EB-2011-0120

WRITTEN REPLY SUBMISSIONS OF TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

DELIVERED FEBRUARY 9, 2012

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IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by Canadian Distributed Antenna Systems Coalition for certain orders under the *Ontario Energy Board Act, 1998;*

AND IN THE MATTER OF Motions to compel further and better interrogatory responses brought by Canadian Distributed Antenna Systems Coalition and Consumers Council of Canada*;*

WRITTEN REPLY SUBMISSIONS OF
TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

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A. INTRODUCTION

1. Toronto Hydro-Electric System Limited ("**THESL**") makes these written submissions in reply to the oral submissions of the Canadian Distributed Antenna Systems Coalition ("**CANDAS**"), Consumers Council of Canada ("**CCC**"), and Board Staff ("**Staff**") made on February 6, 2012 in respect of THESL's claims of solicitor-client privilege and litigation privilege over the documents specified in Schedule "B" of THESL's Affidavit of Documents dated January 30, 2012 filed in respect of Procedural Order No. 8 (collectively, the "**Privileged Documents**").

B. RELEVANCE

2. During the oral hearing on February 6, 2012, the Board panel gave both CCC[1] and CANDAS[2] an opportunity to justify exactly why, in their view, the Privileged Documents are relevant to the matters at issue in this proceeding.

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[1] Tr. pg. 81, ln. 13-28.

3. In response, CCC argued that disclosure of the Privileged Documents is necessary because:

> "If, in fact, there were no safety concerns or they were trivial or -- that's the wrong word -- if they were not material or if they could be managed, if the concerns expressed in Ms. Byrne's affidavit are not material, then that goes to the question of whether or not those concerns are valid and that the Board should rely on them.
>
> And all of those documents, the reports that were produced, would go to that issue. It is not so much the motivation for their getting out of it, but whether or not those claims are made in good faith based on the evidence that you have."[3]

4. Similarly, CANDAS argued that disclosure of the Privileged Documents is necessary because:

> "If in fact there is information that was provided to a third party, such as Toronto Hydro's board of directors, that doesn't even mention safety, then we would say that that puts a lie to THESL's evidence in this case."[4]

5. In both instances, it is clear that CANDAS and CCC are asking for disclosure of the Privileged Documents to investigate THESL's ***motivations***. CCC goes as far as to allege, in the absence of any evidence, that THESL's operational and safety concerns are not made ***in good faith***.[5]

6. THESL submits that it is helpful to refer to the Board's Decision and Order on the CANDAS and CCC Motions dated December 9, 2011 to shed some light on the relevance and probative value of the requested materials.

7. In respect of the information sought under Part 1 of the Affidavit of Documents, the Board ruled that it would be assisted by having additional information about the "apparent

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[2] Tr. pg. 85, ln. 23-24.
[3] Tr. pg. 82, ln. 1-16.
[4] Tr. pg. 86, ln. 3-6.
[5] Supra note 3.

ambiguity about the intent of the letter and the nature of THESL's policy."[6] However, the Board went on to rule that:

> "The Board does not agree that draft versions of THESL's August 13, 2010 letter to the Board (as requested in CANDAS IR 1(i)) are relevant to the issues before the Board in this proceeding and therefore will not order their production. The Board is also of the view that whether or not THESL sought and obtained legal advice as to the application of the CCTA Order to wireless attachments is not information which is relevant to the issues before the Board in this proceeding and therefore will not order THESL to provide a response CANDAS IR 3(d)."[7]

8. In respect of the information sought under Part 2 of the Affidavit of Documents, the Board ruled that "some of the information sought by CCC IRs 5 and 7 will assist the Board in examining whether safety will be compromised by wireless attachments to distribution poles."[8] THESL has filed a representative sample of its reports, including incident reports evidencing its operational and safety concerns attached to Schedule "A" of its Affidavit of Documents, including an incident evidenced at Tab 5 which includes a series of photographs illustrating a DASCom wireless attachment with potentially live wires coming from the attachment were left exposed and unprotected near the communications space of a utility pole.

