

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN TRANSPORTATION AGENCY

Intervener

**WRITTEN REPRESENTATIONS OF THE INTERVENER,
CANADIAN TRANSPORTATION AGENCY**

(Pursuant to January 26, 2022 Direction of Justice Gleason)

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PART I – OVERVIEW & STATEMENT OF FACTS

Overview

1. In this judicial review proceeding, the Canadian Transportation Agency ("Agency") has disclosed material in its possession to the Applicant, as required by an order of this Court dated October 15, 2021 ("Order").¹ That Order was made pursuant to Rule 318 of the *Federal Courts Rules*.
2. In the month following this disclosure, the Applicant and its counsel have sent five letters seeking more documents. The Agency has communicated that, having searched extensively, it has not found such documents or that some documents are beyond the Order's scope. The Applicant has now filed a motion seeking the production of 21 documents or categories of documents. It erroneously claims that these documents should have been disclosed and that

¹ *Air Passenger Rights v Canada (Attorney General)*, [2021 FCA 201](#) [October 2021 Court Order].

the Agency has withheld them.

3. The Applicant does not specify the rule under which it seeks an order for production and accordingly, the Agency submits that the motion should be considered under Rule 318 of the *Federal Courts Rules* and the principles applicable thereto.
4. In making its claims, the Applicant ignores three considerations applicable to the Order and to tribunal disclosure under Rule 318.
5. First, the Agency was only required to produce the documents that come within the Order's scope. In doing so, the Agency was required to search for and disclose responsive documents falling into the categories described in the Order.
6. Second, the Agency cannot produce documents that are not in its possession. The Agency cannot disclose documents that never existed, no longer exist or are not otherwise within its possession.
7. And third, Rule 318 does not serve the same purpose as document discovery. Tribunal disclosure does not entitle the Applicant to conduct a fishing expedition or to require the Agency to perform endless searches.
8. The Agency herein provides its response to each item the Applicant seeks to obtain. The Agency is providing a fresh version of one document that was previously disclosed (Item A4 in Schedule "A" of the Applicant's motion). The Agency submits that it cannot be required to produce non-responsive documents or documents it does not possess. Accordingly, the Agency submits that the motion for production should be dismissed. That said, the Agency remains committed to ensuring compliance with the Order or any future order for production this Court may make.

Background and Facts

9. On March 25, 2020, the Agency posted a statement on its website entitled the "Statement on Vouchers" ("Statement"). The Applicant has sought judicial review of the Statement and claims that the issuance, distribution and subsequent referencing of the website statement and information page (collectively referred to as "the publications") raise a reasonable

apprehension of bias and/or are contrary to the Agency's *Code of Conduct for Members of the Agency* ("*Code of Conduct*")² for the Agency or the members who supported the publications. The Application also claims that the members have exceeded or lost jurisdiction to hear any future complaints of passengers about refunds from air carriers related to the COVID-19 pandemic.

10. Several interlocutory rulings have been made in this proceeding. For present purposes, two are significant. First, in rejecting the Applicant's motion for an interlocutory injunction, Justice MacTavish found that the Statement does not affect rights, impose legal obligations or cause prejudicial effects.³ Second, in considering a motion to dismiss, Justice Webb ruled that the reasonable apprehension of bias claim would be heard on its merits.⁴ The proceeding continues on this basis.

11. On January 4, 2021, the Applicant filed a motion seeking the disclosure of the following documents pursuant to Rule 318 or Rule 41 of the *Federal Courts Rules*:

Complete and unredacted copies of all records from March 9 – April 8, 2020 in respect of the Publications, including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos.

12. In the Order, Justice Gleason granted this motion in part and required the Agency to disclose documents sent to or from a member of the CTA, related to a meeting attended by CTA members or sent to or from a third party concerning the impugned statement between March 9 and March 25, 2020. Documents post-dating the Statement's publication, purely internal documents not shared with Agency members, and privileged documents were not subject to disclosure.

13. After the Order issued, it rested with the Agency to search for and identify responsive documents and to disclose only these.

² *Code of Conduct for Members of the Agency*, Exhibit D of the affidavit of Gábor Lukács, affirmed January 16, 2022, Motion Record of the Applicant dated January 17, 2022, Volume 1, Tab 2D at 50 [*Code of Conduct*].

³ *Air Passengers Rights v Canada (Transportation Agency)*, [2020 FCA 92](#) at paras [20](#), [27](#) (Leave to Appeal to the Supreme Court of Canada refused: *Air Passenger Rights v Canadian Transportation Agency*, [2020 CanLII 102983 \(SCC\)](#)).

⁴ *Air Passenger Rights v Canada (Transportation Agency)*, [2020 FCA 155](#) at paras [32-34](#).

14. The Agency disclosed approximately 160 pages of responsive correspondence, drafts and meeting documents in its possession on December 14, 2021 and one further document on December 24, 2021. By December 17, the Applicant had produced a list of alleged deficiencies in the disclosure package and by December 20, it was employing the language of contempt of court against the Agency and its personnel. The Agency responded to these and other communications and in doing so, it provided a new document as well as different versions of disclosed documents to show the author of changes made to drafts; it explained that it had searched for but not found documents sought; and it indicated that certain documents were outside the Order's scope.⁵ By January 17, 2022, the Applicant filed a contempt motion against the Agency and its personnel in connection with this disclosure. The Court has now ordered that the Applicant's motion be bifurcated and that only the portion seeking document production be pursued at this time.
15. The Agency has informed the Applicant that the disclosure package was the result of several searches; consultations with several persons within the Agency; and a review of thousands of pages of material.⁶ The Applicant does not dispute the adequacy of the search but instead makes unsupported claims, based on speculation, that the Agency possesses and is withholding further documents.

PART II – STATEMENT OF THE POINTS IN ISSUE

16. The issue to be decided is whether this Court should order the Agency to produce the items identified in Schedule "A" of the Notice of Motion.⁷

PART III – STATEMENT OF SUBMISSIONS

17. The Agency submits that it has disclosed the responsive documents in its possession, as required by the Order. Accordingly, the Agency submits that it should not be required to

⁵ Exhibits AO to AV of the affidavit of Gabor Lukacs, affirmed on January 16, 2022, Motion Record of the Applicant dated January 17, 2022, Volume 1, Tab 2AO to 2AV at 186 to 243.

⁶ Exhibit AQ of the affidavit of Gabor Lukacs, affirmed on January 16, 2022, Motion Record of the Applicant dated January 17, 2022, Volume 1, Tab 2AQ at 204.

⁷ Schedule "A" of the Notice of Motion, Motion Record of the Applicant dated January 17, 2022, Volume 1, Tab 1 at 9-13 [*Withheld Materials*].

produce further documents.

18. In these submissions, the Agency outlines the documents it does and does not have in its possession and the reasons why certain documents were determined to be outside the scope of the Order.
19. The Agency submits that this motion should be considered in light of the principles applicable to disclosure under Rules 317 and 318 of the *Federal Courts Rules*. Specifically, disclosure of material in the possession of a tribunal does not serve the same purpose as document discovery; it forms part of judicial review proceedings, which are meant to be summary in nature.⁸ Courts have held that the rules around disclosure of a tribunal's record "do not permit a party to ask the tribunal to prepare new documents or to do research in existing documents, any more than they permit a party to obtain existing documents from the tribunal which are in no way related to the impugned decision."⁹
20. In considering whether further document production is warranted in this case, the Agency submits that three considerations apply. First, the Agency is not required to disclose documents that are beyond the Order's scope. Second, the Agency cannot be required to produce documents that are not in its possession. And third, the Agency's obligation to disclose its record should not be conflated with the process of document discovery.

The Agency is not required to disclose documents that are beyond the Order's scope

21. The Order identified three categories of documents for disclosure, as opposed to a specific list of identifiable documents to produce. As a result, the obligation rested with the Agency to search its records, and to identify and disclose responsive documents based on its reading of the Order's scope.
22. The Applicant now speculates that there must be additional responsive documents that have been withheld. This is not the case. The Agency was required by the terms of the Order to produce documents that are responsive. The Order did not require the Agency to provide

⁸ *Access Information Agency Inc. v Canada (Attorney General)*, [2007 FCA 224](#) at para [20](#) [*AIA v Canada*].

⁹ *Hiebert v Canada (Acting/assistant Commissioner, Corporate Development, Correctional Service)*, [1999 CanLII 9184 \(FC\)](#) at para [11](#), citing *Quebec Port Terminals Inc. v Canada (Labour Relations Board)* (1993), 164 NR 60.

explanations for documents that were not produced. It did not require the Agency to produce documents to prove that they are not responsive.

23. The Applicant now also claims an entitlement to certain documents that it did not seek in its disclosure motion and that do not fall within the Order's scope. The Agency submits that to the extent that a debate exists as to the scope of the Order, it cannot be said that the Agency has wrongly withheld documents from disclosure.

24. The Agency submits that it should not be required to produce further documents not required by the Order, nor should it be required to produce documents to prove that they do not come within the Order's scope.

The Agency cannot be required to produce documents that are not in its possession

25. Rules 317 and 318 apply to material that is "in the possession of a tribunal." The Agency cannot produce documents that never existed, no longer exist or are not in its possession.

26. By its nature, the Order did not determine the existence or non-existence of any specific document. The Agency submits that a party claiming the existence of a document that has not been disclosed under Rule 318 must provide persuasive evidence of its existence. It cannot rely on speculation or guesswork. The burden does not lie on the responding party to provide evidence to counter the moving party's claims. The Federal Court's findings in the context of document discovery are apposite here:

[33] With respect to the requirement on the moving party to demonstrate that further documents likely exist, the moving party must have some persuasive evidence that documents are available and have not been produced, rather than mere speculation, intuition or guesswork: *Havana House Cigar & Tobacco Merchants Ltd et al v Naeini* (1998), [1998 CanLII 7605](#) (FC), 80 CPR (3d) 132 at para 19. The Defendants were under no obligation to provide their own evidence to be considered by the Court in contrast to that of the Plaintiff. The burden was on him to make his case.¹⁰

27. In this case, the Applicant has combed through the disclosure package and now speculates that certain documents must exist and that the Agency has withheld them. The Applicant

¹⁰ *Paid Search Engine Tools, LLC v Google Canada Corporation*, [2021 FC 515](#) at para 14, citing *Hutton v Sayat*, [2020 FC 1183](#) at para 33.

leaves no room for the possibility that documents may not have been produced, that documents may have been deleted, or that documents may not be in the Agency's possession.

28. The Agency cannot disclose any documents that it does not possess. Moreover, the Agency submits that where, as here, the existence of documents is speculative, the Agency should not be required to provide evidence to prove their non-existence.

The Agency's disclosure obligation should not be conflated with document discovery

29. The Applicant has crossed the line from disclosure under Rule 318 into an attempt at document discovery. Tribunal disclosure does not produce the same results as discovery and "does not require a tribunal (by contrast to a respondent in an action) to engage in an extended and exhaustive search for material whose relevance may at best be marginal and whose selection will necessarily involve an exercise of judgment."¹¹

30. Since receiving the disclosure package, the Applicant has made rolling demands for documents and now raises the specter of contempt of court. In many instances, the Applicant demands new categories of documents or has particularized its document request to a point that extends beyond what it originally sought. In doing so, the Applicant has effectively required the Agency to continuously scour its records for an expanding list of documents whose existence and relevance cannot be assumed. The Agency submits that this cannot be the intent of Rule 318 or the Order.

31. In light of the above, the Agency respectfully submits that it should not be required to produce the documents outlined below on the basis that they are not responsive to the Order or they do not exist. For ease of reference, the Agency has organized its submissions, as much as possible, along the lines of the items outlined in Schedule A to the Applicant's motion.

¹¹ *AIA v Canada*, *supra* note 8 at para 17, citing *Atlantic Prudence Fund Corp. v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No. 1156 at para 11.

Agency responses to items listed in Schedule A of Applicant's motion

CATEGORY A: CTA Member correspondences

A1: Original Microsoft Word files for the Statement (original version of Statement and drafts thereof between March 9 and March 25, 2020)¹²

A5: Original Microsoft Word file(s) for a draft response to media¹³

32. Having received the disclosure package, the Applicant has now requested the original Microsoft Word files for various draft documents that the Agency disclosed in pdf format. The Applicant's stated purpose is to verify the metadata to, among other things, establish authorship.
33. The Agency submits that it was not required by the terms of the Order to provide original Microsoft Word files for any of the documents now requested by the Applicant. The Order simply required the Agency to disclose "documents" and to do so "electronically". The Agency submits that the Order must be read in light of Rule 318 and the Applicant's own motion for disclosure under that Rule.
34. Rule 318 contemplates the disclosure of certified copies of materials. It alternatively calls for the transmission of original material "where the material cannot be reproduced".¹⁴ The Court may order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.¹⁵ In this case, the Court did not specify that original material was required to be transmitted. Because the transmission of original material is treated as an alternative when it is not possible to provide copies, the Agency submits that it was not required to provide original Microsoft Word files in order to comply with the Order.
35. What is more, up until now, the Applicant has sought copies of documents in its disclosure requests. In its Notice of Application for judicial review, the Applicant sought "a certified copy" of Agency material. In its Notice of Motion under Rules 318 or 41 of the *Federal Courts Rules*, the Applicant requested "complete and unredacted copies" of documents,

¹² Written representations of the Moving Party, Motion Record of Applicant dated January 17, 2022, Volume 1, Tab 6 at 304 at para 34 [*Applicant's Written Reps*].

¹³ *Ibid* at 308 at paras 50-51.

¹⁴ See s [318\(1\)](#) of the *Federal Courts Rules*.

¹⁵ See s [318\(4\)](#) of the *Federal Courts Rules*.

including "draft documents." In light of this, it cannot be assumed that the Applicant was seeking a Court order for the production of original versions of documents.

36. The Agency submits that the Applicant has not established that obtaining original versions of documents to determine authorship is relevant to its grounds of judicial review. The Applicant could have argued that disclosure of the original versions of drafts was relevant when it made its motion for disclosure. The relevance of original versions would have been debated in that context. The Agency submits that the Applicant cannot now demand these documents under the guise that the Order required their disclosure.
37. Moreover, the demand for original versions to conduct metadata analysis is inconsistent with the purpose of judicial review proceedings, which are intended to be summary in nature. In light of this, it cannot be assumed that the Order required the disclosure of original documents in order to allow for a debate on metadata. This line of inquiry would entail additional evidentiary and procedural steps that are not contemplated in these types of proceedings.
38. Accordingly, the Agency submits that it is not required to produce original Microsoft Word versions of documents.

A2. Documents regarding the Statement on Vouchers on March 23, 2020¹⁶ and

A3. Documents regarding the Statement on Vouchers on March 24, 2020.¹⁷

39. The Applicant seeks to recreate the chain of events to explain why the Statement was published on March 25, 2020 when the then-Chairperson wanted to publish it on the 23rd and then 24th.
40. Relying on a perceived absence of updates to the then-Chairperson on the status of the Statement on March 23 and 24, the Applicant wrongly infers that documents related to this have been created, retained and withheld. The Applicant reasons that the disclosed documents show that the then-Chairperson wanted the Statement to be published on March 23, that it was not published on that date, and that the then-Chairperson knew that it had not

¹⁶ *Applicant's Written Reps*, *supra* note 12 at 305-306 at paras 41-43.

¹⁷ *Ibid* at 308 at paras 52-53.

been published. A similar situation transpired on March 24. The Applicant insists that written updates must exist which would have informed the then-Chairperson of the status of the Statement, given that Agency personnel were working from home at the time.

41. The Agency submits that the Applicant has provided no persuasive evidence that the documents sought exist. The claim that updates to any person are necessarily made in writing is plainly speculative.
42. The Agency further submits that the Applicant has not shown how recreating status updates to the then-Chairperson is relevant to its grounds of review. The Applicant appears to be searching for these documents in hopes of establishing their relevance, and requiring the Agency to conduct an exhaustive search more consistent with document discovery than tribunal disclosure.
43. That said, having thoroughly searched its records, the Agency has concluded that it does not possess any additional documents in relation these items beyond what has already been disclosed. The Agency cannot therefore produce further documents.

A4 Documents regarding the announcement of the Statement to third-parties (draft message to stakeholders)¹⁸

44. The Applicant claims that the Agency has tampered with a copy of an e-mail that it disclosed by removing the sender and recipient information. There is no basis at all for this claim. The document appears as it does because of the process of converting the e-mail to pdf format for the purposes of disclosure.
45. The Agency is providing a fresh version of the document with these materials. The Agency acknowledges that the document that was certified as a true copy was imperfect but submits that this was inadvertent and should not be regarded as improper. Under Rule 318, tribunals are only required to transmit certified copies to the Registry; they are not required to file certified copies with the Court. Certification in this context is designed to allow the Registry to authenticate that materials in the parties' records are in fact those that were supplied by

¹⁸ Applicant's Written Repts, *supra* note 12 at 306-307 at paras 45-46.

the decision-maker.¹⁹ The Agency submits that the certification of this imperfect version was not intentional or done for an improper purpose, and asks that the Court accept the fresh version so that it may be treated as part of the tribunal record.

A6. Ms. Jones' Draft FAQs about the Statement on Vouchers of March 24, 2020²⁰

46. The Applicant seeks to recreate the chain of events to explain how a draft document containing responses to frequently asked questions ended up in an Agency member's hands on March 24, 2020. The Applicant speculates that the Agency possesses, has retained, and is withholding further responsive documents that would answer this question.

47. The Agency notes that the Applicant has not shown how recreating the circumstances in which an Agency member obtained this draft is relevant to its grounds of review. The Applicant appears to be searching for these documents in hopes of establishing their relevance, and requiring the Agency to conduct an exhaustive search more consistent with document discovery than tribunal disclosure.

48. That said, having thoroughly searched its records, the Agency has produced all responsive documents in its possession in relation to this item. The Agency therefore cannot be required to produce further documents.

CATEGORY B: Third Party Correspondence

B1. Original Email Announcing the Statement on Vouchers sent by Ms. Marcia Jones on March 25, 2020.²¹

B2. Original Email from Transport Canada on March 18, 2020 from Mr. Colin Stacey at Transport Canada to Ms. Marcia Jones on March 25, 2020²²

49. The Applicant rightly claims that there must have been original e-mails from Agency staff person Marcia Jones and from a third party, Colin Stacey, on March 25, 2020. There is direct evidence of this because their messages appear within e-mail chains that were disclosed by the Agency.

¹⁹ *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, [2015 FCA 268](#) at para [18](#).

²⁰ *Applicant's Written Repts*, *supra* note 12 at 309-310 at paras 58-59.

²¹ *Ibid* at 310 at para 60.

²² *Ibid* at 300 at paras 22-23.

50. However, the Applicant speculates that e-mails that were created are retained permanently and are being withheld. This is not the case. Having thoroughly searched its records, the Agency was unable to locate the original e-mails sought by the Applicant, and the Agency has concluded that they no longer exist. The Agency cannot therefore produce these items.

B3. Correspondence in respect of Ms. Jones' and the Assistant Deputy Minister's Meetings on or about March 21-22, 2020²³

51. The Applicant speculates that there must be documents in respect of discussions that are said to have taken place around March 21 and 22, 2020 between Agency staff person Marcia Jones and the Assistant Deputy Minister at Transport Canada.

52. The Applicant relies on an e-mail from an Agency staff person who does not appear to have taken part in these discussions and who states that Ms. Jones "spoke" with this third party concerning the Statement. There is no indication in that email that there are any documents associated with this discussion. The Applicant also points to an e-mail from the then-Chairperson to Ms. Jones providing attachments "as background for your call". The nature or details of that call are not specified and there is no indication that other documents for that call exist, have been retained and are being withheld.

53. Having thoroughly searched its records, the Agency has concluded that it does not possess any documents in relation this item. The Agency cannot therefore produce further documents.

B4: CTA's Info Email and Twitter Messages²⁴

54. The Applicant sought disclosure of these documents on December 17 and 20, 2021, after receiving the Agency's disclosure package. On December 24, 2021, the Agency responded that a category of such documents exists and explained why they were not disclosed. These documents consist of messages and inquiries from individuals to the Agency concerning their personal air travel situations.

55. The Agency noted in its December 24 letter that since the Applicant has previously filed

²³ *Applicant's Written Reps, supra* note 12 at 302-303 at paras 29-32.

²⁴ *Ibid* at 307 at paras 48-49.

documents from the Agency's Twitter feed on the record of this proceeding, it stands to reason that this category of documents is available to the Applicant. The Agency submits that tribunal disclosure does not require the Agency to disclose documents already in the possession of the Applicant.

56. The Agency further submits that any private messages on Twitter or e-mails to the Agency's general e-mail account need not be produced for two reasons: first, the Applicant explicitly abandoned this category of documents in its Notice of Motion under Rules 318 or 41 of the *Federal Courts Rules*; and second, the documents are not within the scope of the Order.

57. In its Notice of Application, the Applicant requested, among other documents, the following:

Complete and unredacted copies of all correspondences, e-mails, and/or complaints that the Agency received from passengers between February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected by COVID-19.²⁵

58. Subsequently, in its Notice of Motion under Rule 318, the Applicant abandoned its request to obtain this and other categories of documents. The Applicant stated: "In the interest of swift resolution of this motion and the application, only a small portion of the transmittal request is being pursued." The Applicant then indicated that it was seeking "complete and unredacted copies of all records from March 9 – April 8, 2020 in respect of the Publications, including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos."

59. The Applicant framed the purpose of seeking the requested documents as follows:

The Materials will demonstrate:

- i. The names of the specific appointed members of the Agency who participated in the issuance of the Publications by approving, supporting, or otherwise endorsing the Publications, and the nature of their respective involvement; and

²⁵ Notice of Application dated April 6, 2020, Motion Record of Applicant dated January 17, 2022, Volume 1, Tab 3 at 274.

- ii. The Agency's objective in issuing the Publications, including the nature and extent of external influences on the Agency from the airline industry and/or Transport Canada.

60. It is difficult to see how individual passenger correspondence to general Agency accounts handled by Agency staff would advance the claims made by the Applicant.

61. The Agency also submits that this category of documents falls outside the scope of the Order. The Order was crafted to capture only documents that are "relevant to the bias issues raised by the applicant".²⁶ The Court summarized the bias allegations as follows:

[24] As noted, the applicant's allegations related to bias are two-fold and concern, first, the alleged pre-judgement by the CTA as an institution or, in the alternative, by its constituent members of passengers' entitlement to reimbursement for flights cancelled due to the COVID-19 pandemic and, second, alleged third-party influence in the development of the impugned statement on vouchers.

62. While the Agency will comply with any order to produce this category of documents, the Agency submits that these documents fall outside the Order's scope and that they are not relevant to the claims advanced in the underlying judicial review proceeding.

B5. Correspondence to/from PIAC²⁷

63. The Applicant claims that the Agency has withheld correspondence with the Public Interest Advocacy Centre ("PIAC") that should have been produced. The Applicant relies on a draft message to stakeholders, authored by an Agency staff person, informing them that the Statement and other Agency decisions had been published. In the draft message, the staff person references the fact that there had been "outreach from PIAC/CAA."

64. The Applicant makes three assumptions in relation to its claim. First, it assumes that the outreach from PIAC came in the form of written correspondence. Second, it assumes that if there was written correspondence, it was retained and is being withheld. And third, it assumes that this outreach concerned the Statement. The Agency notes that the draft message announced not only the publication of the Statement but also two other Agency

²⁶ *October 2021 Court Order*, *supra* note 1 at para 22.

²⁷ *Applicant's Written Repts*, *supra* note 12 at 310 at paras 60-61.

decisions: an exemption allowing for the suspension of domestic air services; and a decision exempting carriers from certain requirements of the *Air Passenger Protection Regulations*, SOR/2019-150. The Agency submits that the Applicant relies on speculation to conclude that a responsive document exists, has been retained, and has been withheld.

65. Having thoroughly searched its records, the Agency has concluded that it does not possess any responsive documents in relation this item. The Agency cannot therefore produce further documents.

CATEGORY C: Meeting Documents

C1. Documents for the March 19, 2020 EC Call;²⁸ and

C5. Documents for the March 22, 2020 CTA Key Personnel Call;²⁹ and

C6. Documents for the March 23, 2020 EC Call.³⁰

66. The Applicant speculates that the Statement was discussed at meetings of the Executive Committee and of key Agency personnel. The Applicant relies on e-mails from the then-Chairperson that preceded these meetings. In these e-mails, the then-Chairperson writes of his intention to discuss the topic of vouchers at an upcoming meeting.

67. The Agency submits that e-mails stating that a topic will be discussed at a future meeting do not prove that the discussions indeed happened, that documents were created to support the discussions or that minutes noting these discussions were prepared. Accordingly, these e-mails simply provide evidence that the then-Chairperson intended to discuss the topic prior to the time a meeting took place.

68. Pursuant to the Order, the Agency was required to disclose documents related to meetings attended by members where the Statement was discussed. The Agency submits that if meeting documents in its possession contain no record that the matter was discussed, then the documents must be considered non-responsive.

69. This is the case with the meetings that were held on March 19, 22 and 23, 2020. The Agency

²⁸ *Applicant's Written Reqs, supra* note 12 at 301 at paras 24-25.

²⁹ *Ibid* at 303-304 at paras 33-35.

³⁰ *Ibid* at 305 at paras 38-40.

has in its possession documents related to these three meetings, namely in the form of schedulers and/or meeting minutes. However, these documents contain no record that the Statement or the subject matter of vouchers were in fact discussed.

70. The Agency submits that it is not required to produce documents that are not responsive to the Order. The Agency has disclosed responsive meeting documents to the Applicant. The Applicant is relying on speculation to claim that other documents must exist, must be responsive and that the Agency has withheld these.
71. The Agency further submits that the Order did not require it to disclose documents for the purpose of proving that they are not responsive. To require this now would allow the Applicant to use this motion to obtain more than that to which it is entitled under the Order and Rules 317 and 318 of the *Federal Courts Rules*. This would be tantamount to document discovery.

C2. Documents for the March 20 EC Call³¹

72. The Agency has disclosed draft minutes for an Executive Committee meeting that took place on March 20, 2020 and has made a privilege claim on a small portion of that document. The e-mails disclosed concerning the draft minutes show that the Statement was discussed on March 20 but no deliverable resulted, such that a request was made to remove mention of the Statement from the final version of the minutes.
73. The Applicant speculates that more documents must exist for this meeting and that the Agency must have withheld them.
74. There are additional documents in the Agency's possession but they contain no mention of the Statement or the subject of the Statement. The Agency has a meeting scheduler and the final version of the minutes. The scheduler contains no information about the content of the meeting. The final minutes do not mention the Statement as that item was removed. The Agency submits that it should not be required to disclose these documents as they do not mention the Statement and provide no information not already disclosed in relation to this

³¹ Applicant's Written Repts, *supra* note 12 at 302 at paras 27-28.

meeting.

C3. CTA Chairperson's March 21-22, 2020 Weekend Meeting(s)³²

75. The Applicant speculates that there must be documents in respect of discussions that are said to have taken place between the Agency's then-Chairperson, the Deputy Minister of Transport and the Minister of Transport's Chief of Staff.
76. The Applicant relies on an e-mail from an Agency staff person who does not appear to have taken part in these discussions and who states that the subject matter of the Statement "was discussed" between the then-Chair and these third parties.
77. There is no indication in that email that any documents are associated with such discussions, that any such documents have been retained and that they are being withheld. That said, having thoroughly searched its records, the Agency has concluded that it does not possess any documents in relation this item. The Agency cannot therefore produce further documents.

C4. CTA Chairperson' March 21 and/or March 22, 2020 Discussions with the Vice-Chairperson³³

78. The Applicant claims that documents related to discussions between the then-Chairperson and Vice-Chairperson on March 21 or 22, 2020 exist and have been withheld. The Applicant relies on an e-mail authored by the then-Chairperson stating that he and the Vice-Chairperson wanted to share a draft of the Statement with the Agency's members.
79. The Applicant speculates that since the then-Chairperson and Vice-Chairperson wanted to share the draft, they must have communicated and there must be meeting documents associated with that communication. The existence of such documentation is plainly speculative. There is no reason to conclude from this e-mail that documents in relation to any discussions that may have taken place exist.
80. That said, having thoroughly searched its records, the Agency has concluded that it does not

³² *Applicant's Written Reps, supra* note 12 at 302-303 at paras 29-32.

³³ *Ibid* at 304 at paras 36-37.

possess any additional documents in relation this item beyond what has already been disclosed. The Agency cannot therefore produce further documents.

C7: Documents for the March 24 Agency Members' Call³⁴

81. A meeting of Agency members was scheduled for March 24, 2020. The Applicant points to an e-mail pre-dating that meeting in which the then-Chairperson wrote of his intention to discuss the Statement at the meeting.
82. The Agency submits that the existence of this e-mail does not prove that the discussions indeed happened, that documents were created to support the discussion or that minutes noting these discussions were prepared.
83. The Agency has in its possession a single document in relation to this meeting, namely a scheduler. That document contains no indication of the content of the meeting's discussions nor does it confirm that the meeting took place. Accordingly, the Agency submits that the document is not responsive to the Order.
84. In relation to this item, the Applicant has requested the production of notes taken by or on behalf of participants at the meeting. The Agency submits that if personal notes were taken and kept by members, they are not in the Agency's possession.
85. Rule 317 allows a party to receive material that is "in the possession of a tribunal." The Order stated that "documents in the possession, control or power of a tribunal that are relevant to the allegations of bias or breach of procedural fairness are subject to disclosure."³⁵
86. This Court in *Canada (Privacy Commissioner) v Canada (Labour Board)* has held that personal notes taken by Governor-in-Council appointees are not "under the control" of a tribunal. These notes do not form part of the official record of the tribunal and are not

³⁴ *Applicant's Written Reps, supra* note 12 at 307 at para 47.

³⁵ *October 2021 Court Order, supra* note 1 at para [21](#).

contained in any record-keeping system over which the tribunal has control.³⁶

87. While the Court decided this matter in a quasi-judicial context, the Agency submits that there is a reasonable question as to whether the same principles apply in this case. The applicability of Rules 317 and 318 of the *Federal Courts Rules* has been debated by the parties on the grounds that the Statement does not constitute an order to which a tribunal record attaches. This Court has determined that the rules do, in fact, apply. Accordingly, the Agency submits that the principles applicable to decision-making, records and judicial independence that informed the Court's decision in *Canada (Privacy Commissioner)* have some application to this case.

88. To be clear, the Agency has no knowledge of the existence of members' personal notes in relation to this meeting. However, the Agency respectfully submits that, having found no such notes in its record-keeping systems, if any such notes exist they are not "in the possession" of the tribunal within the meaning of Rules 317 and 318.

C8: Documents for the March 25 Discussion involving the Chair and/or Vice-Chair and others³⁷

89. To claim that documents exist and have been withheld, the Applicant relies on an e-mail from March 25, 2020 between the then-Chairperson and Vice-Chairperson that states "After a lot of back-and-forth this morning, Liz and I have decided on a few additional tweaks to the statement." That document evidences the "tweaks" that were made.

90. The Applicant has focused on the mention of "back-and-forth" and speculates that there must be associated meeting documents, that these have been retained, and that they have not been disclosed. There is no indication in these documents that any back and forth entailed any associated documentation.

91. The Applicant similarly points to the fact that the Statement was attached to an e-mail from the then-Chairperson to the Vice-Chair and Agency staff on March 25, 2020. The Applicant

³⁶ *Canada (Privacy Commissioner v Canada (Labour Relations Board)* (2000), 257 N.R. 66 (F.C.A.), [2000] F.C.J. No. 617 (C.A.) (QL)) at para 5.

³⁷ *Applicant's Written Reps*, *supra* note 12 at 309 at paras 55-56.

plainly speculates that since the Chair's covering e-mail is blank, a meeting must have taken place, there must be associated documentation, this documentation has been retained, and it is not being disclosed.

92. Having thoroughly searched its records, the Agency has concluded that it does not possess any additional documents in relation these items beyond what has already been disclosed. The Agency cannot therefore produce further documents.

C9: Documents for the Cancelled March 25, 2020 Call³⁸

93. The Applicant seeks to obtain information in relation to a meeting between the then-Chairperson and Agency personnel that was cancelled before it took place on March 25, 2020. The Applicant requests access to documents pertaining to when and how the meeting was initially scheduled.

94. The Applicant provides no reason to suggest that providing such documents would be responsive to the Order. It is difficult to see how details of when and how a meeting was scheduled are relevant to the grounds of judicial review when it is clear that the meeting was cancelled. The Applicant appears to be searching for these documents in hopes of establishing their relevance, and requiring the Agency to conduct an exhaustive search more consistent with document discovery than tribunal disclosure.

95. That said, having thoroughly searched its records, the Agency has concluded that it does not possess any additional documents in relation this item beyond what has already been disclosed. The Agency cannot therefore produce further documents.

C10: The then-CTA Chairperson's Discussion(s) with "Other Federal Players"³⁹

96. The Applicant speculates that there must be documents in connection with alleged discussions between the then-Chairperson and "other federal players." The Applicant bases its assertion on an e-mail from the then-Chairperson to Agency members on March 22, 2020 that states: " After some analysis, reflection, and discussion with other federal players, we're

³⁸ *Applicant's Written Reps, supra* note 12 at 309 at para 57.

³⁹ *Ibid* at 302-303 at paras 29-32.

considering issuing a statement [...]"

97. The Applicant assumes that these discussions have associated documentation that is being withheld. This is speculative. In fact, the wording of the e-mail references "discussion", which regularly take place verbally rather than in writing.

98. That said, having thoroughly searched its records, the Agency has concluded that it does not possess any additional documents in relation this item beyond what has already been disclosed. The Agency cannot therefore produce further documents.

Conclusion with respect to production order

99. The Agency respectfully submits that it has complied with the Order and that there is no basis for a further order under Rule 318. The Applicant has not provided persuasive evidence that the documents sought are in the Agency's possession or within the Order's scope. The Agency has thoroughly searched its records before concluding that documents sought are not in its possession. Accordingly, the Agency asks that the Applicant's motion be dismissed.

100. The Agency's submissions relate only to the issue of motion for a production order. The Agency reserves the right to produce further submissions or evidence should the Court hear the motion for contempt.

The Agency should not be required to pay, nor does it seek, costs

101. Generally, an administrative body like the Agency will neither be entitled to nor be ordered to pay costs, at least when there has been no misconduct on its part. Where the body has acted in good faith and conscientiously throughout, albeit resulting in error, the reviewing tribunal will not ordinarily impose costs.⁴⁰

102. The Agency submits that it has acted in good faith. The Agency has complied with the terms of the Order, and will comply with any further production order that might be made in response to the Applicant's motion.

⁴⁰ *Lang v British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 at para 47.

103. The Applicant is requesting costs as if it had successfully prosecuted contempt proceedings. However, this Court has found that resorting to contempt powers is premature at this stage, as there is no reason to assume non-compliance. The Applicant cannot rely on the customary practice that applies in contempt proceedings. It is well established that this practice is reserved for successful contempt applications.⁴¹

104. The Agency does not seek costs and submits that in the circumstances it should not be ordered to pay costs. However, should this Court find that an award of costs is appropriate, the Agency submits that it must reflect any division of success.⁴²

PART IV – ORDER SOUGHT

105. The Agency seeks an Order dismissing the Applicant's motion.

106. The Agency does not seek costs and asks that costs not be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, in the Province of Quebec, this 1st day of February, 2022.



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⁴¹ *Apotex Inc. v Merck & Co. Inc.*, [2003 FCA 234](#) at paras 93-94 [*Apotex*].

⁴² *Ibid* at para 94.

