 200-202). The fact that he did not repeat the same discussion in the context of paragraph 21(1)(a) and section 23 of the Act cannot be taken as an indication that he was unaware or oblivious to those considerations in the exercise of his discretion pursuant to these two provisions.

[88] Finally, an internal Memorandum by PCO officials in the Access to Information and Privacy Unit dated December 10, 2013 (Appeal Book, vol. 6, tab 9(5) at p. 1041), also reveals that public interest considerations were front and centre in the exercise of the discretion conferred by the Act. Under the heading ""Factors…and probable injuries…considered in the exercise of discretion"", we find the following paragraph:

> The decision-making process involves two steps. First, PCO considered whether or not [an] exemption applied to the information and concluded that it does. Secondly, PCO considered all relevant interests (including the public interest in disclosure); and considered whether all or individual parts of the record could be disclosed. With the intention of releasing as much information as possible, PCO carefully assessed the risk that disclosure of this information would incur against the public's right to disclosure. These were confidential documents that were not written with the intention of publication.
>
> (Appeal Book, vol. 6, tab 9(5) at p. 1043.)

[89] Of course, these officials did not have delegated authority to make decisions regarding disclosure under either paragraph 21(1)(a) or section 23 of the Act. The Memorandum was nevertheless transferred to PCO officials working under Mr. Fothergill's watch, and his letters to the Assistant Commissioner must be read in the context of this information.

[90] In short, there is sufficient evidence that PCO considered all the relevant factors in exercising its discretion to withhold information, including the public interest in access to information and the principle of government transparency, and there was a sufficient basis for the Judge to carry out his role and determine that the discretion was exercised in a reasonable manner. The decision of PCO to refuse disclosure was both transparent and intelligible.

E. Was PCO authorized to refuse the disclosure of the records based on subsection 19(1) of the Act?

[91] Section 19 of the Act holds that, as a general rule, the disclosure of ""any record … that contains personal information"" as defined in section 3 of the *Privacy Act* shall be refused by the government institution. The latter provision broadly defines this notion as ""information about an identifiable individual that is recorded in any form"". These opening words are followed by a list of examples of what constitutes personal information, as well as a list of exceptions. Among these exceptions is the information described in paragraph (l) of the definition of ""personal information"" in section 3 of the *Privacy Act*:

"(l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit… "	"l) des [renseignements concernant des] avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages… "

[92] The only issue in this appeal is whether that paragraph applies. The Judge came to the conclusion that the information in issue relates to a financial benefit, since [redacted] has a substantial monetary value (Reasons at paras. 10-15). [redacted]; in the Judge's view, this amounts to a benefit of a financial nature.

[93] He also held that granting such benefit is discretionary, [redacted]

[94] The Judge also made the following critical finding:

> [15] In addition, to my mind, [redacted] is a financial benefit. The rationale behind the benefit here is fairness - ensuring that public servants [redacted]. However, the fact that fairness animates [redacted] does not mean that [redacted] does not provide public servants with a financial benefit. In the absence of [redacted], public servants could potentially [redacted]. Instead, [redacted]. In my view, that is a financial benefit.

[95] The phrase ““discretionary benefit of a financial nature”” is not defined in the *Privacy Act*, and has not received much judicial attention. In one of the very few cases discussing that exception, *Sutherland v. Canada (Minister of Indian and Northern Affairs)*, 1994 CanLII 3493 (FC), [1994] 3 F.C. 527, Justice Rothstein (then at the Federal Court) adopted a dictionary definition of ““benefit””, referring to *The Shorter Oxford English Dictionary* (3 ed.) and its description of that word as a ““favour””, ““gift””, ““advantage”” or ““profit””.

[96] I agree with the Commissioner that there is no need to resort to the case law interpreting the term ““benefit”” in the *Income Tax Act*. As the Commissioner rightly points out, the Act and the *Privacy Act* are far from pertaining to the same subject, or sharing the same purpose, as the *Income Tax Act*. What constitutes a ““benefit”” for the purpose of calculating <u>taxable</u> income has no bearing on what constitutes a ““benefit of a financial nature”” in the context of the *Privacy Act*. One should therefore be wary of transposing the meaning of words from one act to the other.

[97] I also accept the Commissioner’s argument that a ““benefit”” is not limited to a positive benefit, such as the payment of money, and that it can also be a negative benefit. In her Memorandum of Fact and Law as Respondent, the Commissioner, relying on two decisions about unjust enrichment, *Peel (Regional Municipality) v. Canada*, 1992 CanLII 21 (SCC), [1992] 3 S.C.R. 762 at p. 790 (*Peel*) and *Garland v. Consumers’ Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 at para. 31 (*Garland*), writes that ““[a] ‘benefit’ can also be a negative benefit, such as the avoidance of the payment of an expense”” (at para. 26). Yet, this is an incomplete statement of what the Supreme Court wrote in each of these cases. What is missing is the notion that the negative benefit relates to the avoidance of the payment of an expense ““which [the beneficiary] would otherwise have incurred”” (*Garland* at para. 31) or ““would have been required to undertake”” (*Peel* at p. 790). In my view, this is a critical feature of the ““benefit”” to which paragraph (l) of the definition of ““personal information”” in section 3 of the *Privacy Act* refers.

[98] As broad as the term ““benefit”” may be, it cannot be interpreted in such an all-encompassing manner as to overshoot its ordinary meaning, or as bearing no relationship with the underlying purpose of the Act. A ““benefit”” must be something that gives an advantage to or profits the person upon whom it is conferred. To receive a benefit, a recipient must be put in a better position than he or she would otherwise have been without the benefit.

[99] The Commissioner argues that [redacted] placed them in a better financial position than they otherwise would have been placed, since ordinary citizens do not have the benefit of [redacted]. In my view, this is an erroneous analogy. [redacted] In such a case, they would clearly receive a negative benefit, [redacted]. Such a benefit would compare to other medical and dental insurance plans offered by various employers to their employees: these benefits would clearly add to the salary to which they are entitled as a compensation for the work performed.

[100] This is to be contrasted with the reimbursement of expenses that they would not incur were they not employed in a particular position, and that result directly from the performance of their duties. Relocation costs, travel expenses, and costs associated with the purchase of apparel and work uniforms, for example, could conceivably fall under that category. It would be a stretch to assimilate the payment of these items by an employer to a financial benefit for the employee. Far from being a salary increase or bonus, such payments are only meant to ensure that employees are not negatively impacted as a result of being made liable for costs they would not otherwise incur.

[101] This approach is consistent with the specific inclusion of the granting of a licence or permit as a discretionary benefit of a financial nature under paragraph (l) of the definition of ““personal information”” in section 3 of the *Privacy Act*. A permit or a licence has a monetary value and provides an advantage for which an interested ordinary citizen would have to pay. The same is true of so-called ““fringe benefits”” often associated with employment, such as dental coverage and life insurance. On the contrary, [redacted].

[102] For the above reasons, I am of the view that the Judge erred in determining that the information in the above documents is not exempted from disclosure under subsection 19(1) of the Act. When properly construed, [redacted] does not give rise to a ““benefit”” of a financial nature, and the exception to the exemption for ““personal information”” found in paragraph (l) of the definition of ““personal information”” in section 3 of the *Privacy Act* therefore does not apply.

<u>F. Did PCO reasonably exercise its discretion not to disclose the information at issue under subsection 19(2) of the Act?</u>

[103] Subsection 19(2) of the Act allows for the disclosure of personal information if: ““(a) the individual to whom it relates consents to the disclosure””; ““(b) the information is publicly available””; or ““(c) the disclosure is in accordance with section 8 of the *Privacy Act*””. Having found that the Prime Minister had not established that he was authorized to refuse disclosure based on subsection 19(1) of the Act, the Judge determined that it was not necessary to consider the applicability of subsection 19(2). Since I came to the opposite conclusion, I now have to address that issue.

[104] The Commissioner does not argue the applicability of either paragraphs (a) or (b) of that provision. [redacted] declined to consent to the release of their personal information, and the Prime Minister had directed departmental officials to protect his instructions under section 21 of the Act. As well, PCO could reasonably conclude, as it did during the Commissioner’s investigation, that the limited information that was publicly available could not be released without inadvertently disclosing other non-publicly available information about the individuals.

[105] Subparagraph 8(2)(m)(i) of the *Privacy Act* provides that personal information may be disclosed ““for any purpose where, in the opinion of the head of the institution, … the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure””. The Commissioner argues, much as she did in the context of paragraph 21(1)(a) and section 23 of the Act, that the Prime Minister’s delegate did not consider one single factor favouring disclosure in exercising his discretion. For the reasons set out earlier in section D) of these reasons, I am of the view that this argument must fail. If anything, it is even more obvious, in light of the record (Appeal Book, vol. 2, tab 6(11), at pp. 200-202), that PCO took into consideration all relevant factors in exercising the discretion conferred by subsection 19(2) than it did when exercising its discretion under paragraph 21(1)(a) and section 23 of the Act.