9. THESL continues to be very concerned that CCC and CANDAS[9] continue to pursue an inappropriate fishing expedition by seeking disclosure of information which is of limited, if any, probative value in the present application. Both CANDAS and CCC seek to put THESL's past conduct on trial – rather than dealing with the substantive issues of public policy that are before the Board today. The information requested will not advance the Board's determination of the specific public policy questions at issue in this proceeding. THESL has been abundantly clear

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[6] Decision and Order on Motion dated December 9, 2011 at pg. 7.
[7] *Ibid*.
[8] *Ibid*. at pg. 15.
[9] That CCC and CANDAS may be acting in cooperation in this proceeding is evidenced by the record. Mr. Warren, counsel for CCC, is expressly copied on the cover letter to the April 21, 2011 CANDAS Application. Both CANDAS and CCC brought their notice of motions in conjunction. Finally, while CCC disputes THESL's claims of litigation privilege, CCC does not challenge CANDAS' claim of settlement privilege, even though the anticipated "litigation" is the same for both parties' privilege claims.

about its position in respect of the non-applicability of the CCTA Decision to wireless attachments and the specific operational and safety concerns it has. An investigation into how THESL arrived at its position is not relevant to the matters at issue in this proceeding. While parties to a proceeding may be entitled to examine the motivations of another party to support its position, this is only the case if motive is relevant to the matters at is in the proceeding. Parties are not entitled to seek endless layers of evidence in an attempt to discredit another party simply because they dislike or disagree with the evidence that is already on the record. This is the definition of a fishing expedition. To hold otherwise would be to ignore the principle of proportionality and the rules of evidence.

C. SOLICITOR-CLIENT PRIVILEGE

10. THESL has claimed solicitor-client privilege over the Privileged Documents numbered 3, 13, 15, 16, 18, 19, 20, 21, 22, 24, 26, 31 and 32. Each of these documents were made for the purpose of providing or seeking legal advice, including advice given by external litigation and regulatory counsel at BLG (Mr. Rodger, Mr. Sclisizzi, Mr. Vellone, Mr. Austin, Ms. Long, and Mr. Zacks) and in-house litigation and general counsel (Mr. Wilde and Ms. Hoare). No party disputes THESL's assertion of solicitor-client privilege over these documents. THESL submits that it fully disclosed a description of these documents in its Affidavit of Documents and the Board should therefore uphold THESL's claim of solicitor-client privilege.

D. LITIGATION PRIVILEGE

11. THESL claims litigation privilege over all of the Privileged Documents numbered 1-32 on the basis of reasonably contemplated related litigation in the form of civil litigation whether in contract or in tort, an administrative proceeding before this Board, including a potential compliance proceeding before this Board. Both CCC and CANDAS dispute this claim, albeit for different reasons.

THESL has provided credible and compelling evidence that there is a reasonable prospect of civil litigation.

12. It its submissions CCC asserts that THESL has "provided no credible evidence that there is a reasonable prospect of civil litigation."[10] The basis of this assertion, which in CCC's mind is definitive, is that CANDAS has not yet chosen to pursue a civil claim against THESL.

13. THESL submits that the fact that civil litigation has not yet occurred is not in any way determinative of whether or not there was a reasonable prospect of anticipated litigation commencing as early as January of 2010.[11] Nor is it determinative of THESL's ongoing concern that civil litigation remains a very real and tangible threat.[12]

14. The Affidavit of Ivano Labriciossa evidences that civil litigation was anticipated by THESL in January of 2010, following a very heated meeting with Public Mobile. During that meeting, THESL arrived at the conclusion that the positions of THESL and the CANDAS members were polar if not irreconcilable. Shortly after that meeting, THESL retained external counsel (both Mr. Rodger and Mr. Sclisizzi) in anticipation of potential litigation.