PART V – LIST OF AUTHORITIES

Appendix A – Statutes and Regulations

Federal Courts Rules, [SOR/98-106](#), r [41](#), [318](#).

Appendix B – Case Law

Access Information Agency Inc. v Canada (Attorney General), [2007 FCA 224](#)

Air Passengers Rights v Canada (Transportation Agency), [2020 FCA 92](#)

Air Passenger Rights v Canada (Transportation Agency), [2020 FCA 155](#)

Air Passenger Rights v Canadian Transportation Agency, [2020 CanLII 102983 \(SCC\)](#)

Air Passenger Rights v Canada (Attorney General), [2021 FCA 201](#)

Apotex Inc. v Merck & Co. Inc., [2003 FCA 234](#)

Canada (Privacy Commissioner v Canada (Labour Relations Board) (2000), 257 NR 66 (FCA), [2000] FCJ No. 617 (CA) (QL))

Canadian Copyright Licensing Agency (Access Copyright) v Alberta, [2015 FCA 268](#)

Hiebert v Canada (Acting/assistant Commissioner, Corporate Development, Correctional Service), [1999 CanLII 9184 \(FC\)](#)

Lang v British Columbia (Superintendent of Motor Vehicles), [2005 BCCA 244](#)

Paid Search Engine Tools, LLC v Google Canada Corporation, [2021 FC 515](#)

APPENDIX A

 **Federal Courts Rules, SOR/98-106, r. 41**

Canada Rules of Court

Enabling Act: Federal Courts Act

Registration 5 February, 1998

SOR/98-106, r. 41 | DORS/98-106, r. 41

Canada Rules of Court > Federal Courts Act > Federal Courts Rules > PART 2 ADMINISTRATION OF THE COURT > SUMMONING OF WITNESSES OR OTHER PERSONS

SUMMONING OF WITNESSES OR OTHER PERSONS

RULE 41

Subpoena for witness

41. (1) Subject to subsection (4), on receipt of a written request, the Administrator shall issue, in Form 41, a subpoena for the attendance of a witness or the production of a document or other material in a proceeding.

Issuance in blank

(2) A subpoena may be issued in blank and completed by a solicitor or party.

Multiple names

(3) Any number of names may be included in one subpoena.

Where leave required

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

(a) for the production of an original record or of an original document, if the record or document may be proven by a copy in accordance with an Act of Parliament or of the legislature of a province;

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

(c) to compel the attendance of a witness at a hearing other than a trial or a reference under rule 153.

Ex parte motion

(5) Leave may be granted under subsection (4) on an ex parte motion.

 **Federal Courts Rules, SOR/98-106, r. 318**

Canada Rules of Court

Enabling Act: Federal Courts Act

Registration 5 February, 1998

SOR/98-106, r. 318 | DORS/98-106, r. 318

Canada Rules of Court > Federal Courts Act > Federal Courts Rules > PART 5 APPLICATIONS > MATERIAL IN THE POSSESSION OF A TRIBUNAL

RULE 318

Material to be transmitted

318. (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit
- (a) a certified copy of the requested material to the Registry and to the party making the request; or
 - (b) where the material cannot be reproduced, the original material to the Registry.

Objection by tribunal

- (2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

Directions as to procedure

- (3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

Order

- (4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

APPENDIX B

Date: 20070608

Docket: A-184-07

Citation: 2007 FCA 224

2007 FCA 224 (CanLII)

Present: PELLETIER J.A.

BETWEEN:

THE ACCESS INFORMATION AGENCY INC.

Applicant

and

**ATTORNEY GENERAL OF CANADA
(TRANSPORT CANADA)**

Respondent

and

IRENA LANG CONSULTING

Respondent

Motion in writing decided without appearance of the parties.

Order delivered at Ottawa, Ontario, on June 8, 2007.

REASONS FOR ORDER:

PELLETIER J.A.

Date: 20070608

Docket: A-184-07

Citation: 2007 FCA 224

Present: PELLETIER J.A.

BETWEEN:

THE ACCESS INFORMATION AGENCY INC.

Applicant

and

ATTORNEY GENERAL OF CANADA
(TRANSPORT CANADA)

Respondent

and

IRENA LANG CONSULTING

Respondent

REASONS FOR ORDER

PELLETIER J.A.

[1] The applicant, the Access Information Agency Inc., filed an application for judicial review of a decision of the Canadian International Trade Tribunal (the Tribunal). In its application for judicial review, the applicant included a request for transmission of certain materials in the Tribunal's possession, a request that reads as follows:

[TRANSLATION]

By the service of this application for judicial review on the Canadian International Trade Tribunal, in accordance with section 317 of the *Federal Court Rules, 1998* [sic] the applicant REQUIRES THAT

the Canadian International Trade Tribunal sent it and transmit to the Registry of the Federal Court of Appeal, a complete and certified copy of all of the documents in the Tribunal's record bearing number PR-2006-031; including all written submissions and documents filed with the Tribunal in the context of its investigation procedure, whether these documents were entered into evidence or not, and all correspondence documents, in any format whatsoever, from all individuals who participated directly or indirectly in drafting the decision and orders made in the matter.

[2] The Tribunal objected to this request on the basis that it could contemplate communications protected by professional privilege and that it could also go so far as to include communications which, if filed, would compromise the Tribunal members' privileged deliberations. Further, the Tribunal objected to the request on the grounds that the relevance of the documents requested by the applicant had not been established. On the other hand, the Tribunal had provided the applicant with all but two of the exhibits filed for the purposes of the procedures leading to the decision under judicial review.

[3] The applicant disputes the Tribunal's refusal to disclose the documents other than the exhibits. It filed this motion in which it requests that the Court:

- Give the parties directions to file submissions regarding an objection to a request for material whose disclosure is challenged.
- After hearing the parties, make an order requiring the Tribunal to transmit a complete and certified copy of the documents described in its request to the Registry and to the applicant.
- Give it an additional 20 days to file and serve its affidavit and its documentary evidence.
- Give it additional time to file and serve the applicant's record.

[4] The Tribunal filed the affidavit of H el ene Nadeau, the Tribunal's secretary, in support of its objection. She acknowledged that two exhibits filed at the hearings had not been transmitted to the applicant. In the case of exhibit PR-2006-031-14, it was sent to the applicant's counsel as soon as

the Tribunal learned that it had not been included in the documents sent to the applicant. With regard to exhibit PR-2006-031-34A, Ms. Nadeau stated that this was a confidential exhibit [TRANSLATION] “containing scoring tables developed and used by the Department of Transport to evaluate bids received for procurement purposes, which is the subject of the applicant’s complaint.” Ms. Nadeau noted the fact that this document is protected [TRANSLATION] “by section 45 of the *Canadian International Trade Tribunal Act*, and given that the applicant’s counsel is also the applicant’s director”, he is not entitled to this document.

[5] Also according to the affidavit of Ms. Nadeau, the presiding member is assisted by the Tribunal’s personnel, [TRANSLATION] “usually counsel, a research officer and a research director”. They prepare various documents for the presiding members and may also assist them in drafting the reasons [TRANSLATION] “in accordance with the member’s directions and very specific instructions.” The documents prepared by these personnel are not filed into the official record. Tribunal panel members are also assisted by the Tribunal’s personnel in the form of briefing notes. Ms. Nadeau claims that the disclosure of the Tribunal’s internal documentation would compromise the confidentiality of communications between members of the Tribunal and their legal counsel, as well as the privilege extending to their deliberations. Further, the relevance of this documentation had not been established.

[6] In its reply record, the applicant says that it agreed to have exhibit PR-2006-031-34A transmitted to the Court under seal for the Court to decide whether it is privileged. It justifies its request for the other documents by relying on page iii of the Tribunal’s decision listing the names of the tribunal director, the senior investigator and legal counsel for the Tribunal. The applicant stated

that it has the right to ensure that there was no breach of procedural fairness, particularly the *audi alteram partem* rule. That said, the applicant has not put forward any circumstance suggesting that there was interference in this matter.

ANALYSIS

[7] It has been consistently held in the case law that the requesting party is entitled to be sent everything that was before the decision-maker (and that the applicant does not have in its possession) at the time the decision at issue was made: *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)*, [1999] F.C.J. No. 1432 (F.C.A.).

[8] The Court points out that the French version of section 317 of the Rules appears to lack an element which appears in the English version of the same section, specifically that the right to require communication of material is limited to material that is not in the possession of the party when the party's request is made. Given that the applicant participated fully in the Tribunal hearings, it would be surprising that it would not have any of the exhibits filed during the hearing of its complaint. The Tribunal does not therefore have to deliver to the applicant what it already has in its hands. That being said, the Court does not think that an order need be made on this point, given the Tribunal's willingness to give the applicant all but one of the exhibits.

[9] With regard to exhibit PR-2006-031-34A, the Tribunal submits that this document is confidential under section 45 of the Act. Subsection 45(1) of the Act reads as follows:

45. (1) Where a person designates information as confidential pursuant to paragraph 46(1)(a) and that designation is not withdrawn by that person, no member and no person employed in

45. (1) Les agents de l'administration publique fédérale et les membres qui ont en leur possession, au cours de leur emploi ou de leur mandat, selon le cas, des renseignements

the federal public administration who comes into possession of that information while holding that office or being so employed shall, either before or after ceasing to hold that office or being so employed, knowingly disclose that information, or knowingly allow it to be disclosed, to any other person in any manner that is calculated or likely to make it available for the use of any business competitor or rival of any person to whose business or affairs the information relates.

désignés comme confidentiels aux termes de l'alinéa 46(1)a) ne peuvent, si la personne qui les a désignés ou fournis n'a pas renoncé à leur caractère confidentiel, sciemment les communiquer ou laisser communiquer de manière à ce qu'ils puissent être vraisemblablement utilisés par un concurrent de la personne dont l'entreprise ou les activités sont concernées par les renseignements. Cette interdiction s'applique même après que l'agent ou le membre a cessé ses fonctions.

[10] Paragraph 46(1)(a), referred to in subsection 45(1), appears below:

46. (1) Where a person who provides information to the Tribunal for the purposes of proceedings before the Tribunal wishes some or all of the information to be kept confidential, the person shall submit to the Tribunal, at the time the information is provided,

46. (1) La personne qui fournit des renseignements au Tribunal dans le cadre d'une procédure prévue par la présente loi et qui désire qu'ils soient gardés confidentiels en tout ou en partie fournit en même temps que les renseignements :

(a) a statement designating as confidential the information that the person wishes to be kept confidential, together with an explanation as to why that information is designated as confidential; and

a) d'une part, une déclaration désignant comme tels les renseignements qu'elle veut garder confidentiels avec l'explication à l'appui;

(b) a non-confidential edited version or non-confidential summary of the information designated as confidential pursuant to paragraph (a) in sufficient detail to convey a reasonable understanding of the substance of the information or a statement

b) d'autre part, soit une version ne comportant pas les renseignements désignés comme confidentiels ou un résumé ne comportant pas de tels renseignements suffisamment précis pour permettre de les comprendre, soit une déclaration accompagnée d'une explication destinée à la justifier, énonçant, selon le cas:

(i) that such a non-confidential edited version or non-confidential summary cannot be made, or

(i) qu'il est impossible de faire la version ou le résumé en question,

(ii) that such a non-confidential edited version or non-confidential summary would disclose facts that the person has a proper reason for wishing to keep confidential, together with an explanation that justifies the making of the statement.

(ii) qu'une version ou un résumé communiquerait des faits qu'elle désire valablement garder confidentiels.

[11] According to these provisions, the person who provides information to the Tribunal can file a statement to the effect that the information is confidential.

[12] If the Tribunal does not take issue with this statement, the confidential information cannot be disclosed to a competitor of the person who provided it. However, this information can be disclosed to opposing counsel and to its expert under conditions stipulated by the Tribunal regarding confidentiality (subsection 45(3) of the Act). For the purposes of this provision “counsel” does not include a person who is a party’s director.

[13] If, after hearing the parties, the Tribunal does not agree that the information is confidential, it must proceed without taking into account this information, unless this information is available from another source (subsection 48(3) of the Act).

[14] The Tribunal alleges that the applicant’s counsel also holds a position as the applicant’s director, who is in fact a person to whom disclosure is forbidden. The applicant does not deny that its counsel is a director.

[15] The fact that counsel is a director is only relevant in the case where the information is contemplated by section 45 of the Act. The affidavit filed by Ms. Nadeau is silent regarding the process through which the Tribunal identified the information in exhibit PR-2006-031-34A as confidential. Did the Department of Transport file a statement as provided under section 46 of the Act? Did the Tribunal consider this statement? Do sections 45 and 46 apply to the Department of Transport? Neither the Tribunal nor the Attorney General of Canada addressed these issues in their memoranda. The Court is therefore not able to decide this issue on account of these deficiencies.

[16] The Attorney General has the obligation to justify the non-disclosure of exhibit PR-2006-031-34A since it is the Minister of Transport who filed this exhibit and the confidentiality statement. The Tribunal must disclose exhibit PR-2006-031-34A to the applicant and to any other party after 21 days have elapsed from the date of the order in the case at bar unless, within that 21-day period, the Attorney General serves and files a motion for an order prohibiting the disclosure of the exhibits except in accordance with the terms set out in section 45 of the Act.

[17] With regard to the request for disclosure of documents other than the exhibits, this betrays a misunderstanding of the purpose of section 317. As is so aptly stated by Mr. Justice Hugessen in *Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1156, section 317 does not serve the same purpose as documentary discovery in an action:

11 . . . Rule 317 does not have the same theoretical foundation, nor does it produce the same results as documentary discovery and does not require a tribunal (by contrast to a respondent in an action) to engage in an extended and exhaustive search for material whose relevance may at best be marginal and whose selection will necessarily involve an exercise of judgment.

[18] The applicant did not advance any fact which would lead to a finding of interference in this matter. The fact that the Tribunal is assisted in its endeavours by its personnel is entirely normal. As the Supreme Court states in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canada Human Rights Commission)*, [1989] 2 S.C.R. 879, at page 898:

. . . This is merely an example of the principle that applies to administrative tribunals, that they do not have to do all the work themselves but may delegate some of it to others.

Therefore, the mere fact that the members of the Tribunal have access to legal counsel or to researchers is not a breach of procedural fairness. The applicant relies on this Court's decision in *Telus Communications Inc. v. Canada (Attorney General) (Telus)*, 2004 FCA 317, [2004]

F.C.J. No. 1587, to say that the working document of an administrative tribunal must be disclosed to the requesting party if the document could have influenced its decision. In *Telus*, there were reasons to believe that a government policy had been implemented before it had been made public. There was therefore a factual basis for the disclosure request. In this case, there is nothing of the sort. The applicant did not advance anything that would suggest that there was interference in the matter.

[19] Under the circumstances, the applicant's argument is limited to the statement that it wants to be satisfied that the case was decided by the individual who heard it (see, on this point, the affidavit of Lorraine Turcotte sworn April 23, 2007, at paragraph 8). In the absence of a factual basis justifying such a concern, the Court is not disposed to impose an obligation to disclose on the Tribunal which goes beyond what the parties filed into evidence or in written submissions.

[20] In closing, the Court would like to express its disapproval for document disclosure requests drafted in terms as vague as the one at issue. Judicial review does not proceed on the same basis as an action; it is a procedure that is meant to be summary. There is therefore a series of limits on the parties as a result of this distinction. Evidence is brought by affidavit and not by oral testimony. There is less leeway for preliminary procedures such as discovery of evidence in the hands of the parties and examination on discovery. If such proceedings do prove to be necessary, the Rules provide that a judicial review may be transformed into an action.

[21] It is in this context that we find section 317 of the Rules dealing with the request for disclosure of material. The purpose of the rule is to limit discovery to documents which were in the hands of the decision-maker when the decision was made and which were not in the possession of

the person making the request and to require that the requested documents be described in a precise manner. When dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes of later establishing relevance. Such a procedure is entirely inconsistent with the summary nature of judicial review. If the circumstances are such that it is necessary to broaden the scope of discovery, the party demanding more complete disclosure has the burden of advancing the evidence justifying the request. It is this final element that is completely lacking in this case.

[22] As for the applicant's request for an extension of time to file its affidavit and its memorandum, it can refile its request once the Minister of Transport has filed his motion, or once the 21 days he was given to do so have elapsed and no such motion has been filed.

[23] For these reasons, except in regard to exhibit PR-2006-031-34A, the motion is dismissed with costs.

“J.D. Denis Pelletier”

J.A.

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-184-07

STYLE OF CAUSE: *THE ACCESS INFORMATION AGENCY INC. and
ATTORNEY GENERAL OF CANADA (TRANSPORT
CANADA) and IRENA LANG CONSULTING*

MOTION IN WRITING DECIDED WITHOUT APPEARANCE BY THE PARTIES

REASONS FOR ORDER: PELLETIER J.A.

DATE OF REASONS: JUNE 6, 2007

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FOR THE RESPONDENT/
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CANADA)

Federal Court of Appeal



Cour d'appel fédérale

Date: 20200522

Docket: A-102-20

Citation: 2020 FCA 92

Present: MACTAVISH J.A.

BETWEEN:

AIR PASSENGERS RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 22, 2020.

REASONS FOR ORDER BY:

MACTAVISH J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20200522

Docket: A-102-20

Citation: 2020 FCA 92

Present: MACTAVISH J.A.

BETWEEN:

AIR PASSENGERS RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

MACTAVISH J.A.

[1] As is the case with so many other areas of life today, the airline industry and airline passengers have been seriously affected by the COVID-19 pandemic. International borders have been closed, travel advisories and bans have been instituted, people are not travelling for non-essential reasons and airlines have cancelled numerous flights.

[2] In response to this unprecedented situation, the Canadian Transportation Agency (CTA) issued two public statements on its website that suggest that it could be reasonable for airlines to provide passengers with travel vouchers when flights are cancelled for pandemic-related reasons, rather than refunding the monies that passengers paid for their tickets.

[3] Air Passenger Rights (APR) is an advocacy group representing and advocating for the rights of the public who travel by air. It has commenced an application for judicial review of the CTA's public statements, asserting that they violate the CTA's own *Code of Conduct*, and mislead passengers as to their rights when their flights are cancelled. In the context of this application, APR has brought a motion in writing seeking an interlocutory order that, among other things, would require that the statements be removed from the CTA's website. It also seeks to enjoin the members of the CTA from dealing with passenger complaints with respect to refunds on the basis that a reasonable apprehension of bias exists on their part as a result of the Agency's public statements.

[4] For the reasons that follow, I have concluded that APR has not satisfied the tripartite injunctive test. Consequently, the motion will be dismissed.

1. Background

[5] In early 2020, the effects of the COVID-19 coronavirus began to be felt in North America, rapidly reaching the level of a pandemic. On March 25, 2020, the CTA posted a statement on its website dealing with flight cancellations. The statement, entitled "Statement on

Vouchers” notes the extraordinary circumstances facing the airline industry and airline customers because of the pandemic, and the need to strike a “fair and sensible balance between passenger protection and airlines’ operational realities” in the current circumstances.

[6] The Statement on Vouchers observes that passengers who have no prospect of completing their planned itineraries “should not be out-of-pocket for the cost of cancelled flights”. At the same time, airlines facing enormous drops in passenger volumes and revenues “should not be expected to take steps that could threaten their economic viability”.

[7] The Statement on Vouchers states that any complaint brought to the CTA will be considered on its own merits. However, the Statement goes on to state that, generally speaking, the Agency believes that “an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time”. The Statement then suggests that a 24-month period for the redemption of vouchers “would be considered reasonable in most cases”.

[8] Concurrent with the posting of the Statement on Vouchers, the CTA published an amendment to a notice already on its website entitled “Important Information for Travellers During COVID-19” (the Information Page), which incorporates references to the Statement on Vouchers.

[9] These statements are the subject of the underlying application for judicial review.

2. APR's Arguments

[10] APR submits that there is an established body of CTA jurisprudence that confirms passengers' right to a refund where air carriers are unable to provide air transportation, including cases where flight cancellations are for reasons beyond the airline's control. According to APR, this jurisprudence is consistent with the common law doctrine of frustration, the doctrine of *force majeure* and common sense. The governing legislation further requires airlines to develop reasonable policies for refunds when airlines are unable to provide service for any reason.

[11] According to APR, statements on the Information Page do not just purport to relieve air carriers from having to provide passenger refunds where flights are cancelled for reasons beyond the airlines' control, including pandemic-related situations. They also purport to relieve airlines from their obligation to provide refunds where flights are cancelled for reasons that are within the airlines' control, including where cancellation is required for safety reasons.

[12] APR further contends that the impugned statements by the CTA are tantamount to an unsolicited advance ruling as to how the Agency will treat passenger complaints about refunds from air carriers where flights are cancelled for reasons relating to the COVID-19 pandemic. The statements suggest that the CTA is leaning heavily towards permitting the issuance of vouchers in lieu of refunds, and that it will very likely dismiss passenger complaints with respect to airlines' failure to provide refunds during the pandemic, regardless of the reason for the flight cancellation. According to APR, this creates a reasonable apprehension that CTA members will not deal with passenger complaints fairly.

3. The Test for Injunctive Relief

[13] The parties agree that in determining whether APR is entitled to interlocutory injunctive relief, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

[14] That is, the Court must consider three questions:

- 1) Whether APR has established that there is a serious issue to be tried in the underlying application for judicial review;
- 2) Whether irreparable harm will result if the injunction is not granted; and
- 3) Whether the balance of convenience favours the granting of the injunction.

[15] The *RJR-MacDonald* test is conjunctive, with the result that an applicant must satisfy all three elements of the test in order to be entitled to relief: *Janssen Inc. v. Abbvie Corp.*, 2014 FCA 112, 120 C.P.R. (4th) 385 at para. 14.

4. Has APR Raised a Serious Issue?

[16] The threshold for establishing the existence of a serious issue to be tried is usually a low one, and applicants need only establish that the underlying application is neither frivolous nor vexatious. A prolonged examination of the merits of the application is generally neither necessary nor desirable: *RJR-MacDonald*, above at 335, 337-338.

[17] With this low threshold in mind, I will assume that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part. However, as will be explained further on in these reasons, I am not persuaded that APR has satisfied the irreparable harm component of the injunctive test in this regard.

[18] However, APR also seeks mandatory orders compelling the CTA to remove the two statements from its website and directing it to “clarify any misconceptions for passengers who previously contacted the Agency regarding refunds arising from COVID-19, and key stakeholders of the travel industry”. It further seeks a mandatory order requiring that the CTA bring this Court’s order and the removal or clarification of the CTA’s previous statements to the attention of airlines and a travel association.

[19] A higher threshold must be met to establish a serious issue where a mandatory interlocutory injunction is sought compelling a respondent to take action prior to the determination of the underlying application on its merits. In such cases, the appropriate inquiry is whether the party seeking the injunction has established a strong *prima facie* case: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196 at para. 15. That is, I must be satisfied upon a preliminary review of the case that there is a strong likelihood that APR will be ultimately successful in its application: *C.B.C.*, above at para. 17.

[20] As will be explained below, I am not persuaded that APR has established a strong *prima facie* case here as the administrative action being challenged in its application for judicial review is not amenable to judicial review.

[21] APR concedes that the statements on the CTA website do not reflect decisions, determinations, orders or legally-binding rulings on the part of the Agency. It notes, however, that subsection 18.1(1) of the *Federal Courts Act* does not limit the availability of judicial review to formal decisions or orders, stating rather that applications may be brought “by anyone directly affected by the matter in respect of which relief is sought” [my emphasis].

[22] Not every administrative action gives rise to a right to judicial review. No right of review arises where the conduct in issue does not affect rights, impose legal obligations, or cause prejudicial effects: *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 69, [2020] F.C.J. No. 498 at para. 19. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. No. 3, leave to appeal to SCC refused 38379 (2 May 2019); *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.

[23] For example, information bulletins and non-binding opinions contained in advance tax rulings have been found not to affect rights, impose legal obligations, or cause prejudicial effects: see, for example, *Air Canada v. Toronto Port Authority at al.*, 2011 FCA 347, 426 N.R. 131; *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3. It is noteworthy that in its Notice of Application, APR itself states the CTA’s

statements “purport[t] to provide an unsolicited advance ruling” as to how the CTA will deal with passenger complaints about refunds for pandemic-related flight cancellations.

[24] I will return to the issue of the impact of the CTA’s statements on APR in the context of my discussion of irreparable harm, but suffice it to say at this juncture that there is no suggestion that APR is itself directly affected by the statements in issue. The statements on the CTA website also do not determine the right of airline passengers to refunds where their flights have been cancelled by airlines for pandemic-related reasons.

[25] Noting the current extraordinary circumstances, the statements simply suggest that having airlines provide affected passengers with vouchers or credits for future travel “could be” an appropriate approach in the present context, as long as these vouchers or credits do not expire in an unreasonably short period of time. This should be contrasted with the situation that confronted the Federal Court in *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750, relied on by APR, where the statement in issue included a clear statement of how, in the respondent’s view, the law was to be interpreted and the statement in issue was intended to be coercive in nature.

[26] As a general principle, CTA policy documents are not binding on it as a matter of law: *Canadian Pacific Railway Company v. Cambridge (City)*, 2019 FCA 254, 311 A.C.W.S. (3d) 416 at para. 5. Moreover, in this case the Statement on Vouchers specifically states that “any specific situation brought before the Agency will be examined on its merits”. It thus remains open to affected passengers to file complaints with the CTA (which will be dealt with once the

current suspension of dispute resolution services has ended) if they are not satisfied with a travel voucher, and to pursue their remedies in this Court if they are not satisfied with the Agency's decisions.

[27] It thus cannot be said that the impugned statements affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers. While this finding is sufficient to dispose of APR's motion for mandatory relief, as will be explained below, I am also not persuaded that it has satisfied the irreparable harm component of the test.

5. Irreparable Harm

[28] A party seeking interlocutory injunctive relief must demonstrate with clear and non-speculative evidence that it will suffer irreparable harm between now and the time that the underlying application for judicial review is finally disposed of.

[29] APR has not argued that it will itself suffer irreparable harm if the injunction is not granted. It relies instead on the harm that it says will befall Canadian airline passengers whose flights have been cancelled for pandemic-related reasons. However, while APR appears to be pursuing this matter as a public interest litigant, it has not yet sought or been granted public interest standing.

[30] As a general rule, only harm suffered by the party seeking the injunction will qualify under this branch of the test: *RJR-MacDonald*, above at 341; *Manitoba (Attorney General) v.*

Metropolitan Stores Ltd., [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 at 128. There is a limited exception to this principle in that the interests of those individuals dependent on a registered charity may also be considered under this branch of the test: *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255, 440 N.R. 232 at paras. 33-34; *Holy Alpha and Omega Church of Toronto v. Attorney General of Canada*, 2009 FCA 265, [2010] 1 C.T.C. 161 at para. 17. While APR is a not-for-profit corporation, there is no suggestion that it is a registered charity.

[31] I am also not persuaded that irreparable harm has been established, even if potential harm to Canadian airline passengers is considered.

[32] Insofar as APR seeks to enjoin the CTA from dealing with passenger complaints, it asserts that the statements in issue were published contrary to the CTA's own *Code of Conduct*. This prohibits members from publicly expressing opinions on potential cases or issues relating to the work of the Agency that may create a reasonable apprehension of bias on the part of the member. According to APR, the two statements at issue here create a reasonable apprehension of bias on the part of the CTA's members such that they will be unable to provide complainants with a fair hearing.

[33] Bias is an attitude of mind that is unique to an individual. As a result, an allegation of bias must be directed against a specific individual who is alleged to be unable to bring an impartial mind to bear on a matter: *E.A. Manning Ltd. v. Ontario Securities Commission*, 23 O.R.

(3d) 257, 32 Admin. L.R. (2d) 1 (C.A.), citing *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171, 94 D.L.R. (4th) 339 (C.A.).

[34] As is the case with many administrative bodies, the CTA carries out both regulatory and adjudicative functions. It resolves specific commercial and consumer transportation-related disputes and acts as an industry regulator issuing permits and licences to transportation providers. The CTA also provides the transportation industry and the travelling public with non-binding guidance with respect to the rights and obligations of transportation service providers and consumers.

[35] There is no evidence before me that the members of the CTA were involved in the formulation of the statements at issue here, or that they have endorsed them. Courts have, moreover, rejected the notion that a “corporate taint” can arise based on statements by non-adjudicator members of multi-function organizations: *Zündel v. Citron*, [2000] 4 FC 225, 189 D.L.R. (4th) 131 at para. 49 (C.A.); *E.A. Manning Ltd.*, above at para. 24.

[36] Even if it subsequently turns out that CTA members were in fact involved in the formulation of the statements, APR’s argument could be advanced in the context of an actual passenger complaint and any bias concerns could be addressed in that context. Relief could then be sought in this Court if the complainant is not persuaded that they have received a fair hearing. The alleged harm is thus not irreparable.

[37] APR also asserts that passengers are being misled by the travel industry as to the import of the CTA's statements, and that airlines, travel insurers and others are citing the statements as a basis to deny reimbursement to passengers whose flights have been cancelled for pandemic-related reasons. If third parties are misrepresenting what the CTA has stated, recourse is available against those third parties and the alleged harm is thus not irreparable.

6. Balance of Convenience

[38] In light of the foregoing, it is unnecessary to deal with the question of the balance of convenience.

7. Other Matters

[39] Because it says that APR's application for judicial review does not relate to a matter that is amenable to judicial review, the CTA argues in its memorandum of fact and law that the application should be dismissed. There is, however, no motion currently before this Court seeking such relief, and any such motion would, in any event, have to be decided by a panel of judges, rather than a single judge. Consequently, I decline to make the order sought.

[40] APR asks that it be permitted to make submissions on the issue of costs once the Court has dealt with the merits of its motion. APR shall have 10 days in which to file submissions in writing in relation to the question of costs, which submissions shall not exceed five pages in length. The CTA shall have 10 days in which to respond with submissions that do not exceed

five pages, and APR shall have a further five days in which to reply with submissions that do not exceed three pages in length.

"Anne L. Mactavish"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-102-20

STYLE OF CAUSE: AIR PASSENGERS RIGHTS v.
CANADIAN TRANSPORTATION
AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: MACTAVISH J.A.

DATED: MAY 22, 2020

WRITTEN REPRESENTATIONS BY:

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Federal Court of Appeal



Cour d'appel fédérale

Date: 20201002

Docket: A-102-20

Citation: 2020 FCA 155

Present: WEBB J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 2, 2020.

REASONS FOR ORDER BY:

WEBB J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20201002

Docket: A-102-20

Citation: 2020 FCA 155

Present: WEBB J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

WEBB J.A.

[1] The Canadian Transportation Agency (CTA) has brought a motion to strike the judicial review application filed by Air Passenger Rights (APR). The judicial review application relates to two statements that were published on the website of the CTA that were prompted by the COVID-19 pandemic. The “Statement on Vouchers” addresses the situation arising when flights are cancelled. It includes the following:

[w]hile any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

[2] The second statement that is the subject of the judicial review application is one which references the Statement on Vouchers.

[3] Following the filing of its application for judicial review, APR brought a motion seeking an interlocutory order that would require the removal of the statements from the CTA's website. It was also seeking "to enjoin the members of the CTA from dealing with passenger complaints with respect to refunds on the basis that a reasonable apprehension of bias exists on their part as a result of the [CTA]'s public statements" (*Air Passenger Rights v. Canadian Transportation Agency*, 2020 FCA 92, at para. 3).

[4] In dismissing the motion, Justice Mactavish applied the test for interlocutory injunctive relief as set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

[5] In paragraph 16 of the reasons related to the dismissal of this motion, Justice Mactavish noted that there is a low threshold for establishing the existence of a serious issue to be tried. In paragraph 17 she stated:

With this low threshold in mind, I will assume that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable

apprehension of bias exists on their part. However, as will be explained further on in these reasons, I am not persuaded that APR has satisfied the irreparable harm component of the injunctive test in this regard.

[6] Justice Mactavish also noted that a higher threshold is involved when a person is seeking a mandatory interlocutory injunction to compel another person to take action prior to the determination of the underlying application on its merits. In that case, she found that the party who is seeking an injunction would need to establish a strong *prima facie* case (paragraph 19).

[7] In addressing whether APR had established a strong *prima facie* case, Justice Mactavish stated:

22 Not every administrative action gives rise to a right to judicial review. No right of review arises where the conduct in issue does not affect rights, impose legal obligations, or cause prejudicial effects: *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 69, [2020] F.C.J. No. 498 at para. 19. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. No. 3, leave to appeal to SCC refused 38379 (2 May 2019); *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.

23 For example, information bulletins and non-binding opinions contained in advance tax rulings have been found not to affect rights, impose legal obligations, or cause prejudicial effects: see, for example, *Air Canada v. Toronto Port Authority at al.*, 2011 FCA 347, 426 N.R. 131; *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3. It is noteworthy that in its Notice of Application, APR itself states the CTA's statements "purport [t]o provide an unsolicited advance ruling" as to how the CTA will deal with passenger complaints about refunds for pandemic-related flight cancellations.

[8] In paragraph 27 of her reasons, Justice Mactavish concluded:

27 It thus cannot be said that the impugned statements affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers. While this finding is sufficient to dispose of APR's motion for mandatory relief, as will be explained below, I am also not persuaded that it has satisfied the irreparable harm component of the test.

[9] As a result, APR had failed to establish, with respect to its request for mandatory relief that the statements be removed from the CTA's website, that these statements "affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers".

[10] Following this finding, Justice Mactavish noted:

39 Because it says that APR's application for judicial review does not relate to a matter that is amenable to judicial review, the CTA argues in its memorandum of fact and law that the application should be dismissed. There is, however, no motion currently before this Court seeking such relief, and any such motion would, in any event, have to be decided by a panel of judges, rather than a single judge. Consequently, I decline to make the order sought.

[11] Prompted by this notation that there was no motion before the Court to dismiss the application for judicial review, the CTA brought the current motion to strike this application.

[12] In *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, (*JP Morgan*) this Court noted that the threshold for striking an application for judicial review is high:

47 The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success" [footnote omitted]: *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.), at page 600. There must be a "show stopper" or a "knockout punch" — an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at

paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at paragraph 6; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

48 There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, above, at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 18 C.C.L.I. (5th) 263. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, above, subsection 18.1(2) and section 18.4. An unmeritorious motion — one that raises matters that should be advanced at the hearing on the merits — frustrates that objective.

[13] APR's main argument in its memorandum filed in relation to this motion is that the test for the availability of judicial review has changed. APR submits that the test based on whether the conduct of the administrative body affects legal rights, imposes legal obligations, or causes prejudicial effects is no longer applicable. Therefore, APR submits that Justice Mactavish erred in basing her decision on her finding that the impugned statements did not affect legal rights, impose legal obligations, or cause prejudicial effects.

[14] APR notes that this Court in *Air Canada v. Toronto Port Authority*, 2011 FCA 347, (*AC v. TPA*) stated:

28 The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.

29 One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.

[15] However, APR, in paragraph 49 of its memorandum, submits that the Supreme Court of Canada changed the test that is to be applied to determine if judicial review is available:

[i]n 2018, in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018 SCC 26] the Supreme Court recast the test for availability of judicial review as simply whether the administrative bodies' action is an exercise of state authority that is of a sufficiently public character [**Wall-test**].

(emphasis in original)

[16] Although APR does not explicitly state that, in its view, the Supreme Court indirectly overturned the decision of this Court in *AC v. TPA*, it appears that this is implicit in its argument which culminates in the following statement in paragraph 63 of its memorandum:

Therefore, the panels of this Honourable Court in *Oceanex [Oceanex Inc. v. Canada (Transport), 2019 FCA 250]* and *Guérin [Guérin c. Canada (Procureur général), 2019 CAF 272]* correctly concluded that availability of judicial review of acts of federal administrative bodies is to be determined based on the *Wall-test*.