V. Conclusion

[106] For these reasons, I would allow both the Prime Minister's appeal and the Information Commissioner’s appeal in part, without costs as neither party sought them. I would therefore amend the Appendix attached to the Order of the application Judge to reflect the following conclusions:

- The information found in the third bullet of the summary that is part of the Memorandum for the Prime Minister dated July 10, 2013 (Appeal Book, vol. 2, tab 6(11), at p. 212) is covered by the exemption in paragraph 21(1)(a) of the Act;
- The information relating to [redacted] to the Clerk (Appeal Book, vol. 2, tab 6(11), at pp. 225 and 227), in the Decision Annex (Appeal Book, vol. 2, tab 6(11), at p. 220), in the email exchanges between [redacted] and Mr. Fothergill (Appeal Book, vol. 2, tab 6(11), at pp. 229-234), and in the letter from the Clerk to [redacted] (Appeal Book, vol. 2, tab 6(11), at p. 209), are not covered by the exemption in section 23 of the Act;
- The Memorandum from the Clerk to the Prime Minister dated July 10, 2013 (Appeal Book, vol. 2, tab 6(11), at pp. 212-215) is covered by the exemption in section 23 of the Act;
- The two draft [redacted] letters attached to the above-mentioned Memorandum from the Clerk to the Prime Minister (Appeal Book, vol. 2, tab 6(11), at pp. 217, 219) are covered by the exemption in section 23 of the Act;
- The letter from [redacted] to the Clerk dated June 18, 2013 (Appeal Book, vol. 2, tab 6(11), at pp. 225-227) is covered by the exemption in section 23 of the Act; and
- The information for which an exemption was claimed pursuant to section 19 of the Act should be redacted.

“Yves de Montigny”

J.A.

“I agree

D. G. Near J.A.”

“I agree

Judith Woods J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-311-17

STYLE OF CAUSE: THE INFORMATION COMMISSIONER OF CANADA v. THE PRIME MINISTER OF CANADA

AND DOCKET: A-313-17

STYLE OF CAUSE: THE PRIME MINISTER OF CANADA v. THE INFORMATION COMMISSIONER OF CANADA

DATE OF HEARING: September 17, 2018

PUBLIC REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	NEAR J.A.
	WOODS J.A.
DATED:	april 24, 2019

APPEARANCES:

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TAB 11

Solosky v. The Queen, 1979 CanLII 9 (SCC), [1980] 1 SCR 821

Date: 1979-12-21

Other citations:
105 DLR (3d) 745 — 30 NR 380 — 16 CR (3d) 294 — 50 CCC (2d) 495 — 4 WCB 177 — [1979] CarswellNat 4 — [1979] SCJ No 130 (QL) — [1979] ACS no 130

SUPREME COURT OF CANADA

Solosky v. The Queen, [1980] 1 S.C.R. 821

Date: 1979-12-21

William (Billy) Solosky (Plaintiff) Appellant;

and

Her Majesty The Queen (Defendant) Respondent.

1979: June 13; 1979: December 21.

Present: Laskin C.J. and Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Prisons Censorship of prisoners' mail — Right of prison inmates to communicate in confidence with their solicitors — Solicitor-client privilege — Inmate failing to establish entitlement to a declaration — Penitentiary Service Regulations, SOR/62-90 — Canadian Bill of Rights, 1960(Can.), c. 44, ss. 1(b), (d), 2(c)(ii).

The appellant, imprisoned at Millhaven Institution, commenced an action in the Federal Court of Canada for a declaration that "properly identified items of correspondence directed to and received from his solicitor shall henceforth be regarded as privileged correspondence and shall be forwarded to their respective destinations unopened". The action was dismissed and on appeal to the Federal Court of Appeal the pleadings were amended to request a declaration " ... that hence-forth all properly identified items of solicitor-client correspondence should be forwarded to their respective destinations unopened". The appeal failed, and at the opening of the appeal in this Court counsel for the appellant moved to substitute, for the prayer for relief in the statement of claim, a declaration that the order of the Director of Millhaven Institution that the appellant's mail be opened and read "insofar as it has been applied to mail originating from his solicitor David Cole, and to mail written by the Plaintiff to his solicitor David Cole, is not authorized by law".

In accordance with the Penitentiary Act, R.S.C. 1970, c. P-6, and Regulations thereunder, an institutional head of a penitentiary may order censorship of inmate correspondence to the extent considered necessary or desirable for the rehabilitation of the inmate or the security of the institution. The main ground upon which the appellant rested his case was solicitor-client privilege.

Held: The appeal should be dismissed.

[Page 822]

Contrary to the views expressed by the Court below, the important issues raised in this case should not be determined by the particular form of wording employed in the prayer for relief, or on the basis that the question is hypothetical.

There could be no doubt that there was a real, and not a hypothetical, dispute between the parties. The declaration sought was a direct and present challenge to the censorship order of the Director of Millhaven Institute. That order, so long as it continues, from the past through the present and into the future, is in controversy. The fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself, deprive 'the remedy of its potential utility in resolving the dispute over the Director's continuing order. Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case. The determination of the right of prison inmates to correspond, freely and in confidence with their solicitors, is of great practical importance, although, admittedly, any such determination relates to correspondence not yet written. However poorly framed the prayer for relief may be, even as twice amended, the present claim was clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege.

Recent case law has taken the traditional doctrine of solicitor-client privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits. However, while there is no question that the Canadian courts have been moving towards a broader concept of solicitor-client privilege, the concept has not been stretched far enough to save the appellant's case. Although there has been a move away from treating solicitor-client privilege as a rule of evidence that can only be asserted at the time the privileged material is sought to be introduced as evidence, the move from rigid temporal restrictions has not gone as far as the appellant contends. The appellant's suggestion that privilege has come to be recognized as a "fundamental principle", more properly characterized as a "rule of property", was not accepted. Without the evidentiary connection, which the law now requires, the privilege cannot be invoked.

[Page 823]

The statutory disciplinary régime, described in this case, does not derogate from the common law doctrine of solicitor and client privilege, as presently conceived, but the appellant was seeking in this appeal something well beyond the limits of the privilege, even as amplified in modern cases.

In aid of his main submission, appellant argued faintly that the Penitentiary Service Regulations and Commissioner's Directive should not be construed and applied so as to abrogate, abridge, or infringe any of the rights or freedom recognized in the Canadian Bill of Rights by s. 1(b) (the right of the individual to equality before the law and the protection of the law), 1(d) (freedom of speech) and 2(c)(ii) (the right of a person arrested or detained to retain and instruct counsel without delay). This argument also failed.

One could depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law. In that context, the Court was faced with the interpretation of the Penitentiary Service Regulations and Commissioner's Directive No. 219.

It was submitted there are three alternative interpretations of the scope of Regulations 2.17 and 2.18 which may govern the extent of the authority of the institutional head in dealing with an envelope which appears to have originated from a solicitor, or to be addressed to a solicitor, in circumstances where the institutional head has reason to believe that the unrestricted and unexamined passage of mail to or from the particular inmate in question represents a danger to the safety and security of the institution. The third such interpretation was as follows: "he may order that the envelope be subject to opening and examination to the minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege". This alternative represents that interpretation of the scope of the Regulations which permits to an inmate the maximum opportunity to communicate with his solicitor through the mails that is consistent with the requirement to maintain the safety and security of the institution.

The "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that (i) the contents of an envelope may be inspected for contraband;

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(ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the bona fides of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication.

Per Estey J.: As to the above item (iii) in the catalogue of considerations in the interpretation of the expression "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege", any procedure adopted with reference to the scrutiny of letters passing from solicitor to client should, wherever reasonably possible, recognize the solicitor-client privilege long established in the law.

[Mellstrom v. Garner, [1970] 1 W.L.R. 603, distinguished; Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd., [1921] 2 A.C. 438; Pyx Granite Co. v. Ministry of Housing and Local Government, [1958] 1 Q.B. 554; Pharmaceutical Society of Great Britain v. Dickson, [1970] A.C. 403; Re Director of Investigation and Research and Shell Canada Ltd. (1975), 1975 CanLII 2217 (FCA), 22 C.C.C. (2d) 70; Greenough v. Gaskell (1833), 39 E.R. 618; Anderson v. Bank of British Columbia (1876), 2 Ch. 644; Re Director of Investigation and Research and Canada Safeway Ltd. (1972), 1972 CanLII 1028 (BC SC), 26 D.L.R. (3d) 745; Re Presswood et al. and International Chemalloy Corp. (1975), 1975 CanLII 367 (ON SC), 65 D.L.R. (3d) 228; Re Borden and Elliot and The Queen (1975), 1975 CanLII 739 (ON CA), 30 C.C.C. (2d) 337; Re BX Development Inc. and The Queen (1976), 1976 CanLII 1084 (BC CA), 31 C.C.C. (2d) 14; Re B and The Queen (1977), 1977 CanLII 2032 (ON CJ), 36 C.C.C. (2d) 235, referred to.]

APPEAL from a judgment of the Federal Court of Appeal[1][4], dismissing an appeal from a judgment of Addy J. who dismissed the appellant's application for a declaration. Appeal dismissed.

Ronald Price, Q.C., and David P. Cole, for the appellant.

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E. Bowie and J.—Paul Malette, for the respondent.

The judgment of Laskin C.J. and Martland, Ritchie, Pigeon, Dickson, Beetz, Pratte and McIntyre JJ. was delivered by

4. 1978 CanLII 3641 (FCA), [1978] 2 F.C. 632, 86 D.L.R. (3d) 316.

DICKSON J.—This case concerns the censorship of prisoners' mail and the right of an inmate of a federal penitentiary to communicate in confidence with his solicitor. The appellant, imprisoned at Millhaven Institution, commenced an action in the Federal Court for a declaration that "properly identified items of correspondence directed to and received from his solicitor shall henceforth be regarded as privileged correspondence and shall be forwarded to their respective destinations unopened".