15. It is also important to emphasize that the Privileged Documents over which solicitor-client privilege is claimed did not exist in a vacuum, and would not have been created except for the purpose of anticipated litigation, but instead were prepared in an evolving context of anticipated litigation. The timing and description of these documents in relation to the other Privileged Documents, which is clearly set out in the Affidavit of Documents, further evidences THESL's legitimate claim of litigation privilege.[13]

CANDAS agrees with THESL that there was a reasonable prospect of civil litigation.

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[10] Tr. Pg. 79, ln. 7-13.
[11] See *Hamalainen* at Tab 10 of the CCC brief of authorities which at para. 22 states that "litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it. The test is not one that will be particularly difficult to meet."
[12] CANDAS' response to CCC Interrogatory Number 7 evidences CANDAS's view that its members could bring a civil claim for damages amounting to more than $10 million against THESL. In light of the evidence given by Public Mobile during the technical conference that it does not intend to abandon its existing macrocell solution in favour of the proposed Toronto DAS Network if CANDAS is successful in this proceeding – one needs to ask why would CANDAS be prosecuting the current application if not to bolster their odds of success in a future civil litigation claim or compliance proceeding?
[13] See, for example, Privileged Document number 16 with a description of "Legal Memorandum from Mark Rodger to Lawrence Wilde and Shauna Hoare on the subject of "THESL – LDC Pole Attachment Issues" dated January 27, 2010 marked as confidential and providing legal advice in contemplation of potential litigation."

16. It is not very often that a panel deciding claims of litigation privilege has the benefit of both parties to the dispute agreeing that there was a reasonable prospect of litigation. Nevertheless, CANDAS counsel admits that there was a commercial contractual dispute that rose to such a level that civil litigation was a reasonable prospect.[14]

17. Counsel for CANDAS sets out her rendition of the fundamental issue in the contractual dispute in her submissions.[15] While THESL disagrees with CANDAS' biased interpretation of the contract, the mere existence of this dispute lends further credibility to THESL's claim of litigation privilege.

18. Counsel for CANDAS also agrees on the point in time, the January 2010 meeting, after which THESL would have had reason to anticipate litigation. In CANDAS' own words:

> "After that meeting, which obviously must have been a very harsh meeting, based on the evidence we've heard, there was what we have referred to in the application at paragraph 7.5 as a stop work order. So there was an order issued by the senior management of Toronto Hydro to stop processing all permit applications."[16]

19. THESL submits that this again lends further credibility to THESL's assertion that there was a reasonable prospect of litigation following the January 2010 meeting. CANDAS perceived THESL to have taken an action that further bolstered the litigious nature of the dispute.

CANDAS continues to claim settlement privilege over the two letters which THESL sought to produce to further evidence its claim of litigation privilege.

20. THESL attempted to produce additional documentary evidence in the form of correspondence between CANDAS' members and THESL to further evidence THESL's claim of litigation privilege. CANDAS' counsel denied THESL's request to produce the documents on the basis that they were claiming settlement privilege. During Monday's oral hearing, THESL

[14] Tr. pg. 89, ln. 16 - 19.
[15] Tr. pg. 92, ln. 19 to pg. 93, ln. 22.
[16] Tr. Pg. 96, ln. 20-25.

asked CANDAS to, once again, reconsider its refusal. In an email response received Feb. 8, 2012 counsel for CANDAS confirmed that her clients are "not prepared to reconsider."

21. In order to successfully invoke settlement privilege, the party seeking the privilege must establish that a litigious dispute is in existence or within contemplation, and that the communications in question were for the purpose of attempting to effect a settlement of the litigious dispute.[17] Both THESL and CANDAS are concerned with the same litigious disputes, and are taking steps to protect their respective privileged information. Therefore the Board has clear indications from both CANDAS and THESL about the contemplation of civil litigation.

22. In conclusion, the submissions of CCC that there was no reasonable prospect of civil litigation flies in the face of the facts before the Board and is itself not credible.