[17] The position of the CTA is that the principle, as set out in *AC v. TPA*, that there is no right to judicial review “where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects” is still good law and it has not been overturned by the Supreme Court. Therefore, since the statements at issue in this judicial review application do not affect legal rights, impose legal obligations or cause prejudicial effects, the application for judicial review should be struck.

[18] It is important to examine exactly what each court said. The relevant paragraph in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (*Wall*), is paragraph 14:

Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature – such as renting premises and hiring staff – and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (*ibid.*). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

[19] There is nothing in this paragraph that indicates that the Supreme Court is overturning the decision of this Court in *AC v. TPA*. Rather, the Supreme Court specifically refers to this decision in the above quoted paragraph, albeit for a different principle referenced in that case. If the Supreme Court had intended that *AC v. TPA* should no longer be followed for the principle that judicial review will not be available if the conduct does not affect legal rights, impose legal obligations or cause prejudicial effects, it presumably would have explicitly stated it was overturning this decision.

[20] Furthermore, it is important to review the context in which this statement was made by the Supreme Court. The issue in *Wall*, was described by the Supreme Court in the first paragraph of that decision:

1. The central question in this appeal is when, if ever, courts have jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness. In 2014, the appellant, the Judicial Committee

of the Highwood Congregation of Jehovah's Witnesses, disfellowshipped the respondent, Randy Wall, after he admitted that he had engaged in sinful behaviour and was considered to be insufficiently repentant. The Judicial Committee's decision was confirmed by an Appeal Committee. Mr. Wall brought an originating application for judicial review of the decision to disfellowship him before the Alberta Court of Queen's Bench. The court first dealt with the issue of whether it had jurisdiction to decide the matter. Both the chambers judge and a majority of the Court of Appeal concluded that the courts had jurisdiction and could proceed to consider the merits of Mr. Wall's application.

[21] The issue was, therefore, whether the decision that had been reached by the Judicial Committee could be the subject of a judicial review. The conclusion of the Supreme Court was that this decision was not justiciable. The Supreme Court did not decide that a particular conduct which did not affect legal rights, impose legal obligations or cause prejudicial effects, could nevertheless be subject to judicial review. In *Wall*, Mr. Wall had been disfellowshipped by the Judicial Committee and therefore his rights were affected.

[22] APR submitted that two decisions of this Court applied the test as set out in *Wall*. In *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250, this Court simply noted that the Supreme Court had recently revisited the law governing the availability of judicial review and that it had emphasized:

[...] that judicial review is available only where two conditions are met – "where there is an exercise of state authority and where that exercise is of a sufficiently public character" [...]

(emphasis in original)

[23] This Court did not decide that judicial review would be available where these two conditions are met regardless of whether the particular decision or conduct affects legal rights, imposes legal obligations or causes prejudicial effects.

[24] In *Guérin c. Canada (Procureur général)*, 2019 CAF 272, the reference to the Supreme Court's decision in *Wall*, is in paragraph 65: « Ce principe a récemment été réitéré par la Cour suprême dans *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) c. Wall* [...] ». The principle to which this Court was referring was stated in the immediately preceding paragraph: « Dans l'arrêt *Dunsmuir*, la Cour suprême a clairement réaffirmé le principe selon lequel la relation de la Couronne avec ses employés est régie par le droit des contrats. » The principle to which this Court was referring was not the principle that related to the availability of judicial review but rather that the relationship between the Crown and its employees is governed by the law of contract.

[25] As a result, none of these cases support the proposition advanced by APR. APR also refers to the decision of this Court in *Wenham v. Canada (Attorney General)*, 2018 FCA 199. In that case, this Court noted:

36 An application can be doomed to fail at any of the three stages:

I. Preliminary objections. An application not authorized under the *Federal Courts Act*, R.S.C., 1985, c. F-7 or not aimed at public law matters may be quashed at the outset: *JP Morgan* at para. 68; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26; *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605.

[26] This Court referred to both the Supreme Court's decision in *Wall* and the decision of this Court in *AC v. TPA* as providing a basis on which a judicial review application could fail. Therefore, an application for judicial review could fail if the test as set out in *Wall* is not satisfied, or if the particular decision or conduct did not affect legal rights, impose legal obligations or cause prejudicial effects.

[27] As a result, there is no support for the proposition as advocated by APR that "where there is an exercise of state authority and where that exercise is of a sufficiently public character" that exercise of public authority can be subject to judicial review even though no legal rights are affected, no legal obligations are imposed and there are no prejudicial effects.

[28] However, the finding by Justice Mactavish that the impugned statements did not affect legal rights, impose legal obligations or cause prejudicial effects were made in relation to the part of the judicial review application with respect to the request for an order compelling the CTA to remove these statements from its website.

[29] As noted above, Justice Mactavish stated that she was assuming "that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part". APR lost its motion for an interlocutory injunction in relation to this aspect at the irreparable harm stage, not the serious issue to be tried stage. CTA did not address this distinction in its memorandum of fact and law that it included with its motion record.

Instead, the CTA only focused on Justice Mactavish's conclusion that the impugned statements did not affect legal rights, impose legal obligations or cause prejudicial effects.

[30] Following the receipt of APR's motion record, CTA addressed the reasonable apprehension of bias argument in its reply submissions, which were longer than its original submissions.

[31] CTA, in its reply submissions, stated:

13. [APR] wants this Court to review facts which [APR] says create a reasonable apprehension of bias in future cases. There is no precedent for this. The proper course is to raise the issue in those cases where the decision of the [CTA] would affect the legal rights of the parties.

14. The decision of Mactavish J.A. on the motion for an interlocutory injunction brings home this very point. Mactavish J.A. pointed out that allegations of bias could be raised in actual proceedings affecting the rights of individuals, as was done in *E.A. Manning* [*E.A. Manning Ltd. v. Ontario Securities Commission*, 18 O.R. (3d) 97, [1994] O.J. No. 1026];

“Even if it subsequently turns out that CTA members were in fact involved in the formulation of the statements, APR's argument could be advanced in the context of an actual passenger complaint and any bias concerns could be addressed in that context. Relief could then be sought in this Court if the complainant is not persuaded that they have received a fair hearing.”

[32] However, these comments of Justice Mactavish were made in paragraph 36 of her reasons in relation to the irreparable harm component of the *RJR-MacDonald* test, not whether there was a serious issue that was raised in the judicial review application in relation to this matter. The absence of a precedent should not also necessarily lead to the conclusion that an application for judicial review should be struck. CTA was also unable to identify any precedent

that clearly supported its position that this part of the judicial review application was “so clearly improper as to be bereft of any possibility of success” (*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, at page 600 (C.A.), 58 C.P.R. (3d) 209).

[33] The arguments related to the reasonable apprehension of bias should be made at the hearing of the judicial review application, not in reply submissions in relation to a motion to strike the judicial review application. APR should not be deprived of its argument simply because there is no precedent.

[34] As a result, I would dismiss the motion to strike the application for judicial review. The costs of this motion shall be in the cause.

“Wyman W. Webb”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-102-20

STYLE OF CAUSE: AIR PASSENGER RIGHTS v.
CANADIAN TRANSPORTATION
AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: WEBB J.A.

DATED: OCTOBER 2, 2020

WRITTEN REPRESENTATIONS BY:

Simon Lin FOR THE APPLICANT

Allan Matte FOR THE RESPONDENT

SOLICITORS OF RECORD:

Evolink Law Group FOR THE APPLICANT
Burnaby, British Columbia

Legal Services Directorate FOR THE RESPONDENT
Canadian Transportation Agency
Gatineau, Quebec

No. 39266

December 23, 2020

Le 23 décembre 2020

BETWEEN:

ENTRE :

Air Passenger Rights

Air Passenger Rights

Applicant

Demanderesse

- and -

- et -

Canadian Transportation Agency

Office des transports du Canada

Respondent

Intimé

JUDGMENT

JUGEMENT

The application for leave to appeal from the judgment of the Federal Court of Appeal, Number A-102-20, 2020 FCA 92, dated May 22, 2020, is dismissed without costs.

La demande d'autorisation d'appel de l'arrêt de la Cour d'appel fédérale, numéro A-102-20, 2020 CAF 92, daté du 22 mai 2020, est rejetée sans dépens.

J.S.C.C.
J.C.S.C.

Air Passenger Rights v. Canada (Attorney General), [2021] F.C.J. No. 1835

Federal Court Judgments

Federal Court of Appeal

M.J.L. Gleason J.A.

Heard: In writing.

Judgment: October 15, 2021.

Docket: A-102-20

[2021] F.C.J. No. 1835 | 2021 FCA 201

Between Air Passenger Rights, Applicant, and The Attorney General of Canada, Respondent, and The Canadian Transportation Agency, Intervener

(40 paras.)

Counsel

Simon Lin, for the Applicant.

J. Sanderson Graham, for the Respondent.

Barbara Cuber, Counsel for the Canadian Transportation Agency.

REASONS FOR ORDER

M.J.L. GLEASON J.A.

1 I have before me three motions: a motion from the applicant seeking disclosure of documents from the Canadian Transportation Agency (the CTA) under Rules 317 and 318 of the *Federal Courts Rules*, SOR/98-106, or alternatively, that a subpoena be issued for their disclosure; an informal motion from the applicant made by way of letter seeking to put additional materials before the Court on the disclosure motion; and a motion from the CTA seeking leave to intervene in this application.

2 Before turning to each of the motions, a little background is useful.

3 The underlying judicial review application in this file challenges a statement on vouchers posted on the CTA's website on March 25, 2020, shortly after the onset of the COVID-19 pandemic. The CTA opined in the statement that airlines could issue vouchers to passengers for cancellations caused by the pandemic as opposed to reimbursements for cancelled flights. The statement provided:

The COVID-19 pandemic has caused major disruptions in domestic and international air travel.

For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

4 In its judicial review application, the applicant seeks the following declarations: (1) that the foregoing statement does not constitute a decision of the CTA and has no force or effect at law; (2) that the issuance of the statement violates the CTA's Code of Conduct and gives rise to a reasonable apprehension of bias, either for the CTA, as a whole, or for any member who supported the statement; and (3) that the CTA as a whole or any member who supported the statement exceeded or lost its or their jurisdiction to rule on passenger complaints seeking reimbursements for cancelled flights. The applicant also seeks injunctive relief requiring, among other things, removal of the statement from the CTA's website and an order enjoining the CTA as a whole or, alternatively, any member who supported the statement, from hearing passenger complaints requesting reimbursement for flights cancelled because of the pandemic.

5 The applicant sought an interlocutory injunction for much the same relief on an interim basis. Justice Mactavish dismissed the request for interim relief, but in so doing accepted, without specifically ruling on the point, that the applicant's judicial review application raised a serious issue (*Air Passenger Rights v. Canada (Transportation Agency)*, 2020 FCA 92, [2020] F.C.J. No. 630 at para. 17).

6 The CTA then brought a motion to strike the application, which was dismissed by Justice Webb (*Air Passenger Rights v. Canada (Transportation Agency)*, 2020 FCA 155). In so ruling, Justice Webb held that the bias issues raised by the applicant were ones that merit a hearing before a full panel of this Court (at para. 33).

7 After being seized with the applicant's disclosure motion, I issued a direction requesting submissions on the proper respondent in this matter because the applicant had named the CTA and not the Attorney

General of Canada (the AGC). After receipt of submissions from the parties and the AGC, I ruled that the AGC was the proper respondent in light of the nature of the application, the requirements of the *Federal Courts Rules* and the nature of the allegations made in the application. However, I left open the possibility of the CTA's bringing a motion to intervene (*Air Passenger Rights v. The Attorney General of Canada*, 2021 FCA 112).

8 The AGC subsequently advised that he relied on the CTA's submissions in response to the applicant's motion for disclosure and made brief submissions opposing the applicant's informal motion to file additional materials on the disclosure motion.

9 Thereafter, the CTA made a motion to intervene in the application, seeking the ability to make submissions related to its jurisdiction and mandate. The applicant opposes the intervention motion, and the AGC takes no position in respect of it.

I. The Motion for Disclosure and the Informal Motion to add an Affidavit on the Disclosure Motion

10 In its motion for disclosure, the applicant seeks an order requiring disclosure of unredacted copies of all CTA records from March 9 to April 8, 2020 in respect of the impugned statement, including, without restriction, emails, meeting agendas, meeting minutes, notes, draft documents, and memos.

11 In support of its disclosure motion, the applicant filed an affidavit from its President, Dr. G bor Luk cs, in which he attached excerpts from the transcript of the evidence given by the CTA's Chairperson before the House of Commons Standing Committee on Transport, Infrastructure and Communities on December 1, 2020. Dr. Luk cs also appended an email exchange between an official at the Transport Canada and a Member of Parliament and documents obtained from the CTA through an access to information request that sought documents similar to those sought by the applicant in the present motion for disclosure. Several of the documents disclosed by the CTA in response to the access request were heavily redacted. In addition, the documents disclosed are but a few of the several thousand pages that the CTA indicated were responsive to the access request.

12 The materials appended to Dr. Luk cs' affidavit indicate that there were email communications between representatives from two airlines and the CTA regarding the subject matter of the impugned statement before it was issued and that there were likewise similar communications between representatives of the CTA and Transport Canada about the statement before the statement was issued. Given the redactions to these documents, it is difficult to discern the nature of what was said about the statement in them. Other documents attached as exhibits to Dr. Luk cs' affidavit indicate that the Chairperson and Vice-Chairperson of the CTA received drafts of the impugned statement before it was posted on the CTA's website. The fact that the Chairperson of the CTA was involved in approving the statement was confirmed in his testimony to the House of Commons Standing Committee on Transport, Infrastructure and Communities on December 1, 2020 and the email exchange between officials at the Transport Canada and a Member of Parliament. The latter email exchange also suggests that other CTA members endorsed the impugned statement.

13 In the informal motion, the applicant seeks to add an additional affidavit from Dr. Luk cs that appends three additional documents he obtained after he swore his first affidavit in support of the disclosure

motion. These documents indicate that there are additional documents concerning the impugned statement that were exchanged between the CTA and Transport Canada prior to the issuance of the statement. One of the appended documents is a less redacted version of one of the emails appended to Dr. Luk cs' original affidavit.

14 I will deal with the informal motion first.

15 The AGC objects to the filing of Dr. Luk cs' additional affidavit because he says that the applicant did not follow the *Federal Courts Rules* in proceeding by way of informal motion and because the additional documents the applicant seeks to add to the record in respect of the disclosure motion are not relevant.

16 With respect, I disagree. Given the current circumstances associated with the COVID-19 pandemic, as well as the fact that the informal motion contained an affidavit that appended the additional documents that the applicant seeks to put before the Court, there was no need for the applicant to have proceeded via way of formal motion. The AGC has suffered no prejudice due to the way the motion was brought and the Court has before it all that is necessary for disposition of the motion, including the arguments of the parties.

17 As for relevance, the additional documents are of the same nature as those appended to Dr. Luk cs' original affidavit and are relevant to the applicant's bias arguments, which are two-fold in nature. On one hand, the applicant asserts that the posting of the statement, itself, gives rise to a reasonable apprehension of bias because it indicates that the CTA pre-judged the merits of any complaint that might be filed in which a passenger seeks compensation for a cancelled flight. On the other hand, the applicant asserts that there was inappropriate third party interference in the CTA's adoption of the policy reflected in the impugned statement, which the applicant says provides an additional basis for a reasonable apprehension of bias. The documents the applicant wishes to add are relevant to the second prong of its bias argument.

18 The second affidavit of Dr. Luk cs is therefore relevant and I will consider it in support of the applicant's disclosure request.

19 Turning to that request, adopting the submissions that were previously filed by the CTA, the AGC opposes the requested disclosure for several reasons. First, he says that Rule 317 of the *Federal Courts Rules* does not permit or require the requested disclosure because the Rule only applies to material in the possession of a tribunal whose order is the subject of an application for judicial review. According to the AGC, there is no basis for disclosure under Rule 317 or 318 because the applicant contends that the impugned statements do not have the force of an order and no order has been made. In the alternative, the AGC submits that the request for disclosure should be denied because it is overly-broad, constitutes a fishing expedition and the materials sought are irrelevant to the issues raised in the application, which the AGC says have been impermissibly expanded by the applicant to include alleged third-party interference in the adoption of the impugned statement.

20 I disagree in large part with each of these assertions.

21 Turning to the first of the foregoing assertions, as the applicant rightly notes, the breadth of materials that are subject to disclosure under Rules 317 and 318 of the *Federal Courts Rules* is broader where bias

or breach of procedural fairness is alleged, particularly where, as here, relief in the nature of prohibition is sought. In such circumstances, disclosure is not limited to the materials that were before the tribunal when an order was made. Rather, where such arguments are raised, documents in the possession, control or power of a tribunal that are relevant to the allegations of bias or breach of procedural fairness are subject to disclosure. Indeed, were it otherwise, this Court would be deprived of evidence necessary for the disposition of an applicant's claims of bias or breach of procedural fairness and the availability of relief in the nature of prohibition would be largely illusory: see, e.g., *Humane Society of Canada Foundation v. Canada (National Revenue)*, 2018 FCA 66, 289 A.C.W.S. (3d) 875 at paras. 5-6; *Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program & Advertising Activities)*, 2006 FC 720, 293 F.T.R. 108 at para. 50, aff'd 2007 FCA 131; *Majeed v. Canada (Minister of Employment & Immigration)*, 1997 CarswellNat 1693, [1993] F.C.J. No. 908 (F.C.T.D.) at para. 3, aff'd [1994] F.C.J. No. 1401 (F.C.A.). Thus, the first assertion advanced by the AGC as to the scope of permitted disclosure under Rules 317 and 318 is without merit.

22 As concerns the subsidiary arguments advanced by the AGC to resist disclosure, I do not agree that all the documents sought by the applicant are irrelevant or fall outside the scope of the claims made in the applicant's Notice of Application. However, the requested disclosure is broader than necessary and goes beyond that which is relevant to the bias issues raised by the applicant. Disclosure should instead be limited to documents sent to or from a member of the CTA (including its Chairperson and Vice-Chairperson), related to a meeting attended by CTA members or sent to or from a third party concerning the impugned statement between March 9 and March 25, 2020, the date the statement was posted on the CTA website. In addition, privileged documents should be exempt from disclosure.

23 For clarity, meetings include telephone conversations, video conferences and internet meetings as well as in-person meetings and third parties include anyone other than a member or employee of the CTA.

24 As noted, the applicant's allegations related to bias are two-fold and concern, first, the alleged pre-judgement by the CTA as an institution or, in the alternative, by its constituent members of passengers' entitlement to reimbursement for flights cancelled due to the COVID-19 pandemic and, second, alleged third-party influence in the development of the impugned statement on vouchers. The Notice of Application and affidavits of Dr. Luk cs are broad enough to encompass both aspects of the bias argument. I therefore do not accept that the bias argument has been impermissibly widened by the applicant.

25 Documents received by and sent from CTA members or sent to or by anyone at the CTA from third parties about the subject matter of the statement that were sent or received prior to the date the statement was posted are relevant to the applicant's bias allegations because they are relevant to the involvement of decision-makers and third parties in the adoption of the impugned statement. Such involvement is central to the applicant's bias allegations. Likewise, documents related to meetings attended by CTA members during which the impugned statement was discussed before its adoption are similarly relevant.

26 The evidence filed to date by Dr. Luk cs shows that there were communications between third parties and the CTA about the subject matter of the impugned statement, prior to its adoption. Such evidence also suggests that the CTA's Chair, and possibly other CTA members, were involved in the decision to adopt

and post the impugned statement. There is therefore a factual grounding for the requested disclosure, which cannot be said to constitute an impermissible fishing expedition.

27 However, the applicant has provided no evidence to substantiate disclosure of documents post-dating the date the impugned statement was posted. Similarly, the applicant has failed to establish that documents that were purely internal to the CTA and which were not shared with its members are relevant. In short, there is no basis to suggest that such documents would contain information about whether CTA members or third parties were involved in making the decision to post the impugned statement, which is the essence of the applicant's bias allegations. Thus, these additional documents need not be disclosed.

28 The AGC, in adopting the submissions of the CTA, has requested that if disclosure is ordered, privileged documents be exempt from disclosure and that a process be established for ruling on privilege claims. I agree that this is necessary, and believe that the most expeditious process for advancing any claims of privilege would be for the CTA to submit any documents over which it claims privilege to the Court on a confidential basis for a ruling.

29 I would accordingly order that, within 60 days from the date of the Order in these matters, all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 or sent to a third party by the CTA or received from a third party by the CTA between the same dates concerning the impugned statement or related to a meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the impugned statement was discussed shall be provided electronically to the applicant. I would also order that, within the same period, the AGC shall provide the Court, on a confidential basis, copies of any document over which the CTA claims privilege, that would otherwise be subject to disclosure, along with submissions outlining the basis for the privilege claim. Such filing may be made via way of informal motion and should be supported by an affidavit attaching copies of the documents over which privilege is claimed. A redacted version of the AGC's submissions, from which all details regarding the contents of the documents are deleted, shall be served and filed. The applicant shall have 30 days from receipt to make responding submissions, if it wishes. These materials shall then be forwarded to the undersigned for a ruling on privilege.

30 Should a 60-day period be too short to accomplish the foregoing, the AGC may apply for an extension, via way of informal motion supported by affidavit evidence, if the time provided is inadequate by reason of complexities flowing from the COVID-19 pandemic or the number of documents involved.

31 The applicant will have 30 days from receipt of this Court's ruling on the privilege claims to serve any additional affidavits it intends to rely on in support of its application. Subsequent time limits for completion of the remaining steps to perfect the application will thereafter be governed by the *Federal Courts Rules*.

II. The Motion for Intervention

32 I turn now to the CTA's motion for intervention. It seeks leave to intervene to provide a brief affidavit, a memorandum of fact and law and oral submissions on its jurisdiction and, more specifically, on the scope of its regulatory and adjudicative functions. The CTA proposes that such affidavit would be limited

to attaching a sample of six resource, informational and guidance tools it says it has issued and posted on its website and the submissions limited to explaining the scope of the CTA's jurisdiction and practice of publishing guidance materials on its website.

33 The applicant objects to the intervention, arguing that it is an impermissible attempt by the CTA to indirectly argue the merits of the bias issue. The applicant further submits that the AGC is the only party who should be heard and says that the AGC is able to adequately defend against the bias claims. The applicant in the alternative submits that, if it is allowed to intervene, the CTA should not be allowed to file additional evidence as an intervener is bound by the record the parties put before the Court and may not file new evidence or raise new arguments. The applicant also says that two of the six examples the CTA wishes to submit are bootstrapping as they were issued by the CTA after this application was commenced.

34 The test for intervention applied by this Court involves the consideration of several factors such as whether: (1) the intervener is directly affected by the outcome; (2) there is a justiciable issue and a public interest raised by the intervention; (3) there is another efficient means to put the issue before the Court; (4) the position of the proposed intervener is adequately defended by one of the parties; (5) the interests of justice are better served by the intervention; and (6) the Court can effectively decide the case without the participation of the intervener: *Rothmans Benson & Hedges Inc. v. Canada (Attorney General)*, [1989] F.C.J. No. 446, 1989 CarswellNat 594, at para. 12; *Sport Maska v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3 at para. 37-39[*Sport Maska*]. However, as noted at paragraph 42 of *Sport Maska*, the test is a flexible one as each case is different and, ultimately, the most important question for the Court is whether the interests of justice are best served by granting the intervention.

35 Here, I believe the interests of justice would be best served by granting the CTA the right to intervene as the Court may well benefit from some of the background information the CTA seeks to put before the Court, which will set out the relevant context. The CTA is uniquely placed to provide such information to the Court, and such information might be important for the Court to understand in order to appreciate the relevant backdrop and scope of the CTA's jurisdiction in regulatory and adjudicative matters. Administrative tribunals have often been granted leave to intervene to explain their jurisdiction as was noted by the Supreme Court of Canada in *Ontario (Energy Board) v. Ontario Power Generation*, 2015 SCC 44, [2015] 3 S.C.R. 147 at paras. 42 and 48.

36 That said, it is vital that the CTA's intervention not impair its ability to function as an independent administrative tribunal. Its submissions must therefore be factual and go no further than explaining its role and setting out the examples the CTA wishes to put before the Court that pre-date March 25, 2020. I do not believe it appropriate that the CTA refer to more recent examples because they are not directly relevant to what transpired in this application and may be perceived as an attempt to bootstrap the approach taken by the CTA in issuing the impugned statement. It is not the role of the CTA in intervening to act as an advocate or in any way defend the propriety of issuing the impugned statement. The CTA should rather behave as an amicus, who is allowed to intervene solely to ensure the Court possesses relevant background information.

37 The examples the CTA will be allowed to put before the Court are not the sort of evidence that it is impermissible for an intervener to add to the record, if they indeed even constitute evidence as opposed to

something more akin to a decision that may simply be filed or referred to in submissions. They do not expand the factual record or points in issue.

38 I would accordingly allow the CTA to submit an affidavit that attaches the four examples appended as exhibits to the affidavit of Meredith Desnoyers, sworn July 14, 2021, which pre-date March 25, 2020. The applicant may submit such affidavit at the same time as the AGC submits its affidavits in response to those of the applicant. I would also allow the CTA to file a memorandum of fact and law of no more than 10 pages, explaining its jurisdiction and practice of publishing guidance materials on its website, as exemplified by the examples attached to the affidavit it will file. I would further grant the CTA's request that the style of cause be amended to add it as an intervener and that the other parties be ordered to serve the CTA with all further materials filed in this application.

39 I would leave the issue of whether the CTA will be allowed to make oral submissions during the hearing to the panel seized with the application on the merits and would remit to such panel the issue of whether costs should be awarded in respect of the intervention.

40 These three motions will therefore be granted on the foregoing terms. I make no order as to costs as none were sought in respect of the motion for intervention and success was divided on the motion for disclosure.

M.J.L. GLEASON J.A.

End of Document

Merck & Co. v. Apotex Inc., [2003] F.C.J. No. 837

Federal Court Judgments

Federal Court of Appeal

Toronto, Ontario

Stone, Noël and Sexton JJ.A.

Heard: April 8 and 9, 2003.

Judgment: May 26, 2003.

Dockets A-226-00, A-410-01

[2003] F.C.J. No. 837 | [2003] A.C.F. no 837 | 2003 FCA 234 | 2003 CAF 234 | 241 F.T.R. 160
| 227 D.L.R. (4th) 106 | 305 N.R. 68 | 25 C.P.R. (4th) 289 | 123 A.C.W.S. (3d) 157

Between Apotex Inc., appellant (defendant), and Bernard Sherman, appellant, and Merck & Co., Inc. and Merck Frosst Canada & Co., respondents (plaintiffs)

(95 paras.)

Case Summary

Appeal by Apotex Inc. from a decision finding it in contempt of court. Reasons for judgment were released granting Merck & Co. a permanent injunction restraining Apotex from selling a certain drug. After the release of the reasons but prior to the entry of the formal judgment, Apotex continued to sell the drug. After the entry of the judgment, Apotex financially facilitated sales of the drug among third parties. The judge found that Apotex was in contempt of court with respect to the pre-judgment period, as it had knowledge of the reasons and had acted in a manner that was prohibited by the reasons. With respect to the post-judgment period the judge also found that Apotex was in contempt, as its activities interfered with the orderly administration of justice and impaired the authority and dignity of the court. Apotex was fined \$250,000. The judge found that Apotex was not denied an opportunity to make full answer and defence due to the fact that Merck's lawyers acted as prosecutors on the contempt hearing. Apotex was ordered to pay costs on a solicitor-client basis. With respect to the pre-judgment period, Apotex argued that the judge erred in applying the test applicable to breach of an order to find that it had breached the reasons for judgment. With respect to the post-judgment period, Apotex argued that the judge erred in finding that it was in contempt, as the injunction did not prohibit it from assisting third parties to transfer the drug among themselves. Apotex also argued that there were mitigating factors which justified a reduction of the fine. Apotex further argued that the judge erred in imposing solicitor-client costs, as there was no scandalous or reprehensible conduct during the proceeding.

HELD: Appeal allowed in part.

There was no difference in the applicable test whether dealing with reasons for judgment or the formal order. In either case it was sufficient to show that the reasons or order were clear and that Apotex knowingly committed the prohibited act. The permanent injunction did not prohibit sales among third parties. The facilitation of such sales did not amount to contempt. Therefore, with respect to the post-

judgment period, the judge erred in concluding that Apotex had interfered with the orderly administration of justice. There was no basis to interfere with the judge's conclusion that Apotex was not prejudiced in its right to make full answer and defence. In determining the fine, the judge erred in giving insufficient weight to the factor of deterrence. However, the fine had to be reduced in light of the finding that the judge erred in finding contempt in the post-judgment period. The fine was reduced to \$125,000. It was not inappropriate for costs to have been awarded on solicitor-client basis, as this was the customary practice in contempt cases. Given Apotex's partial success on the appeal, however, it was appropriate that no costs be awarded for that issue at trial and on appeal.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7. Federal Court Act, R.S.C. 1985, c. F-7, ss. 52(b)(i), 57. Federal Court Rules, 1998 SOR/98-106, Rule 400(1). Federal Court Rules, C.R.C. 1978, c. 663, Rule 355(1). Patent Act, R.S.C. c. P-4, s. 56

Counsel

H.B. Radomski, David Scrimger, Brian Greenspan and Sharon Lavine, for the appellant. Brian Crane, G. Alexander Macklin and Ritu Gambhir, for the respondent.

The judgment of the Court was delivered by

SEXTON J.A. (orally)

1 This is an appeal and cross-appeal from the Judgment of MacKay J., dated March 7, 2000 [Merck & Co. v. Apotex Inc. (2000), 5 C.P.R. (4th) 1], which held that both Apotex Inc. and Dr. Bernard Sherman, who at the time was the President and Chief Executive Officer of Apotex Inc., were in contempt of court, and from the Supplementary Judgment of MacKay J. dated June 5, 2001 imposing fines in respect of the contempt and awarding costs in favour of the respondents on a solicitor and client basis.

2 In the 1990s, the leading prescription drug in Canada in sale value was enalapril maleate, for which Merck held a patent. Apotex Inc. ("Apotex") manufactured its generic equivalent. Merck alleged infringement and on December 14, 1994, MacKay J. released Reasons for Judgment in which he found infringement and held inter alia that Merck & Co., Inc. ("Merck") was entitled to a permanent injunction restraining further infringement on the part of Apotex. He also directed that counsel for the parties submit, for the Court's consideration, a draft judgment incorporating his findings. On December 15, 1994, before counsel had even commenced to discuss such a draft, Apotex sold \$9 million worth of the drug. This equated to a month of normal sales by Apotex. The main issue in this case is whether Apotex's actions amounted to a contempt of court.

Facts

3 The Respondent Merck is a United States corporation organized under the laws of the State of New Jersey, where it has its principal place of business. It is the owner of the Canadian patent for enalapril maleate, issued on October 16, 1990, which was the basis of the patent infringement action initiated by

Merck on September 20, 1991. Merck Frosst Canada Inc. ("Merck Frosst") is a corporation organized under the laws of the province of Ontario, a wholly owned subsidiary of Merck. Merck Frosst is the exclusive licensee of Merck, under the patent, in Canada.

4 The patent includes the claimed invention of enalapril maleate which, when combined into tablets or liquid dosage form, provides a product that can be dispensed as a prescription drug to members of the public for treatment of hypertension and congestive heart failure.

5 After enalapril maleate's introduction into the Canadian market in 1987 under the trade name VASOTEC, it became a popular product. In 1993, sales were in excess of \$150 million, and it was said to have been the leading prescription product in sales value in Canada. It constituted nearly one-third of total sales by Merck Frosst's pharmaceutical division. On a worldwide basis, it was said to be the second most valuable prescription drug sold.

6 The Appellant, Apotex, is a manufacturer and distributor of generic pharmaceutical products. Apotex has neither sought, nor ever held, a license from Merck to import, manufacture, export or sell enalapril or enalapril maleate for use or consumption in Canada or in any other place. In February 1990, Apotex applied to Health and Welfare Canada for a Notice of Compliance ("NOC") to market in Canada its version of enalapril maleate under the trade name APO-ENALAPRIL. When an NOC was not forthcoming, Apotex applied in late December 1992 for a mandamus order to compel the Minister to issue the notice. In turn, Merck applied for an order to prohibit the Minister from issuing an NOC to Apotex. Mr. Justice Dubé ordered that an NOC be issued and dismissed Merck's motion. This decision was upheld on appeal to this Court. Consequently, on September 2, 1993, Apotex received an NOC authorizing sale in Canada of APO-ENALAPRIL in tablet form. The tablets are similar in size, shape, colour, and concentration to Merck Frosst's VASOTEC tablets.

7 Merck then applied for an interim and interlocutory injunction to restrain Apotex from selling its APO-ENALAPRIL product pending trial of the patent infringement action. Even though the injunction was refused on November 4, 1993, Apotex was ordered to maintain accounts of sales and shipments pending disposition of the action. Arrangements were also made for an expedited trial in the matter. The trial occurred in March and April 1994.

8 On December 14, 1994, MacKay J. released his Reasons for Judgment [Merck & Co. v. Apotex (1994), 59 C.P.R. (3d) 133]. The Reasons were faxed to the office of counsel for Apotex, Mr. Radomski, at 2:53 p.m. on the same date. After finding infringement, the Reasons dealt with the relief sought by the plaintiffs, Merck, in the following terms:

... On the basis of my findings, they [the plaintiffs] are entitled to

- (a) a declaration that claims 1 to 5 and 8 to 15 of Canadian Letters Patent No. 1,275,349 have been infringed by the defendant;
- (b) a permanent injunction restraining the defendant by its officers, directors, servants, agents, employees or otherwise from infringing claims 1 to 5 and 8 to 15 of Canadian Letters Patent No. 1,275,349.

- (c) an order ... for delivery up, or destruction under oath or under supervision of this Court, of all compositions, that is, APO-ENALAPRIL products, not including bulk enalapril maleate held in inventory ...

...

At the conclusion of trial in this matter, counsel suggested that formal judgment might most appropriately be considered after an opportunity for consultation between counsel, and if desirable a further appearance, before the Court, concerning the terms of judgment in light of my findings and conclusions. That seems to me an appropriate course at this stage, in particular since judgment will be rendered after a delay following trial which was unanticipated and for which I express my regret.

In the circumstances, these Reasons are filed with this final direction and an invitation to counsel for the plaintiffs to consult with counsel for the defendant on appropriate terms of the final judgment to be filed in light of my conclusions as set out in these Reasons. Counsel for plaintiffs should prepare a draft judgment, seek approval of counsel for the defendant as to its form and, if possible, its content, and submit the draft for consideration by the Court. If counsel for either or both of the parties wishes to be heard on the matter, a hearing shall be arranged.

9 After receiving the Reasons, Dr. Sherman and Mr. Kay, the Executive Vice-President of Apotex, discussed by telephone with Mr. Radomski on the evening of December 14th their understanding of the Reasons. According to Apotex, the participants all interpreted the Reasons to reflect the Court's intention to permit the continuation of sales activities until the terms of the Judgment were settled. Apotex and Mr. Radomski expected that MacKay J. could have been persuaded to incorporate a term in the Judgment which would have permitted Apotex to sell the remainder of its existing inventory of finished tablets on the same terms as the previous unsuccessful request for an interlocutory injunction.