I

Prison Disciplinary Regime

The penitentiary authorities rely upon the following statutes and Regulations as authorizing restrictions upon the personal correspondence of prison inmates. Section 660(1) of the Criminal Code, R.S.C. 1970, c. C-34, provides that a sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced. Section 29(1) of the Penitentiary Act, R.S.C. 1970, c. P-6, empowers the Governor in Council to make regulations for the custody, treatment, training, employment, and discipline of inmates, and, generally, for carrying into effect the purposes and provisions of the Penitentiary Act. Section 29(3) authorizes the Commissioner of Penitentiaries to make rules, known as Commissioner's directives, for the custody, treatment, training, employment, and discipline of inmates, and the good government of penitentiaries.

Pursuant to the foregoing, Penitentiary Service Regulations SOR/62-90, were passed, which pro-vide in part, as follows:

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Institutional Heads

1.12(1) The institutional head is responsible for the direction of his staff, the organization, safety and security of his institution and the correctional training of all inmates confined therein.

Visiting and Correspondence

2.17 The visiting and correspondence privileges that may, in accordance with directives, be permitted to inmates shall be such as are, in all the circumstances, calculated to assist in the reformation and rehabilitation of the inmate.

Censorship

2.18 In so far as practicable the censorship of correspondence shall be avoided and the privacy of visits shall be maintained, but nothing herein shall be deemed to limit the authority of the Commissioner to direct or the institutional head to order censorship of correspondence or supervision of visiting to the extent considered necessary or desirable for the reformation and rehabilitation of inmates or the security of the institution.

It will be observed then that the Regulations, the validity of which are not challenged by the appellant, expressly recognize the authority of the institutional head of a penitentiary to order censorship of inmate correspondence to the extent considered necessary or desirable for the security of the institution. These Regulations are implemented by Commissioner's Directive No. 219 (as amended following the date of issuance of the statement of claim in these proceedings, but prior to the date of trial). The following paragraphs are pertinent to the present inquiry:

Directive

5. a. Penitentiary staff shall promote and facilitate correspondence between inmates and their families, friends, and other individuals and agencies who can be expected to make a contribution to the inmate's rehabilitation within the institution and to assist in his subsequent and eventual return to the community.

c. Subject to the provisions of paragraph 14 every inmate shall be permitted to correspond with any

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person, and shall be responsible for the contents of every article of correspondence of which he is the author. There shall be no restriction to the number of letters sent or received by inmates, unless it is evident that there is mass production.

Paragraph 5 d. makes provision for inspection for contraband, in these terms:

d. Subject to the provisions of paragraph 8, every item of correspondence to or from an inmate may be opened by institutional authorities for inspection for contraband.

Censorship, dealt with in para. 7, is defined as any examination (other than for the express purpose of searching for contraband) and includes the reading, reproducing, extracting, or withdrawing of inmate correspondence. Paragraph 7 b. makes the point that censorship in any form is to be avoided, but reserves to the Commissioner of Penitentiaries and to the Institutional Director the authority to censor for one of two purposes, the rehabilitation of the inmate, or the security of the institution. Paragraph 7 b. reads:

Censorship of correspondence in any form shall be avoided, but nothing herein shall be deemed to limit the authority of the Commissioner to direct, or the Institutional Director to order, censorship of correspondence in any form, to the extent considered necessary or desirable for the rehabilitation of the inmate or the security of the institution. (PSR 2.18). Any form of censorship shall be undertaken only with the approval of the Institutional Director.

The Directive seeks to maintain the confidentiality of the contents of correspondence. Paragraph 7 c. states that only authorized staff shall be allowed to read inmate mail, when necessary, and further provides that no comments, other than those required for official duties, shall be made to other members of the staff on the contents of the correspondence.

Paragraph 8 of Directive 219 speaks of "privileged correspondence", defined as "properly identified and addressed items directed to and received from" any of a lengthy list of persons including, among others, members of the Senate, members of the House of Commons, members of provincial

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legislatures, and provincial ombudsmen. Conspicuous is the absence of any reference to inmates' legal representatives. Privileged correspondence is forwarded to the addressee unopened with the proviso that in exceptional cases, where institutional staff suspect contraband in such privileged correspondence, the Commissioner's approval shall be obtained before it is opened. Paragraph 8 clearly countenances the maintenance of uncensored channels of mail for complaints and grievances. But the restricted listing of destinations assures that the channels through which grievances pass are limited to internal procedures (Solicitor General, Commissioner of Penitentiaries, Correctional Investigator) or political outlets (Members of Parliament and Senators). Lawyers are mentioned in paragraph 10 c. of Directive No. 219, "Use of Telephone and Telegraph", which reads:

c. In urgent cases where lawyers call their inmate clients, and wish to communicate privately with them, the institutional authorities shall ask the lawyer to leave his name and telephone number and, following verification of the lawyer's identity, a call shall originate from the institution.

For the purposes of trial, an agreed statement of facts was filed. Paragraphs 4 and 5 of the statement are in the following terms:

4. Pursuant to section 6 paragraph (b) [s. 7(b), as amended,] of Directive No. 219, John Dowsett, Director of Millhaven Institution has ordered that William (Billy) Solosky's mail be opened and read. This order has been applied to mail originating from his solicitor David Cole.

5. William (Billy) Solosky's mail is being read because it is John Dowsett's opinion that William (Billy) Solosky's conduct, activities and attitude cause him to believe that attention should be paid to his incoming and outgoing correspondence. Those letters which are deemed to be significant with respect to the security of the institution are being brought to the attention of John Dowsett.

Paragraph 5 of the statement of defence clarifies any obscurity in para. 5 of the agreed statement of facts. The statement of defence reads "The security of the Millhaven Institution has required that the Plaintiff's mail be opened."

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II

Judicial History

Mr. Justice Addy, at trial, was of the view that solicitor and client privilege, upon which the appellant founds his case, can only be claimed document by document and that each document is privileged only to the extent it meets the criteria which would support the privilege. Whether a letter does, in fact, contain a privileged communication cannot be determined until it has been opened and read. There is no logical nor legal justification for permitting correspondence which appears to have emanated from, or to be addressed to, a solicitor to enjoy any special aura of protection. Mr. Justice Addy relied upon these propositions in dismissing the appellant's action, with costs. He buttressed his conclusion by the argument that in this situation it would be too easy for a person to obtain envelopes and letterheads bearing the name and title of a real or fictitious solicitor, and equally as easy for a prisoner to camouflage the true identity of an addressee.

The appellant appealed to the Federal Court of Appeal. In that Court, his counsel amended the pleadings to request a declaration " ... that hence-forth all properly identified items of solicitor-client correspondence should be forwarded to their respective destinations unopened". The revised form of declaration differs little from that appearing in the amended statement of claim. Both are defective, at least to this extent—it is not every item of correspondence passing between solicitor and client to which privilege attaches, for only those in which the client seeks the advice of counsel in his professional capacity, or in which counsel gives advice, are protected. That a privilege may not encompass all solicitor and client communications is clearly illustrated by the correspondence exhibited in the present case. Some of the letters concerned the appellant's parole review. Others merely contained criticism of the administration, information about other inmates, and prison gossip. One letter enclosed a second letter with the request that the second letter be forwarded to a named magazine for publication.

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The Federal Court of Appeal dismissed the appeal, holding that a declaration that all correspondence between the appellant and his solicitor be declared privileged would extend considerably the ambit of the solicitor-client privilege as it is generally known and understood. To grant the declaration sought would be to give to the appellant an extension of the privilege afforded to the ordinary citizen. As a second ground for rejecting the appeal, the Court held that by issuing an order relating to correspondence not yet written, the court would be granting relief on the basis of purely hypothetical issues, and in futuro. Assuming jurisdiction, the case was not one where jurisdiction should be asserted.

III

Declaratory Relief

At the opening of the appeal in this Court, counsel for the appellant moved to substitute, for the prayer for relief in the statement of claim, a declaration that the order of the Director of Millhaven Institution that the appellant's mail be opened and read "insofar as it has been applied to mail originating from his solicitor David Cole, and to mail written by the Plaintiff to his solicitor David Cole, is not authorized by law". The amended form of prayer seems to have been conceived with a view to meeting the point, taken by the Federal Court of Appeal, that the relief earlier sought would relate to letters not yet written.

With great respect for the views expressed in the Federal Court of Appeal, I do not think that the important issues raised in these proceedings should be determined by the particular form of wording employed in the prayer for relief, or on the basis that the question is hypothetical.

Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.

The principles which guide the court in exercising jurisdiction to grant declarations have been

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stated time and again. In the early case of Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.[2][5], in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):

The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

In Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government[3][6], (rev'd [1960] A.C. 260, on other grounds), Lord Denning described the declaration in these general terms (p. 571):

.. if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

The jurisdiction of the court to grant declaratory relief was again stated, in the broadest language, in Pharmaceutical Society of Great Britain v. Dickson[4][7], a case in which the applicant sought a declaration that a proposed motion of the pharmaceutical society, if passed, would be ultra vires its objects and in unreasonable restraint of trade. In the course of his judgment, Lord Upjohn stated, at p. 433:

A person whose freedom of action is challenged can always come to the court to have his rights and position clarified, subject always, of course, to the right of the court in exercise of its judicial discretion to refuse relief in the circumstances of the case.