THESL has also provided credible and compelling evidence that there is a reasonable prospect of an administrative proceeding, including a potential compliance proceeding with an associated penalty.

23. The Affidavit of Ivano Labriciossa evidences that THESL also anticipated regulatory proceedings following the January 2010 meeting with Public Mobile. The substance of the dispute between THESL and the CANDAS members is the applicability, or non-applicability, of the CCTA Decision to wireless attachments. It is important not to lose sight of the fact that the CCTA Decision itself is a mandatory term of THESL's distribution licence.

24. If the Board does not agree with THESL's assessment about the non-applicability of the CCTA Decision to wireless attachments, a potential future licence compliance proceeding under PART VII.1 of the *Ontario Energy Board Act, 1998* remains a live possibility. The consequences of a compliance proceeding brought against THESL are very serious, and can include the suspension or revocation of a distribution licence as well as administrative penalties.

25. Board staff admits that compliance matters involving penalties do not fall within the scope of their argument that Board processes are not "adversarial" in the sense of needing to

[17] *Sinclair v. Roy (1985),* [1985] B.C.J. No. 3085 at para. 9.

provide parties with the protections afforded by litigation privilege.[18] Similarly, CCC acknowledges that when there is the risk of a compliance proceeding with a penalty attached, the courts have routinely found those administrative proceedings to constitute litigation.[19]

The Board's regulatory processes constitute "litigation" that would afford the protection of litigation privilege.

26. Each of Board Staff, CCC and CANDAS argue that the current proceeding before the Board is not "adversarial" and does not constitute "litigation" that would afford the protections of litigation privilege. THESL submits that this is a red herring, because as is explained above, THESL was and continues to live under the spectre of prospective civil litigation and other administrative proceedings, including a compliance proceeding.

27. However, if the Board elects to determine whether the current proceeding is "litigation" that would afford the protections of litigation, THESL would like to give the Board the benefit of THESL's perspective on this issue. If the Board accepts the submissions that litigation privilege does not apply to Board proceedings, THESL submits that the Board would be acting in contravention of applicable law. In particular the clear wording of Section 5.4(2) of the SPPA is not limited to solicitor-client privilege, but is more broadly worded to be inclusive of all types of privileged information, including settlement privilege, litigation privilege, and other forms of privilege when applicable. Furthermore section 15(2) of the SPPA states that "[n]othing is admissible in evidence at a hearing, (a) that would be inadmissible in a court by reason of any privilege under the law of evidence."

28. THESL submits that it is important not to confuse the Board's *public interest mandate* with the *undeniably adversarial process* the Board has elected to adopt to fulfill that mandate.

29. The Board's own *Rules of Practice and Procedure* set out many of the hallmarks of an adversarial process, including: the filing and service of documents, including affidavit evidence,

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[18] Tr. pg. 121, ln. 19-28.
[19] Tr. pg. 73, ln. 2-6.

written evidence, and expert evidence; the formal commencement of proceedings by way of an application or notice; the right of various intervenors that have a "substantial interest"[20] in the proceeding to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by cross-examining a witness; the ability of the Board to order pre-hearing technical conferences (oral discovery) or to establish an interrogatory procedure (written discovery) to allow parties to clarify the evidence; the ability to mandate alternative dispute resolution procedures, including the appointment of a mediator and the filing of settlement proposals; the provision for oral, written or electronic hearings; the ability of the Board to issue a summons to produce a witness or document; the awarding of costs of proceedings; the ability to request a review of decisions; and the ability to appeal decisions to the divisional court on questions of law or jurisdiction. These are the fundamental hallmarks of an adversarial process, and each – including the mandatory obligation imposed on parties to produce relevant information in response to interrogatories (i.e. mandatory discovery) - are all present in the Board's quasi-judicial processes.