10 On the evening of December 14, 1994, counsel for Merck sent a letter to Mr. Radomski, urging Apotex to suspend its sales of APO-ENALAPRIL on the basis that the Reasons had already imposed an injunction. The letter requested confirmation that "Apotex will cease to manufacture, deliver, distribute, sell or offer for sale its Apo-enalapril product", "will do nothing to dispose of its inventory", and "will advise its customers immediately that there is an injunction in place to that effect". Mr. Radomski responded by letter, dated December 14, 1994, and advised that Apotex held a fundamentally different interpretation of the Reasons - Apotex was of the view that the Reasons did not require the company to stop selling, and that business would continue as usual, at least until a formal Judgment and injunction was filed. Mr. Radomski also advised in this letter that they would be appealing the decision of MacKay J. and would be seeking a stay of any permanent injunction ordered pending disposition of the appeal. On December 15, 1994, counsel for Merck sent a letter to Mr. Radomski, which was received at 10:03 a.m., disagreeing with Apotex's position:

I have just received your letter of December 14, which arrived in our office at 9:39 last evening, in response to mine of the same date, and I have just this moment read it.

I take strong exception to your interpretation of the Reasons for Judgment of Mr. Justice MacKay and the terms of the Judgment which are set out at page 61 of those Reasons.

As I advised you in my letter yesterday, it is clear in my view that an injunction is presently in place and that any action by your client to continue to sell Apo-enalapril at this time would be in breach of that injunction. The point that you raised was considered by the Supreme Court of Canada and found against you. I refer you in particular to, first of all, the trial decision of Mr. Justice Gibson in *Baxter Travenol v. Cutter* (1981), 52 CPR (2d) 163, and in which His Lordship expressed in his Reasons for Judgment the terms of judgment which were to be embodied in a formal document thereafter.

That decision of Mr. Justice Gibson was considered by the Supreme Court of Canada in the same case as reported in (1984), 75 C.P.R. (2d) 1, in which the Court held that the injunction was in place from the moment that the Reasons for Judgment were delivered.

I repeat what I said in my letter yesterday and ask for your immediate confirmation that your client has stopped all activities that would be in breach of the injunction.

I can assure you that this matter is being treated extremely seriously by my client and I expect that you will immediately instruct your client to cease and desist any further infringing activities and obey the injunction of the Court. Any communication your client has made to a provincial authority advising that no injunction is in effect must be immediately retracted. [emphasis in original]

11 On the morning of December 15th, newspapers reported that APO-ENALAPRIL had violated the Merck patent and that MacKay J.'s ruling restrained Apotex from manufacturing and selling the product.

12 At 11:15 a.m., Richard Barbeau, Vice President of Sales and Marketing of Apotex ("Mr. Barbeau"), either personally or through the Apotex sales organization, contacted all of Apotex's customers. These customers were assured that Apotex was still selling APO-ENALAPRIL, but were advised that there was a possibility that Apotex could be enjoined in the future. According to Mr. Kay's testimony, the customers were informed that Apotex was "free to continue to sell" APO-ENALAPRIL. The customers were told that "we could continue to sell, we don't know what the future is going to bring in the product, buy what you want to buy". In addition to the telephone calls, Apotex issued an information circular titled INFO Rx, which was written and signed by Dr. Sherman in the mid-afternoon on December 15th. This circular was sent on-line and by facsimile to all Apotex's customers. Dr. Sherman also prepared a press release in the same terms which was issued simultaneously to the media. The documents advised:

... On the other hand, yesterday, in a related litigation, the Federal Court released a decision against Apotex in favour of Merck. Apotex is immediately appealing this decision to the Federal Court of Appeal. We are also applying for a stay of any injunction pending appeal. Apotex and its solicitors are confident that we will prevail upon appeal of this particular decision.

No injunction has been directed against pharmacists, and we are hopeful, as aforesaid, that a stay pending appeal will prevent any disruption of continuing supplies.

The INFO Rx also stated:

We are concerned that you will again be subjected to pressure from Merck not to dispense APO-ENALAPRIL.

No injunction has been directed against pharmacists, and we are hopeful, as aforesaid, that a stay pending appeal will prevent any disruption of continuing supplies.

13 At 11:30 a.m., Mr. Radomski received Merck's December 15th letter, which made reference to Baxter Travenol Laboratories of Canada Ltd. et al. v. Cutter (Canada) Ltd., [1983] 2 S.C.R. 388, (1984) 75 C.P.R. (2d) 1 (S.C.C.) ["Baxter v. Cutter"], by hand-delivery, as he was in court at the time. According to Dr. Sherman's evidence, Mr. Radomski called him around noon advising that he received the December 15th letter from counsel for Merck. Mr. Radomski advised that Apotex should stop selling, and Dr. Sherman testified that he instructed Mr. Kay to "stop selling" as soon as he got off the phone, but gave no direct instructions to Mr. Barbeau and the Apotex sales staff. According to Dr. Sherman, "stop selling" meant that the inventory was frozen on the computer. When inventory is "frozen", invoices are not generated for customer orders. However, invoices already generated continued to be processed, meaning that the product was still picked, packed and shipped. No instructions were given by Dr. Sherman to stop processing the orders already received.

14 Despite this "stop selling" order by Dr. Sherman, oral evidence from Kohlers Distributing Ltd. ("Kohlers"), a distributor of Apotex products, confirms that sales by Apotex continued long into the afternoon on December 15, 1994. MacKay J. found that a sale occurred as late as 4:00 p.m. Apparently, at about 4:00 pm, Mr. Barbeau called Mr. Organ, an employee of Kohlers, and subsequently an APO-ENALAPRIL order exceeding \$866,000 was placed.

15 On December 15, 1994, Apotex issued 481 sales invoices totalling \$8,213,693.21 in sales of APO-ENALAPRIL to Canadian customers and an additional two invoices totalling \$580,130.40 U.S. (\$804,640.86 Cdn) to export customers, for a total exceeding \$9 million. This single day of sales was the equivalent to more than an average month of sales, 7.5 times greater than the previous highest day of sales, and more than 20 times the daily average of sales.

16 On December 16, 1994, at about 8:26 a.m., Mr. Radomski faxed a letter to the Court:

Our client respectfully requests that an emergency conference call be convened today between counsel for the parties and the Honourable Mr. Justice MacKay. The purpose of this conference is to seek an interim stay of the implementation of the reasons for Judgment issued by Mr. Justice MacKay pending the return of Apotex' motion to stay the Order of Mr. Justice MacKay pending appeal therefrom. We would seek to schedule the latter motion next week.

Also, at about 10:58 a.m., Mr. Radomski sent a Draft Notice of Motion, unsworn affidavit of Dr. Sherman, and a covering letter to the Court Registrar and to counsel for Merck.

17 Throughout the morning and early afternoon on December 16, 1994, Apotex continued shipping APO-ENALAPRIL that had been invoiced but not yet processed on December 15th.

18 Mid-morning on December 16th, counsel for Merck responded by letter to Apotex's request for an emergency conference:

I object to a matter as serious as the suspension of a permanent injunction being dealt with by conference call with the trial judge. Mr. Radomski has the obligation to bring a proper motion before the Court for a suspension of the injunction and our client has the right to respond to such a motion and to have an opportunity for a full and proper hearing before the Court on this very serious matter.

Mr. Radomski responded by letter at about 12:43 p.m. the same day, repeating the request for an urgent emergency telephone conference call for the hearing of an interim stay motion. MacKay J. did not speak to counsel but issued directions which were read to Mr. Radomski over the phone by the Court Registry at about 1:45 p.m. MacKay J.'s Direction stated:

1. Judgment in this matter has not been filed, as the Reasons for Judgment now issued indicate, pending opportunity, as requested by counsel at conclusion of the trial, for counsel to make submissions concerning terms of judgment to implement the Reasons.
2. As I understand it there is no formal decision until judgment is filed, and thus nothing to be appealed from and no judgment to be stayed until a judgment is filed.
3. If the parties cannot agree on the terms of judgment and either wishes to be heard on that matter the Court will arrange a hearing at the mutual convenience of counsel at the earliest opportunity.
4. If Apotex applies by motion for a stay of Judgment when it is filed, Merck requests that application be heard by personal appearance of counsel, not by telephone conference. The Court would arrange for a hearing by personal appearance at the earliest opportunity convenient for counsel.
5. Counsel should consider whether a hearing by personal appearance can be arranged by agreement between them to 1) settle terms of judgment in accord with the Reasons now issued, 2) deal with any application to stay implementation of the judgment pending any appeal by Apotex, 3) terms, if any, for a reference as to damages / profits in accord with the earlier consent Order in this action, or any of these matters.
6. The only useful purpose of a telephone conference on an urgent basis would appear to be to seek possible agreement on a date or dates when matters listed in item 5 (above) might be heard. Counsel are requested to consult and advise the Registry if such a telephone conference is desirable. [my emphasis]

19 It should be noted that neither the Draft Notice of Motion, nor correspondence to the Court from Mr. Radomski, referred to the sales activity of APO-ENALAPRIL by Apotex on December 15, 1994, or that Apotex was of the view that they were at liberty to keep selling.

20 According to Dr. Sherman, Mr. Radomski called and advised him that "the court had confirmed [by the Direction] that we were correct, and that there was no injunction in effect and we were free to sell the product". Clearly, MacKay J. had not been asked, nor did he address, whether Apotex was "free to sell the product". Sales of APO-ENALAPRIL resumed by order of Dr. Sherman at that time.

21 Between 4:35 p.m. and 5:40 p.m. on December 16th, a telephone conference was held, during which MacKay J. was advised by Merck of the Baxter case and of the fact that Apotex was continuing to sell APO-ENALAPRIL. As a result, MacKay J. issued a further direction, in which he made specific mention of Baxter v. Cutter. He later explained this direction in his Reasons on Apotex' stay motion, rendered January 24, 1995 [(1995), 60 C.P.R. (3d) 31]:

... In the absence of any expressed intention with respect to the effective date of an order in the nature of an injunction as provided by my reasons for judgment, the circumstances were similar to those in *Baxter Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.* (1983), 75 C.P.R. (2d) 1, 2 D.L.R. (4th) 621, [1983] 2 S.C.R. 388. ... Yet Dickson J., as he then was, for the Supreme Court of Canada, held that a party to an action, having notice from its reasons for judgment that the court has determined an injunction would issue to preclude actions found to infringe patent rights, is liable for contempt if it continues activities which would be enjoined when the court's formal order is signed and filed.

22 As a result of this telephone conference, Mr. Radomski called Dr. Sherman, advising that Apotex should stop selling. On Dr. Sherman's instructions, Apotex again froze its inventory. However, already generated invoices continued to be processed - shipments and deliveries of APO-ENALAPRIL continued well past December 16th. The full extent of these shipments is not known. However, MacKay J. found that there were at least five deliveries of APO-ENALAPRIL on Saturday, December 17, 1994, 63 deliveries on Monday, December 19, 1994, and one delivery of \$87,953 of APO-ENALAPRIL on Tuesday, December 20, 1994.

23 By the close of business on December 16, 1994, Apotex had issued a further 238 invoices for APO-ENALAPRIL to Canadian customers, totalling \$362,652.54.

24 Merck's motion to settle the terms of the Judgment on patent infringement and Apotex's motion for a stay of Judgment were argued before MacKay J. on December 21, 1994. The Judgment in the action was issued on December 22, 1994, and included orders for an injunction and a delivery up in the following terms:

3. The Defendant, by its officers, directors, servants, agents, employees, or otherwise, is hereby restrained and enjoined from infringing claims 1 to 5 and 8 to 15 inclusive of Canadian Letters Patent No. 1,275,349, and in particular from manufacturing, using, offering for sale and selling, in Canada or elsewhere, APO-ENALAPRIL tablets or any tablets or other dosage forms containing enalapril maleate as an active ingredient, whether such manufacture or sale be from
 - (a) bulk enalapril or enalapril maleate acquired prior to the grant of the patent, or
 - (b) any quantities of bulk enalapril maleate acquired after the grant of the patent.
4. The Defendant shall forthwith deliver up, or destroy under the supervision of this Court all compositions, that is, APO-ENALAPRIL products and any compositions or dosage forms containing enalapril maleate, as well as bulk enalapril maleate manufactured by Delmar Chemicals Inc. ...

25 On December 23, 1994, MacKay J. issued an interim stay of the injunction, pending further hearing in early January, "insofar as it enjoins the defendant from offering for sale or selling APO-ENALAPRIL tablets in response to bona fide orders from pharmacists in the regular course of business". Consequently, sales of APO-ENALAPRIL resumed on December 23, 1994, and substantial sales were made during this period.

26 Following a further hearing, MacKay J. dismissed Apotex' application for a stay of the Judgment on January 9, 1995. This withdrawal of the interim stay order was made effective after ordinary business hours on Monday, January 9, 1995. The Order of January 9, 1995 stated:

Upon the Court *ex proprio motu* considering that in this case the positions of third parties, engaged in distribution, purchase or sale of drug products at the wholesale or retail level, or health authorities, or institutions not being parties to this action, should be clarified in the interests of orderly marketing:

This court orders that:

...

2. The interim stay of the injunction ordered herein on December 23, 1994, pending ultimate determination of the defendant's motion for a stay, is withdrawn and is of no force and effect after the hour ordinarily fixed for close of business by the defendant at its various local office sites, on Monday, January 9, 1995.
3. Third parties, not having been parties to the action herein, who have acquired in good faith property in APO-ENALAPRIL products made by the defendant, before the close of business on January 9, 1995, shall be deemed not to be in violation or contempt of any order of this Court by their possession, distribution, sale or consumption of those products whether before or after January 9, 1995.

Therefore, the injunction was in full force and effect at the close of business on January 9, 1995.

27 Commencing on January 10, 1995, Dr. Sherman declared a blanket "no returns" policy for APO-ENALAPRIL. This "no returns" policy was a change from Apotex's usual policy to accept returns due to overstock, stale-dating, defect or damage. MacKay J. found that, in order to avoid the consequence of the returns, Mr. Barbeau and his sales force were "imaginative": Apotex sales representatives assisted in arrangements to re-direct APO-ENALAPRIL between customers by offering distribution allowances and discounts and by issuing credits to customers to facilitate sales transactions. For instance, Apotex entered into a commercial arrangement with Kohlers whereby Apotex sales representatives directed returns of APO-ENALAPRIL from its customers to Kohlers. In general, Kohlers was a distributor who purchased pharmaceuticals from manufacturers including Apotex, reselling them to pharmacies. Kohlers was paid a distribution allowance by the pharmaceutical manufacturers to sustain its business. With respect to sales, Kohlers usually received an allowance of a 6% deduction or credit on its purchases from Apotex. According to the evidence, Mr. Barbeau initiated contact with Kohlers to determine whether Kohlers would be willing to purchase inventory from other sources, including from pharmacies who were not customers of Kohlers, and then sell the returned product to other customers. For this particular arrangement, Kohlers received a 6% distribution allowance, and, in some cases, an additional 4% prompt payment discount from Apotex. The allowances facilitated the transactions and avoided the return of APO-ENALAPRIL to Apotex, which would have resulted in a loss of the product. Gary Timm, Merck's forensic accountant, was of the opinion that the transactions were sales of APO-ENALAPRIL by Apotex to Kohlers. According to the Respondents, the total amount involved in such transactions in the period amounted to about \$1,561,170.21, plus additional unknown amounts.

28 On April 19, 1995, the Federal Court of Appeal delivered its Judgment with respect to Apotex's appeal of the judgment of MacKay J. at trial [[1995], 2 F.C. 723]. The Court allowed the appeal in part. It indicated that section 56 of the Patent Act, R.S.C. c. P-4 allowed an infringer to use or sell an article without being liable to the patentee if the infringer "purchased, constructed or acquired" the article before the patent became open for public inspection. The Court held at para. 16 that "most of the enalapril maleate acquired by the appellant was shipped by the supplier, before the grant of the patent" and, thus, was non-infringing. However, the Court still declared three lots of enalapril maleate to be infringing because these lots were not re-purified until after the issuance of the patent.

29 Being concerned about possible further infringements, counsel for Merck made repeated requests for compliance with earlier production Orders. Apotex produced on March 7, 1995 about 15 boxes of APO-ENALAPRIL invoices for the period October 3, 1994 to January 9, 1995. Relying on the analysis of these invoices, counsel for Merck brought a motion for a show cause order. On April 27, 1995, Pinard J. issued a Show Cause Order, charging Apotex with two acts of contempt, "all so as to defeat and subvert the Court's process herein and render nugatory the permanent injunction" by: (1) selling and causing to be sold APO-ENALAPRIL during the period between December 14 and 22, 1994 ["December sales"]; and, by (2) aiding and abetting in the transfer, distribution and sale by third parties, among themselves, during the period January 9, 1995 to date ["post-January, 1995 aiding and abetting"].

30 Apotex brought a number of preliminary motions with respect to this Show Cause Order between November 27 and December 4, 1995. These motions sought inter alia: (1) to dismiss or permanently stay the show cause hearing; (2) to quash subpoenas duces tecum issued; (3) to disqualify Gowlings, solicitors for Merck, as prosecutor; and, (4) to prevent use in the show cause hearing of documentation or information obtained from Apotex as a result of a Court order in the patent proceedings. Specifically, the basis of the preliminary motion alleging prosecutorial misconduct and seeking to remove Gowlings as prosecutor of the contempt charge was the idea that contempt proceedings are criminal in nature. As a result, Apotex argued it had the right to have the alleged contempt prosecuted by the Attorney-General, or at least by a prosecutor independent from counsel for Merck. Apotex alleged that counsel for Merck acted with impropriety because of their "vindictive attitude" and inability to act with "the fair impartial demeanor proper for a prosecutor".

31 MacKay J. issued three orders with respect to these preliminary motions on January 23, 1996. He refused all relief sought by Apotex, except that he quashed the subpoena issued to Mr. Kay. With respect to the motion for a stay and to remove Gowlings as solicitors, he stated:

I am not persuaded that the proceedings now initiated before the Court demand special arrangements for their prosecution, aside from those already established by jurisprudence of this Court in relation to contempt proceedings under Rule 355, and applicable principles under the Charter or the Canadian Bill of Rights. It is the responsibility to the Court to ensure that in the proceedings, rules of fundamental justice and due process of law are followed. ...

I am not persuaded that the conduct complained of can be characterized as abusive of the court's process or as otherwise tainting the process so as to warrant dismissal or a stay of further proceedings, or of an order to disqualify and restrain plaintiffs' solicitors from continuing to act in these proceedings.

32 The orders of MacKay J. on these preliminary motions were appealed by Apotex. The show cause hearing was adjourned sine die on consent pending resolution of these appeals. The Court of Appeal dismissed all appeals with costs on October 31, 1996 [(1996), 70 C.P.R. (3d) 309]. On May 22, 1997, the applications for leave to appeal were dismissed by the Supreme Court of Canada [[1996] S.C.C.A. No. 638].

33 The show cause hearing was commenced in July of 1997 and was not completed until February of 1998. At the close of the prosecutor's case, on February 25, 1998, Apotex again moved for an order dismissing or permanently staying the contempt proceedings. Again, Apotex argued that counsel for Merck had conducted the case in a manner fundamentally inconsistent with the obligations of the office of prosecutor, and that, as a consequence, Apotex had been denied its right to be tried in accordance with the principles of fundamental justice. As an alternative to this order for dismissal or permanent stay, Apotex sought an order staying the proceedings until the duties of Merck had been assumed by an impartial and disinterested prosecutor. Apotex argued many of the same allegations of impropriety as in its preliminary motion on this issue. In addition, Apotex argued that it suffered non-disclosure or late disclosure of evidence with respect to testimony, and improperly asserted privilege. MacKay J. dismissed this motion by Order dated June 24, 1998, with Reasons dated July 22, 1998 [T-2408-91]. It should be noted that at no time did Apotex or Dr. Sherman give Notice of a Constitutional challenge under section 57 of the Federal Court Act, nor at any time did Apotex or Dr. Sherman ask the Attorney General of Canada to conduct the show cause proceedings.

34 MacKay J. issued his Reasons for Judgment with respect to the contempt proceedings on March 7, 2000, finding that Apotex and Dr. Sherman were both in contempt of court.

Findings of the Trial Judge on Contempt

35 MacKay J. made the following specific findings in his Judgment. He concluded that both Apotex by its officers and Dr. Sherman in his personal capacity committed contempt by carrying out the December sales of APO-ENALAPRIL after Dr. Sherman had read the Reasons for Judgment dated December 14, 1994. "These Reasons indicated that, as of that day, the Court had resolved that Merck was entitled to a permanent injunction prohibiting Apotex by its officers, and others, from infringing upon the valid claims of Merck's patent." Citing *Baxter v. Cutter*, supra, MacKay J. stated that the action taken in the interim period between the Reasons for Judgment being released and the formal Judgment being filed may constitute contempt, if, with knowledge of the Reasons, one acts in a manner that the Court has clearly indicated in its Reasons is prohibited. In this case, MacKay J. found beyond a reasonable doubt that this test had been met, and recited at paragraph 26 Dickson J.'s words at page 8 in *Baxter v. Cutter* as deciding the matter:

... Once a judge has rendered his decision by giving reasons, and assuming any prohibitions contained therein are clearly worded, it is not, in my view, open to any person to flout his disposition of the case on the ground that there is no judgment yet in effect. The situation after reasons for decision is very different from a situation in which the defendant acts prior to any court determination. Once reasons for decision have been released, any action which would defeat the purpose of the anticipated injunction undermines that which has already been given judicial

approval. Any such action subverts the processes of the court and may amount to contempt of court.

36 MacKay J. concluded that Apotex, but not Dr. Sherman personally, had committed contempt of court by aiding and abetting the third party sales between January 9, 1995 and April 27, 1995. He found at paragraph 57 that "by facilitating sales of its product among third parties, not merely by exchange of information but by its financial involvement in providing distribution allowances and prompt payment allowances, [and by] treating some transactions as if they were sales made directly by Apotex to third party purchasers" Apotex "did interfere with the orderly administration of justice and did impair the authority and dignity of the Court". These transactions "were not transactions exclusively between third parties", and "Apotex' actions in relation to these transactions ... did subvert the Court's process".

37 On the issue of prosecutorial misconduct, MacKay J. stated that he was not persuaded that any of the alleged conduct impaired the opportunity for the moving parties to make full answer and defence.

38 In Supplementary Reasons, MacKay J. imposed a \$250,000.00 fine on Apotex and a \$4500.00 fine on Dr. Sherman personally [(2001), 12 C.P.R. (4th) 456]. He considered the following factors in coming to this decision: (1) the apology of Dr. Sherman, as a mitigating factor; (2) the January facilitating activities of Apotex, which came "close to deliberate flaunting of the Court's Judgment, in spirit at least"; (3) the extraordinary nature and severity of the contempt, as an aggravating factor; (4) the damages suffered by Merck, such that the profits garnered by Apotex through its actions were irrelevant; (5) the past conduct of Apotex, as a mitigating factor, and the future deterrence of similar behaviour as being of insignificant weight; and, (6) the fact that Apotex acted on the advice of counsel, as a mitigating factor.

39 Finally, MacKay J. determined that Merck should be paid costs on a solicitor-client basis in a fixed lump sum in the amount of \$1,500,000.00, for which the defendants, Apotex and Dr. Sherman, would be jointly and severally liable [[2002] FCT 1210; [2002] F.C.J. No. 1637]. He stated at paragraph 20 that "the party who assumes that responsibility [on behalf of the public] ought not to be left to bear costs incurred to establish contempt where contempt is found". MacKay J. considered the following factors in making this decision: (1) the result of the proceeding; (2) the importance and complexity of the proceeding; (3) the public interest in having the proceeding litigated; and (4) the fact that the manner in which Apotex and Dr. Sherman defended their positions resulted in increased costs for Merck, especially since Apotex brought a number of unsuccessful motions to stay the proceedings.

Appellants' Arguments

40 With respect to the December sales period of contempt, Apotex argues that the test with respect to the level of intent necessary for proving contempt is different for a breach of a formal order under the first branch of Rule 355(1) than for an interference with the orderly administration of justice with respect to Reasons for Judgment under the second branch of Rule 355(1). With respect to the first branch, where there is a breach of an order that is clear and unambiguous, the mental elements of the offence consist of acting deliberately or wilfully "with full knowledge of the existence and terms of the injunction issued". The intention to commit an act proscribed by that Order is sufficient to prove contempt. However, with respect to the second branch - acting "in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court" - the test requires a demonstration of contumacy,

thus obliging the prosecutor to prove beyond a reasonable doubt that the accused engaged in conduct knowing that the Court intended to prohibit it. The prosecution must prove that the accused deliberately acted so as to interfere with the orderly administration of justice. Thus, the Appellants assert that MacKay J. applied the wrong test for intent in this context. Where the contempt finding is based not on a breach of an order but on interfering with the orderly administration of justice, an accused cannot be held in contempt of court when he reasonably and bona fide believed that the impugned activity had not been prohibited by the Reasons, and did not intend to otherwise interfere with the orderly administration of justice. Therefore, according to the Appellants, MacKay J. treated the Reasons as if they were an order, and applied the test for an order to the Reasons. In support of its propositions, the Appellants point to MacKay J.'s statement in paragraph 38 of his reasons that "it may be that subjectively, Dr. Sherman did not intend to violate the injunction provided for in the Reasons, or to subvert the process of the Court".

41 Apotex claims as follows. It did not have this level of intent and, thus, cannot be found in contempt of court. Apotex honestly and reasonably interpreted the Reasons as not immediately instituting an injunction. Considering the Direction made by MacKay J. and the history of events preceding the release of the Court's reasons, including the Court's refusal to grant Merck an interlocutory injunction in this case, Apotex's collective understanding of the Reasons as not immediately implementing an injunction was reasonable. Apotex asserts that if MacKay J. had always intended his Reasons to effectively impose an immediate injunction, then he would not have stated in response to the emergency conference call of December 16, 1994 that there was "nothing to be stayed" until Judgment was filed.

42 Also, with respect to the first period of contempt involving the December sales, the Appellants argue that MacKay J. misapplied *Baxter v. Cutter* because the Reasons by MacKay J. were not clearly worded to truly anticipate an injunction. Unlike in *Baxter v. Cutter* where the Reasons were clear and unambiguous, the fact that Apotex' interpretation of the Reasons was reasonable and the fact that the filed Judgment differed from the Reasons reveals that MacKay J.'s Reasons were unclear and ambiguous. Thus, the Appellants argue that the ruling in *Baxter v. Cutter* should not apply in this context.

43 With respect to the post-January, 1995 period of aiding and abetting, the Appellants argue that no contemptuous actions occurred. Because of the third party clause in the January 9, 1995 Order, the Appellants argue that it did not breach the permanent injunction. Apotex did not itself sell APO-ENALAPRIL to its customers. Neither can it be claimed that Apotex committed contempt by interfering with the orderly administration of justice because "to establish a breach" or other violation of a Court order, the Court must specifically find that the accused engaged in an activity proscribed by that order. The order in question did not actually prohibit Apotex from engaging in activities which could "assist" third parties to transfer APO-ENALAPRIL among themselves. As well, conduct which "assists" activities that the Court has expressly permitted, and which are themselves not in contravention of any order, cannot "interfere" with the administration of justice. A party can certainly assist legal activities.

44 In its factum filed with this Court, Apotex, for the most part, repeats the same arguments and relies on the same evidence for prosecutorial misconduct as was put before MacKay J. in its motion, which was dismissed on June 24, 1998.

45 With respect to the penalty imposed by MacKay J., Apotex asserts that the following mitigating factors, present in this case, justify an appropriate reduction in the penalty:

- (a) the act was the contemnor's first offence;
- (b) the Order was ultimately found to have been improperly imposed;
- (c) the contemnor was acting on the advice of counsel;
- (d) the act was not done with the intention of interfering with the administration of justice;
- (e) the contemnor attempted to comply with the Order;
- (f) a formal apology was tendered to the Court by Dr. Sherman;
- (g) the breach was a result of a mistake as to what the Order required.

Apotex argues that the fine imposed by MacKay J. is far outside the range of what has previously been assessed for acts of contempt. A sentence must be proportional to the act committed, and must be similar to that given for similar offences.

46 The Respondents Merck (Appellants by Cross-Appeal) submit that MacKay J. erred in setting the fine too low. In particular, MacKay J. erred by:

1. Failing to give significant weight to the principle of deterrence, in the context of a corporate contemnor.
2. Failing to have sufficient regard to the corporation's financial circumstances, given the need to deter and denounce the conduct.
3. Giving consideration to the fact that Merck's concerns about injury could be recoverable in damages or an accounting of profit.

47 As to costs, the Appellants argue that there is no automatic entitlement to costs following a contempt proceeding, and that the solicitor and client scale should be reserved for particularly scandalous or reprehensible misconduct committed in the course of a proceeding. It was wrong for MacKay J. to assert that the party prosecuting "ought not to be left to bear costs incurred to establish contempt where contempt is found". MacKay J. fettered his discretion in failing to consider that many allegations of contempt were not successfully established at trial, and that the bill of costs was evidentiarily deficient.

Issues

48 This appeal raises five questions:

1. Did MacKay J. err in applying the test for contempt, specifically the level of intent necessary to establish a case of contempt? In other words, did MacKay J. err in finding that Apotex acted in a contemptuous manner, despite concluding that Dr. Sherman may not have subjectively intended to breach the order or interfere with the orderly administration of justice?
2. Did MacKay J. err in finding that Apotex acted in a contemptuous manner by "assisting" its third party customers in transferring APO-ENALAPRIL?
3. Did MacKay J. err in failing to find that Merck committed prosecutorial misconduct during the course of the contempt proceedings, such that a stay of the contempt proceedings ought to have resulted?

4. Should this Court interfere and decrease, or increase, the fine imposed against Apotex and Dr. Sherman?
5. Did MacKay J. err in assessing costs on a solicitor and client basis, without paying heed to the divided success in proving contempt in the contempt proceedings?

Relevant Statutory Provisions

49 The relevant provisions of the Federal Court Rules, C.R.C. 1978, c. 663, as they were when the contempt proceeding was initiated, are as follows:

355. (1) Anyone is guilty of contempt of court who disobeys any process or order of the Court of a judge thereof, or who acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court. In particular, any officer of justice who fails to do his duty, and any sheriff or bailiff who does not execute a writ forthwith or does not make a return thereof or, in executing it, infringes any rule the violation whereof renders him liable to a penalty, is guilty of contempt of court.
- (2) Except where otherwise provided, anyone who is guilty of contempt of court is liable to a fine, which in the case of an individual shall not exceed \$5,000, or to imprisonment for a period not exceeding one year. Imprisonment, and in the case of a corporation, a fine, for refusal to obey any process or order may be repeatedly inflicted until the person condemned obeys.
- (4) No one may be condemned for contempt of court committed out of the presence of the judge, unless he has been served with a show cause order ordering him to appear before the Court, on the day and at the hour fixed to hear proof of the acts with which he is charged and to urge any grounds of defence that he may have. ... [my emphasis]

The relevant provision of the Federal Court Rules, 1998 SOR/98-106, as amended, is as follows:

400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

* * *

400. (1) La Cour a entière discrétion pour déterminer le montant des dépens, les répartir et désigner les personnes qui doivent les payer.

Analysis

A) CONTEMPT INVOLVING DECEMBER SALES

1. Level of Intent Necessary Under the Second Branch of Rule 355(1)

50 It is my opinion that there is no logical reason why the character of intent required under the second branch of Rule 355(1) [interfering with the orderly administration of justice] should be different from that under the first branch. In both cases, the issue should be whether the Order (which would fall under the first branch) or the Reasons for Judgment (which would fall, among other actions, under the second branch) was clear. If the Reasons are clear, then an intent to commit the act is sufficient. By this I mean

that with respect to the first branch of the Rule, provided that the Order is clear, if the defendant intended to commit the prohibited act, then there is contempt. With respect to the second branch of the Rule, provided that the Reasons are clear, if the defendant intended to commit an act, which results in an interference with the orderly administration of justice or an impairment of the authority or dignity of the Court, then there is contempt.

51 This reasoning is borne out by the jurisprudence. For instance, in the Supreme Court of Canada's decision in *Baxter v. Cutter*, supra, the appellants had similarly become entitled to an injunction against the respondent in a patent infringement action. The Reasons for Judgment were delivered on December 11, 1980, but the formal judgment was not signed and issued until December 18, 1980. In the meantime, the respondent, like Apotex in our case, continued to sell the infringing product. The appellants sought and obtained a Show Cause Order under Rule 355 of the Federal Court Rules. The evidence was that the respondent, Cutter, had been legally advised by its solicitor that it was entitled to ship the goods before the issuance of the formal Judgment. The solicitor actually testified at the contempt hearing and stated that he had read the trial judge's reasons upon their release and that he had telephoned Cutter, advising that it should dispose of all the infringing goods in the possession of Cutter in Canada. He did not appear as counsel on the contempt hearing. In contrast, in our case Mr. Radomski, counsel for Apotex, did not give any evidence as to the advice he gave to Apotex about MacKay J.'s Reasons for Judgment; rather, the evidence only came from those to whom he gave such advice, such as Dr. Sherman. However, Mr. Radomski did appear to argue the contempt case before the trial judge and before this Court.

52 The import of the Reasons for Judgment issued by Gibson J. in *Baxter v. Cutter* (1980), 52 C.P.R. (2d) 163 is very similar to the Reasons issued by MacKay J. in our case. Gibson J.'s reasons for decision included the following:

As a consequence, Bellamy [sic Baxter Travenol] is entitled to judgment against Cutter, declaring, ordering and adjudging as follows:

1. That as between the parties hereto, Canadian Letters Patent No. 685,439 and Claims 1 to 4 thereof are valid and have been infringed by the defendant [Cutter] in manufacturing and selling to the Canadian Red Cross multiple blood bag sets having valves as exemplified by those of Exhibits P-8 and P-8A to this trial.
2. The defendant, its employees, servants, and any person acting under its directions, are restrained and enjoined from manufacturing, offering for sale, selling or distributing multiple blood bag sets having valves as exemplified by those of Exhibits P-8 and P-8A to this trial.

In the present case, MacKay J. dealt with the relief sought by Merck in the patent infringement action in the following terms:

... On the basis of my findings they [the plaintiffs] are entitled to

- (a) a declaration that claims 1 to 5 and 8 to 15 of Canadian Letters Patent No 1,275,349 have been infringed by the defendant;
- (b) a permanent injunction restraining the defendant by its officers, directors, servants, agents, employees or otherwise from infringing claims 1 to 5 and 8 to 15 of Canadian Letters Patent No. 1,275,349.

...

The only difference between the details of these two sets of reasons is that Gibson J. elaborates on how the patent was infringed (by selling and manufacturing) and on what is enjoined by the injunction (manufacturing and selling). However, it was obvious from MacKay J.'s Reasons that Apotex infringed Merck's patent by its manufacture and sale of APO-ENALAPRIL, and that any workable injunction would have to enjoin manufacturing and selling in order to curb future infringements.

53 In *Baxter v. Cutter*, Baxter requested that, if it was successful, formal judgment be given at the time reasons were issued. Gibson J. indicated that he would not accede to this request, and the final paragraph of his reasons stated:

Counsel for either the plaintiffs or the defendant may prepare in both official languages an appropriate judgment to implement the foregoing conclusions and may move for judgment in accordance with Rule 337(2)(b). [my emphasis]

In MacKay J.'s Reasons for Judgment, he similarly invited counsel for both sides to consult to draft an "appropriate" judgment, in light of his conclusions:

At the conclusion of trial in this matter, counsel suggested that formal judgment might most appropriately be considered after an opportunity for consultation between counsel, and if desirable a further appearance, before the Court, concerning the terms of judgment in light of my findings and conclusions. That seems to me an appropriate course at this stage, in particular since judgment will be rendered after a delay following trial which was unanticipated and for which I express my regret.