In the instant case, Mellstrom v. Garner[5][8], was cited in the Federal Court of Appeal in support of

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the proposition that courts will not grant declarations regarding the future. There, a chartered accountant and former partner of the defendant sought a declaration as to the true construction of the agreement by which the partnership had been dissolved. The plaintiff asked whether, having regard to a clause in the agreement, he would be in breach were he to solicit clients or business of the 'continuing partners'. Karminski L.J. held that declarations concerning the future ought to be approached with considerable reserve. Since neither the plaintiff nor the defendants had broken the provisions of the clause in question, nor sought to do so, there was no useful purpose to be gained in granting the declaration. The application was dismissed. That is a very different case from the present one.

As Hudson suggests in his article, "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dal.L.J. 706:

The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.

The first factor is directed to the "reality of the dispute". It is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise. As Hudson stresses, however, one must distinguish, on the one hand, between a declaration that concerns "future" rights and "hypothetical" rights, and, on the other hand, a declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as future rights. (p. 710)

Here there can be no doubt that there is a real and not a hypothetical, dispute between the parties. The declaration sought is a direct and present challenge to the censorship order of the Director of

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Millhaven Institute. That order, so long as it continues, from the past through the present and into the future, is in controversy. The fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself, deprive the remedy of its potential utility in resolving the dispute over the Director's continuing order.

Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case.

The determination of the right of prison inmates to correspond, freely and in confidence with their solicitors, is of great practical importance, although, admittedly, any such determination relates to correspondence not yet written.

5. [1921] 2 A.C. 438.
6. [1958] 1 Q.B. 554.
7. [1970] A.C. 403 (H.L.).
8. (1970] 1 W.L.R. 603.

However poorly framed the prayer for relief may be, even as twice amended, the present claim is clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege. It is not directed to the characterization of specific and individual items of correspondence. If the appellant is entitled to a declaration, it is within this Court's discretion to settle the wording of the declaration: see de Smith, Judicial Review of Administrative Action (3rd ed. 1973, p. 431). Further, s. 50 of the Supreme Court Act allows the Court to make amendments necessary to a determination of the "real issue", without application by the parties.

IV

Solicitor-Client Privilege

As I have indicated, the main ground upon which the appellant rests his case is solicitor-client privilege. The concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice. As Jackett C.J. aptly

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stated in Re Director of Investigation and Research and Shell Canada Ltd.[6][9], at pp. 78-9:

... the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.

The history of the privilege can be traced to the reign of Elizabeth I (see Berd v. Lovelace[7][10] and Dennis v. Codrington[8][11]). It stemmed from respect for the 'oath and honour' of the lawyer, dutybound to guard closely the secrets of his client, and was restricted in operation to an exemption from testimonial compulsion. Thereafter, in stages, privilege was extended to include communications exchanged during other litigation, those made in contemplation of litigation, and finally, any consultation for legal advice, whether litigious or not. The classic statement of the policy grounding the privilege was given by Brougham L.C. in Greenough v. Gaskell[9][12], at p. 620:

The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection (though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers).

But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

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The rationale was put this way by Jessel M.R. in Anderson v. Bank of British Columbia[10][13], at p. 649:

The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

Wigmore [8 Wigmore, Evidence (McNaughton rev. 1961) para. 2292] framed the modern principle of privilege for solicitor-client communications, as follows:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.

There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential, privilege will not attach, O'Shea v. Woods[11][14], at p. 289. More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is R. v. Cox and Railton[12][15], in which Stephen J. had this to say (p. 167): "A communication

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in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

9. (1975), 1975 CanLII 2217 (FCA), 22 C.C.C. (2d) 70, [1975] F.C. 184.
10. (1577), 21 E.R. 33.
11. (1580), 21 E.R. 53.
12. (1833), 39 E.R. 618.
13. (1876), 2 Ch. 644.
14. [1891] P. 286.
15. (1884), 14 Q.B.D. 153.

Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits. See Re Director of Investigation and Research and Canada Safeway Ltd.[13][16]; Re Director of Investigation and Research and Shell Canada Ltd., supra; Re Presswood et al. and International Chemalloy Corp.[14][17]; Re Borden and Elliot and The Queen[15][18], (affirmed on other grounds[16][19]; Re BX Development Inc. and The Queen[17][20]; Re B and The Queen[18][21].

While there is no question that the Canadian courts have been moving towards a broader concept of solicitor-client privilege, I do not think the concept has been stretched far enough to save the appellant's case. Although there has been a move away from treating solicitor-client privilege as a rule of evidence that can only be asserted at the time the privileged material is sought to be introduced as evidence, the move from rigid temporal restrictions has not gone as far as the appellant contends. In the factum of the appellant, it is suggested that the privilege has come to be recognized as a "fundamental principle", more properly characterized as a "rule of property". The cases cited in support of this proposition, however, all involved search warrants that caught documents to which the privilege unquestionably attached. In those cases, such as Re Borden & Elliot and The Queen, supra, the search warrant led to the seizure of documents believed "to afford evidence." If privilege were to attach to the documents, then such material could not afford evidence at trial and hence the evidentiary connection remained.

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The judgments can be rationalized as merely shifting the time at which the privilege can be asserted. As the comment by Kasting in (1978), 24 McGill L.J. 115, "Recent Developments in the Law of Solicitor-Client Privilege" suggests, the shift away from the strict rule-of-evidence-at-trial approach has taken place by logical extensions. Chassé, in his annotation at (1977), 36 C.R.N.S. 349, The Solicitor-Client Privilege and Search Warrants, asserts that the privilege is being looked upon "as more akin to a rule of property rather than merely as a rule of evidence" (p. 350), but the privilege, in my view, is not yet near a rule of property. That is what the privilege must become if the appellant is to succeed.

There is no suggestion in the materials in the case at bar that the authorities intend to employ the letters or extracts obtained therefrom as evidence in any proceeding of any kind. Much as one might well wish to analogize from the search warrant cases to the censorship order here impugned, as a form of blanket search warrant upon appellant's mail, the order cannot be characterized as being directed to obtaining or affording evidence in any proceeding. Without the evidentiary connection, which the law now requires, the appellant cannot invoke the privilege.

As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege—(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.

The complication in this case flows from the unique position of the inmate. His mail is opened

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and read, not with a view to its use in a proceeding, but by reason of the exigencies of institutional security. All of this occurs within prison walls and far from a court or quasi-judicial tribunal. It is difficult to see how the privilege can be engaged, unless one wishes totally to transform the privilege into a rule of property, bereft of an evidentiary basis.

In my view, the statutory disciplinary régime, which I have earlier described, does not derogate from the common law doctrine of solicitor and client privilege, as presently conceived, but the appellant is seeking in this appeal something well beyond the limits of the privilege, even as amplified in modern cases.

V

In aid of his main submission, resting upon privilege, counsel for the appellant argued faintly that the Penitentiary Service Regulations and Commissioner's Directive should not be construed and applied so as to abrogate, abridge, or infringe any of the rights or freedoms recognized in the Canadian Bill of Rights by s. 1(b) (the right of the individual to equality before the law and the protection of the law), 1(d) (freedom of speech) and 2(c)(ii) (the right of a person arrested or detained to retain and instruct counsel without delay). The authorities relied upon by counsel were, in the main, breathalyzer cases dealing with the right of a motorist to communicate with his counsel in private and without delay. These, and other cases cited, give little assistance to the resolution of the issue now before the Court, due to the difference in factual context and relevant considerations. The question in this case is whether the appellant's right to retain and instruct counsel is incompatible with the right of prison authorities to prevent threat to the security of the institution. In my view, there is no such incompatibility provided the exercise of authority is not greater than is necessary to support the security interest. This, as I read it, is precisely the effect of para. 7b. of Directive 219.

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With respect to s. 1(b) of the Bill, it has been held by this Court that equality before the law does not require "that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective": Martland J., giving the unanimous reasons of this Court in Prata v. Minister of Manpower and Immigration[19][22], at p. 382.

16. (1972), 1972 CanLII 1028 (BC SC), 26 D.L.R. (3d) 745 (B.C.S.C.).
17. (1975), 1975 CanLII 367 (ON SC), 65 D.L.R. (3d) 228 (Ont. H.C.).
18. (1975), 1975 CanLII 739 (ON CA), 30 C.C.C. (2d) 337.
19. (1975), 30 C.C.C. (2d) 345 (Ont. C.A.).
20. (1976), 1976 CanLII 1084 (BC CA), 31 C.C.C. (2d) 14 (B.C.C.A.).
21. (1977), 1977 CanLII 2032 (ON CJ), 36 C.C.C. (2d) 235 (Ont. Prov. Ct.).

It is difficult to attack the validity of Penitentiary Service Regulation 2.18 or Directive 219 with a freedom of speech argument, having regard to the will of Parliament, as reflected in the Penitentiary Act and in the Penitentiary Service Regulations, which preserves a limited right of censorship by penitentiary authorities in the interests of security and, at the same time, affords inmates a right to communicate freely through uncensored channels with members of Parliament and provincial legislatures, and the many persons listed in para. 8 of Directive 219.

VI

One may depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law.

In that context, the Court is faced with the interpretation of the Penitentiary Service Regulations and Commissioner's Directive No. 219. Section 2.18 of the Regulations, as earlier noted, undoubtedly reserves the authority of the institutional head to order censorship of correspondence to the extent considered necessary or desirable for the security of the institution. As a general rule, I do not think it is open to the courts to question the judgment of the institutional head as to what may, or may not, be necessary in order to maintain

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security within a penitentiary. On the other hand, it is to be noted that Penitentiary Service Regulation 2.18 and Commissioner's Directive No. 219 speak in general terms, in their reference to the reading of correspondence and to other forms of censorship, without express mention of solicitor-client correspondence. The right to privacy in solicitor-client correspondence has not been expressly taken away by the language of the Regulations and the Directive.