30. While THESL agrees that the matters at issue in this proceeding are questions of the public interest, the Board has, in its procedural orders and through its Rules, adopted an adversarial process to facilitate its quest for truth in pursuit of the public interest. It follows that confidential communications between solicitor and client or a third party for the dominant purpose of considering, preparing or conducting a defence to such a regulatory proceeding would be covered by litigation privilege.

31. As Sopinka states in the *Law of Evidence in Canada* (excerpt found at Tab 5 of the THESL Brief of Authorities):

> "The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free

[20] There is nothing to suggest that all of the intervenors will have the same or a common interest. Rather, as is common in Board proceedings, the applicant and intervenors will often have differing and sometimes adverse interests depending on the issues. This is not a problematic outcome. Rather, it gives the Board the opportunity to hear strong cases from various adverse viewpoints on particular issues. Indeed, there would be no justification for intervenor funding through cost awards unless it was being made available to facilitate a healthy and adversarial debate representing various different interests before the Board.

> to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forgo conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel."[21]

32. The same justification applies to Board proceedings. In short, counsel and independent experts of applicants (such as CANDAS) or intervenors (such as THESL or CCC) must be free to make the fullest investigation and research without risk of disclosure of various opinions, strategies and conclusions before parties of adverse interests. The invasion of the zone of privilege may well lead counsel to postpone doing research or other preparation in advance of a Board proceeding, or avoid involving external consultants or experts so as to avoid early disclosure of harmful information.

What does the Case Law Say?

33. THESL submits that its view that "litigation" exists at administrative tribunals such as this Board is fully supported by the case law. There is no confusion in the cases, as suggested by CCC. THESL will begin with some of the cases cited by CCC in its document brief. THESL invites the Board panel to carefully read each of the cases cited by CCC to confirm for itself the conclusions set out below.

Ed Miller Sales: Confirms that litigation privilege applies when documents are prepared in contemplation of an investigation conducted by an administrative tribunal.

[21] The case that is being quoted by Sopinka can be found on page 7 of Tab J of THESL's November 15, 2011 filing.

34. In *Ed Miller*,[22] litigation privilege was claimed over working papers created by Price Waterhouse & Company some years earlier in connection with a final report which was ultimately supplied to the Director of Investigation and Research under the Combines Investigation Act in connection with an action brought under that Act.[23]

35. In this case, the Alberta Court of Appeal was asked to consider a decision of the Court of Queen's Bench that found that the documents were not protected by litigation privilege because Caterpillar was "merely being investigated pursuant to the Combines Investigation Act."[24] The Alberta Court of Appeal disagreed, and their decision must be read in light of the lower court decision that they were over-turning.

36. It is in this context that the Court of Appeal decides "I confess that, to me, to say that they were "merely being investigated" seems an unduly sanguine description of the process in which Caterpillar companies were then involved. They were "merely being investigated" but that investigation had the potential for the gravest consequences, both civil and criminal. It was the first step in a procedure which could ultimately lead to huge fines, to jail sentences for individuals, to the destruction of their marketing and warranty system, and to civil liability if the facts established showed breaches of statute."[25]

37. The Court of Appeal ruled that the working papers did meet the dominant purpose test and were protected by litigation privilege.[26] However, to suggest – as CCC has in submissions – that *Ed Miller* stands for the proposition that litigation privilege applies only to administrative proceedings with the potential for penal consequences is quite misleading. In emphasizing these consequences, the Court of Appeal was reacting to the manner in which the lower court had dismissed the inquiry as "merely being investigated."

38. The Court of Appeal then goes on to rule on the nature of litigation privilege when "related litigation" is ongoing, finding that "the conclusion of the Director's Inquiry did not mean

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[22] Tab 7 of the CCC Document Brief.
[23] *Ibid*. at pg. 2.
[24] *Ibid*. at pg. 3-4.
[25] *Ibid*. at pg. 4.
[26] *Ibid*. at pg. 6.

that the litigation was ended. Section 39 of the Combines Investigation Act expressly provides that civil rights of action remain despite the provisions of the Act. The issues raised by the Director were still open to other litigants such as the respondent."[27] Similarly, the litigation privilege claimed in this proceeding will not end with the end of the current proceeding before this Board panel. Rather, it would continue for so long as the issues remained open to other litigants such as CANDAS to bring a civil claim or to the Board to bring a compliance proceeding.