In the circumstances, these Reasons are filed with this final direction and an invitation to counsel for the plaintiffs to consult with counsel for the defendant on appropriate terms of the final judgment to be filed in light of my conclusions as set out in these Reasons. Counsel for plaintiffs should prepare a draft judgment, seek approval of counsel for the defendant as to its form and, if possible, its content, and submit the draft for consideration by the Court. If counsel for either or both of the parties wishes to be heard on the matter, a hearing shall be arranged. [my emphasis]

I cannot see any significant differences between these two sets of Reasons. The Appellants point to the fact that there were differences between MacKay J.'s Reasons for Judgment and his Judgment to support its method of distinguishing the *Baxter v. Cutter* case. In our case, MacKay J. added the third party clause into the January 9, 1995 Order. However, in *Baxter*, there were also changes from the Reasons for Judgment to the Judgment, relating to the reference to determine damages or an accounting of profits. Therefore, in my opinion, *Baxter v. Cutter*, for all of the above reasons, is indistinguishable from the present case.

54 Dickson J. for the Supreme Court of Canada outlined at pages 395-397 in *Baxter v. Cutter* the applicable principles to adopt in this situation:

Gibson J. acted under Rule 337(2)(b). Cutter notes, correctly in my view, that Rule 337 draws a clear distinction between reasons for decision or conclusions on the one hand, and a judgment on the other hand. There is no judgment until a document in Form 14 is executed. I agree with Cutter and the Federal Court of Appeal that, by virtue of Rule 337, a judgment in that court only takes effect on the date a document in Form 14 is executed. In the present case there was no injunction,

and hence there could be no breach of the injunction, prior to December 18, 1980. If this case had involved an attempt to execute or directly enforce a judgment, the effective date would be decisive of the result. In my view, however, Cutter and the Federal Court were in error in assuming the effective date of the injunction is decisive in a contempt proceeding. The inquiry does not end with a consideration of whether the injunction as such has been breached.

The general purpose of the court's contempt power is to ensure the smooth functioning of the judicial process. Contempt extends well beyond breach of court orders. Subsection (1) of Rule 355 of the Federal Court Rules, repeated here for ease of reference, provides in part as follows:

Rule 355.(1) Anyone is guilty of contempt of court who disobeys any process or order of the Court or a judge thereof, or who acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court.

(Emphasis added.)

Paragraph (a) of the show cause order in the present case invoked the first part of Rule 355(1), whereas paragraph (b) invoked the underlined portions. Even if there was no actual breach of an injunction so as to constitute contempt under paragraph (a), it is still necessary to consider paragraph (b).

Contempt in relation to injunctions has always been broader than actual breaches of injunctions. Cattanach J. recognized this in the present case. Thomas Maxwell is named in the show cause order as having committed contempt in his personal capacity although he is not a party to the action. He is not personally bound by the injunction and therefore could not personally be guilty of a breach. Nevertheless, Cattanach J. acknowledged he could still be found in contempt if he, with knowledge of its existence, contravened its terms. Although technically not a breach of an injunction, such an action would constitute contempt because it would tend to obstruct the course of justice; Kerr on Injunctions, 6th ed 1927, at p. 675; Poje v. Attorney General for British Columbia, [1953] 1 S.C.R. 516.

The same kind of analysis applies to the period between reasons for decision and the pronouncement of judgment. Cutter argues, in effect, that this constitutes a period of grace in which the defendant can contravene the prohibitions set out in the reasons for decision with impunity. To accept that argument would be to accede to the proposition that it is open to a party completely to defeat an injunction. That would subvert the whole process of going to court to settle disputes. That is precisely what the contempt power is designed to prevent.

[my emphasis]

Nowhere in *Baxter v. Cutter* does the Supreme Court of Canada indicate that it need be shown that the defendant intended to act in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court.

55 Since the Supreme Court merely decided the preliminary objection made by Cutter (that the acts complained of could not be in breach of the judgment of Gibson J., which was not issued until December 18, 1980) a court still had to decide whether Cutter had actually committed the contempt by disobeying the Reasons for Judgment, rendered on December 11. After the Supreme Court of Canada rendered its decision, Cutter applied for directions with respect to the charge under which it was required to show

cause. Cattanach J., who heard that motion granted directions, and stated "that the matters which must be proven" are: (1) that Cutter and Maxwell had knowledge of the prohibitions in Gibson J.'s reasons for judgment dated December 11, 1980; and (2) that there was a contravention of a prohibition therein (436). Dubé J., who decided the case on its merits for the Federal Court, Trial Division [(1984), 1 C.P.R. (3d) 433] found that this test was met and stated at page 439:

I am convinced beyond a reasonable doubt, firstly, that the defendant knew of the existence of the prohibitions contained in the reasons for judgment of Gibson J., and, secondly, that the defendant contravened the prohibitions by failing to destroy the goods, or delivering up the goods to the plaintiff, and most specially by disposing of the goods by sale and otherwise during the relevant period. That ought to settle the issues referred to this court by the Supreme Court of Canada. However, serious points of law were raised and they deserve consideration.

Dubé J. went on to consider whether mens rea is required to be proved in a contempt of court case. Following the Supreme Court, Dubé J. concluded at page 440 that it is not necessary to show that the defendant was intentionally contumacious or that he intended to interfere with the administration of justice:

[The defendant's solicitor] obviously believed that he was legally right. He, therefore, did not possess the ingredient of a "guilty mind" necessary to commit a crime and, in consequence, his principal (the defendant) argues that it ought not to be found guilty of contempt.

The defendant relies in particular on *Koffler Stores Ltd. v. Turner et al.* (1971), 2 C.P.R. (2d) 221 at p. 223, [1971] F.C. 145, wherein Pratte J. (then of the Trial Division) would not "punish the defendants for having, in good faith, given a possibly wrong but not unreasonable interpretation to an order of this Court". The order was an injunction restraining the defendant from infringing the plaintiff's trade mark.

As to the conduct of this defendant in the instant case, Cattanach J. had this to say in his February 3, 1981 judgment (at p. 9 [pp. 151-2]):

I expressed the view at the hearing, and to which view I adhere, that the conduct of the defendant through its chief executive officer, has the stench of sharp and perhaps even misleading practice and that the defendant and its chief executive officer were devoid of standards of ethics but that in all likelihood such ethics are neither expected nor required in the jungle of the business world and the rewards may be greater to those vested with inherent predatory cunning.

Borrie and Lowe's *Law of Contempt*, 2nd ed. (1983), considers the requirement for mens rea in Chapter 13, titled "Civil Contempt". The answer is clearly "that it is not necessary to show that the defendant is intentionally contumacious or that he intends to interfere with the administration of justice". The authors, at p. 400, quote Sachs L.J. in *Knight et al. v. Clifton et al.*, [1971] Ch. 700 at p. 721, [1971] 2 All E.R. 378 at p. 393, as follows:

"when an injunction prohibits an act, that prohibition is absolute and is not to be related to intent unless otherwise stated on the face of the order"

The authors quote Warrington J. In *Stancomb v. Trowbridge Urban District Council* [[1910] 2 Ch. 190 at p. 194], who said that if a person "in fact does the act, and it is no answer to say that the act was not contumacious ... ". In *Re Agreement of Mileage* [Conference Group of Tyre

Manufacturers' Conference, Ltd., [1966] 2 All E.R. 849 at p. 862], contempt was held to have been established even though the acts were done "reasonably and despite all due care and attention, in the belief, based on legal advice, that they were not breaches."

Finally, the mandate of the Supreme Court of Canada to this court is crystal clear: two matters only are to be established: firstly, was there a knowledge of Gibson J.'s reasons for judgment and, secondly, was there a contravention of that judgment? Neither the good faith of the defendant nor its error in law are factors to be considered. The Supreme Court, of course, was fully aware of the defendant's legal position on contraventions of Gibson J.'s reasons for judgment and yet did not include that factor in its directions to this court. [my emphasis]

Likewise, in the present case, Dr. Sherman and Apotex knew of MacKay J.'s Reasons for Judgment and committed acts in contravention of those Reasons.

56 This Court upheld Dubé J.'s decision in *Baxter v. Cutter* [(1987), 14 C.P.R. (3d) 449] on intent, although it reduced the penalty imposed from \$100,000 to \$50,000. Urie J.A. stated at page 454:

Having said that, counsel conceded, correctly I think, that the presence or absence of good faith on the part of an alleged contemnor is not relevant in the determination of whether or not there was an act of contempt. It is relevant only in considering the penalty to be imposed, as a mitigating factor.

In fact, Urie J.A. went on to approve of Dubé J.'s comments and recited his words at page 456:

Finally, the mandate of the Supreme Court of Canada to this court is crystal clear: two matters only are to be established: firstly, was there a knowledge of Gibson J.'s reasons for judgment and, secondly, was there a contravention of that judgment? Neither the good faith of the defendant nor its error in law are factors to be considered. The Supreme Court, of course, was fully aware of the defendant's legal position on contraventions of Gibson J.'s reasons for judgment and yet did not include that factor in its directions to this court.

It is clear from the foregoing that the trial judge was well aware of the unavailability of the defence of lack of contumacy in respect of the contempt per se. However, it may be that he did not consider that non-contumacious conduct can be a mitigating factor on the question of penalty. [my emphasis]

Thus, a lack of intent to interfere with the orderly administration of justice or to act with contempt is only relevant to the question of penalty, and the only reason the fine was reduced by Urie J.A. was that the trial judge had failed to appreciate that. Thus, while non-contumacious conduct is not a defence to a finding of contempt per se, it can be a mitigating factor in the determination of penalty.

57 The Appellants only cite a few cases in their factum to support the proposition that the prosecutor must show that the alleged contemnor wilfully intended to disobey the Court by doing the act prohibited. While referred to in their factum, the Appellants did not mention these cases in oral argument. First, in *Skipper Fisheries Ltd. v. Thorbourne*, [1997] N.S.J. No. 56 (NSCA), the Nova Scotia Court of Appeal found that Skipper Fisheries Ltd. ("Skipper"), charged with contempt, did not wilfully flout the Court order by failing to disclose information. However, this case can easily be distinguished on its facts. Skipper was the plaintiff in the main action in which it claimed damages relating to a fishing boat. Skipper was found in breach of the rules for non-disclosure of documents and was found to be in contempt of

court for this non-disclosure. The trial judge dismissed Skipper's action as a punishment. The majority of the Court of Appeal found that the order was unclear and ambiguous, as it did not require disclosure by a specific date. As a result, Skipper did not technically disobey its terms. The Court held that in order to actually dismiss the main action for damages as punishment for contempt there must be proof of a deliberate breach. The Court stated at paragraph 89:

The dismissal of the action is only to be ordered in the case of a willfully disobedient party, not of one who had made a mistake on the advice of counsel or otherwise -- and it is done only in the last resort. ... In general, another opportunity is given to act properly and answer the questions, even after an order has been made and disobeyed ... [my emphasis]

Therefore, this case does not support the Appellants' position. This case should not be taken out of context - it deals with the appropriateness of the dismissal of a main action as a punishment for contempt. It deals primarily with penalty, and not contempt per se.

58 Second, the Appellants cite *Canada Games Co. v. Hasbro Canada Inc.*, [1989] F.C.J. No. 500 (F.C.T.D.) to support their position on intent. However, this case, too, can be distinguished on its facts. An order was made against the defendants, Hasbro Canada Inc. ("Hasbro"), requiring them to file with the plaintiff, on a monthly basis, information on the sales figures of a toy allegedly infringing the plaintiff's trade-mark. The defendants appealed the order, arguing that the information was valuable confidential commercial trade information, and applied for a stay of execution of this interim order, pending the appeal. Joyal J. for the Federal Court, Trial Division refused to stay the order, but decided to amend the order to provide for the protection of the information. There was also a motion before the Court, in which the plaintiffs alleged that the defendants had breached the order by failing to provide the sales figures information. Counsel for the defendants said the technical breach was a mistake and was not wilful, in that they thought that the filing of an appeal in the Quebec courts automatically stayed the execution of the order. Joyal J. dismissed the motion, but gave costs to the plaintiff. Thus, in its very short reasons, the Court dealt with both an application to stay the order and a motion by the plaintiffs to have the defendants show cause for breaching the same order. Considering that the trial judge amended the order to allow for the protection of the information demanded and said to be the cause of the breach, I cannot think that his decision to dismiss the motion for the show cause order was fully based on the lack of "wilfulness" on the part of the defendants. Therefore, this case does not assist the Appellants in demonstrating their point.

59 The Appellants also refer to *Beverly Hills Home Improvements Inv. v. Greenberg* (1993), 47 C.P.R. (3d) 66 (Ont. Gen. Div.) in support of their proposition that the prosecution must prove beyond a reasonable doubt that the accused deliberately acted so as to interfere with the orderly administration of justice, but the Court actually said the exact opposite at page 83:

It is not necessary to establish that the alleged contemner intended to put himself in contempt; that is, actual intent to interfere with the course of justice is not required. See for example, *R. v. Perkins* (1980), 51 C.C.C. (2d) 369 (B.C.C.A.) ...

... Appellant intended to and did write and publish respectively the impugned article that is the intent, the mens required; actual intent to interfere with [the] course of justice is not required.

Conversely, breach of an injunction is not excused because the person committing it had no direct intention to disobey the order ... Neither is it a defence to contempt proceedings that the activities

were done reasonably with all due care and attention, in the belief, based on legal advice, that they were not breaches ... [my emphasis]

60 Therefore, the jurisprudence establishes that it is not necessary to show that the alleged contemnor intended, by doing the action, to "interfere with the orderly administration of justice or to impair the authority or dignity of the Court". This is too high a level of intent to require in civil contempt cases. Rather, it is sufficient to find that the Court's intention was clear and that the alleged contemnor knowingly committed the prohibited act. For instance, Apotex must have intended to sell APO-ENALAPRIL -- the sales must not have occurred accidentally. Good faith just goes to mitigation of sentence.

61 The Supreme Court of Canada case of *U.N.A. v. Alberta (Attorney General)* (1992), 89 D.L.R. (4th) 609 provides further support for the proposition that the intent as alleged by the Appellants is not required for civil contempt, such as in a patent case. At pages 636-637 the Court states:

A person who simply breaches a court order, for example by failing to abide by visiting hours in a child custody order, is viewed as having committed civil contempt. However, when the element of public defiance of the courts's process in a way calculated to lessen societal respect for the courts is added to the breach, it becomes criminal. This distinction emerges from *Poje v. British Columbia (Attorney General)*, [1953] 1 S.C.R. 516:

The context in which these incidents occurred, the large numbers of men involved and the public nature of the defiance of the order of the court transfers the conduct here in question from the realm of a mere civil contempt, such as an ordinary breach of injunction with respect to private rights in a patent or trademark, for example, into the realm of a public depreciation of the authority of the court, tending to bring the administration of justice into scorn.

...

To establish criminal intent the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge, or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*).

...

While publicity is required for the offense, a civil contempt is not converted to a criminal contempt merely because it attracts publicity, ... but rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended, or was reckless as to the fact that the act would publicly bring the court into contempt. [my emphasis]

These statements indicate that the subjective knowledge submitted by the Appellants as a requirement for contempt in this case is in fact the level of subjective intent which sets criminal contempt apart from its civil counterpart. In the present case, which is a civil contempt involving a patent infringement action, this level of intent is just not required.

62 In *R. v. Hill* (1976), 73 D.L.R. (3d) 621, where a lawyer did not show up for court, the British Columbia Court of Appeal stated at page 629 that "an intent to bring a Court or Judge into contempt is not an essential ingredient of this offence". Likewise, in *Re Sheppard and Sheppard* (1976), 67 D.L.R. (3d)

592, where the appellant was held in contempt of an order restraining him from leasing or renewing leases of the matrimonial home, the Ontario Court of Appeal stated at page 595:

We are all of the view, therefore, that in order to constitute a contempt it is not necessary to prove that the defendant intended to disobey or flout the order of the Court. The offence consists of the intentional doing of an act which is in fact prohibited by the order. The absence of the contumacious intent is a mitigating but not an exculpatory circumstance.

63 It should be pointed out that in their written factum the Appellants did not argue that the Canadian Charter of Rights and Freedoms supported their argument with respect to intention, nor did the Appellants even bring up the Charter in their oral argument in chief during the hearing. Obviously, the Respondents in their argument before this Court also did not mention the Charter. The Charter is not mentioned by MacKay J. in his Reasons and it would appear not to have been raised before him. Counsel for Dr. Sherman for the first time devoted a very small part of his self-described five minute reply, to the Charter with respect to this issue, where he asserted that the level of intent suggested by the Respondents could never survive a section 7 Charter challenge. Clearly, the Charter was not an issue on this point, and, consequently, I have not addressed it.

2. Were the Reasons by MacKay J. Clear?

64 Apotex argues that its interpretation of the Reasons and the announced injunction therein was reasonable having regard to the history and context of the proceedings, specifically MacKay J.'s earlier dismissal of Merck's motion for an interim injunction. I do not see that any significance can be attached to this dismissal of the interim injunction motion. The fact that a motion for an interim injunction was dismissed, thus permitting the defendant to continue selling the product in question while the trial proceeded, cannot be used to interpret the Reasons for Judgment issued at the end of that trial. This is especially the case when these Reasons later found that the activity for which the interim injunction was sought to prevent, constituted infringement for which a permanent injunction was granted. Indeed, quite the opposite conclusion should be drawn.

65 The following aspects of the history of the litigation between Merck and Apotex involving enalapril are relied upon by Apotex to buttress its position that its interpretation of the Reasons was reasonable:

- (i) that Apotex had been marketing and selling its enalapril maleate products throughout the preceding 14 months;
- (ii) that the continued sale of Apotex' enalapril maleate tablets had been shown not to cause irreparable harm to Merck;
- (iii) that whatever losses Merck was shown to have suffered as a consequence of Apotex' sale of enalapril maleate tablets would be entirely recovered if Merck succeeded;
- (iv) that Apotex was maintaining an accurate record of all sales of its enalapril maleate tablets, and that these documents were available to Merck and the Court in determining any question of damages or the appropriate quantum if Merck elected to seek an accounting of profits;
- (v) that the Court had reserved its decision on the merits for eight months, and there was no suggestion that the Court's earlier conclusions on the question of irreparable harm and the adequacy of damages had changed during this time;

- (vi) MacKay J. had indicated that he intended to accommodate the parties following the release of his Reasons, allowing them to speak to the question of the relief to be granted, if any, and then stated in the Reasons themselves that it was appropriate to do so, "in particular since judgment will be rendered after a delay following trial ...".

In my opinion, these points do not somehow render the Reasons "uncertain". The Reasons are clear. Apotex was enjoined. MacKay J. was fully familiar with this litigation, including the fact that Apotex had been marketing and selling APO-ENALAPRIL for a year and a half and that Merck had failed prior to trial to obtain an interlocutory injunction. It was with this knowledge that he declared that a permanent injunction should issue, in addition to an order for delivery up of all enalapril product held by Apotex. In fact, the Appellants conceded in oral argument that no one was more aware of the context and history of the proceedings than MacKay J., who had been presiding on the matter since its inception as a patent infringement action in 1991.

66 Apotex also points to MacKay J.'s Direction, issued in response to Mr. Radomski's letter to the Court requesting an emergency conference, as demonstrating that no injunction was intended to be immediately effective in the Reasons and as permitting Apotex to continue selling APO-ENALAPRIL during the interim period before the Judgment was filed. However, all that MacKay J. directed on December 16, 1994 was that the judgment had not yet been entered and that therefore there was no judgment in place to which a stay could apply. MacKay J. did not suggest that his Reasons for Judgment would be varied or that Apotex could continue to sell. It is trite law that the Court will not "stay" reasons for judgment. MacKay J. reasonably responded to "a proposed motion to stay implementation of the Reasons pending hearing of a motion to stay an injunction" by simply observing that "there was nothing to be stayed or appealed until judgment was filed". Surprisingly, Mr. Radomski's letter did not even hint that Apotex had been selling, and planned to continue to sell, APO-ENALAPRIL. Therefore, MacKay J.'s response cannot be taken as responding to the notion that continued selling was permitted. In fact, MacKay J. stated at paragraph 8 of his Reasons for Judgment in the contempt proceeding, rendered on March 7, 2000, the following:

At that stage the Court was not aware of the correspondence between counsel or of the position taken by Apotex that it was free to continue, or that it did continue, selling Apo-Enalapril, which the Reasons had concluded was product infringing upon Merck's patent interests.

67 Apotex further points to the fact that the filed Judgment differed from the Reasons to support the notion that the Reasons were unclear and that Apotex' interpretation of the Reasons as allowing the sale of APO-ENALAPRIL in the interim period was reasonable. However, as discussed above, the Judgment in *Baxter v. Cutter*, supra also differed from the Reasons in that case, and the Supreme Court in *Baxter* still considered the Reasons to be clear and unambiguous despite these changes. In any event, in the present case there was no change to the paragraph which provided that a permanent injunction would issue. There was no ambiguity in the Reasons on this point.

68 In light of my conclusion that an intention to subvert the process of the court is not required to prove contempt of court, but only goes to mitigation of sentence, it is unnecessary to analyse MacKay J.'s reasons on the issue of subjective intent. However, because the Appellants focus so much on the "reasonableness" of their interpretation of the Reasons to support the argument that they lacked any subjective intent to interfere with the orderly administration of justice, I will examine the Reasons to

demonstrate that MacKay J. did not find this "reasonableness" credible and did not subscribe to the view that his Reasons were unclear. In my view, MacKay J. concluded that Dr. Sherman, his counsel, and his fellow staff could not have reasonably interpreted the Reasons in the manner in which they did. Indeed, MacKay J. seemed to find the story unbelievable, for at paragraph 35, he stated:

Dr. Sherman qualified his understanding, when cross-examined, by referring to the paragraphs of the Reasons quoted above in paragraph 6, which referred to delay and asked counsel to consult on appropriate terms of final Judgment, as counsel had requested at the conclusion of trial. Those paragraphs he read as implying, without any expressed indication in the Reasons, that the relief, including presumably the declaration of infringement, the permanent injunction and the order for delivery up were not to be effective until some unspecified date. A determination of this sort, which Dr. Sherman inferred from his reading of the Reasons for Judgment, would be so extraordinary, in my opinion, that the Reasons would only be so understood by persons knowledgeable about the legal process, as Dr. Sherman is by reason of his direction of legal affairs for Apotex, and counsel for Apotex is, if the Court had clearly expressed an intention that its findings and conclusions should be considered to be effective only at some specified time in the future. No such express wording of the application of the findings and conclusions is set out in the Reasons. [my emphasis]

Simply put, MacKay J. expressed the view that no person such as Dr. Sherman, who was responsible of legal affairs for Apotex, and no person such as Mr. Radomski, a very knowledgeable lawyer, could construe the Reasons for Judgment as meaning that the permanent injunction and order for delivery up would only become effective at some unspecified future date. Such a interpretation is not only unreasonable but unbelievable in these circumstances. Thus, in my opinion, MacKay J. did not accept Apotex's explanation for the December sales, and his comments about "subjective intent" in paragraph 38 should be read in this context.

69 In paragraph 38, MacKay J. stated the following:

It may be that subjectively Dr. Sherman did not intend to violate the injunction provided for in the Reasons, or to subvert the process of the Court. However,

... in order to constitute a contempt it is not necessary to prove that the defendant intended to disobey or to flout the Order of the Court. The offence consists of the intentional doing of an act which is in fact prohibited by the Order. The absence of the contumacious intent is a mitigating factor but not an exculpatory circumstance.

Apotex did, and so did Dr. Sherman do, just what he intended. Apo-Enalapril product was sold, and sold in quantity, after the Reasons for Judgment specifying Merck's entitlement to a permanent injunction were read by officers and by counsel of Apotex. By so doing both Apotex and Dr. Sherman, in my opinion, committed contempt. In the words of Dickson J. in *Baxter v. Cutter*:

... Once reasons for decision have been released, any action which would defeat the purpose of the anticipated injunction undermines that which has already been given judicial approval. Any such action subverts the processes of the Court and may amount to contempt of court. [my emphasis]

It is clear from the jurisprudence that subjective intent is irrelevant to the issue of the contempt, and only goes to mitigation of sentence. MacKay J. realized and adverted to this. Thus, in my opinion, MacKay J.'s

comment about subjective intent in his Reasons for Judgment is not important to his finding of contempt, as it is only relevant to penalty. This comment does not provide any support for the Appellants' argument that their interpretation of the Reasons was reasonable.

70 In my opinion, MacKay J. was correct in saying that the Reasons for Judgment in the patent infringement action were clear and unambiguous, and did not reasonably lend themselves to the interpretation alleged by the Appellants. There was no significant difference between MacKay J.'s Reasons for Judgment and those found to be clear in *Baxter v. Cutter*, supra, and the history and context of the litigation in no way supports the position that the Reasons allowed for the Appellants to reasonably interpret the Reasons in the manner they did.

71 If Apotex and Dr. Sherman had wanted to continue selling APO-ENALAPRIL after the Reasons for Judgment were rendered on December 14th, what should they have done? Rather than assuming that the Reasons did not impose an immediate injunction on the basis of the history and context of the proceedings, the Appellants should have applied to the Court to settle the terms of the judgment immediately and should have sought a provision allowing the continuation of sales. The Appellants should have openly sought directions as to whether they could continue to sell APO-ENALAPRIL in the interim period before the Judgment was filed. Instead, the Appellants avoided seeking an answer to the real question which they needed answered and simply assumed the risk that its actions would not be found to be contemptuous. The very fact of Appellants' admitted reversals from selling to non-selling indicates that they knew, at a minimum, that they might well be mistaken in their "interpretation" of the Reasons. They should not be rewarded for taking this risk.

72 Federal Court case law supports these propositions. In *Lubrizol Corp. et al. v. Imperial Oil Ltd. et al.* (1994), 58 C.P.R. (3d) 167 (F.C.T.D.); varied on another point relating to exemplary damages [1996] 3 F.C. 40 (F.C.A.) ["Lubrizol"], the defendant was enjoined from manufacturing and selling a product called ECA 10444, but went on to manufacture and sell a product called ECA 10271. In the Reasons for Judgment following trial, it had been held that ECA 10444 and ECA 10271 were the same product. As a result, the defendant was enjoined from such conduct. The Federal Court, Trial Division found that exemplary damages were appropriate and ordered them in the amount of \$15 million with costs on a solicitor-client basis to reflect the indignation of the Court. Despite that this Court varied the judgment on appeal with respect to exemplary damages because Lubrizol had not been given a sufficient opportunity to present evidence on this matter, the Court's statement at page 170 about this "never-ending saga", in which the defendant chose to defy the interlocutory injunction imposed against it rather than lose an important customer, was not overruled in any way on appeal:

I have also determined that the breach was a deliberate, flagrant and callous disregard of the injunction. If Imperial Oil were of the honestly held view that ECA 10271 did not violate the patent, it would have been an easy process to apply to the court, or, probably more correctly to Reed J., for an order declaring that ECA 10271 was a different product than ECA 10444. This approach would have been the correct one rather than barrelling ahead with manufacturing and eventually selling to Shell their alleged new product. (page 170)

...

They took that risk, when guidance from the court was available, and must face the consequences. (page 173) [my emphasis]

Likewise, Apotex took the risk in continuing APO-ENALAPRIL sales, when guidance from the Court was readily available, and must now face the consequences. As stated by the Federal Court, Trial Division in Canada (Attorney General) v. First National Export & Import Co. (1996), 66 C.P.R. (3d) 1 at page 2, "obeying court orders is not a game. The defendant in this case treated it as such."

3. Conclusion with Respect to December Sales

73 Therefore, in my opinion, the Appellants' actions meet the proper test for finding contempt. The test to apply asks the following two questions: (1) Did the alleged contemner have the knowledge of the prohibitions in the reasons for judgment?; and, (2) Was there an act that constituted a contravention of a prohibition therein? MacKay J.'s Reasons were clear and unambiguous and the Appellants had read those Reasons - Apotex and Dr. Sherman understood that the Reasons were unfavourable to them, that their product had been found to be infringing Merck's patent, and that a permanent injunction was part of the relief granted. They also knowingly committed the prohibited act - the selling of APO-ENALAPRIL. Therefore, I agree with MacKay J. that Apotex was in contempt of court on this issue.

B) CONTEMPT INVOLVING POST-JANUARY 1995 "AIDING AND ABETTING" OF THIRD PARTY SALES

74 It is important at this point to review MacKay J.'s reasoning with respect to finding contempt for these actions. He stated at paragraph 50 that "it is unnecessary to determine whether or not these transactions were sales in the traditional sense, by Apotex", but concluded that the actions of Apotex interfered with the orderly administration of justice and impaired the authority and dignity of this Court. Despite the fact that the Court's Order on January 9, 1995 expressly excluded (from the application of the injunction) sales of APO-ENALAPRIL by third parties who acquired the drug in good faith, MacKay J. concluded that these transactions were unacceptable because Apotex financially committed itself to these third parties and treated some transactions as if they were sales made directly by Apotex to third party purchasers. They were not transactions exclusively between third parties. The Apotex argues that MacKay J. erred in this analysis because third party sales were legally exempted from the injunction, and one cannot be found to be "aiding and abetting" an act when the act assisted was a legal act. I agree with this argument. The provision of assistance by Apotex to such third parties, whether financial or otherwise, does not amount to contempt. If such selling by third parties was not prohibited, then surely there cannot be anything wrong with assisting such legal transactions. This is the simple answer to this charge.

75 The Respondents argued, inter alia, that Apotex made sales during this period which were in breach of the injunction. Indeed this may well be the case. For example, there are at least 11 transactions in which Apotex filled out a Returns Form for, and issued a credit for, returned enalapril to its customers. In turn, Kohlers appears to have received the returned goods. Then the goods were sold to another customer. For example, in one such transaction, Apotex filled out a Returns Form, and issued a credit for the return of enalapril to its customer. The amount of the credit issued to this customer for an "overstock" of enalapril corresponds with the amount indicated as the value of the enalapril returned to Kohlers on the Kohlers's Daily Customer Returned Goods Report, dated the day after the Apotex Form was filled out. Kohlers' customer was listed as Apotex, and the product numbers, strengths, sizes, and prices matched with those on the Apotex Returns Form. It would appear that this was a sale by Apotex. All of these transactions suggest that Apotex was actually selling enalapril, despite the Order enjoining them from doing so.

76 However, the Trial Judge found that it was unnecessary to determine whether these transactions were sales. Presumably, this was because the Show Cause Order did not charge Apotex with contempt by making sales during this period. The show cause Order stated:

- (1) an Order pursuant to Rule 355 of the Federal Court Rules that Bernard Sherman ..., Jack Kay, ... appear before this Court ... to show cause why they and the defendant herein should not be condemned for contempt of this Court for:

...

- (b) acting in such a way as to interfere with the orderly administration of justice, and impair the authority and dignity of this Court, by selling and causing to be sold, distributing and removing ... during the period between December 14 and 22, 1994 ... and by aiding and abetting in the transfer, distribution and sale by third party wholesalers, pharmacy chains and pharmacists or [sic] APO-ENALAPRIL tablets among themselves throughout Canada during the period January 9, 1995 to date, ...

Rather, the Show Cause Order merely charged Apotex with contempt of court by selling during the period between December 14 to 22, 1994, and with aiding and abetting third party sales during the period January 9, 1995 to April 27, 1995. Thus, even though there may have been sales by Apotex during this latter period, since the Show Cause Order did not make this a charge against Apotex, Apotex cannot be found in contempt.

77 Therefore, the Trial Judge erred in concluding that, by providing assistance to third parties in selling and distributing, Apotex had interfered with the orderly administration of justice. The Order of January 9, 1995 expressly permitted such sales and distributions. Merely providing assistance does not put Apotex in contempt of court.

C) PROSECUTORIAL MISCONDUCT

78 Apotex argued two motions in the Trial Division with respect to this issue. First, Apotex argued a preliminary motion (prior to the contempt hearing). The Order dismissing this motion was appealed to this Court and dismissed. Leave to appeal to the Supreme Court of Canada was also dismissed. Second, Apotex argued the issue in a motion at the close of the prosecutor's case in the contempt hearing. Many of the grounds for disqualifying Gowlings as counsel for Merck in this second motion were also argued in Apotex' first preliminary motion. Primarily, the only new evidence of this "improper behaviour" presented by Apotex in this second motion was provided by complaints about Merck's lack of disclosure and its improper use of privilege. Consequently, this issue has been repeatedly argued, with little alteration in its argument. MacKay J. dismissed Apotex' second motion at the close of prosecution's case in the contempt hearing stating that, while the activities of counsel for Merck were not "above criticism in all respects", he was "not persuaded" that the Court should dismiss or stay the proceedings because there was no abuse of process or manifest unfairness to Apotex to warrant such a stay or dismissal. He was not persuaded that Apotex's right to full answer and defence was prejudiced by the lack of disclosure or by any alleged abuse. With respect to the concern about impartial counsel and the need for a public prosecutor, MacKay J. had this to say at paragraph 33:

The same theme, then based on the moving parties' concerns before the commencement of these proceedings, underlay their preliminary motion ... That earlier motion was dismissed by Order dated January 23, 1996. In Reasons for that Order I commented, at [1996] 2 F.C. 223 at pp. 245-6:

I am not persuaded that the proceedings now initiated before the Court demand special arrangements for their prosecution, aside from those already established by jurisprudence of this Court in relation to contempt proceedings under Rule 355, and applicable principles under the Charter ... It is the responsibility of the Court to ensure that in the proceedings, rules of fundamental justice and due process of law are followed.

79 I do not see any reason to disturb the findings of MacKay J. on this issue. A dismissal or stay of proceedings for an abuse of process is an extraordinary remedy and one where it is necessary to show that the abuse "must have caused actual prejudice of such magnitude that the public sense of decency and fairness is affected". The test is an onerous one: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at para. 133; *R. v. Regan (G.A.)* (2002), 282 N.R. 1 (S.C.C.) at para. 53-57. MacKay J. found that none of the Appellants complaints supported a dismissal or a stay of proceedings, as the Appellants were not prejudiced in their right to make full answer and defence. The Trial Judge was the person in the best position to assess the significance of the conduct in question, and he found no evidence that would have affected the fairness of the trial. In my opinion, this Court cannot intervene in this decision absent a palpable and overriding error affecting the Trial Judge's assessment of the facts, a finding that the Trial Judge misdirected himself, or a finding that the decision is so clearly wrong as to constitute an injustice: *Canada v. Tobias*, [1997] 3 S.C.R. 391, at 427-429. The Appellants have not established any such error.

D) SENTENCE

80 The Appellants argue that the fines relating to both Apotex and Dr. Sherman are too high. The Respondents assert in their cross-appeal that, while the fine relating to Dr. Sherman is appropriate, the fine relating to Apotex is much too low.

81 In this case, MacKay J. appeared to take the relevant factors relating to sentencing into account. He considered Dr. Sherman's letter of apology; the activities of the contemnors; the nature and severity of the contempt (the gravity of the offence); past conduct; deterrence; and the fact that the actions taken were based, at least partially, on the legal advice conferred by Mr. Radomski.

82 There is an area, however, where his reasoning on sentence is suspect, and that area relates to the principle of deterrence. MacKay J. stated at para. 12:

There is no record of any such failure on the part of Apotex or Dr. Sherman before this. There is no reason to expect that this failure will re-occur. There is Dr. Sherman's assurance to that effect, and he and Apotex will know that it cannot be said hereafter they have not previously been found to be in contempt. In my view, deterrence of Apotex or others, from future similar acts of contempt, is to be considered, but it is not a factor to be given great weight in penalties assessed in this case. [my emphasis]

Although he mentioned the deterrence of "others", he did not seem to focus on this factor. Rather, he seemed to be merely directing his mind to the deterrence factor as applied to Apotex and Dr. Sherman. In

my view, in a fact situation such as the present one, deterrence of other corporations is an important consideration, and I have some difficulty with his statement that deterrence is not a factor to be given great weight in this case.