Most prisons are sufficiently remote that the mail constitutes the prime means of communication to an inmate's solicitor. Nothing is more likely to have a "chilling" effect upon the frank and free exchange and disclosure of confidences, which should characterize the relationship between inmate and counsel, than knowledge that what has been written will be read by some third person, and perhaps used against the inmate at a later date. I do not understand counsel for the Crown to dispute the importance of these considerations.

The result, as I see it, is that the Court is placed in the position of having to balance the public interest in maintaining the safety and security of a penal institution, its staff and its inmates, with the interest represented by insulating the solicitor-client relationship. Even giving full recognition to the right of an inmate to correspond freely with his legal adviser, and the need for minimum derogation therefrom, the scale must ultimately come down in favour of the public interest. But the interference must be no greater than is essential to the maintenance of security and the rehabilitation of the inmate.

The difficulty is in ensuring that the correspondence between the inmate and his solicitor, whether within the doctrine of solicitor-client privilege or not, is not cloaking the passage of drugs, weapons, or escape plans. There must be some mechanism for verification of authenticity. That seems to be generally accepted. Yet, no one has so far suggested what third party mechanism might be adopted, or by what authority the courts could impose such a mechanism upon penitentiary authorities.

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Counsel for the Crown submits there are three alternative interpretations of the scope of Regulations 2.17 and 2.18 which may govern the extent of the authority of the institutional head in dealing with an envelope which appears to have originated from a solicitor, or to be addressed to a solicitor, in circumstances where the institutional head has reason to believe that the unrestricted and unexamined passage of mail to or from the particular inmate in question represents a danger to the safety and security of the institution:

(a) he may nonetheless permit the letter to be delivered unopened and unexamined to the inmate;

(b) he may suspend the inmate's privilege to receive mail, in respect of that letter, pursuant to sections 2.17 and 2.18 of the Penitentiary Service Regulations.

(c) he may order that the envelope be subject to opening and examination to the minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege.

Counsel contends that to interpret the Regulations as requiring the first of these alternatives is to leave the institutional head without the authority he requires to control the potential passage of contraband, or of correspondence which may endanger the safety of the institution, under the guise of confidential communications passing between inmate and solicitor. I agree. I would also reject the second as providing no solution. I agree that the third alternative represents that interpretation of the scope of the Regulations which permits to an inmate the maximum opportunity to communicate with his solicitor through the mails that is consistent with the requirement to maintain the safety and security of the institution.

In my view, the "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that (i) the contents of an envelope may be inspected for contraband; (ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary

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to determine the bona fides of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication. Paragraph 7c. of Directive 219 underlines this point.

22. 1975 CanLII 7 (SCC), [1976] 1 S.C.R. 376.

The appellant has failed to establish entitlement to a declaration in any of the three forms he has advanced in these proceedings. The appeal must be dismissed. The respondent is entitled to costs in this Court.

The following are the reasons delivered by

ESTEY J.—I have had the opportunity of reading the reasons for judgment of my brother Dickson and I concur therein. I only wish to add to item (iii) in his catalogue of considerations in the interpretation of the expression "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege". Item (iii) reads as follows:

(iii) the letter only should be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to confirm the bona fides of the communication;

In my respectful view, any procedure adopted with reference to the scrutiny of letters passing from solicitor to client should, wherever reasonably possible, recognize the solicitor-client privilege long established in the law. Any mechanics adopted for their examination should, subject only to special circumstances indicating an overriding necessity for intervention by the authorities, safeguard communications flowing under the protection of the privilege so as to ensure that the privilege is left in a practical, workable condition; for example, a covering letter from a solicitor forwarding a sealed communication which the solicitor states to be a communication of legal advice should ordinarily shield the enclosure from examination by the authorities. I would dispose of the appeal as proposed by Dickson J.

Appeal dismissed with costs.

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Solicitor for the plaintiff, appellant: David P. Cole, Toronto.

Solicitor for the defendant, respondent: Roger Tassé, Ottawa.

TAB 12

Blank v. Canada (Justice), 2016 FCA 189 (CanLII)

Date: 2016-06-23
File number: A-378-15
Other citations: 7 Admin LR (6th) 30 — [2016] FCJ No 694 (QL)

Date: 20160623

Docket: A-378-15

Citation: 2016 FCA 189

CORAM: **DAWSON J.A.**

RYER J.A.

DE MONTIGNY J.A.

BETWEEN:

SHELDON BLANK

Appellant

and

THE MINISTER OF JUSTICE

Respondent

Heard at Winnipeg, Manitoba, on February 29, 2016.

Judgment delivered at Ottawa, Ontario, on June 23, 2016.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: DAWSON J.A.

RYER J.A.

Date: 20160623

Docket: A-378-15

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CORAM: **DAWSON J.A.**

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BETWEEN:

SHELDON BLANK

Appellant

and

THE MINISTER OF JUSTICE

Respondent

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal from a decision of Justice Brown (the Judge) of the Federal Court dated June 16, 2015 (2015 FC 753), wherein he dismissed the appellant's application under section 41 of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act) for judicial review of the Department of Justice's (DOJ) decision to deny him access to portions of the requested records dealing with ongoing civil litigation between the parties.

[2] For the reasons that follow, I have come to the conclusion that the appeal should be dismissed for the following reasons.

I. Facts

[3] The relevant facts were set out quite thoroughly by the Judge in his reasons. I shall therefore only refer to the facts that are pertinent for the purpose of this appeal.

[4] The appellant was the owner of a paper mill that was operated by his company, Gateway Industries Ltd., in the City of Winnipeg. In 1995, the appellant and his company were charged with 13 violations under the *Fisheries Act*, R.S.C. 1985, c. F-14 by way of summary conviction proceedings. Eight of those charges were quashed on April 4, 1997, as they failed to identify the place at which the offences allegedly occurred: see *R. v. Gateway Industries Ltd.*, 1997 CanLII 22752 (MB PC), [1997] M.J. No. 185, [1997] 7 W.W.R. 120.

[5] On April 10, 2001, the remaining five charges were held to be nullities because of the absence of a certificate establishing when the Minister of Fisheries became aware of the alleged violations: *R. v. Gateway Industries Ltd.*, 2001 MBQB 106, [2001] M.J. No. 172. The Crown then chose to continue with those five charges by way of indictment and accordingly laid new charges in July of 2002. On February 4, 2004, the Crown decided to stay the prosecution. By that time, the mill was no longer in operation.

[6] In May of 2002, the appellant and his company commenced a civil action against the respondent and certain of her employees and agents alleging abuse of process in respect of the 13 aforementioned criminal charges. This lawsuit is still ongoing and is defended by the DOJ and its outside counsel.

[7] On November 30, 2006, the appellant made a request under the Act for:

All records and communications dealing with or referring to the civil litigation involving Sheldon Blank and Gateway Industries Ltd. (Manitoba Court of Queen's Bench File CI 02-01-28295) from Rod Garson to anyone, or from anyone to Rod Garson. This request includes Rod Garson's notes made on this subject.

[8] Mr. Garson was the Crown counsel with the Federal Prosecution Service (FPS) who, at least for some period of time, was responsible for carriage of the prosecution.

[9] On March 14, 2007, the DOJ first sent 194 redacted pages that formed, in its view, the releasable documents relevant to the appellant's access request, claiming the personal information (section 19), advice or recommendations (section 21(1)(a)), consultations or deliberations (section 21(1)(b)) and solicitor-client privilege (section 23) exemptions of the Act. The appellant complained to the Office of the Information Commissioner (the Commissioner) on the grounds that the DOJ improperly severed the records and wrongfully applied the exemptions. In response to the appellant's complaint to the Commissioner, the DOJ subsequently agreed to release two other sets of documents. On November 10, 2009, the Commissioner reported the result of its investigation to the appellant and declared itself satisfied that the DOJ had properly applied the exemptions.

[10] On December 9, 2009, the appellant applied to the Federal Court for judicial review of the DOJ's decision to deny him access to portions of the requested records. On August 30, 2010, the DOJ disclosed 111 pages of documents that were attachments to previously released documents. These documents were said to have been inadvertently omitted (the attachments). All but 27 of the 111 pages were redacted as the DOJ continued to claim the same exemptions under the Act as claimed in its 2007 release of documents. The appellant has not made a complaint to the Commissioner in respect of the redacted attachments.

[11] The issue of the Federal Court's jurisdiction to review the disclosure of those attachments was raised before the case management judge who deferred it to the application judge.

II. Decision of the Federal Court

[12] Referring to an earlier decision of the Federal Court involving the same parties (*Blank v. Canada (Minister of Justice)*, 2009 FC 1221, 373 F.T.R. 1, at para. 31 (*Blank 2009*)), the Judge found that the jurisprudence had already determined in a satisfactory manner the applicable standard of review with regard to the respondent's decision to refuse to release information pursuant to the application of a discretionary exemption under the Act: correctness for the decision that the withheld information falls within the statutory exemptions and reasonableness for the discretionary decision to refuse to release exempted information.

[13] On the application for judicial review the Judge did not consider two affidavits dated July 11, 2013 and February 28, 2013 which had been filed by the appellant in support of prior interlocutory motions; those affidavits had become spent when the motions were decided and no proper request to introduce them in the record of the current application had been made. In the Judge's view the respondent was entitled to know the case it had to respond to. In addition, the appellant waited until the end of the hearing before requesting leave to file the affidavits, which, in the Judge's opinion, was far too late.