83 Mr. Justice E.G. Ewaschuk's comments in *Criminal Pleadings & Practice in Canada*, 2nd ed., Volume 1 (Aurora: Canada Law Book Inc., 2002) at page 18:0380 support the importance of deterrence in cases involving corporate offenders:

In sentencing a corporate offender, the trial judge must, keeping in mind that a corporation cannot be imprisoned and that general deterrence of other corporations is the prime consideration especially in relation to commercial crimes, impose a substantial and exemplary monetary penalty designed to prevent the corporation from retaining illegally acquired profits and not so small as to be regarded as a licence fee to be passed on to its customers. To determine a fit penalty, the trial judge should consider, along with other relevant factors, the size, scale and nature of the accused's operations and the premeditation and deliberation involved in committing the offence. [my emphasis]

84 In *Baxter v. Cutter*, supra, this Court upheld the sentence imposed by Dubé J. and stated that he had not made an error in law in using as a guide for the determination of the magnitude of the fine a percentage of the value of the sales of the offending product. Thus, to determine a fit penalty, MacKay J. should not have de-emphasized the importance of deterrence considering the value of the infringing sales in the present case, and the fact that a corporation was involved.

85 In addition, deterrence is a particularly important factor in sentencing involving contempt cases. In *Health Care Corp. of St. John's v. Newfoundland and Labrador Assn. of Public and Private Employees*, [2001] N.J. No. 17 (Nfld. S.C.T.D.), Green C.J. for the Newfoundland Supreme Court outlined the importance of deterrence as a sentencing principle in the contempt context:

2. Deterrence, both general and specific, but especially general deterrence, as well as denunciation, are the most important factors to be considered in the imposition of penalties for civil, as well as criminal, contempt.

86 The reasoning of this Newfoundland case was adopted by the Canadian Judicial Council in its May 2001 publication, *Some Guidelines on the Use of Contempt Powers*. At pages 40-41, the Council quoted Green, C.J.'s comments in *Health Care*, supra:

As Green, C.J. has stated:

[I]t can be said that no judge relishes the idea of having to initiate proceedings for contempt with the possibility of imposing sometimes severe penalties, including deprivation of liberty and significant financial penalties, on citizens who may often be completely law-abiding and respectful of the law in other respects. No court wants to do that, but it will and must do it if confronted with actions that amount to violations of its lawful orders. ...

For cases involving failure to obey an injunction, Green C.J. set out the following helpful sentencing principles:

...

2. Deterrence, both general and specific, but especially general deterrence, as well as denunciation, are the most important factors to be considered in the imposition of penalties for civil, as well as criminal, contempt.

87 Interestingly, in a recent Ontario Superior Court of Justice judgment, *West Lincoln (Township) v. Chan*, [2001] O.J. No. 2133, a case involving civil contempt, the Court stated at paragraph 37:

The primary purpose of contempt proceedings is deterrence both general and specific. The punishment for contempt should serve as a disincentive to those who might be inclined to breach court orders. Our legal system is severely weakened when court orders are ignored. In most cases, I think, deterrence is not achieved merely by the act of getting caught. In other words, the simple purging of the contempt usually is an inadequate punishment. Imagine the societal chaos if, for example, a bank robber could purge his crime supply by returning the money. [my emphasis]

88 Furthermore, deterrence is a factor not to be minimized in the area of intellectual property. As stated by the Federal Court, Trial Division in *Louis Vuitton S.A. v. Tokyo-Do Enterprises Inc.* (1990), 37 C.P.R. (3d) 8 at page 13, it is important to deter the violation of protective injunctions in intellectual property cases:

If those who get caught were to get away unscathed that would encourage such activities and consequently destroy the intended effect of the laws that have been passed, especially with respect to the protection of intellectual and industrial property.

Even if Apotex, itself, was unlikely to commit further contempts of court, there is a general deterrent effect to be taken into account in relation to intellectual property matters involving other corporations.

89 Therefore, where a corporation has committed contempt in relation to an intellectual property matter, deterrence is a matter which merits serious consideration. A corporation cannot be imprisoned, so the only penalty that can be imposed is a fine. Where, as here, a corporation has, by its contemptuous act, sought to increase its own profits, the fine must not be so small as to amount to a mere licence fee, which other corporations, in contemplation of similar activity, can simply budget for. In my view, the December sales are a very serious contempt, as demonstrated by the \$9 million in sales that occurred on the day the Reasons were released without informing MacKay J. of these actions. A nominal fine in the range suggested by Apotex would be insufficient.

90 While the matter could be remitted to the Trial Judge for reconsideration, it must be remembered that this litigation has been ongoing for more than 10 years. There is no point in extending this litigation unnecessarily, and for this reason I intend to exercise the power given to this Court in subparagraph 52(b)(i) of the Federal Court Act, R.S.C. 1985, c. F-7, and deal with the issue of quantifying the sentence.

91 In quantifying the sentence, I consider the following points. MacKay J. imposed a fine of \$250,000 on Apotex, but he did not allocate this amount as between the contempt relating to the December activities and the post-January 9th activities. It must also be remembered that he considered there to be mitigating circumstances relating to the December activities which, it might be argued, would have the effect of reducing the fine for that contempt. On the other hand, as I have said, MacKay J. erred in giving little weight to the factor of deterrence, an error that would have the effect of increasing the fine. I must also take into account that the finding of contempt relating to the post-January 9th sales must be set aside.

92 Taking into account all of these various considerations, I would reduce the fine against Apotex Inc., to \$125,000.00. I would not change the fine against Dr. Sherman, set at \$4,500.00, because this personal fine imposed against Dr. Sherman is only with respect to the December sales and has nothing to do with the second period of contempt. I can find no serious error in the reasoning of the Trial Judge in this respect.

E) COSTS

93 I do not think that, as a matter of principle, it was inappropriate for MacKay J. to award costs against the Appellants on a solicitor and client basis. In fact, many authorities indicate that this is the customary practice in contempt cases. In *Pfizer Canada Inc. v. Apotex Inc.* (1998), 86 C.P.R. (3d) 33 (F.C.T.D.) ["Pfizer"] for instance, Hugessen J. for the Federal Court, Trial Division stated at page 35:

It is, of course, customary, in matters of this sort, to require that persons found guilty of contempt pay costs on a solicitor and client basis to the party who has brought the matter to the court's attention. The policy underlying the jurisprudence is clear: a party who assists the court in the enforcement of its orders and in the enforcement of respect for its orders, should not, as a rule, be put out of pocket for having been put to that trouble. [my emphasis]

Also, in *Dimatt Investments Inc. v. Presidio Clothing Inc.* (1993), 48 C.P.R. (3d) 46, MacKay J. for the Federal Court, Trial Division stated at pages 53-54:

I ordered that reasonable costs, on a solicitor-and-client basis be awarded to the plaintiff. This accords with normal practice in a successful application for an order finding contempt, ensuring that the role of the party acting to support compliance with an order of the court does not result in undue costs for the applicant.

In addition, in *Innovation and Development Partners / IDP Inc. v. Canada* (1993), 64 F.T.R. 177, Cullen J. for the Federal Court, Trial Division stated at page 181:

In addition to imposing a fine, I shall order that reasonable costs on a solicitor-and-client basis be awarded to the defendant. In making this order as to costs, I am keeping with the normal practice of awarding costs on a solicitor-and-client basis to parties who have successfully prosecuted contempt proceedings, thereby ensuring that the party acting to support compliance with an order of the court does not bear the costs of proceedings that were necessary to maintain the orderly administration of justice. [my emphasis]

94 However, having regard to the fact that Merck has been unsuccessful with respect to the second period of contempt involving the January facilitation of third party sales, the award of costs must reflect this division of success. I would award solicitor and client costs to the Respondents at trial and on the appeal on all issues, except for the second period of contempt for which no costs will be awarded. The costs should be assessed by an assessment officer.

Conclusion

95 The appeal should be allowed in part by setting aside the finding of contempt relating to the post-January 9, 1995 time period, by reducing the fine for Apotex to \$125,000 and by ordering costs as set forth in paragraph 94. The cross-appeal should be dismissed without costs.

SEXTON J.A.

STONE J.A.:-- I agree.

NOËL J.A.:-- I agree.

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**Canada (Privacy Commissioner) v. Canada (Labour Relations Board), [2000] F.C.J.
No. 617**

Federal Court Judgments

Federal Court of Appeal

Ottawa, Ontario

Desjardins, Rothstein and Evans JJ.

Heard: May 9, 2000.

Oral judgment: May 9, 2000.

Court File No. A-685-96

[2000] F.C.J. No. 617 | [2000] A.C.F. no 617 | 257 N.R. 66 | 25 Admin. L.R. 305 | [2000] CLLC para. 220-037 | 97 A.C.W.S. (3d) 6

IN THE MATTER OF an application pursuant to section 42 of the Privacy Act, R.S.C. 1985, c. P-21 (the "Act") for review to the Federal Court of Canada of the refusal by the Privacy Coordinator of Canada Labour Relations Board to disclose records requested by the Privacy Commissioner of Canada under the Act Between Privacy Commissioner of Canada, appellant (applicant), and Canada Labour Relations Board, respondent (respondent), and The Public Service Staff Relations Board, The Human Rights Tribunal, The Canadian International Trade Tribunal and The National Transportation Agency of Canada, intervenors

(11 paras.)

Case Summary

Crown — Examination of public documents — Record under control of government defined — Grounds for denial of disclosure.

This was an appeal by the Privacy Commissioner from the refusal by the Labour Board to disclose notes taken by members of the Board during a hearing. The complaint alleged a breach of the duty of fair representation. The trial judge concluded that the request was contrary to section 22(1)(b) of the Privacy Act because the disclosure of notes by the Board members could reasonably be expected to be injurious to the enforcement of any law in Canada. He also concluded that the notes were not personal information, and that they were not under the control of the Board.

HELD: Appeal dismissed.

Control was a threshold issue. The notes were not under the control of the Board as provided in section 12(1)(b). The notes were not part of the Board's official record, and were not contained in any other record keeping system over which the Board had control. The principle of judicial independence and its corollary, the principle of adjudicative privilege, as applied to administrative tribunals, lay at the heart of the Board's lack of control over the notes as a government institution.

Statutes, Regulations and Rules Cited:

Access to Information Act, R.S.C. 1985, c. A-1.

Canada Labour Code, R.S.C. 1985, c. L-2, s. 15(a), 15(q).

Privacy Act, R.S.C. 1985, c. P-21, ss. 12(1)(b), 22(1)(b), 42.

Counsel

Marvin J. Huberman and Roger Townshend, for the appellant. Robert Watson and Susan Nicholas, for the respondent. Alain Préfontaine, for the intervenor, Attorney General of Canada. David Scott and Martine Richard, for the intervenor, Public Service Staff Relations Board. Randall J. Hofley, for the intervenor, Human Rights Tribunal. Shelly Appleby-Ostroff, for the intervenor, National Transportation Agency of Canada.

The judgment of the Court was delivered orally by

DESJARDINS J.

1 This is an appeal from the review, under section 42 of the Privacy Act,¹ by the Trial Division² of the refusal by the Canada Labour Relations Board (the "Board") to disclose to the Privacy Commissioner of Canada (the "Commissioner") notes taken by members of the Board during a hearing of a complaint of a breach of a duty of fair representation under section 37 of the Canada Labour Code.³

2 The trial judge made a detailed analysis of the provisions of both the Privacy Act and the Access to Information Act⁴ together with a deep consideration of the long-established principle that adjudicative decision makers, whether judges or members of administrative tribunals, should be free to hear and decide the cases before them independently without any improper influence from others. By the same token, he considered the corollary principle that the decision-making processes of these decision makers should be similarly free from any intrusion. He was careful to indicate that both principles, the first termed "judicial independence" and the second termed "adjudicative privilege" when applied to courts of law,⁵ were imported into the sphere of administrative decision making through the common law duty of fairness. Since administrative tribunals are bound by the duty of fairness, then their members must, like judges, be shielded against any type of intrusion into their thought processes beyond what is revealed by their reasons.

3 The trial judge concluded that the request by the Commissioner was contrary to paragraph 22(1)(b) of the Privacy Act because the disclosure of the notes of the Board members "could reasonably be expected to be injurious to the enforcement of any law in Canada". Such request, he said, would interfere with the independence and intellectual freedom of quasi-judicial decision makers acting under the Canada Labour Code. It would reveal, he said, their personal decision-making processes and might cause them to alter the manner in which they arrive at decisions. The trial judge also concluded that the notes were not "personal information" and that they were not "under the control" of the Board, as found in paragraph 12(1)(b) of the Privacy Act.

4 Many issues were canvassed before us. We choose, however, to decide this case on a threshold point which is the question of control of the information by a government institution.

5 While the notes taken by the Board members may or may not amount to "personal information", a matter we need not decide, it is obvious to us that these notes are not "under the control" of the Board as provided in paragraph 12(1)(b) of the Privacy Act. These notes are being taken during the course of quasi-judicial proceedings, not by employees of the Board, but by Governor in Council's appointees endowed with adjudicative functions which they must perform, not as agent of the Board, but independently of other members of the Board including the chairperson of the Board or a government institution. Board members are under no obligation to take notes although they may. Their notes are not part of the official records of the Board and are not contained in any other record keeping system over which the Board has control.

6 The trial judge made the following statement with which we agree:

... It is clear that there is no requirement either in the Canada Labour Code, or in the CLRB policy or procedure touching upon the notes. The notes are viewed by their authors as their own. The CLRB members are free to take notes as and when they see fit, and indeed may simply choose not to do so. The notes are intended for the eyes of the author only. No other person is allowed to see read or use the notes, and there is a clear expectation on the part of the author that no other person will see the notes. The members maintain responsibility for the care and safe keeping of the notes and can destroy them at any time. Finally, the notes are not part of the official records of the CLRB and are not contained in any other record keeping system over which the CLRB has administrative control.

In my view, it is apparent from the foregoing that however broadly one construes the word control, the notes in issue were not "under the control" of the CLRB within any of the meanings that can be attributed to that term. Not only are the notes outside the control or custody of the CLRB but they are also considered by the CLRB to fall outside the ambit of its functions.

7 Paragraphs 15(a) and (q) of the Canada Labour Code empower the Board to make regulations with respect to:

a) the establishment of rules of procedure for its hearing;

...

q) such other matters and things as may be incidental or conducive to the proper performance of the duties of the Board under this part.

8 We agree with the trial judge's conclusion that, by means of this power, the Board could not exercise such control over these notes as to bring them "under the control of a government institution" within the meaning of paragraph 12(1)(b) of the Privacy Act.

9 A regulation that, for instance, requires members to take notes, prescribes the form of such notes or requires that they be deposited with the Board, would be invalid as a breach of the aspect of the duty of fairness respecting the independence of adjudicative decision makers. The principle of judicial

independence and its corollary, the principle of adjudicative privilege, as applied to administrative tribunals, lie at the heart of the Board's lack of control over the notes as a government institution.

10 Counsel for the appellant suggested that, because the notes were under the control of members who made them, and because decisions of panels are decisions of the Board, the notes are therefore under the control of the Board, the government institution in question. In our view, this does not follow because it ignores the independence of the members in their adjudicative capacity.

11 Control is a threshold issue. Having found that the notes are not under the control of a government institution, we are of the opinion that this appeal must be dismissed with costs in favour of the respondent in a sum of \$ 15 000 inclusive of disbursements.

DESJARDINS J.

1 R.S.C. 1985, c. P-21.

2 Canada (Privacy Commissioner) v. Canada (Labour Relations Board) (1996), 118 F.T.R. 1.

3 R.S.C. 1985, c. L-2.

4 R.S.C. 1985, c. A-1.

5 The trial judge noted at (1996), 118 F.T.R. 1, footnote 14, at 16 and 57, that this principle, as applied to the judiciary, has been termed judicial independence and its corollary is referred to as the adjudicative privilege; see MacKeigan J.A. et al. v. Commission (Marshall Inquiry) (1989), 61 D.L.R. (4th) 688 at 703-704. See also para. 63-67 of the trial judge's reasons for judgment in (1996), 118 F.T.R. 1 at 37-40.

6 (1996), 118 F.T.R. 1 at 52, para. 105 .

End of Document

**Canadian Copyright Licensing Agency (Access Copyright) v. Alberta, [2016] 3
F.C.R. 19**

Federal Courts Reports

Federal Court of Appeal

Stratas J.A.

Heard: Ottawa, November 26, 2015.

Judgment: Ottawa, November 26, 2015.

No. A-293-15

[2016] 3 F.C.R. 19 | [2016] 3 R.C.F. 19 | [2015] F.C.J. No. 1397 | [2015] A.C.F. no 1397 | 2015
FCA 268

The Canadian Copyright Licensing Agency (Operating as Access Copyright) (Applicant) v. Her Majesty the Queen in Right of the Province of Alberta, Her Majesty the Queen in Right of the Province of Manitoba, the Province of New Brunswick, Her Majesty in Right of Newfoundland and Labrador, Her Majesty the Queen in Right of the Province of Nova Scotia, the Government of Nunavut, Her Majesty the Queen in Right of the Province of Prince Edward Island, Her Majesty the Queen in Right of the Province of Saskatchewan, Government of Yukon and Her Majesty the Queen in Right of the Province of British Columbia (Respondents)

(37 paras.)

Case Summary

Catchwords:

Practice — Affidavits — Motion seeking removal of material included by applicant in application for judicial review of Copyright Board of Canada decision — Board responding to request under Federal Courts Rules — Applicant placing material not obtained under r. 317 into application record — That material not introduced by affidavit describing provenance thereof — How should materials before administrative decision maker be brought before reviewing court — Applicant erring in not introducing material by way of affidavit pursuant to Rules, r. 306 — Filing affidavit allowing for cross-examination thereon as parties entitled to test each other's positions on whether certain material appended to affidavits was in fact before administrative decision maker — While having good intentions, applicant contravening rule that facts must be proven by evidence, might have worked procedural unfairness — As to remedy, Rules, r. 3 requiring that Court apply rules in manner to secure just determination on merits, not to punish mistake that can be fixed — Court ordering, inter alia, removal from record of materials mistakenly included therein, allowing parties to file affidavits pursuant to Rules, r. 306, undertake cross-examinations pursuant to Rules, r. 308 — Motion granted.

Summary:

This was a motion by the respondents seeking the removal of certain material included by the applicant in its application for judicial review of a decision by the Copyright Board of Canada.

In response to a request made by the applicant under rule 317 of the *Federal Courts Rules*, the Board informed the parties that it did not have in its possession any relevant material not already in the possession of the applicant. The applicant then placed material that it did not obtain under rule 317 into its application record. It was not under an affidavit describing the provenance of the material.

At issue was how materials that were before the administrative decision maker should be brought before the reviewing court.

Held, the motion should be granted.

Documents by themselves, not introduced by an affidavit authenticating them, are not admissible evidence. Under rule 306 and rule 307, applicants and respondents, respectively, can serve upon each other an affidavit that appends such material. They need only include the material necessary for their application. Cross-examinations may be conducted on the affidavits pursuant to rule 308 as the parties are entitled to test each other's positions on whether certain material appended to the affidavits was in fact before the administrative decision maker at the time it made its decision. The applicant thus erred in not introducing the material by way of an affidavit pursuant to rule 306 of the Rules. After receiving the affidavit, the respondents might have exercised their right to cross-examine pursuant to rule 308. The applicant's error was an innocent one. The applicant had good intentions and was looking for a fast, easy way to place the material before the Court. Unfortunately, the way the applicant went forward offended the Rules, ran contrary to the general rule that facts before the reviewing court must be proven by evidence, and might have worked procedural unfairness.

On the issue of remedy, rule 3 requires the Court to apply the rules to secure a just determination on the merits, not to punish a party that has made a mistake that can be fixed. To [page21] that end, the Court ordered, *inter alia*, that the materials mistakenly included in the applicant's application record be removed from that record; that the applicant may serve an affidavit pursuant to rule 306 appending materials it says were before the Board and in its possession, including the materials mistakenly included in the application record; that the respondents may serve affidavits responding to the applicant's affidavit; and that cross-examinations may be undertaken in accordance with rule 308 concerning those affidavits.

Statutes and Regulations Cited

Federal Courts Rules, SOR/98-106, rr. 3, 306, 307, 308, 309, 310, 317, 318.

Cases Cited

Considered:

R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw, [1951] EWCA Civ. 1 (BAILII), [1952] 1 K.B. 338.

Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild, 2007 SKCA 74 (CanLII), 284 D.L.R. (4th) 268.

Referred to:

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190.

Access Information Agency Inc. v. Canada (Attorney General), 2007 FCA 224, 66 Admin. L.R. (4th) 83.

Canada (Attorney General) v. Slansky, 2013 FCA 199, [2015] 1 F.C.R. 81.

Canada (Attorney General) v. Lacey, 2008 FCA 242.

Canada (Attorney General) v. Canadian North Inc., 2007 FCA 42.

Bernard v. Canada (Revenue Agency), 2015 FCA 263.

History and Disposition:

MOTION by the respondents seeking the removal of certain material included by the applicant in its application for judicial review of a Copyright Board of Canada decision (*Access Copyright (Provincial and Territorial Governments) 2005-2014*, online: <<http://www.cb-cda.gc.ca/decisions/2015/DEC-2015-03-22.pdf>>). Motion granted.

Appearances:

Written representations

Jessica Zagar for applicant.

Wanda Noel, J. Aidan O'Neill and Ariel A. Thomas for respondents except Her Majesty the Queen in Right of the Province of British Columbia.

[page22]

Bruce M. Green for respondent Her Majesty the Queen in Right of the Province of British Columbia.

Solicitors of record:

The Canadian Copyright Licensing Agency, operating as Access Copyright, Toronto, for applicant.

Wanda Noel and Fasken Martineau DuMoulin LLP, Ottawa, for respondents except Her Majesty the Queen in Right of the Province of British Columbia.

Oyen Wiggs Green & Mutala LLP, Vancouver, for respondent Her Majesty the Queen in Right of the Province of British Columbia.

The following are the reasons for order rendered in English by

STRATAS J.A.

A. Introduction and the basic facts giving rise to this motion

1 Access Copyright has brought an application for judicial review in this Court. It seeks to quash the decision dated May 22, 2015 of the Copyright Board [*Access Copyright (Provincial and Territorial Governments) 2005-2014*]. The respondents have now brought a motion seeking the removal of certain material Access Copyright has included in its application record.

2 At the outset, some brief description of the material in issue is necessary.

3 In its notice of application, Access Copyright included a request under rule 317 [of the *Federal Courts Rules*, SOR/98-106 (Rules)] that the Board supply it with "material relevant to [the] application that is in the possession of [the Board] ... and not in [Access Copyright's] possession". In response to the rule 317 request, the Board informed the parties that it did not have in its possession any relevant material not already in the possession of the applicant.

[page23]

4 The motion before this Court concerns how Access Copyright dealt with the material that was before the Board and in its possession, i.e., the material that it did not obtain under rule 317. Access Copyright simply placed that material into its application record. It was not under an affidavit describing the provenance of the material.

5 The respondents move to strike this material from the applicant's record. They say that the documents should have been supplied under affidavit. For the reasons below, I agree with the respondents.

6 The failure to place the documents under affidavit sounds like a technical deficiency of no moment. As I shall explain, it is not - in some instances, that failure can cause procedural unfairness, and it offends a basic principle concerning the admissibility of evidence.

B. Analysis

(1) The applicable principles

7 At the root of this motion is a question: on a judicial review, how does one bring the materials that were before the administrative decision maker before the reviewing court?

8 The frequency with which this question comes before the Federal Courts shows that many do not know the answer. There is little case law on point, perhaps because we regard the relevant rules as being clear. Indeed, the rules are clear but they are intricate and interrelated and, in some cases, stand against a common law backdrop. Now is the time to provide some more general guidance.

9 As is the case with every procedural question in the Federal Courts system, the starting point must be the *Federal Courts Rules*.

[page24]

10 We begin with rule 317, the rule that Access Copyright invoked in its notice of application. Rule 317 permits a party to obtain certain material from the administrative decision maker. The administrative decision maker responds in accordance with rule 318 [of the Rules].

11 Rule 317 stands against a common law backdrop. Over six decades ago, the writ of *certiorari* - the writ used to quash decisions of an administrative decision maker - was available in the case of an error on the face of the record. That sort of error was quite limited and in no way bears relation to the concept of unreasonableness as we know it today. As a result, the material before the administrative decision maker that could be placed before the reviewing court was extremely limited: *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw*, [1951] EWCA Civ. 1 (BAILII), [1952] 1 K.B. 338, at pages 351 and 352.

12 *Northumberland* stood for the proposition that the particular evidence before the administrative decision maker was not to be produced to the reviewing court. But since *Northumberland*, the availability of *certiorari* has dramatically expanded and with that expansion has come the need for more materials to be placed before the reviewing court. Today, *certiorari* is available for substantive unreasonableness of the sort contemplated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Review of that nature may require the reviewing court to have before it large portions of the material or even all of the material the administrative decision maker considered in making its decision.

13 Rule 317 reflects the reality today that the permissible grounds for judicial review are broader than they once were. It entitles the requesting party to receive everything that was before the decision maker at the time it made its decision and that the applicant does not have in its possession: *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83, at paragraph 7. This allows parties "to effectively pursue their rights to challenge [page25] administrative decisions from a reasonableness perspective" and "have the reviewing court [that is engaged in reasonableness review] consider the evidence presented to the tribunal in question": *Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74 (CanLII), 284 D.L.R. (4th) 268, at paragraph 24 (commenting on a rule similar to rule 317).

14 This excerpt from *Hartwig* recognizes the relationship between the record before the reviewing court

and the reviewing court's ability to review what the administrative decision maker has done. If the reviewing court does not have evidence of what the administrative decision maker has relied upon, the reviewing court may not be able to detect reviewable error. In other words, an inadequate evidentiary record before the reviewing court can immunize the administrative decision maker from review on certain grounds. See *Canada (Attorney General) v. Slansky*, 2013 FCA 199, [2015] 1 F.C.R. 81, at paragraph 276 (dissenting reasons, but not opposed on this point).

15 Rule 317 can fulfil another purpose that is less lofty but still important. Parties before the administrative decision maker will often have in their possession all of the material the administrative decision maker considered in making its decision. But not always. And sometimes parties may be unsure whether they do. Sometimes they wish to confirm exactly what the administrative decision maker actually considered in making its decision. Rule 317 of the *Federal Courts Rules* provides a means by which parties can achieve those ends.

16 The administrative decision maker responds to a rule 317 request by following rule 318. Under that rule, it delivers to the requester the material that was before the decision maker (and that the applicant does not have in its possession) at the time the decision at issue was made. Under rule 318, the administrative decision maker can also object to disclosure, for example on the basis of public interest privilege or legal professional privilege: [page26] see *Slansky*, above, at paragraphs 277-283 on the issue of how to litigate a rule 318 objection involving confidential material.

17 Materials produced by the administrative decision maker in response to a rule 317 request can simply be placed in the applicant's record or the respondent's record: see paragraph 309(2)(e.1) and paragraph 310(2)(c.1) [of the Rules]. When that is done, the material is in the evidentiary record before the reviewing court and may be used by the parties and the Court. No affidavit is necessary.

18 For completeness, I should note two other things. First, the portions of any transcript of oral evidence before a tribunal may also be filed in the applicant's or respondent's record without an affidavit: see paragraph 309(2)(f) and paragraph 310(2)(d) [of the Rules]. Second, rule 318 provides that in addition to delivering the material to the party that made the request under rule 317, the administrative decision maker must also "transmit" a certified copy of the material to the reviewing court. Note that the Rule uses the word "transmit", not "file". The material is not formally before the reviewing court in the sense of being a part of the reviewing court's evidentiary record: *Canada (Attorney General) v. Lacey*, 2008 FCA 242. Instead, the Registry is given the material in order to authenticate that materials contained in an application record under paragraph 309(2)(e.1) or paragraph 310(2)(c.1) are indeed those supplied by the administrative decision maker: *Canada (Attorney General) v. Canadian North Inc.*, 2007 FCA 42, at paragraph 11.

19 I turn now to material that the party has in its possession and that was before the administrative decision maker at the time it made the decision in issue. This material is potentially relevant to the judicial review, but is not produced by a decision maker in response to a rule 317 request. Rules 309 and 310 do not permit this material to be filed into the applicant's record or the respondent's record. Thus, the parties must take [page27] affirmative steps to place that material before the reviewing court.

20 Here, we must look at rules 306 to 310. But before doing so, we must appreciate that those rules sit

alongside a fundamental general principle: facts must be proven by admissible evidence. There are exceptions to this, such as the availability of judicial notice, the presence of legislative provisions speaking to the issue, and an agreed statement of facts (including an agreement that certain documents shall be admissible). Putting those exceptions aside, documents by themselves, not introduced by an affidavit authenticating them, are not admissible evidence. Documents simply stuffed into an application record are not admissible.

21 Under rule 306 and rule 307, applicants and respondents, respectively, can serve upon each other an affidavit that appends the material. Parenthetically, for completeness, I note that material that was *not* before the administrative decision maker can *potentially* be placed before the reviewing court by way of affidavit. However, there are restrictions and admissibility requirements unique to judicial review proceedings that must be obeyed: see, e.g., *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, and cases referred to therein.

22 Under rules 306 and 307, parties need not include all of the material that was before the administrative decision maker. To save costs and to simplify the record, they need only include the material necessary for their application. So under rule 306, an applicant may serve an affidavit appending only some of the material. In response, a respondent might regard other parts of the material as being necessary. That respondent may use rule 307 to serve an affidavit appending additional material. See generally *Canadian North*, above, at paragraphs 3-5.

23 Cross-examinations may be conducted on the affidavits: rule 308. Why might cross-examinations be [page28] necessary? Sometimes there is uncertainty about whether certain material appended to the affidavits was in fact before the administrative decision maker at the time it made its decision. The parties are entitled to test each other's positions on that. Down the road, a reviewing court might have to determine the content of the evidentiary record before proceeding further, and in some cases it may be assisted by the cross-examinations.

24 Any affidavits under rules 306 and 307 are placed in the applicant's record or the respondent's record: see paragraph 309(2)(d) and paragraph 310(2)(b). Cross-examination transcripts are also to be included: see paragraph 309(2)(e) and paragraph 310(2)(c).

(2) Applying the principles to this case

25 In this case, Access Copyright simply included in its application record material it had in its possession that it says was before the Board at the time it made its decision. It did not introduce the material by way of an affidavit.

26 The foregoing analysis shows that this was an error. Access Copyright should have served an affidavit explaining that the material was before the Board when it made its decision, appending the relevant material to that affidavit. After receiving that affidavit, the respondents might have exercised their right to cross-examine. As explained in paragraph 23, above, the right to cross-examine can be important in some circumstances. In this case, I cannot tell whether or not the respondents would have exercised their right to cross-examine. The fact they might have underscores the need for Access Copyright to have served an affidavit. Finally, following any cross-examinations, Access Copyright should have included the affidavit

(with exhibits) and any cross-examination transcripts in its application record: see paragraph 309(2)(d) and paragraph 309(2)(e).

27 I am satisfied that Access Copyright's error was an innocent one. The candid and professional affidavit of senior counsel shows that Access Copyright had good intentions and was looking for a fast, easy way to place [page29] the material before the Court. Unfortunately, the way Access Copyright went forward offended the Rules, ran contrary to the general rule that facts before the reviewing court must be proven by evidence, and might have worked procedural unfairness.

28 The *Federal Courts Rules* can accommodate good intentions that give rise to creative and practical solutions that simplify things. At the outset of this matter, Access Copyright and the respondents could have discussed the evidentiary record needed by the Court and could have agreed on a list of material to be placed in that record. Then, by informal letter before at or the same time as the filing of the application record, Access Copyright could have requested, on consent, an order allowing for the agreement and the material covered by it to be placed into the application record without an affidavit: see paragraph 20, above, regarding agreed statements of fact.

29 Given that Access Copyright mistakenly included materials in its application record, what should now happen?

30 The respondents say that they have suffered "irredeemable prejudice" from this "egregious" irregularity. They say that they have served an affidavit responding to Access Copyright's affidavit without realizing that Access Copyright intended to include many more documents into the application record. As will be seen below, this minor irregularity can be easily fixed.

31 On the issue of remedy, the respondents' primary position is basically "too bad, so sad": Access Copyright should be barred from including in the application record an affidavit appending the materials, regardless of how relevant the materials might be to the Court's determination of the judicial review.

32 This is remedial overreach. Rule 3 [of the Rules] requires us to apply the rules to secure a just determination on the merits, not to punish a party that has [page30] made a mistake - here, a relatively benign one - that can be fixed.

33 To that end, this Court will order the following:

- (a) Within 10 days of the Court's order, the materials mistakenly included in Access Copyright's application record (to be detailed in this Court's order) should be removed from that record and Access Copyright's memorandum of fact and law, drafted on the basis of the improper record, should be removed from the record or the Court file, as the case may be;
- (b) Within 20 days of this Court's order, in accordance with rule 306, Access Copyright may serve an affidavit appending materials it says were before the Board and in its possession, including the materials mistakenly included in Access Copyright's application record;
- (c) In accordance with rule 307, the respondents may serve affidavits responding to the affidavit served under (b);

- (d) In accordance with rule 308, cross-examinations may take place concerning the affidavits served under (b) and (c);
- (e) The time limits for (c) and (d) are those set out in rules 307 and 308;
- (f) Within the time specified under rule 309, Access Copyright shall prepare a supplementary application record containing the materials specified under rule 309 that do not appear in its corrected application record; also at that time, Access Copyright shall file its memorandum of fact and law;
- (g) The respondents (comprised of two separately-represented groups) shall file their records and memoranda of fact and law in accordance with rule 310; for clarity, those records should include all of the respondent's affidavits, whether filed in response to Access Copyright's new affidavit or [page31] filed in response to Access Copyright's original application record;
- (h) Time thereafter shall run in accordance with the *Federal Courts Rules*.

34 This motion was about a minor, fixable mistake. As long as humans are involved in litigating cases, no matter how much they try to prevent mistakes, mistakes like this will sometimes happen, even by excellent counsel. Happily, most procedural mistakes, like the one in this case, do not seriously implicate clients' rights. Mistakes of this sort should be nothing more than a minor inconvenience during the drive to the ultimate destination - a judicial determination on the merits that to all is proper and fair.

35 But here, the parties pulled over to the side of the road and stopped to fight, forgetting the destination. After Access Copyright made its mistake, the respondents wrote, pointing out the mistake. Despite the clarity of the relevant rules, Access Copyright dug in its heels, maintaining its position rather than reassessing it. In reaction to that, the respondents brought their motion. But they too showed inflexibility, forcefully asserting their position that Access Copyright should be prevented in the judicial review from using any of the material it improperly included in its application record, whether or not it was needed by the Court. In counter-reaction to that, Access Copyright brought a counter-motion - one that in the end is unnecessary for this Court to determine - proposing a lesser, more practical remedy. In that counter-motion, it laudably advanced submissions showing an awareness of its mistake. But that changed nothing: everyone has remained stuck on the side of the road.

36 All have acted in good faith, representing their clients' interests vigorously, advocating their positions with characteristic excellence. But here initial intransigence begat a motion with remedial overreach, and remedial overreach begat a counter-motion. Forgotten was the destination: this Court, as a practical problem [page32] solver, simply wants to determine the judicial review properly and fairly on the merits, using a proper and fair evidentiary record. The focus should have been on a fix, not a fight.