[14] Turning to the question of the Federal Court's jurisdiction to review the attachments, the Judge stressed that the appellant had not asked the Commissioner to review or report on the redaction of those documents. The Judge held that the failure to do so had the effect of barring the appellant from seeking the Federal Court's review because, according to section 41 of the Act, a complaint to the Commissioner is a condition precedent to the Court's jurisdiction.

[15] As for the question of the application of the exemptions pursuant to the Act, the Judge specified that, although the decision under review was the DOJ's, the Commissioner's findings were owed considerable deference given his expertise with respect to access to information. The Commissioner found that the information withheld under subsection 19(1) met the definition of "personal information" and that none of the conditions allowing for the disclosure of personal information contained in subsection 19(2) applied. Having reviewed the redacted documents, the Judge came to the same conclusion.

[16] The Judge also decided, as had the Commissioner, that solicitor-client privilege was correctly claimed and that the DOJ had properly exercised its discretion not to waive the exemption. The Judge highlighted that litigation privilege was still alive in respect of the ongoing civil litigation, as opposed to litigation privilege attached to the criminal proceedings that terminated with the stay of the remaining charges in 2004.

[17] Addressing the appellant's complaint that documents may be missing, the Judge stated that the Federal Court has no jurisdiction to order a more thorough search and disclosure and that he had no reason to believe the integrity of the record had been tampered with.

[18] The Judge then reviewed the exceptions to solicitor-client privilege as stated by the Supreme Court in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319 (*Blank SCC*) and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574 (*Blood Tribe*). After reviewing the documents in question the Judge concluded there was no evidence of abuse of process or similar blameworthy conduct which would vitiate solicitor-client privilege.

[19] Since the Judge found that the non-disclosure was justified by solicitor-client privilege, it was not necessary to deal with the advice, recommendation and consultation exemptions of the Act. In any event, the Judge was satisfied that the records fell within the exemptions claimed and that exempted portions of the record had been severed in a proper manner.

[20] Finally, the Judge fixed and awarded costs payable by the appellant to the respondent in the amount of $7,000 all inclusive.

III. Issues

[21] I agree with the respondent that this appeal raises the five following questions:

A. Did the Judge err by refusing to consider the appellant's two affidavits?

B. Did the Judge err by concluding that the Federal Court lacked jurisdiction to review the redaction of the attachments released by the respondent on August 30, 2010, because there was neither a complaint to, nor a review by, the Commissioner in respect of these redactions?

C. Did the Judge err by concluding that the Federal Court lacked jurisdiction to order a further search?

D. Did the Judge err by deciding that the redacted portions of the record were protected by solicitor-client privilege?

E. Did the Judge err in his award of costs?

IV. Standard of review

[22] In an appeal from an application for judicial review, the task of this Court is to assess whether the Federal Court correctly selected the standard of review and then properly applied it: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 47; *Erasmo v. Canada (Attorney General)*, 2015 FCA 129, [2015] F.C.J. No. 638, at para. 25.

[23] Contrary to the respondent's submission, this Court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard: *Telfer v. Canada Revenue Agency*, 2009 FCA 23, [2009] F.C.J. No. 71, at para. 18 (*Telfer*). On the contrary, the Supreme Court has held that a court sitting in appeal of a lower court's judgment on an application for judicial review of an administrative decision should "step [...] into the shoes" of the lower court and review for itself the administrative decision on the correct standard of review: *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610, at para. 14, cited in *Merck Frosst Canada Ltd v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247; see also *Telfer*, at para. 18.

[24] When reviewing a decision to withhold information pursuant to section 23 of the Act, it is well established that two standards of review must be applied as two separate determinations must be made: correctness for the decision that the withheld information falls within the statutory exemption, and reasonableness for the discretionary decision to refuse to release exempted information: see *Blank 2009,* at paras. 27-31; *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C.R. 421, at para. 47. The Judge correctly identified those standards of review at paragraph 27 of his reasons, and the appellant has not challenged that portion of his decision.

[25] As for the other issues raised in this appeal, they pertain to decisions made by the Judge himself and not to his review of decisions made by the respondent. Accordingly, the applicable standard of review for those issues is the appellate standard of review stated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Therefore, to succeed on this appeal the appellant must persuade us that the Federal Court erred on a pure question of law or on a question of law that can be extracted from a question of mixed fact and law. In the absence of this sort of legal error the appellant can succeed only if he demonstrates palpable and overriding error.

V. Analysis

A. Did the Judge err by refusing to consider the appellant's two affidavits?

[26] The appellant stresses that he is a lay person, and that many of the documents that would have been introduced in the record as attachments to his affidavits of July 11, 2011, and February 28, 2013, were documents received from the respondent. As a result, they would not have prejudiced the respondent and would have been useful to the Court, as they would have shown that the respondent knowingly withheld relevant records and thus acted in bad faith.

[27] In my view, the appellant has failed to establish an error in the Judge's exercise of discretion. As noted by the Judge, the appellant must be presumed to have some knowledge of the process to be followed as he has filed many applications for judicial review and appeals before the Federal Court and this Court. More importantly, those affidavits had been previously filed by the appellant in support of interlocutory motions before a prothonotary, and these motions had been disposed of at the time of the hearing of the application for judicial review. To that extent, they were spent and did not form part of the appellant's record on the current judicial review application.

[28] Rule 306 of the *Federal Courts Rules*, S.O.R./98-106 makes it clear that affidavits in support of an application for judicial review must be filed within 30 days of the date the notice of application was filed. It is true that with leave of the Court, a party may file additional affidavits. In the case at bar, the Judge refused to grant leave because the request was not timely (it was made on the last day of a two and a half day hearing) and because it would have been procedurally unfair to the respondent who was entitled to know the case he had to respond to. Despite the appellant's assertions to the contrary, I see no reviewable error in the Judge's ruling.

B. Did the Judge err by concluding that the Federal Court lacked jurisdiction to review the redaction of the attachments released by the respondent on August 30, 2010, because there was neither a complaint to, nor a review by, the Commissioner of these redactions?

[29] The Federal Court lacked jurisdiction to conduct a review of the 2010 release because the appellant had not previously made a complaint to the Commissioner about the release as referenced by section 41 of the Act:

Review by Federal Court	**Révision par la Cour fédérale**
41 Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.	41 La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.
(emphasis added)	(soulignement ajouté)

[30] The case law has made it abundantly clear that a complaint to and a report from the Commissioner is a prerequisite before the Federal Court can rule upon the application of any exemption or exclusion claimed under the Act: see *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [1999] F.C.J. No. 522, 240 N.R. 244, at para. 27; *Statham v. Canadian Broadcasting Corp.*, 2010 FCA 315, [2012] 2 F.C.R. 421, at para. 55. As stated by my colleague Justice Stratas in *Whitty v. Canada (Attorney General)*, 2014 FCA 30, 460 N.R. 372, at para. 8, this requirement is a statutory expression of the common law doctrine that all adequate and alternative remedies must be pursued before resorting to an application for judicial review, barring exceptional circumstances.

[31] In the case at bar, not only has the appellant not filed a complaint with the Commissioner with respect to the additional 111 pages disclosed to him on August 30, 2010, but he took this course of action with his eyes wide open. As mentioned by the Judge, the appellant was advised by the respondent that this was contrary to section 41 of the Act, but he nevertheless chose not to avail himself of his right to file a complaint. He must now bear the consequences. The independent review of complaints by the Commissioner is a cornerstone of the statutory scheme put in place by Parliament, and the Federal Court is entitled to the considerable expertise and knowledge of that officer of Parliament before reviewing the government's assertions of exemptions and redactions of documents. I agree with the Judge, therefore, that the appellant could not unilaterally ignore this requirement and come directly to the Court.

[32] It is no excuse to assert that the respondent breached its duty to act in good faith by failing to make a complete and timely response to the appellant's access request, and that the attachments should have been caught by the initial access request made by the appellant. There is, indeed, some evidence that the respondent knew about the missing attachments as early as February 22, 2007 and acknowledged that they were relevant to the request (Appeal Book, p. 2135). Whatever the reason for not disclosing them before the filing of the application for judicial review, the fact remains that the records involved (111 pages minus 27 pages that were released in their entirety) were not reviewed by the Commissioner and no determination was made as to whether they were properly redacted. Section 41 of the Act makes it clear that the Federal Court may only review a refusal to access personal information after the matter has been investigated by the Privacy Commissioner. Accordingly, the Judge correctly concluded he was without jurisdiction to review the documents disclosed after the Commissioner's report.

C. Did the Judge err by concluding that the Federal Court lacked jurisdiction to order a further search?

[33] The appellant made allegations before both the Commissioner and the Federal Court that documents may be missing or could have been tampered with. He made this bold statement on the basis that the attachments were originally withheld from him, and that some documents were "sanitized" when originally disclosed to him so as to hide the icons on the originals that indicated some documents contained attachments. As a result, he asked both the Federal Court and this Court to order "a new and proper search for the records relevant to the request".

[34] Relying on the authorities of *Blank v. Canada (Minister of the Environment)*, [2000] F.C.J. No. 1620, 2000 CanLII 16437 (F.C.T.D.) (*Blank 2000*) and *Blank v. Canada (Minister of Justice)*, 2004 FCA 287, [2005] 1 F.C.R. 403 (*Blank 2004*), the Judge found that the Court had no jurisdiction to make such an order in the absence of any grounds to believe that the integrity of the records had been tampered with. Having carefully read the unredacted version of the documents relied upon by the appellant in support of his allegation that the respondent did not act in good faith, I am unable to find in his favour. While the decision to remove (instead of blacking out) the icons that demonstrated the existence of attachments on some documents may have been ill advised, the record shows that this course of conduct was initially followed on the belief that these attachments were privileged and some icons disclosed privileged information. This record does not establish that the respondent tampered with the documents or tried to evade its obligations under the Act.

[35] As noted by the Court below, the appellant has filed 96 access requests and the DOJ had reviewed 61,312 pages as of January 2010. In that context, it is not surprising that some documents may have been missed in the early stages of the gathering process or been discovered on an ongoing basis. I also note that the appellant has repeatedly asked for a more thorough search and disclosure over the last 15 years on the basis that documents were missing, and that such allegations and requests have been dismissed on every occasion by this Court and the Federal Court: see e.g. *Blank 2000*, at paras. 9, 15 and 19; *Blank 2004*, at paras. 76-77; *Blank v. Canada (Minister of Environment)*, 2006 FC 1253, [2006] F.C.J. No. 1635, at para. 33(g), aff'd 2007 FCA 289, [2007] F.C.J. No. 1218; *Blank v. Canada (Minister of Justice)*, 2015 FC 956, [2015] F.C.J. No. 949, at para. 56 (*Blank 2015*).

[36] Once again, the primary oversight role under the Act remains with the Commissioner. The Federal Court's role is narrowly circumscribed; section 41, when read in conjunction with sections 48 to 49, confines its reviewing authority to the power to order access to a specific record when access has been denied contrary to the Act. Unless Parliament changes the law, it is not for the Court to order and supervise the gathering of the records in the possession of the head of a government institution or to review the manner in which government institutions respond to access requests, except perhaps in the most egregious circumstances of bad faith. On the basis of the confidential record that is before me, I have been unable to find evidence that would lead me to believe, on reasonable grounds, that there has been any attempt to tamper with the integrity of the records. Accordingly, the Judge did not err in concluding that he lacked jurisdiction to order a further search of the records.

D. Did the Judge err by deciding that the redacted portions of the record were protected by solicitor-client privilege?

[37] The appellant argues that the Judge erred in finding that the exempted or redacted portions of the record fell within the solicitor-client exemption set out in section 23 of the Act for two reasons. First, the privilege was spent since these documents were created for the dominant purpose of the criminal proceedings and these proceedings have been stayed. Second, the appellant contends that the privilege has been vitiated by an abuse of process to the extent that the Crown agent made an inappropriate offer to withdraw the charges in the criminal proceedings in exchange for a withdrawal of the civil liability claims.

[38] Solicitor-client privilege has evolved over time from a rule of evidence to a rule of substantive law: *Descôteaux et al. v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, 141 D.L.R. (3d) 590 (*Descôteaux*). The rule has even been held to be "a fundamental civil and legal right" (*Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821 at p. 839, 105 D.L.R. (3d) 745 (*Solosky*)), and Chief Justice Lamer went as far as saying that "the relationship and the communications between solicitor and client are essential to the effective operation of the legal system" (*R. v. Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263 at p. 289, [1991] 6 W.W.R. 673).

[39] Solicitor-client privilege breaks down into two different privileges each with a distinct rationale, scope and duration. Professor Sharpe (as he then was) has captured the differences between litigation privilege and solicitor-client privilege:

It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

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

[R.J. Sharpe, "Claiming Privilege in the Discovery Process", in *Law in Transition: Evidence – Special Lectures of the Law Society of Upper Canada* (Don Mills, Ont.: Richard De Boo, 1984) at pp. 164-165, quoted in *Blank SCC*, at para. 28.]

[40] Even though litigation privilege is not explicitly included in section 23 of the Act, the Supreme Court has confirmed in *Blank SCC* that the phrase "solicitor-client privilege" in that section must be taken as a reference to both legal advice privilege and litigation privilege (*Blank SCC*, at paras. 3-4). That being said, the Supreme Court also made it clear that litigation privilege attaches to documents created for the dominant purpose of litigation and expires when the litigation ends (see *Blank SCC*, at paras. 35-37, 58-60). In this regard, the Supreme Court has cautioned that litigation should be defined broadly to include "separate proceedings that involve the same or related parties and arise from the same or a related cause of action" (*Blank SCC*, at paras. 38-39). Nonetheless, criminal prosecutions and civil lawsuits spring from two different juridical sources and are, to this end, unrelated (*Blank SCC*, at para. 43).

[41] In the case at bar, exemptions are claimed on the basis of both legal advice and litigation privilege. The majority of the withheld records (or portions thereof) are communications either to or from counsel with the DOJ or the law firm defending the appellant's civil claim which discuss the civil litigation. This should come as no surprise, considering the wording of the appellant's access request. Since that civil lawsuit is currently before the Manitoba Court of Queen's Bench against the respondent, her employees and agents, the litigation is still alive and litigation privilege still exists and applies.

[42] Some of the records were created in the course of the prosecution but they are intertwined with discussions of the civil claim. Again, this is to be expected since the civil claim was commenced two years before the prosecution was stayed. It follows that these records are also protected from disclosure by litigation privilege. Only a few of the documents relate exclusively to the criminal prosecution and deal with the decision to stay the charges. These documents are discussed below.

[43] Accordingly, I agree with the Judge that the exemptions claimed under section 23 were correctly invoked and that the DOJ reasonably exercised its discretion not to disclose the withheld portions of the record. Contrary to the situation considered by the Supreme Court in *Blank SCC*, the litigation at issue here is not the criminal prosecution, but the civil claim before the Manitoba courts. Since that litigation is still outstanding, litigation privilege still applies.

> [44] As for the few documents pertaining exclusively to the criminal prosecution, notwithstanding the expiry of litigation privilege, these documents are nevertheless protected from disclosure by legal advice privilege. Four conditions must be met for a document (or a portion thereof) to be considered as legal advice giving rise to the privilege: 1) there must be a communication; 2) made in confidence; 3) with a professional legal advisor; 4) for the purpose of giving and receiving legal advice: see *Descôteaux*, at pp. 873-874; *Solosky*, at p. 837; *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, at para. 49, 171 D.L.R. (4th) 193 (*R. v. Campbell*).

[45] My careful review of the unredacted material has convinced me that all of the impugned records that relate exclusively to the criminal prosecution meet these four conditions. All of these records are letters, memoranda and e-mail communications that contain or refer to legal advice between government lawyers, Crown agents and departmental officials. As such, they fall within the ambit of legal advice privilege, which is permanent in duration.

[46] It is also necessary to consider the extent to which legal advice privilege attaches to the advice provided by government lawyers.

[47] In the seminal case of *R. v. Campbell*, the Supreme Court held that the privilege will arise when in-house government lawyers provide legal advice to their client, in that case the Royal Canadian Mounted Police. The Court went on to add, however, that the privilege will not protect policy advice given outside the realm of their legal responsibilities. As the Court stated, "[w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered": *R. v. Campbell*, at para. 50; see also *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809.

[48] At the core of the impugned records is a memorandum written by a counsel from the FPS which dealt with the issue of whether to stay the criminal charges against Mr. Blank and his corporation. That memorandum was distributed among senior officials of the FPS and underwent a series of iterations. Then counsel within the Legal Services Unit (LSU) of Environment Canada were provided a version of that memorandum for comment. Since the appellant was charged with offences under the *Fisheries Act*, it would be reasonable for the FPS to seek input from and dialogue with that department before coming to any final decision. In response, the LSU prepared a memorandum for the FPS, notifying them of the department's views with respect to the proposed course of action. These two memoranda contain, at least in part, legal rationales outlining why a stay of proceedings was or was not warranted in the circumstances. Eventually, a revised finalized memorandum was forwarded to the Acting Senior General Counsel, Director, Criminal Law Section.

[49] In my view, these communications are protected by legal advice privilege. This is particularly the case in respect of the communications between Crown counsel from the FPS and the LSU at the Department of Environment. These communications clearly meet all the criteria developed in *Descôteaux*. They offered a confidential legal opinion regarding the ongoing prosecution, as evidenced by the fact that the opinion cited case law and legislation and outlined whether a stay was warranted. Indeed, the response from the LSU includes a statement that the e-mail is "protected by solicitor-client privilege" and is "limited to the Department of justice only". Moreover, the relationship between the FPS and Environment Canada is akin to a solicitor-client relationship. These communications related to legal advice provided by lawyers in one government department to lawyers working in another as part of the ongoing dialogue relating to the existing criminal charges. As such, they are cloaked by solicitor-client privilege and were appropriately withheld from the appellant.

[50] I believe the final version of the memorandum from Crown counsel to the Acting Senior General Counsel, Director, Criminal Law Section with respect to the issue of staying the charges is also covered by legal advice privilege. As previously mentioned, whether or not legal advice privilege attaches in the context of government lawyers giving advice as part of their responsibilities depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[51] Pursuant to section 579 of the *Criminal Code*, R.S.C. 1985, c. C-46, "[t]he Attorney General or counsel instructed by him for that purpose" may direct a stay of proceeding at any time before a judgment is rendered. It is not entirely clear from the record who had the delegated authority to make that decision on behalf of the Attorney General at the relevant period of time. Whether it was the Acting

Senior General Counsel, Director, Criminal Law Section, the Assistant Deputy Attorney General or another senior official, a decision to stay a proceeding, just as a decision to prefer an indictment or to appeal, involves numerous considerations that are often of a different magnitude than the decision to lay charges.