37 An order shall issue in accordance with these reasons. There shall be no order for costs.

Hiebert v. Canada (Correctional Service), [1999] F.C.J. No. 1957

Federal Court Judgments

Federal Court of Canada - Trial Division

Ottawa, Ontario

Pelletier J.

Heard: June 15, 1999.

Oral judgment: December 15, 1999.

Court File No. T-559-98

[1999] F.C.J. No. 1957 | [1999] A.C.F. no 1957 | 182 F.T.R. 18 | 45 W.C.B. (2d) 221

Between Kurt Alexander Hiebert, applicant, and Joe Price, in his capacity as Acting/Assistant Commissioner, Corporate Development, Correctional Service of Canada and Ole Ingstrup, in his capacity as Commissioner of Corrections, respondents

(25 paras.)

Case Summary

Prisons — Administration — Powers re prisoners — Transfers — Prisoners' rights — Judicial review or grievance — Practice — Discovery — Production and inspection of documents.

This was an application by Hiebert for judicial review of a Corrections Canada grievance decision refusing his request for a transfer to another penitentiary. Hiebert was incarcerated for life after being convicted of both second degree murder and manslaughter for the killing of two inmates. He believed he would benefit from courses offered in another penitentiary and requested a transfer. His request was denied on the basis that the other penitentiary housed incompatible inmates. Hiebert disputed this and requested disclosure of documents naming the incompatible inmates as part of his application for judicial review. Corrections Canada claimed that Hiebert was asking for documents that either did not exist in the form in which they were requested and were not put before the decision-maker, or else the disclosure of which would endanger the safety of inmates and the security of the penitentiary.

HELD: Application dismissed.

Corrections Canada was not required to disclose documents that did not exist in the form in which they were requested or that were not put before the decision-maker. The refusal to disclose documents naming the incompatible inmates was justified given the potential for fear and revenge that could occur in the closed system of a penitentiary. Hiebert was given the gist of the case against his transfer. To say more would expose particular incompatible inmates to the risk of harm. There was a rational basis for the position taken by the Corrections authorities.

Statutes, Regulations and Rules Cited:

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 37.

Canadian Environmental Assessment Act, R.S.C., c. C-37.

Corrections and Conditional Release Act, R.S.C., c. C-44.6, s. 27(3)(a), 27(3)(b).

Federal Court Rules, Rule 317, 318, 501.

Counsel

Carol Blake, for the applicant. Graham Sanderson, for the respondent.

PELLETIER J. (Reasons for Order and Order, orally)

1 At age 17, Kurt Hiebert heard the doors of a federal penitentiary close behind him as he began his sentence. Today, 23 years later, he is still in a federal institution where he could remain for the rest of his life as a result of convictions for 2nd degree murder (1987) and manslaughter (1991), convictions arising from the death of two other inmates. He has gone from the general prison population to the ultra secure Special Handling Unit to the Mental Health Unit of the Millhaven Institution, where he was at the date of this application. His Case Management Team believes that he has made considerable progress and would benefit from some of the programs which are available in the Pacific Region, where his wife now resides. However, his request for a transfer to Mountain Institution was denied on the basis of the presence of "incompatibles" in the population of that facility. Incompatibles are persons who cannot, in the judgment of the corrections authorities, be housed in the same facility because of animosities between them which may lead to violence. Mr. Hiebert grieved the refusal of his request for a transfer. He disputes that there are insurmountable problems with incompatibles. His grievance was denied and he now brings an application for judicial review. In the course of that application, disclosure of documents has become an issue.

2 In a significant departure from the normal practice, Mr. Hiebert was told the names of some of the persons who are said to be incompatible with him. In his affidavit, he explains his relationships with these individuals and shows why he believes there are no incompatibility problems between them. Some of these men have even written to say that they do not have any difficulty in being housed in the same institution as him. As part of his application for judicial review, Mr. Hiebert has requested disclosure of information which is described in his Originating Notice of Motion as follows:

...the list of incompatibles of the applicant, the reasons for their current status as incompatibles and the dates and methods whereby the status of their incompatibility was reviewed or, in the alternative, as much of the above information as is possible, withholding only as much information as is strictly necessary in order to protect the safety of any person.

3 The Respondent officials of Corrections Canada have filed the Affidavit of Kevin Shaun Crawford in reply, setting out certain facts in relation to Mr. Hiebert and nature of incompatibles. This affidavit suggests that the documents requested by Mr. Hiebert do not exist. The respondents have also filed a certificate by Yvan Joseph Denis Thibault under the Canada Evidence Act invoking the provisions of s.

37 of the Canada Evidence Act R.S.C. 1985 c. C-5 and subsections 27 (3) a) and b) of the Corrections and Conditional Release Act R.S.C. c.C-44.6 which, taken together, allow documents to be withheld from production if their release would jeopardize the safety of any individual or the security of any penitentiary. The documents in question are documents created for the purpose of disposing of Mr. Hiebert's grievance. The Court therefore has before it a request for the production of documents which likely do not exist in the form in which they are requested and were not put before the decision maker, together with a refusal to produce documents which do exist and which were before the decision maker.

4 Mr. Hiebert's application was launched prior to the introduction of the Federal Court Rules 1998. However, Rule 501 provides that the "new" Rules apply to proceedings already underway¹ so that this matter is governed by Rules 317 and 318 which provide as follows:

- 317.(1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.
- (2) An applicant may include a request under subsection (1) in its notice of application.
- 318.(1) Within 20 days after service of a request under rule 317, the tribunal shall transmit
- (a) a certified copy of the requested material to the Registry and to the party making the request; or
 - (b) where the material cannot be reproduced, the original material to the Registry.
- (2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.
- (3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).
- (4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry

* * *

317. (1) Une partie peut demander que des documents ou éléments matériels pertinents à la demande qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande lui soient transmis en signifiant à l'office fédéral et en déposant une demande de transmission de documents qui indique de façon précise les documents ou éléments matériels demandés.
- (2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.
- 318.(1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :
- a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

- b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause
- (2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.
- (3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.
- (4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

5 In this case, an order was made pursuant to Rule 318 setting down for hearing before a judge the question of the production of documents.

6 With respect to the request for production of documents contained in Mr. Hiebert's Originating Notice of Motion, there is no evidence that such documents exist in the form in which they are described in the originating document, and there is evidence in the Affidavit of Kevin Shaun Crawford that no such document was put before the decision-maker, Mr. Price.

7 The bulk of case authority dealing with production of documents in judicial review applications is clear that only documents which were actually before the decision maker are subject to production. A contrary opinion was expressed by Muldoon J. in *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans)* (1997), 130 F.T.R. 206 at p. 218 where the following appears:

Neither Quebec Ports² nor Pathak³ stands for the proposition that a relevant document is one which was "considered" or "relied upon". Pathak clearly states that the test for relevancy is how the document relates to the grounds in the originating notice of motion and the supporting affidavit.

In coming to this conclusion, Muldoon J. distinguished the case before him from the situation which applied in Pathak, supra, where McGuigan J.A. said

Only the report of the investigator and the representations of the parties are necessary matter for the Commission's decision. Anything else is in the discretion of the Commission. If the Commission, therefore, elects not to call for some document, that document cannot be said to be before it in its decision-making phase, as opposed to its investigative phase. It is therefore not subject to production as a document relied upon by the Commission in its decision, although it may well have been relied upon by the investigator in his report. These are two different moments of the Commission's life, distinct moments not to be obliterated by a legal fiction.

8 The basis of the distinction drawn by Muldoon J. was that, under the terms of the Canadian Environmental Assessment Act R.S.C. c. C-37, the Minister had a supervisory function with respect to the assessment which meant that there was no distinct investigation and decision-making stages as there is in proceeding before the Human Rights Commission.

9 On the other hand, Nadon J. reviewed the jurisprudence on this issue in 1185740 *Ontario Limited v. Canada (Minister of National Revenue)* (1998), 150 F.T.R. 60 and came to the conclusion that only

documents which were before the decision-maker were subject to production, a position consistent with that articulated by McGuigan J.A. in Pathak:

In *Sovereign Life Insurance Co. v. Canada* (1995), 100 F.T.R. 81, I had to consider former Rule 1305 which was the equivalent Rule 1612 in the context of statutory appeals. That rule provided that the tribunal whose decision was the subject of the appeal had to send to the Registry of this Court all papers relevant to the matter before it and which were in its possession or control. In reaching a conclusion in that case, I considered a number of Federal Court decisions including the decision of the Federal Court of Appeal in *Trans Quebec & Maritimes Pipeline Inc. v. National Energy Board*, [1984] 2 F.C. 432. At 93 of *Sovereign*, I concluded:

In addition to being relevant to the issue before the Tribunal, the documents sought must, in my view, have been presented or made available to the Tribunal. On this point, I wish to emphasize that part of the Thurlow, C.J.'s comments, cited hereinabove in *Trans Quebec & Maritimes Pipeline Inc.* where he states that "The Tribunal will know what it has or has had that is relevant, what use has been made of it and why it is relevant to the decision ...". In *Pacific Press Ltd. et al. v. Minister of Employment and Immigration et al.* (1990), 127 N.R. 323, the Federal Court of Appeal had to decide whether material should be added to the case in a s. 28 application. At p. 324, Heald, J., stated that:

"By this motion, the court is being asked to add material to the case that was not before the adjudicator when he made his decision and couldn't have been before him because it did not exist at that time. This court has declined to make such an order in such circumstances."

10 The position taken by Nadon J. was approved by the Federal Court of Appeal in *1185740 v. Canada (Minister of National Revenue)* (1998), 150 F.T.R. 60. I therefore find that documents are not subject to production unless they were before the decision-maker at the time the decision was made.

11 Be that as it may, the documents sought to be produced here were not only not before the decision maker, but there is no evidence that they exist in the form requested. This is what Decarie J.A. had to say about such a circumstance in *Quebec Port Terminals Inc. v. Canada (Labour Relations Board)* (1993), 164 N.R. 60:

In short, Rules 1612 and 1613 do not permit a party to ask the tribunal to prepare new documents or to do research in existing documents, any more than they permit a party to obtain existing documents from the tribunal which are in no way related to the impugned decision.

12 Either ground is therefore sufficient to dispose of the request for production found in Mr. Hiebert's Originating Notice of Motion. In the absence of evidence that such documents exist, and in the presence of evidence to the effect that no such documents were put before the decision-maker, there is no basis to make the order requested.

13 When one reads Mr. Hiebert's affidavit, one discerns that the information requested is a function of a concern that the refusal of his transfer is the result of bad faith on the part of one or more corrections officials. At paragraph 51 of his affidavit, he quotes a hearsay statement from a corrections official to the effect that "Mountain [institution] just did not want to take me". I have reviewed the confidential documents attached to the Certificate of Yvan Joseph Denis Thibault. It appears from those documents

that there is a rational basis for the position being taken by the Respondent. It is not simply capricious and arbitrary.

14 I turn now to the second leg of the argument, the Respondent's refusal to produce certain documents which were before the decision maker, but whose production is resisted on the ground that production would endanger the safety of individuals and the security of a penitentiary.

15 Some of the documents are described in the Affidavit of Kevin Shaun Crawford, a senior Corrections official, as follows:

- a) a portion of a letter from Dennis Corrigan dated October 27, 1997 containing sensitive information.
- b) an executive summary of information, both oral and written, received from officials at Mountain Institution and Pacific Region dealing with some inmates who are not prepared to resolve or mediate their concerns for the applicant

16 There are, in addition, other documents which are not identified in the Affidavit and the Certificate. These include internal communications and records of communications with inmates.

17 The reason for refusing disclosure is, in all cases, that it would "jeopardize the safety of inmates and the security of penitentiaries". No detail is given as to how this might come to pass.

18 The test for disclosure of information in a correctional setting has been expressed in various ways. In *Demaria v. Regional Classification Board*, [1987] 1 F.C. 74, an inmate was transferred involuntarily after he was accused of smuggling cyanide into the prison. No cyanide was ever found. The inmate was never told the basis of the correctional officer's suspicions. Mr. Justice Hugessen, writing for the Court of Appeal commented on the absence of detail as follows:

The appellant is told that there are reasonable grounds for believing him to have brought in cyanide. He is given no hint of what those grounds are. The allegations against him are devoid of every significant detail. When? Where? How? Whence came the poison? How was it obtained? For what purpose? How much? The allegation is said to be based on information obtained by the Millhaven staff and the Ontario Provincial Police. What information comes from which source? Is there an informer involved? If so, how much of the substance of his statement can be revealed while protecting his identity? Have the police pursued their enquiries? Have they made any arrests? The list of questions is almost endless.

19 The learned judge then went on to comment on the need to withhold some information while still providing the inmate as much information as possible:

There is, of course, no doubt that the authorities were entitled to protect confidential sources of information. A penitentiary is not a choir school and, if informers were involved (the record here does not reveal whether they were or not), it is important that they not be put at risk. But even if that were the case it should always be possible to give the substance of the information while protecting the identity of the informant. The burden is always on the authorities to demonstrate that they have withheld only such information as is strictly necessary for that purpose. ...

In the final analysis, the test must be not whether there exist good grounds for withholding information but rather whether enough information has been revealed to allow the person concerned to answer the case against him.

20 Another formulation of the test for adequate disclosure is found in *Cadieux v. Mountain Institution*, [1985] 1 F.C. 378. An inmate's Unescorted Temporary Absence program was cancelled. The inmate was simply told that the Correctional Service had reason to believe that he was at risk of breaching his terms of release. He brought an application for judicial review seeking to reinstate his Unescorted Temporary Absence entitlement. Reed J. commented on the fact that in some instances an inmate might only be entitled to the gist of the information against him, as for example where disclosure would automatically lead to the identification of informers:

I think it will be rare that an inmate cannot be told at least the gist of the reasons against him. This would especially be so if the alleged conduct took place outside the institution when the inmate was at large. I can, however, more easily envisage some situations when it might be necessary to refuse to disclose even the gist of the case against him when the information relates to conduct occurring within the institution. This might be necessary if the content of the information was such that its disclosure would automatically lead to the identity of the informer becoming known. It is trite law that the identity of informers is protected from disclosure. ...In the context of the prison situation, safety and order within the prison may particularly require the non-disclosure of the identity of informers. Non-disclosure might also be necessary if such disclosure would automatically lead to the revealing of information collection methods and thus substantially undermine the future functioning of the Board. In circumstances such as these, I do not think the Board should be denied the right to rely on and use information which comes to its knowledge even though it does not pass the gist of that information on to the inmate. The public interests in preventing repeat offences while the inmate is at large, in maintaining security and order in the penal institution, and in preserving the Parole Board's ability to function effectively may outweigh the normal rule that a person is entitled to know the gist of the case against him. But, the occasions on which this is justified must be rare. There must be an element of necessity; mere convenience for the functioning of the Board is not enough.

21 The significance of designation of an inmate as incompatible with another is set out in paragraphs 12, 15, 16, 17 and 18 of the Certificate of Yvan Joseph Denis Thibault which are reproduced below:

12. An inmate may not be able to integrate into an open prison population because he has one or more "incompatibles in that population. An "incompatible" is another inmate or security officer whose presence in the same institution poses a risk to the safety of that inmate or staff member or to the security of the institution. These risks include the risk of violent assault and murder. One inmate may be incompatible with another for a variety of reasons, of which the following are typical:
 - (a) an inmate may have generated debts in prison which his creditors may seek to enforce by violence;
 - (b) an inmate may have provided information about another inmate to a security officer, which information was used by the Correctional Service to the detriment of the other inmate;

- (c) An inmate may have provided information about another inmate to a security officer, which information was used by the Correctional Service to the detriment of the other inmate;
 - (d) an inmate may have stolen items from another inmate and the other inmate may wish to obtain the return of that item or to extract revenge;
 - (e) an inmate may have been convicted of sexual assault or some other crime for which other inmates will seek to punish that inmate;
 - (f) an inmate or a staff member may have been taken hostage or assaulted by another inmate, and,
 - (g) an inmate may belong to a gang or other social or criminal organization and be the target of recrimination from inmates belonging to rival gangs or organizations.
15. In my experience, the behaviour of prison inmates is influenced by a code of conduct which is based on status and reputation. These qualities are affected by such factors as the nature of the offence an inmate has committed, his associations before and during incarceration and his past prison behaviour. For example, inmates who have committed sexual offences or inmates who provide information to security officers about others are regarded with contempt by other inmates and may be subject to attack if placed in an open prison population. In addition, inmates tend not to overlook or forget past incidents and insults and will often seek to redress "wrongs" done to them years earlier when the opportunity arises. Inmates also tend to react more strongly to perceived wrongs than members of the general population because of the competitive nature of the prison population, the proximity of other inmates, and an environment where their status is under constant scrutiny. For these reasons, inmates can become frustrated and resort to violence as a means of resolving conflicts. Even minor incidents, such as a cigarette debt, can have major consequences, ranging from assault to murder.
16. On several occasions, I have witnessed violent incidents when inmates are inadvertently introduced to incompatible inmates. The consequences have included beatings, assaults and murders. These violent incidents have occasionally led to riots involving many prisoners and posed a threat to the security of institutions.
17. The separation of incompatible inmates is an important factor in maintaining safety and security at federal penal institutions. Communication to one inmate of the identities of inmates classified as incompatible with him or her, exposes those "incompatibles" to risks of reprisal by, or at the instance of, that inmate. Incompatibles have been identified as "targets" and subjected to physical attacks by other inmates. Inmates have been beaten and killed for debts, for alerting the authorities about the behaviour of another inmate and for providing evidence against another.
18. For these reasons, inmates are often reluctant to be identified as incompatibles and may deny incompatibility with others. Such denials are considered by correctional staff but cannot be determinative of the issue of incompatibility. Correctional staff must make their own assessments of the incompatibility of inmates.

22 The issue in this case is the status of certain individuals as incompatibles vis-à-vis Mr. Hiebert. It is no

small thing to be considered an incompatible of an individual who has been convicted of killing two other inmates. It would be particularly uncomfortable to be identified as the person whose incompatibility prevented Mr. Hiebert from achieving his objective of returning to the Pacific region. Whatever the Corrections staff think of Mr. Hiebert's emotional growth, inmates could well have a different view of his adjustment. The potential for fear and panic, on the one hand, and a thirst for revenge on the other, is a dangerous combination in a closed system such as a penitentiary.

23 The fact which distinguishes this case from the usual prison disclosure case is that the object of disclosure is the names of the incompatibles themselves, unlike the usual case where the names of informers or incompatibles might be accidentally raised in the course of disclosure of other information. A comparable situation would be a case in which the request for disclosure was with respect to the names of informers. In such a case, it would not take long to decide how much information could be given without disclosing their identity. Any information about the informers would be too much. In the same way, there is no way to discuss incompatibles without endangering the incompatibles. No matter what one says about them, it conveys more than those who would do them harm need to know. This is a case where Mr. Hiebert has been given the gist (and more) of the case against his transfer. To say more is to get into a discussion about specific incompatibles, which exposes them to risk of harm.

24 To put this discussion in the context of the s. 37 application, the leading case on the approach to such cases in *Goguen and Albert v. Gibson*, [1983] 2 F.C. 463. There the Court adopted a two stage approach to the resolution of claims for non-disclosure. In the first stage, the Court considers the competing claims for disclosure and non-disclosure on the basis of the affidavit evidence before it, but without reviewing the documents themselves. Only if the Court cannot resolve the issue at that stage does the Court advance to the second stage which is the review of the documents.

That, in, the case of a request for disclosure of information in respect of which an objection has been raised under Sections 36.1 and 36.2 of the Act the court must proceed by way of a potential two-stage determination of the application is to me quite clear. Authority to inspect the documents is vested in the court, but no duty is imposed on it to do so; and it seems to me that an authority of that kind would be abused if it were exercised unreservedly, uselessly and for any other reason than because it is required to arrive at a conclusion. This observation, to me, not only confirms the inevitability of the two-stage approach but, at the same time, indicates the nature of the so-called test that is implied in it. The court will proceed to the second stage and examine the documents if, and only if, it is persuaded that it must do so to arrive at a conclusion or, put another way, if, and only if, on the sole basis of the material before it, it cannot say whether or not it will grant or refuse the application.

25 I would have, in this case, come to the conclusion which I did without examining the documents since my decision is based upon the nature of the inquiry itself i.e. an inquiry into the identity of incompatibles. However, I did examine the documents for the purpose of dealing with the issue of bad faith raised in Mr. Hiebert's affidavit, even if it is not explicitly pleaded. I did so because I believe it important to balance the very broad protection from disclosure in such cases with some objective assessment that the power thereby conferred upon Corrections officials is exercised for its intended purpose. This involves nothing more than an assessment of whether there is a rational basis for the position taken by the Corrections authorities. It is not for this Court to attempt to make risk assessments. If the material has a rational connection to the stated objective, then no more need or should be done. If the material lacks a rational

connection to the stated objective, then the Court would have to consider the remedies available to it, having regard that the application before it is one dealing with disclosure, and not the merits of the claim. In this case, the material discloses a rational connection to the stated objective, and as a consequence, nothing further need be said.

ORDER

Having read the Affidavits of Kurt Hiebert and Kevin Shaun Crawford as well as the Certificate filed by Yvan Joseph Denis Thibault; and

Having considered the interest of the Applicant in the disclosure of the information requested in his Originating Notice of Motion; and

Having weighed the interests of the parties and the public in the disclosure of certain confidential information attached to the Certificate against the protection of individuals and maintaining the security of penitentiaries;

NOW THEREFORE, IT IS HEREBY ORDERED that:

- 1- the request for disclosure contained in the Applicant's Originating Notice of Motion is hereby dismissed.
- 2- the objection to disclosure of the confidential documents attached to the Certificate is hereby sustained.

- 3- there will be no order as to costs.

PELLETIER J.

- 1 501.(1) Subject to subsection (2), these Rules apply to all proceedings, including further steps taken in proceedings that were commenced before the coming into force of these Rules. 501. (1) Sous réserve du paragraphe (2), les présentes règles s'appliquent à toutes les instances, y compris les procédures engagées après leur entrée en vigueur dans le cadre d'instances introduites avant ce moment.
- 2 Quebec Ports Terminals Inc v. Canada (Labour Relations Board) (1994) 164 N.R. 60 (F.C.A.).
- 3 Pathak v. Canada (Human Rights Commission) [1995] 2 F.C. 455.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Lang v. British Columbia***
(Superintendent of Motor Vehicles),
2005 BCCA 244

Date: 20050425

Docket: CA028764; CA028794; CA029799; CA030648

Docket: CA028764

Between:

Robert Lang

Respondent
(Petitioner)

And

**The Superintendent of Motor Vehicles for the Province of British Columbia and
the Attorney General of British Columbia**

Appellants
(Respondents)

- and -

Docket: CA028794

Between:

Roger Steven Corbett

Respondent
(Petitioner)

And

**The Superintendent of Motor Vehicles for the Province of British Columbia and
the Attorney General of British Columbia**

Appellants
(Respondents)

- and -

Docket: CA029799

Between:

Kim Charles Lucas

Respondent
(Petitioner)

And

**The Superintendent of Motor Vehicles for the Province of British Columbia and
the Attorney General of British Columbia**

Appellants
(Respondents)

- and -

Docket: CA030648

Between:

Michael Sebelius Feddersen

Respondent
(Petitioner)

And

**The Superintendent of Motor Vehicles for the Province of British Columbia and
the Attorney General of British Columbia**

Appellants
(Respondents)

Before: The Honourable Mr. Justice Donald
 The Honourable Madam Justice Newbury
 The Honourable Mr. Justice Low

J.G. Penner and
R. Mullett

Counsel for the Appellants

R.P. Helme and
R.M. Junger

Counsel for the Respondents
R. Lang, R.S. Corbett and K.C. Lucas

W.C. MacGregor

Counsel for the Respondent
M.S. Feddersen

Place and Date of Hearing:

Victoria, British Columbia
1 and 2 February 2005

Place and Date of Judgment:

Vancouver, British Columbia
25 April 2005

Written Reasons by:

The Honourable Mr. Justice Donald

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] These appeals are brought with leave by the Superintendent of Motor Vehicles and the Attorney General of British Columbia against awards of costs upon the quashing of administrative licence prohibitions on judicial review in the Supreme Court. The issues require a determination of the correct parties in a judicial review, the role of the Attorney General in those proceedings, the exposure of the statutory decision maker and the Attorney General to costs, and whether the awards of costs in the instant cases are valid.

[2] For reasons that follow I have concluded:

1. The representative of the Crown in proceedings under the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241, is the Attorney General, not Her Majesty the Queen in Right of the Province of British Columbia.
2. The Attorney General can appear in his own right to speak for the public interest and may advocate for the statutory decision maker (hereinafter the tribunal) if the latter has not engaged separate counsel.
3. If the decision in question is set aside, costs should not be levied against the tribunal unless:
 - (a) the tribunal exhibited misconduct or perversity in the proceedings before it; or

- (b) made submissions on the merits of the judicial review application and did not limit itself to jurisdiction.
- 4. The Attorney General may be liable in costs if:
 - (a) the tribunal did not file an appearance to the petition; and
 - (b) the Attorney General argued the merits of the tribunal's decision.
- 5. Of the instant cases, an award of costs was only justified in the ***Feddersen*** case and should be read as applying only to the tribunal.

FACTS

[3] In each of the four cases the respondent (a motorist) was pulled over by a police officer while driving, provided a breath sample to the officer, and was given a driving prohibition after recording a blood alcohol level above the legal limit. The respondents then applied to have the driving prohibition reviewed by an adjudicator appointed under the ***Motor Vehicle Act***, R.S.B.C. 1996, c. 318, as the Superintendent's delegate. The reviews of the prohibition were dismissed.

[4] The respondents then brought a petition for judicial review of the adjudicator's decision in the Supreme Court for British Columbia; each was successful and awarded costs of the judicial review proceedings.

(a) Corbett

[5] The petition in **Corbett** named the Superintendent and Her Majesty the Queen as respondents. On 18 December 2001, Mr. Justice Grist set aside the driving prohibition and remitted the matter to the Superintendent. He also made an order that the petitioner was entitled to double costs based on an offer to settle. In the style of cause of the order the Attorney General was substituted for Her Majesty the Queen, however, a dispute remains whether the proper Crown respondent is the Attorney General or Her Majesty the Queen. We were asked to put this controversy to rest.

(b) Feddersen

[6] The petition in **Feddersen** was styled:

Re: The Decision of the Superintendent of Motor Vehicles in the Matter of Michael Sebelius Feddersen and Administrative Driving Prohibition No. 00-175422

On 10 February 2003, Mr. Justice Slade in an order styled:

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MICHAEL SEBELIUS FEDDERSEN

PETITIONER

AND:

THE SUPERINTENDENT OF MOTOR VEHICLES and
THE ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTS

pronounced:

THIS COURT ORDERS that

1. The Review Decision of adjudicator K. Anderson of August 1, 2002 in respect of Administrative Driving Prohibition No. 00-175422 is set aside, the Notice of Driving Prohibition is stayed, and the Superintendent of Motor Vehicles is prohibited from confirming the driving prohibition.
2. The Respondent shall pay the Petitioner costs on Scale 3 of the Supreme Court Rules (British Columbia).

(c) Lang

[7] The petition in **Lang** used this style of cause:

IN THE SUPREME COURT OF BRITISH COLUMBIA

RE: REGINA v. ROBERT LANG

IN THE MATTER OF AN APPLICATION FOR RELIEF IN
THE NATURE OF CERTIORARI

BETWEEN:

ROBERT LANG

PETITIONER

AND:

THE SUPERINTENDENT OF MOTOR VEHICLES FOR THE
PROVINCE OF BRITISH COLUMBIA and HER MAJESTY THE
QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

RESPONDENTS

[8] On 29 November 2000, Mr. Justice Bouck set aside the decision of the adjudicator and declared the prohibition a nullity. The order named the Superintendent and the Attorney General as respondents even though in his

reasons for judgment Mr. Justice Bouck recommended that Her Majesty the Queen be substituted for the respondents, if both parties agreed. He subsequently issued a memorandum to counsel on 30 July 2001 on the party issue, ventured the opinion that Her Majesty the Queen was the correct party respondent, but declined to make an order changing the style of cause because both parties seemed content with it.

(d) Lucas

[9] The petition in ***Lucas*** named the Superintendent and Her Majesty the Queen as respondents. On 9 May 2002, Madam Justice Neilson made the following order:

THIS COURT ORDERS, AND BY CONSENT, that

1. Her Majesty the Queen in Right of the Province of British Columbia be removed as a Respondent and be replaced by the Attorney General of British Columbia;
2. the Superintendent of Motor Vehicles rehear the application of the Petitioner to review the driving prohibition served pursuant to Section 94.1 of the *Motor Vehicle Act* on August 15, 1998;
3. the rehearing be held within 21 days of the date of this Order, unless the Superintendent is unable to send the decision within this period in which case the Superintendent may extend this period pursuant to Section 94.6(4) of the *Act*.

AND, THIS COURT FURTHER ORDERS that

4. costs are payable to the Petitioner on scale 3.

[10] The orders in ***Corbett*** and ***Lucas*** setting aside the prohibition are by consent. This is because the adjudicators in those cases extrapolated breathalyzer readings back to the time of driving without expert evidence or notice to the disputant, a practice this Court condemned in ***Dennis v. British Columbia (Superintendent of***

Motor Vehicles) (2000), 82 B.C.L.R. (3d) 313, 150 C.C.C. (3d) 544, 2000 BCCA 653, upholding the order of Melvin J. (1999), 45 M.V.R. (3d) 10, [1999] B.C.J. No. 1568 (S.C.) (QL), as contrary to law.

[11] In ***Lang***, Bouck J. found a defect in the initiating document prepared by the peace officer which in his opinion nullified the process.

[12] In ***Feddersen***, Slade J. struck down the prohibition on grounds that the adjudicator's decision gave rise to a reasonable apprehension of bias and the adjudicator's findings were patently unreasonable.

DISCUSSION

[13] The appeals arise in a much litigated scheme under ss. 94.1 to 94.6 of the ***Motor Vehicle Act***, R.S.B.C. 1996, c. 318, which provide for a 90 day driving prohibition. The procedure involves the review by a delegate of the Superintendent, referred in the authorities as the adjudicator, of the grounds for a prohibition reported by a peace officer who investigated a drinking and driving incident. The authority of the Superintendent to delegate his powers, duties and functions is found in s. 117 of the ***Motor Vehicle Act***.

[14] The enactments creating the program came into force on 18 December 2000 pursuant to B.C. Reg. 418/00. Counsel for the appellants summarized the scheme in this way:

2. Broadly speaking, the Legislation is divided into two phases. First, a peace officer acts under s. 94.1 to issue a Notice of Driving

Prohibition (the "Notice"). The peace officer must issue a Notice when he or she has reasonable and probable grounds to believe that one of two specified conditions exist: (1) on the basis of an analysis of breath or blood, the driver was "over .08" at any time within three hours after operating or having care or control of a motor vehicle; or (2) upon a demand being made for a sample of breath under s. 254 of the *Criminal Code*, the person failed or refused, without reasonable excuse, to provide a sample.

3. If a Notice is issued, the peace officer must send the documents specified in s. 94.3 to the Superintendent of Motor Vehicles (the "Superintendent"). The documents specified are: (a) the driver's licence; (b) a copy of the Notice; (c) a certificate of service; (d) a report, in the form established by the Superintendent, sworn or solemnly affirmed by the peace officer; and (e) a copy of any certificate of analysis under s. 258 of the *Criminal Code* with respect to the driver. The peace officer has no further involvement in the process.

4. A person who has been served with a Notice may apply to the Superintendent for a review by filing an Application for Review (the "Application") pursuant to s. 94.4. The person may submit, with the Application, any sworn statements or other evidence the applicant wishes the Superintendent to consider. The Superintendent is not required to hold an oral hearing unless the applicant requests an oral hearing at the time of filing the Application and pays the prescribed fee.

5. The second phase of the Legislation addresses the review to be conducted by the Superintendent. The Superintendent is directed by s. 94.5 to consider: (a) any relevant sworn or solemnly affirmed statements and any other relevant information; (b) the report of the peace officer; (c) any certificate of analysis under s. 258 of the *Criminal Code*; and (d) any relevant evidence given or representations made at the hearing.

6. After considering the Application, if the Superintendent is satisfied that either (a) the person had care or control and was "over .08" within three hours of having care or control; or (b) the person failed or refused, without a reasonable excuse, to comply with a demand made under s. 254 of the *Criminal Code* to supply a sample of his or her breath or blood, then the Superintendent must confirm the driving prohibition. If, however, the Superintendent is satisfied that either (a) the person was not, because of alcohol consumed prior to or while in care or control of the vehicle, "over .08" within three hours of having care or control; or (b) the person did not fail or refuse to comply with a demand, or had a reasonable excuse for doing so, then the Superintendent must revoke the driving prohibition and return the

driver's licence, and must direct that the Application and hearing fees be refunded.

[15] We are told that after more than 100 judicial reviews virtually all the major legal issues related to the program have been settled, except the issue of costs. Of particular importance here is the determination that the standard of review on the merits of the adjudicator's decision is patent unreasonableness: **Pointon v. British Columbia (Superintendent of Motor Vehicles)** (2002), 6 B.C.L.R. (4th) 112, 29 M.V.R. (4th) 167, 2002 BCCA 516, following **R. v. Gordon** (2002), 100 B.C.L.R. (3d) 35, 23 M.V.R. (4th) 165, 2002 BCCA 224.

THE PARTIES

[16] The question whether the Crown should be named as Her Majesty the Queen or the Attorney General arises from a concern by counsel for Corbett, Lang and Lucas that an order of costs against the Superintendent and the Attorney General may not be recoverable.

[17] It is said that Her Majesty the Queen is a proper party respondent because of the **Crown Proceeding Act**, R.S.B.C. 1996, c. 89, and the reference to that **Act** in the **Judicial Review Procedure Act**, s. 19 which reads:

19 This Act is subject to the *Crown Proceeding Act*.

[18] In the memorandum issued by Bouck J. in the **Lang** case to which I have referred, he reasons that all proceedings against the Crown provincial are subject to the **Crown Proceeding Act**. I respectfully disagree with that view. The **Crown**

Proceeding Act deals with claims against the Crown. In judicial review there is no true *lis* between the subject and the Crown, the issue is the jurisdiction of the tribunal (although there may be another party truly adverse in interest such as between a union and an employer in a labour relations dispute: **Hollinger Bus Lines v. Ontario (Labour Relations Board)**, [1952] 3 D.L.R. 162 at 169-70, [1952] O.R. 366 (C.A.)).

[19] The subject matter of the **Crown Proceeding Act** is the liability of the Crown in the ordinary sense. Section 2 reads:

Liability of government

- 2 Subject to this Act,
- (a) proceeding against the government by way of petition of right is abolished,
 - (b) a claim against the government that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceeding against the government in accordance with this Act, without the grant of a fiat by the Lieutenant Governor,
 - (c) the government is subject to all the liabilities to which it would be liable if it were a person, and
 - (d) the law relating to indemnity and contribution is enforceable by and against the government for any liability to which it is subject, as if the government were a person.

[20] Although the point was not fully argued before us, it would seem that s. 19 of the **Judicial Review Procedure Act** refers to the **Crown Proceeding Act** to harmonize the power to issue an injunction or a declaration with the immunity provided in s. 3(2)(a) of the **Crown Proceeding Act**.

- 3(2) Nothing in section 2 does any of the following:
- (a) authorizes proceedings against the government for anything done or omitted to be done by a person acting in good faith while discharging or purporting to discharge responsibilities
 - (i) of a judicial nature vested in the person, or
 - (ii) that the person has in connection with the execution of judicial process;

[21] Section 13 of the **Judicial Review Procedure Act** reads:

13(1) On the application of a party to a proceeding for a declaration or injunction, the court may direct that any issue about the exercise, refusal to exercise or proposed or purported exercise of a statutory power be disposed of summarily, as if it were an application for judicial review.