[52] When legal advice is sought and obtained in this context a solicitor-client relationship between a Crown prosecutor and the Attorney General or his delegate exists. Before exercising his statutory duty, the Attorney General or his delegate is entitled to receive legal advice; indeed, a minister of the Crown is no less entitled to legal advice when performing his functions than any private litigant. As Justice Brennan of the Australian High Court wrote in *Waterford v. Australia* (1987), 163 C.L.R. 54 (H.C.A.), at pages 74 to 75, as cited in *R. v. Ahmad* (2008), 2008 CanLII 27470 (ON SC), 77 W.C.B. (2d) 804, 59 C.R. (6) 308 (Ont. S.C.) (*R. v. Ahmad*):

... I should think that the public interest is truly served by according legal professional privilege to communications brought into existence by a government department for the purpose of seeking or giving legal advice as to the nature, extent and the manner in which the powers, functions and duties of government officers are required to be exercised or performed. If the repository of the power does not know the nature or extent of the power or if he does not appreciate the legal restraints on the manner in which he is required to exercise it, there is a significant risk that a purported exercise of the power will miscarry. The same may be said of the performance of functions and duties. The public interest in minimizing the risk by encouraging resort to legal advice is greater, perhaps, than the public interest in minimizing the risk that individuals may act without proper appreciation of their legal rights and obligations. In the case of governments no less than in the case of individuals, legal professional privilege tends to enhance the application of the law, and the public has a substantial interest in the maintenance of the rule of law over public administration. Provided the sole purpose for which the document is brought into existence is the seeking or giving of legal advice as to the performance of a statutory power or the performance of a statutory function or duty, there is no reason why it should not be the subject of legal professional privilege. (emphasis added)

[53] Having reviewed the context of the memorandum, I am satisfied that it meets all of the factors required for solicitor-client privilege to apply. It is a communication made in confidence by counsel with the purpose of providing legal advice to the respondent. It is not a communication meant to secure the consent for a particular course of action, but a genuine recommendation of a legal nature. In that respect, it is of the same nature as a memorandum from a Crown counsel to the Attorney General or his delegate advising as to whether an indictment should be preferred (*R. v. Ahmad* and *R. v. Chan*, 2003 ABQB 169, 172 C.C.C. (3d) 349) or as to the merit of an appeal (*Samaroo v. Canada Revenue Agency*, 2014 BCSC 1349, [2014] B.C.J. No. 1879). The fact that the memorandum was drafted by the Crown counsel in charge of the file, in consultation with other prosecutors, does not disqualify it from being in the nature of legal advice. As the High Court of Ontario found in *R. v. Ahmad*, Crown counsel can wear two hats: while intimately connected with the prosecution, they are also the lawyers best situated to provide legal advice on the file.

[54] The content of the memorandum, particularly when seen in the context of the circumstances in which it was created, demonstrates that the memorandum was a confidential communication. The surrounding circumstances that, together with the content of the memorandum, support an inference of confidentiality include the complex nature of the prosecution with its attendant unique procedural history, the publicity surrounding the case and the pending civil action proceeding against the respondent and certain of her employees and agents.

[55] I am mindful of the decision rendered by the British Columbia Court of Appeal in *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337, [2009] B.C.J. No. 1469, where it was decided that communications between Crown counsel about charging decisions were not protected by legal advice privilege because they are not made within any solicitor-client relationship. That situation, however, can be distinguished from the case at bar. When exercising his or her discretion to lay charges, Crown counsel may consult with colleagues but ultimately makes his or her own independent decision. The advice that may be sought from other prosecutors or counsel is not that of a client *vis-à-vis* another lawyer. As noted by the British Columbia Court of Appeal, the mere fact that the Attorney General or his delegates can review a subordinate's decision and override it, is not sufficient to convert such a decision into legal advice. The Court was keen to acknowledge, however, that solicitor-client privilege may apply in other situations where Crown counsel genuinely give advice:

[107] This conclusion should also not be taken as suggesting Crown counsel can never claim privilege. Outside of the charge approval process, Crown counsel may well take legal advice from other Crown counsel or from independent solicitors. Such communications will be subject to solicitor-client privilege. Even within the charge approval process, there may be unusual situations in which the Attorney General, Deputy Attorney General, Assistant Deputy Attorney General or an individual Crown counsel seeks legal advice on the limits of his or her jurisdiction under the *Crown Counsel Act*. In such instances, the advice would be taken within a solicitor-client relationship, and would be the subject of privilege.

[56] In my view, the decision to stay a prosecution of such a sensitive nature as the one considered here was not of the same nature as the run-of-the-mill charging decision made by Crown counsel in the exercise of his or her prosecutorial discretion, and was at the very least one of those unusual situations contemplated by the British Columbia Court of Appeal in the above quoted paragraph. The memorandum at issue here was clearly drafted as a recommendation and the Attorney General or his delegate was entitled to such recommendation before exercising his statutory duty under section 579 of the *Criminal Code*. As a result, I find that it was cloaked in solicitor-client privilege.

[57] The only question left to be decided, therefore, is whether solicitor-client privilege that attaches to the impugned records has been vitiated by an abuse of process. In its earlier decision involving the appellant, the Supreme Court explicitly dealt with that possibility:

The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.

Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.

[*Blank SCC*, at paras. 44-45.]

[58] In a subsequent decision, the Supreme Court appears to have somewhat narrowed the exceptions to solicitor-client privilege (at least in the context of the legal advice branch of that privilege) to those communications that are "criminal in themselves or intended to further criminal purposes". The Court went on to state that "[t]he extremely limited nature of the exception emphasizes, rather than dilutes, the paramountcy of the general rule whereby solicitor-client privilege is created and maintained 'as close to absolute as possible to ensure public confidence and retain relevance'" (*Blood Tribe*, at para. 10, citing *R. v. McClure*, 2001 SCC 14 [2001] 1 S.C.R. 445, at para. 35).

[59] The appellant argued before the Judge and before this Court that the privilege is being used to conceal the blameworthy conduct of the Crown and the inappropriateness of the Crown agent's offer to withdraw the charges in the criminal proceedings in exchange for a waiver of civil liability. The onus was obviously on the appellant to demonstrate a basis for this allegation: see *Blank v. Canada (Minister of the Environment)*, 2007 FCA 289, 368 N.R. 279, at para. 10. After reviewing the confidential record, the Judge was unable to find any evidence of abuse of process, improper conduct or of communications "criminal in themselves or intended to further criminal purposes".

[60] Following the decision of the Supreme Court in *Blood Tribe,* this Court and the Federal Court have repeatedly found that blameworthy conduct or abuse of process is not sufficient to lift solicitor-client privilege: see *Blank v. Canada (Minister of Justice)*, 2010 FCA 183, 409 N.R. 152, at para. 20; *Blank v. Canada (Minister of Justice)*, 2015 FC 460, [2015] F.C.J. No. 441, at para. 14; *Blank v. Canada (Minister of the Environment)*, 2015 FC 1251, [2015] F.C.J. No. 1299; *Blank 2015,* at paras. 52-53. After having carefully reviewed the impugned documents, I have been unable to find any communication that can properly be characterized as "criminal in themselves or intended to further criminal purposes". Further, the Judge did not err in finding that the evidence does not disclose any misconduct or attempted cover up of blameworthy conduct or abuse of process.

[61] For all of the foregoing reasons, I am therefore of the view that the redacted portions of the record were protected by solicitor-client privilege and that the Judge did not err in so finding.

E. Did the Judge err in his award of costs?

[62] The appellant submits that the Judge erred in law by not recognizing that an award of costs of $7,000 would act as a deterrent to citizens who desire to exercise their right for an independent review of a refusal by the Government to disclose records. He also suggests that an award of costs could have been made in his favour, pursuant to subsection 53(2) of the Act, in light of the fact that he raised an important new principle.

[63] It is well established that cost awards are quintessentially discretionary and should only be set aside on appeal if the court below has made an error in principle or if the costs award is plainly wrong: *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 247.

[64] Subsection 53(2) of the Act does contemplate an award of costs to an unsuccessful applicant where the Court is of the opinion that the application raises an important new principle in relation to the Act. The Judge noted, however, that the application concerned the same core argument that had been raised in numerous cases before this Court and the Federal Court, namely that solicitor-client privilege is being used to shield disclosure of evidence of misconduct. As for subsection 4(2.1) of the Act, which speaks to the increased responsibility of government institutions to assist the person making an access request and to respond accurately, completely and in a timely fashion, I agree with the respondent that it does not expand the scope of a section 41 application. As a result, the Judge could rely on subsection 53(1) of the Act to order that costs follow the event.

[65] Bearing in mind that the application of the default tariff would have entailed an award of costs to the respondent in the amount of $20,790 exclusive of disbursements, and considering the seriousness of the allegations made by the appellant and their rejection by the Court as well as the time and complexity involved, the Judge's exercise of discretion in awarding costs in the amount of $7,000 was neither plainly wrong nor an error in principle. There is therefore no justification to vary his order in that respect.

VI. Conclusion

[66] For these reasons, I am of the view that this appeal should be dismissed with costs in the amount of $2,000 (all inclusive) in favour of the respondent.

"Yves de Montigny"

J.A.

"I agree

Eleanor R. Dawson J.A."

"I agree

C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

Docket: A-378-15

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CONCURRED IN BY:	DAWSON J.A.
	RYER J.A.
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