(2) Subsection (1) applies whether or not the proceeding for a declaration or injunction includes a claim for other relief.

[22] The argument that Her Majesty the Queen is the proper party respondent to a judicial review proceeding proceeds on a fundamental misunderstanding of the origin and nature of the proceeding. Although put in modern dress, judicial review under the **Act** remains in substance the process by which the Sovereign supervises the jurisdiction of a Crown agency. If the agency acted outside its jurisdiction then the Queen's Court remits the matter for proper determination. To name the Sovereign as a party moved against is to place the Sovereign on both sides of the dispute, which is absurd. This was pointed out by Southin J., as she then was, in **Allen v. British Columbia (Superintendent of Motor Vehicles)** (1986), 2 B.C.L.R. (2d) 255 at 260-61, 27 C.C.C. (3d) 519, 42 M.V.R. 25 (S.C.):

Finally, I think it appropriate to point out that the style of these proceedings is not correct.

The petitioner ought not to have added Her Majesty the Queen in right of the Province of British Columbia as a respondent. I can only assume he thought that s. 7 of the *Crown Proceeding Act*, R.S.B.C. 1979, c. 86, applied. It does not.

Here, the petitioner sought two remedies:

(a) A declaration that s. 24.1 is invalid.

(b) A mandamus to order the Superintendent of Motor Vehicles to issue a driver's licence or to renew the petitioner's existing driver's licence.

As to the first, the proper respondent to a proceeding for a declaration that a statute is unconstitutional is the Attorney General.

As to the second, until the *Judicial Review Procedure Act* was introduced in 1976 [see R.S.B.C. 1979, c. 209] proceedings for mandamus were brought in the name of the Sovereign upon the relation of the citizen. The Sovereign could not then be both applicant and respondent and cannot be a respondent now. Judicial review is simply a modern form of the prerogative writs which were commands by the Sovereign ensuring obedience to the law, it being the Sovereign's right and duty to ensure that obedience: see the Crown Office Rules (Civil) of the *Supreme Court Rules*, 1943, and the *Supreme Court Rules*, 1961, O.LIX.

The style of cause of these proceedings is to be amended by striking out Her Majesty as a respondent and substituting the Attorney General of British Columbia.

[Emphasis added]

[23] In Jones and de Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Carswell, 2004), the learned authors describe the history in this way:

The "prerogative" nature of the remedies derives from the fact that they were issued by the Crown to control the actions of its servants taken in its name. In time, the Crown delegated these remedies to the superior courts. Royal writs were used to compel the administrators to come before the courts to justify their actions.

Traditionally, the proper nomenclature for a prerogative remedy was "*R. v. Delegate; Ex parte Applicant*". In the first stage of what was a two-step procedure, the applicant applied for the writ *ex parte*, based on an affidavit indicating the applicant's knowledge, information or belief about the invalidity of the delegate's decision. The writ was issued if there was a *prima facie* case of illegality (although this was not required if the Crown itself was the applicant). The delegate was required by the writ to come to court to justify its actions. The second stage of the procedure involved an application at which the court determined the issue of illegality. If illegality was demonstrated, the court would generally issue an order for the respective prerogative remedy. However, the court always retained the discretion to refuse to issue such an order even if the case was made out by the applicant.

[Footnotes omitted]

[24] The substance of judicial review is the prerogative superintendence of jurisdiction. The substance was not changed by the **Judicial Review Procedure Act. *Smithers v. Olsen*** (1985), 60 B.C.L.R. 377 (C.A.) at para. 15; see also ***Hollinger Bus Lines***, *supra*, at 171-72 where it was said:

Now the old prerogative writs of prohibition and *certiorari* have been abolished in this Province and a new and simpler procedure has been authorized for obtaining the relief that was made available by those writs. The change in procedure, however, has not altered the nature of the relief. It is still *certiorari* or prohibition.

In *Rex v. Titchmarsh* [(1914), 32 O.L.R. 569], Riddell J. said, at p. 577: "The whole proceeding of removal into a Court where the King may be 'certified' is the *certiorari*; the means by which his order is made known is the writ. So long as by some means the record, etc. are got before the King, the means is unimportant, the effect is the same. If the King were to (effectively) change his method of procedure and cause the record etc. to come into his Court by some other process than by signifying his pleasure by a writ, surely that could not be called an abolition of *certiorari*, although the writ might be abolished."

In this conception of *certiorari* it is plain that the relief thereby made available is of a type distinct and apart from the relief obtainable in an ordinary action.

[25] Bouck J. dismisses the reasoning in **Allen** as anachronistic and out of step with the **Crown Proceeding Act**. For the above reasons I respectfully disagree with him on both points.

[26] I move now to consider the position of the Attorney General in judicial review proceedings. At common law the Attorney General represents the Crown in the matter of the public interest. I refer to the third edition of *Halsbury's Laws of England*, (3d ed., vol. 7 (London: Butterworths, 1954) at 382-83, paras. 806-07):

The Attorney-General represents the Crown in the courts in all matters in which rights of a public character come into question (c). He must be plaintiff in any civil proceedings by the Crown unless an authorised government department sues in its own name and may be defendant in any civil proceedings against the Crown unless an authorised government department is clearly the appropriate defendant (d). He is a necessary party to the assertion of public rights even where the moving party is a private individual (e); though it is otherwise where a public body has a private right of action peculiar to itself, as, for example, for maintaining the quality of a commodity supplied to the public (f). The Attorney-General can be sued, as representing the Crown, for a declaration of right (g).

[27] The **Attorney General Act**, R.S.B.C. 1996, c. 22, lists as one of the duties and powers of the office:

2(i) ... the regulation and conduct of all litigation for or against the government or a ministry in respect of any subjects within the authority or jurisdiction of the legislature, ...

[28] The notice requirements in the **Judicial Review Procedure Act** provide:

Notice to decision maker and right to be a party

15(1) For an application for judicial review in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power

(a) must be served with notice of the application and a copy of the petition, and

(b) may be a party to the application, at the person's option.

(2) If 2 or more persons, whether styled a board or commission or any other collective title, act together to exercise a statutory power, they are deemed for the purpose of subsection (1) to be one person under the collective title, and service, if required, is effectively made on any one of those persons.

Notice to Attorney General

16(1) The Attorney General must be served with notice of an application for judicial review and notice of an appeal from a decision of the court with respect to the application.

(2) The Attorney General is entitled to be heard in person or by counsel at the hearing of the application or appeal.

[29] It is said on behalf of the Attorney General that when he appears at a judicial review hearing he is not a party, and it follows therefore that he cannot be ordered to pay costs because he is not a party. It is submitted that while s. 15(1)(b) allows the tribunal the option to appear as a party, no such language describes the position of the Attorney General in s. 16 thus evincing an intention of the Legislature not to put the Attorney General in the position as a party. I am unable to accept these propositions.

[30] It is common practice for the Attorney General to appear for himself and as the legal representative of the tribunal. In that way he can address both matters of public interest and defend the jurisdiction of the tribunal. I am of the opinion that

when the Attorney General appears in his own right he is a party, although I do not think that determines his liability for costs.

[31] Reading the ***Judicial Review Procedure Act*** together with the ***Rules of Court***, I think that when the Attorney General files an appearance he becomes a "party of record" within the meaning of the definition section of the ***Rules***. The ***Rules*** do not define "party" but in Rule 1(8):

(8) In these rules, unless the context otherwise requires:

* * *

"party of record" means a person who has

- (a) commenced a proceeding,
- (b) filed an appearance,
- (c) [*Repealed*. B.C. Reg. 161/98, s. 1(c).], or
- (d) filed a third party notice as an insurer under the *Insurance Act* or the *Insurance (Motor Vehicle) Act*,

[Emphasis added]

[32] Rule 63 entitled "Crown Practice Rules in Civil Matters" provides:

Originating application

63(1) Applications for relief in the nature of mandamus, prohibition, certiorari or habeas corpus are governed by these rules and must be commenced by petition under Rule 10.

Writs abolished

(2) No writ of mandamus, prohibition, certiorari or habeas corpus shall be issued, but all necessary directions shall be made by order.

Person affected may take part in proceeding

(3) The court may order that a person who may be affected by a proceeding for an order in the nature of mandamus may take part in the proceeding to the same extent as if served with the petition.

[33] The relevant parts of Rule 10 are:

Originating application by petition

(3) Subject to subrule (2), a person wishing to bring an originating application must file a petition in Form 3. [am. B.C. Reg. 367/2000, s. 3.]

Service

(4) Unless these rules provide otherwise, a copy of the petition and of each affidavit in support must be served on all persons whose interests may be affected by the order sought. [am. B.C. Reg. 367/2000, s. 3.]

Response

(5) A respondent who wishes to receive notice of the time and date of the hearing of the petition or to respond to it must, in addition to complying with Rule 14 (1) (b), deliver to the petitioner 2 copies, and to every other party of record one copy, of

- (a) a response in Form 124, and
- (b) each affidavit on which the respondent intends to rely. [am. B.C. Reg. 367/2000, s. 3.]

Time for response

(6) A respondent must deliver the documents referred to in subrule (5) on or before the 8th day after the date on which the respondent entered an appearance. [am. B.C. Reg. 367/2000, s. 3.]

[34] Form 3 sets out the style in which the petition should be drawn:

No. _____
_____ Registry

In the Supreme Court of British Columbia

Between

, Petitioner(s)

and

, Respondent(s)

[or, where there is no person against whom relief is sought:
Re (State the person by whom, or the entity in respect of which relief is sought).]

[35] The style of cause in judicial review proceedings suggested by McLachlin and Taylor, *British Columbia Court Forms*, Vol. 1 (Butterworths: July 2002), Service Issue 36, appears as follows:

No. [number]
[place name] Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Re: The decision of [name of tribunal] in [describe proceeding, preferably identified by reference to name of Petitioner and where applicable, Respondent(s)] [1]

OR

BETWEEN

[name of Party seeking to have the decision reviewed]

PETITIONER

AND

[name of other Party(ies) in original proceeding]

RESPONDENT

[36] The form is followed by this note at p. 55:

Referenced to Precedent

1. The above formulation has the advantage of identifying the tribunal whose decision is to be reviewed. The conventional Petitioner/Respondent formulation does not allow identification of the tribunal because the role of an administrative tribunal whose decision

is at issue before the Court, even where the right to appear is given by statute, is limited to an explanatory role with reference to the record before the tribunal and to the making of representations relating to jurisdiction: the tribunal is given *locus standi* as a participant in the nature of an *amicus curiae* but not as a Party: *Northwestern Utilities Ltd and the Public Utilities Board of the Province of Alberta v The City of Edmonton* [1979] 1 SCR 684 at 708-709, 89 DLR (3d) 161. In addition, it is often the case that relief is sought by the Petitioner against the tribunal rather than another Party to the proceedings, in which case, the alternative instructions in Form 3 of Appendix A ("Re (State the person by whom, or the entity in respect of which relief is sought)") should be followed, as has been done in the suggested Style of Proceeding.

[Emphasis added]

[37] The learned authors do not suggest that at the initiating stage either the Attorney General or the Crown in the name of Her Majesty the Queen should be named.

[38] The style of cause may not be static through the course of the proceedings, it depends on the response from those given notice of the petition. Rule 10(5), quoted above, calls upon a respondent (someone who has received notice of the petition) to deliver a response in Form 124. Form 124 reads:

[Style of Proceeding]

RESPONSE OF [name of respondent]

The respondent does not oppose the granting of the relief set out in the following paragraphs of the petition (or notice of motion): [*set out paragraph numbers*].

The respondent opposes the granting of the relief set out in the following paragraphs of the petition (or notice of motion): [*set out paragraph numbers*].

The respondent consents to the granting of the relief set out in the following paragraphs of the petition (or notice of motion) on the following terms: [*set out paragraph numbers and any proposed terms*].

The respondent will rely on the following affidavits and other documents: [set out affidavits delivered with this response and any other affidavits or other documents already in the court file on which the respondent will rely].

The respondent estimates that the application will take minutes.

Dated: _____
Respondent (or respondent's solicitor)

[39] When the Attorney General files a response, as he did in each of the instant cases, he ensures that he will receive notice of the hearing of the petition. He also acquires standing to address the matters to which he refers in the response. By s. 15 of the **Judicial Review Procedure Act** he automatically has standing to speak to matters of the public interest, whether or not he files a response. In my view, by filing a response the Attorney General becomes a party, or at least a party of record (if there is any real difference for the purposes of this case, which I doubt). Thus I reject the Attorney General's submission that he is never a party when he participates in the manner provided in the **Judicial Review Procedure Act** and the **Rules**. However, his special status must not be ignored when it comes to costs. When the Attorney General presents submissions on the public interest he speaks on behalf of everyone and does not take sides. When the Attorney General defends the tribunal the petitioner can look to the tribunal for costs, assuming the claim for costs falls within the narrow limits discussed below. Hypothetically, the Attorney General could expose himself to costs if the tribunal does not file a response and the Attorney General purports to appear only in the public interest but in fact argues the tribunal's case.

[40] I now consider an argument concerning both the Attorney General and the tribunal to the effect that no order of costs can be made in relation to either unless the Legislature has made an appropriation to cover the expenditure. The authorities cited in support of this contention do not in my opinion have any application to the present matter. They deal with the imposition of new and unanticipated expenditures on a public body. In my opinion, it can be fairly assumed that the Attorney General, as the officer with the responsibility for all litigation involving the government, has a budget for court costs; and likewise the Superintendent, whose many determinations are subject to court challenge.

[41] The leading case on this topic is ***Auckland Harbour Board v. The King***, [1924] A.C. 318 (P.C.). There the issue related to compensation for land taken for railway purposes where no appropriation was made for the payment. The Privy Council dismissed the appeal from a decision that the payment should be recovered. The judgment was given by Viscount Haldane who said at 326-27:

For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and *ultra vires*, and may be recovered by the Government if it can, as here, be traced.

[42] In ***R. v. Savard*** (1996), 106 C.C.C. (3d) 130, 47 C.R. (4th) 281 (Y.T.C.A.), leave to appeal to S.C.C. refused, [1997] 1 S.C.R. xi, Rowles J.A. for the majority (Wood J.A. dissenting) wrote at para. 113:

My opinion is that, in the absence of express language requiring government to pay counsel who represent an accused pursuant to an order made under s. 672.24, the fundamental principle the courts have applied in regard to the expenditure of public funds, as set out in *Auckland Harbour Board v. The King*, *supra*, must be respected. Thus I conclude that Stuart T.C.J. exceeded his jurisdiction in expressly ordering the Attorney General of Canada to pay Mr. La Flamme fees, and that Maddison J. erred in declining to set aside the order.

[43] Unlike compensation for expropriation in ***Auckland Harbour Board*** or the *ad hoc* expansion of a legal aid program in ***Savard***, court awarded costs in litigation are commonplace expenditures and just part of doing the business of the Attorney General's ministry and the Motor Vehicle Branch.

THE TRIBUNAL

[44] As mentioned, it has been held that the adjudicator exercises a quasi-judicial function which attracts the patently unreasonable standard of review: ***Gordon***, *supra*, ***Pointon***, *supra*.

[45] It follows that the Superintendent whose powers are delegated to the adjudicator enjoys the traditional immunity protecting quasi-judicial tribunals.

[46] The parties agree that the immunity extends to costs, subject only to certain exceptions.

[47] In Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998-), the learned authors write:

5:2560 *Costs Payable by or to the Administrative Agency*

Generally, an administrative tribunal will neither be entitled to nor be ordered to pay costs, at least where there has been no misconduct or lack of procedural fairness on its part. As one court has noted:

It has been recognized... that, contrary to the normal practice, costs do not necessarily follow the event where administrative or quasi-judicial tribunals are concerned. They may be awarded only in unusual or exceptional cases, and then only with caution... where the tribunal has acted in good faith and conscientiously throughout, albeit resulting in error, the reviewing tribunal will not ordinarily impose costs... I am of the view that the circumstances which prevail here do not warrant an order for costs against the commission [***St. Peters Estates Ltd. v. Prince Edward Island (Land Use Commn.)*** (1991), 2 Admin. L.R. (2d) 300 at 302-04 (PEITD)].

However, costs have been awarded against an administrative tribunal where it cast itself in an adversarial position, acted capriciously in ignoring a clear legal duty, made a questionable exercise of state power, effectively split the case so as to generate unnecessary litigation, manifested a notable lack of diligence, or was the initiator of the litigation in question, or where bias among tribunal members had necessitated a new hearing. However, generally only *court* costs, and not costs associated with the entire administrative proceeding, are assessed where there has been misconduct on the part of the tribunal.

Costs were also ordered against a chief judge whose order relocating the applicant to a different district because he disapproved of his decision was set aside as in breach of judicial independence. Otherwise, judges would be discouraged from discharging their duties to uphold constitutional rights.

[Emphasis added, footnotes omitted]

[48] For the purposes of this case it is enough to identify two exceptions:

1. misconduct or perversity in the proceedings before the tribunal;
or
2. the tribunal argues the merits of a judicial review application rather than its own jurisdiction.

[49] Applying the second exception may not always be clear cut. There are at least two reasons for this. First, the review by the adjudicator under the scheme in question does not conform to the classic adversarial model where opposing parties argue for and against the decision in question. The peace officer's report is the case, so to speak, for the prohibition, and there is no argumentation back and forth before the adjudicator as there would be in a conventional hearing. This feature may create a tendency on the part of the tribunal, or the Attorney General on its behalf, to argue the case for the prohibition at judicial review. The tendency should be resisted, otherwise costs may be awarded.

[50] Secondly, the traditional restriction against the tribunal's arguing the merits of its own decision, articulated clearly and emphatically in cases like ***Canada Labour Relations Board v. Transair***, [1977] 1 S.C.R. 722, 67 D.L.R. (3d) 421, and ***Northwestern Utilities Ltd. v. Edmonton (City)***, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161, has been relaxed somewhat by the decision in ***CAIMAW v. Paccar of Canada Ltd.***, [1989] 2 S.C.R. 983, 62 D.L.R. (4th) 437. ***Paccar*** permits the tribunal to demonstrate that its decision was not patently unreasonable.

[51] In ***Northwestern Utilities Ltd.***, Estey J. writing for the Court said at 709-10:

It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. (*Vide The Labour Relations Board of the Province of New Brunswick v. Eastern Bakeries Limited et al.* [[1961] S.C.R. 72]; *The Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products Limited et al.* [[1947] S.C.R. 336].) Where the right to appear and present arguments is granted, an administrative tribunal would be well advised to adhere to the principles enunciated by Aylesworth J.A. in *International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board* [(1958), 18 D.L.R. (2d) 588], at pp. 589, 590:

Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.

Where the parent or authorizing statute is silent as to the role or status of the tribunal in appeal or review proceedings, this Court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question. (*Vide Central Broadcasting Company Ltd. v. Canada Labour Relations Board and International Brotherhood of Electrical Workers, Local Union No. 529* [[1977] 2 S.C.R. 112].)

[52] In holding that the review test was patent unreasonableness, Mackenzie J.A.

for the Court in **Gordon** said at para. 28:

In my view, a consideration of the pragmatic and functional approach outlined in *Pushpanathan* [**Pushpanathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982] supports the conclusion that the decision of an adjudicator should only be overturned if it is patently unreasonable. While adjudicators do not have a particularly high level of expertise relative to their judicial counterparts *vis-à-vis* the *indicia* of impaired driving, the specificity of

their mandate and training, as well as the broad public protection purposes embodied in the *Act*, indicate that the question raised under s. 94.4 is one that was intended by the legislators to be left to the exclusive decision of the Superintendent of Motor Vehicles and his delegates.

[53] *Paccar* allows the tribunal some latitude to speak to its decision at judicial review. This is what La Forest J. said at 1016:

In *British Columbia Government Employees' Union v. Industrial Relations Council* (unreported, B.C.C.A., May 24, 1988), the British Columbia Court of Appeal held that the Industrial Relations Council had the right to make the submissions that the court below had erred in substituting its judgment for that of the Industrial Relations Council, and that the court erred in finding the Council's interpretation of the Act to be patently unreasonable. In the course of his judgment, Taggart J.A. for the court made the following statement with which I am in complete agreement, at p. 13:

The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them.

[Emphasis added]

[54] When read closely, the passage adopted by La Forest J. does not in my view provide the tribunal a broad opportunity to argue the merits. The matters before the adjudicator, breathalyzer analysis and refusing a breath sample demand, are hardly

unfamiliar to the regular courts and so it will seldom be necessary for the tribunal to expose some arcane or esoteric feature of the case in order to understand why it arrived at its decision. While the line between arguing the merits and explaining the record is somewhat blurry when the test is patent unreasonableness, there remains a boundary which must be observed. It will be up to the judgment of the reviewing judge in each case to determine if the tribunal, or the Attorney General on its behalf, has gone too far.

THE COSTS AWARDS

(a) Corbett

[55] Double costs were awarded on the basis that Corbett delivered an offer to settle. This was in my respectful opinion an error for two reasons. First, neither the adjudicator nor the Attorney General can be treated as ordinary litigants with respect to costs. I refer to my earlier description of the special nature of judicial review and the absence of a true *lis* between the petitioner on the one hand and the Attorney General and the tribunal on the other. It is in my view inappropriate to give effect to an offer to settle when the parties referred to in the offer are not adverse in interest and the only question is the jurisdiction of the tribunal. Second, there was no contest of any kind at this judicial review hearing. The Crown consented to an order sending the matter back to the adjudicator to conduct a hearing free of the error identified in ***Dennis***. I would set aside the order of costs.

(b) **Feddersen**

[56] The award of costs in **Feddersen** can be supported on the basis of the first exception to the rule of immunity. The reviewing judge found misconduct on the part of the adjudicator. I refer to the judge's reasons at para. 44:

I conclude that a reasonable apprehension of bias arises on a review of the adjudicator's reasons. My reasons follow:

1) The adjudicator considered the written arguments presented by the petitioner's legal counsel. In her reasons she says: "your lawyer submits that the police just fill in blanks not using their own words to describe the incident". Her reasons go on to say: "I also note that the police evidence is in the constable's own words. Your affidavit is not in your own words, as your lawyer stated in his submission and as you stated in your affidavit." This passage suggests that the adjudicator gave greater weight to the officer's report than the applicant's affidavit based on the fact that one was handwritten and the other was typed. This indicates bias.

Moreover, her words are not a response to counsel's argument, but a retort. It is defensive in tone, and reveals the absence of an open mind.

My view is reinforced by the adjudicator's treatment of the 'evidence' she relied upon to find that the petitioner was in care or control of a vehicle. She treated her own inferences as evidence of care or control of a motor vehicle, when an inference that the petitioner's cooperation established that he was not in care or control, i.e. that he 'blew' because he knew he was not in care or control and thus had nothing to worry about, would be equally available. This indicates a lack of neutrality.

[57] The order in question provides that the respondent (singular) pay the petitioner's costs, even though the style of cause shows both the Superintendent and the Attorney General as respondents. The order should be read as applying

only to the Superintendent, there being no reason to impose costs on the Attorney General.

(c) Lang

[58] The question in ***Lang*** was whether the report from the peace officer was so fundamentally defective that the proceedings before the adjudicator were a nullity. The reviewing judge found that the report was defective because it did not indicate whether the prohibition was based on Lang's blood alcohol reading or a refusal to give a breath sample. Applying a *strictissimi juris* approach the judge effectively concluded that the adjudicator had no jurisdiction to embark on the inquiry.

[59] It does not appear that the argument by the Attorney General on behalf of the adjudicator went beyond questions of jurisdiction. Neither has it been shown that by proceeding on the peace officer's report the adjudicator was guilty of misconduct or perversity. I would set aside the order of costs.

(d) Lucas

[60] Like ***Corbett***, the adjudication of Lucas' case suffered from the ***Dennis*** error and accordingly the Attorney General consented to an order remitting the case. Unlike ***Corbett***, there was no offer to settle. The reviewing judge awarded costs payable on Scale 3.

[61] I would set aside the order for the same reasons given in relation to ***Corbett***.

DISPOSITION

[62] I would allow the appeals in **Corbett**, **Lang** and **Lucas** and set aside the orders of costs. I would dismiss the appeal in **Feddersen**.

“The Honourable Mr. Justice Donald”

I Agree:

“The Honourable Madam Justice Newbury”

I Agree:

“The Honourable Mr. Justice Low”

Federal Court



Cour fédérale

Date: 20210601

Docket: T-40-18

Citation: 2021 FC 515

Fredericton, New Brunswick, June 1, 2021

PRESENT: Madam Justice McDonald

BETWEEN:

PAID SEARCH ENGINE TOOLS, LLC

**Plaintiff/
Defendant by Counterclaim**

and

**GOOGLE CANADA CORPORATION,
GOOGLE LLC AND ALPHABET INC.**

**Defendants/
Plaintiffs by Counterclaim**

ORDER AND REASONS

[1] On this Motion, the Plaintiff, Paid Search Engine Tools, LLC (PSET) seeks an Order pursuant to Rule 227 requiring the Defendants (Google) “to produce an accurate and complete affidavit of documents” containing the following:

1. Documents that assess, report on, discuss, or otherwise disclose the actual or potential impact/effect/change to the Defendants' revenues and/or profits, including the RASTA reports, resulting from:
 - (i) The use of a generalized second price auction, including any variants;
 - (ii) The use of a generalized first price auction, including any variants;
 - (iii) The use of other auction models and mechanisms, including a VCG, and including any variants;
 - (iv) The use of a cost per click (CPC) pricing model;
 - (v) The use of CPM or CPA pricing models;
 - (vi) Demographic targeting of users; and
 - (vii) Changes based on quality and relevance of advertisements
2. The Defendant's knowledge, information and belief as to the above.

[2] Alternatively, PSET seeks an Order to cross-examine Google on their affidavit of documents.

I. Background

[3] In its Statement of Claim, PSET alleges that Google's "AdWords" infringes its 2,416,167 Patent (167 Patent). The 167 Patent generally relates to a system and process for managing the cost of advertising through an internet search engine. PSET seeks damages in the form of an accounting of Google's profits and/or a reasonable royalty for infringement.

[4] In its Defence and Counterclaim, Google alleges that the 167 Patent is invalid and not infringed. Alternatively, Google alleges that if infringement is established, no damages are payable as Google had non-infringing methods and systems.

[5] The issue raised on this Motion relates specifically to Google's evidence on the non-infringing alternatives. PSET claims that Google has taken a new position on this issue as reflected in their Amended Defence and the opinions of Google's experts in their recently served reports.

[6] In its original Statement of Defence and Counterclaim filed on November 12, 2018, Google states as follows at paragraph 18:

18. ...Google denies that PSET has suffered any damage as a result of any alleged infringement, or other allegedly unlawful activity of Google and denies that PSET is entitled to an accounting of any profits as a result of the alleged infringement. In this regard, (i) non-infringing methods and systems manage bids were and are a true substitute and real alternative to any allegedly infringing method or system of Google's, (ii) such alternative methods and systems were and are economically viable, (iii) as of the time of alleged infringement, Google could have made, implemented, and used such non-infringing methods and systems, and (iv) Google would have actually made, implemented, and used such non-infringing methods and systems.

[7] In its March 11, 2021 Amended Defence Google made the following addition to paragraph 18:

18. ...In addition or in the alternative, such non-infringing methods and systems establish a non-infringing baseline. Google would have earned at least the same profit had the non-infringing methods and systems been implemented, including, at least, using other payment models other than cost-per-click, using a first price auction, and using a VCG auction.

[8] PSET also points to the reports of Goggle's Experts, Steven Tadelis and Christopher Bakewell, filed on April 7, 2021, who provide opinions on non-infringing alternatives. According to PSET, the experts rely on undisclosed information in their reports.

[9] To date, the parties have conducted two rounds of oral discovery and written examinations for discovery. Google argues that PSET has had the opportunity to fully canvass the issue of non-infringing alternatives.

[10] PSET suggests that Google has obfuscated on this issue and is now attempting to introduce through experts information that was not otherwise disclosed.

[11] The trial in this matter is scheduled to begin on June 14, 2021.

II. Federal Courts Rules

[12] PSET requests a further and better Affidavit of Documents pursuant to Rule 227 of the *Federal Courts Rules* which states:

Sanctions

227 On motion, where the Court is satisfied that an affidavit of documents is inaccurate or deficient, the Court may inspect any document that may be relevant and may order that

(a) the deponent of the affidavit be cross-examined;

(b) an accurate or complete affidavit be served and filed;

(c) all or part of the pleadings of the party on behalf of whom the affidavit was made be struck out; or

(d) that the party on behalf of whom the affidavit was made pay costs.

III. Analysis

[13] The parties first exchanged their Affidavits of Documents in 2019. Since then, Google has provided further documentary production on July 8, 2020; July 10, 2020; December 10, 2020 and May 20, 2021. However, Goggle has not served a re-sworn or re-affirmed Affidavit of Documents to reflect these additional productions.

[14] The relevant considerations on this Rule 227 Motion are addressed in *Hutton v Sayat*, 2020 FC 1183. While I acknowledge that the facts in *Hutton* are distinguishable, the general principles outlined at paragraphs 32 and 33 are nonetheless applicable:

[32] On a motion to compel a further and better affidavit of documents, the burden is on the moving party to show that (i) further documents likely exist; (ii) that these documents might reasonably be supposed to contain information which might directly or indirectly enable the moving party to advance its own case or to damage the case of its adversary, or which might fairly lead the moving party to train of inquiry that could have either of these consequences; and (iii) that the opposing party had them in its power, possession or control or is aware that they are in some other party's power, possession or control.

[33] With respect to the requirement on the moving party to demonstrate that further documents likely exist, the moving party must have some persuasive evidence that documents are available and have not been produced, rather than mere speculation, intuition or guesswork: *Havana House Cigar & Tobacco Merchants Ltd et al v Naeni* (1998), 1998 CanLII 7605 (FC), 80 CPR (3d) 132 at para 19. The Defendants were under no obligation to provide their own evidence to be considered by the Court in contrast to that of the Plaintiff. The burden was on him to make his case.

[15] I disagree with Google's characterization that PSET has a "heavy burden" under Rule 227; however, PSET does have the burden discussed in *Hutton* above. Specifically, PSET must be able to show that further documents "likely" exist.

[16] In support of its argument that further documents "must" exist, PSET points to the public comments of Google's former CEO, Eric Schmidt, in which he stated that a change from a static bidding system to the AdWords system resulted in a ten-fold increase to Google's revenues. This is not a new issue and was addressed at Discovery. In response to a discovery undertaking Google replied that it had made reasonable inquiries and "was unable to locate any information confirming the specific basis of this statement was located." In my view, this issue has been canvassed and the corresponding undertaking has been answered. Google's response will preclude Google from introducing any evidence otherwise at trial.

[17] PSET also points to the Discovery evidence of a Google witness who answered as follows regarding a question on VCG: "I think we have done an assessment on that text." An undertaking was provided by Google to provide any relevant documents and I understand that Google has produced the documents that were located. Accordingly, the VCG issue is not new and has been addressed through the discovery process.

[18] PSET asks the Court to draw an inference that Google would have regularly and fully analyzed its advertisement models and therefore reports must have been created. PSET points to the RASTA reports as a basis to argue that further such documents likely exist. The issue of the

RASTA reports were addressed through Discovery. In my view, PSET arguments on this issue are largely speculative and do not meet the test that documents “likely” exist.

[19] Google argues that some of the issues raised in this Motion were previously addressed by Case Management Judge Ayles in a Motion by PSET to compel Google to answer discovery questions on non-infringing alternatives. For example, her Order of May 22, 2020, states in part:

[61] Item 57 seeks information regarding Google’s allegation that it would have used a non-infringing alternative. While Google has advised what non-infringing technology it would have developed, Google has refused to advise how long that would have taken and at what cost. Google asserts that these latter questions improperly seek an opinion. I disagree. While ultimately this issue may be addressed in an expert report, any expert opinion will be based on the cost and timing/effort information furnished by Google. Google shall accordingly answer these questions.

...

[63] Item 59 seeks information as to any non-infringing alternatives that Google has developed for its AdWords products when it was unable to get a license. I find that this question lacks relevance and is overly broad, as it applies to any aspect of AdWords (not simply those in dispute in this proceeding) and in relation to any jurisdiction.

[20] Although PSET acknowledges that Rule 248 prevents Google from leading evidence at trial on any question it has refused in discovery, it argues that opinion of Google’s experts supports a strong inference that further documents or information exists on Google’s use of or assessment of different auction mechanisms.

[21] Google’s experts, Dr. Tadelis and Mr. Bakewell, both provide opinions on non-infringing alternatives. With respect to their reports, I note that both experts list the documentary evidence

they consulted. In addition, both experts allude to having obtained information directly from Google employees and representatives. The Tadelis Report states in the footnote to paragraph 14: “I have also spoken to Google employees regarding their experience.” Similarly, the Backwell Report at paragraph 25 states: “I also interviewed representatives of Google.”

[22] PSET argues that these comments raise concerns that Google may attempt to lead evidence through fact witnesses on non-infringing alternatives that has not been disclosed. However, and considering this Motion, if those circumstances arise at trial, they it will be addressed at that time with the options of either disallowing the evidence or granting an adjournment with the appropriate cost consequences.

[23] I would also note that if it is established that Google’s experts’ opinions on non-infringing alternatives are without an evidentiary foundation, the opinions will be weighed accordingly. Likewise, if the experts rely upon hearsay evidence in support of opinions on non-infringing alternatives, the Court will not permit that evidence.

[24] The comments of Justice LeBlanc in *Sibomana v Canada*, 2018 FC 43, regarding the proper use of Rule 227 are equally applicable here; he states:

[34] A party’s mere desire to confirm that the affidavit filed by the opposing party is accurate and complete is insufficient to trigger the application of Rule 227. Further, the moving party that has [TRANSLATION] ‘the burden to submit convincing evidence to demonstrate that available documents exist but were not produced’ must also explain how the documents they are seeking to have added to the affidavit are relevant to the dispute [citations omitted].

[35] That was not demonstrated. Rule 227, which is the only one that allows the Court to intervene in the filing of affidavits of documents, was not intended to allow for fishing expeditions to be

done in the opposing party's records in the hope of possibly finding something that would support the argument put forth. Other mechanisms that are not governed by the rules of relevance or judicial law can be used to this end.

[25] Overall, I am not convinced that PSET has demonstrated with convincing evidence that documents likely exist. I do not view the amendments to paragraph 18 of Google's defence as raising a new issue. Rather, it appears to be an attempt to bring Google's position in line with the Federal Court of Appeal decision in *Nova Chemicals Corporation v Dow Chemicals Company*, 2020 FCA 141. Nor am I convinced that the expert reports allow the drawing of an inference that there are other documents or information relating to non-infringing alternatives.

[26] Although I am dismissing PSET's Rule 227 Motion for a further and better Affidavit of Documents, I will Order that Google serve PSET with a current sworn or affirmed Affidavit of Documents within five (5) days of the date of this Order.

ORDER IN T-40-18

THIS COURT ORDERS that:

1. The Plaintiff's Rule 227 Motion for a further and better Affidavit of Documents is dismissed;
2. Google is to serve PSET with a current sworn or affirmed Affidavit of Documents within five (5) days of the date of this Order; and
3. Costs shall be in the cause.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-40-18

STYLE OF CAUSE: PAID SEARCH ENGINE TOOLS, LLC v GOOGLE CANADA CORPORATION, GOOGLE LLC AND ALPHABET INC.

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: MAY 26, 2021

ORDER AND REASONS: MCDONALD J.

DATED: JUNE 1, 2021

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