College of Physicians of British Columbia: Confirms that parties to an administrative proceeding have an adversarial interest even though the regulator is governed by a public interest mandate.

39. In *College of Physicians of British Columbia*[28] the British Columbia Court of Appeal was asked to determine whether a regulatory body itself (in this case, the College) could rely upon a claim of litigation privilege over documents obtained by the regulator as a result of an investigation it conducted over a member. The College's investigative function is analogous to the Board's own inspection and investigation powers under Part VII and Part VII.1 of the *Ontario Energy Board Act, 1998*. The facts were unique in this case: the College investigated an average of 1,300 complaints per year, the vast majority of which did not result in disciplinary action.[29] The Court determined that because, in all likelihood, no disciplinary action would be taken as was the case with most complaints, litigation was not "in reasonable prospect" during the investigation.[30]

40. However, the BC Court of Appeal also states that "I do not disagree that the interest of the member being investigated is adversarial to that of the College and the complainant. That is the ratio of *Ed Miller Sales & Rentals* and *Bank Leu Ag*, which I accept. However, when the College is investigating a complaint, its interest in the outcome of the investigation is not adversarial in relation to either the complainant or the member. Its duty, mandated by statute, is to "serve and

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[27] *Ibid*. at pg. 6.
[28] Tab 8 of the CCC Document Brief.
[29] *Ibid*. at para. 82.
[30] *Ibid*. at para. 84 and 85.

protect the public" and "to exercise its powers and discharge its responsibilities...in the public interest.""[31]

41. In this case, the British Columbia Court of Appeal clearly distinguishes between the *public interest* mandate of the College, on the one hand, and the *adversarial interest* of the member being investigated to that of both the College and the complainant, on the other.

Order F06-16: Confirms that litigation privilege applies to proceedings before the National Energy Board and the Washington State Energy Facility Site Evaluation Council.

42. In *Order F06-16*[32] the British Columbia Ministry of Environment (the "Ministry") claimed litigation privilege over documents prepared in connection with a National Energy Board (NEB**)** application for authorization to construct an international power line that would give the applicant's (SE2) proposed gas-fired electric generation facility access to the power grid in British Columbia if the applicant was certified to construct and operate that facility by the Washington State Energy Facility Site Evaluation Council (EFSEC).[33]

43. After considering the *Ed Miller* and the *College of Physicians and Surgeons* decisions, the British Columbia Privacy Commissioner concluded that "the information the Ministry refused to disclose on the basis of litigation privilege was protected by that privilege. The scope and application of litigation privilege in relation to administrative proceedings, and principles for deciding when proceedings are related to each other, are still developing. In deciding that litigation privilege applies here, I have kept in view the underlying policy of litigation privilege, which is, again, to give parties who are adverse in interest in contested legal proceedings confidentiality protection for information that they obtain or create to prepare their cases."[34]

44. The Privacy Commissioner finds that "I note that, in *College of Physicians*, the Court of Appeal approved of *Ed Miller Sales*, which held that a regulatory investigation can support a claim of litigation privilege in relation to the adversarial interest of the target of the investigation.

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[31] *Ibid*. at para. 79-80.
[32] Tab 9 of the CCC Document Brief.
[33] *Ibid*. at para. 21.
[34] *Ibid*. at para. 40.

SE2 and British Columbia were clearly opposed in interest in the EFSEC and the NEB hearings--their interests were adversarial, as was the case in *Ed Miller*."[35]

45. In this case, the Privacy Commissioner of British Columbia acknowledges that the parties to a National Energy Board proceeding are "clearly opposed in interest" and that as a result the National Energy Board's proceeding constitutes an adversarial process that constitutes "litigation" for the purposes of a claim of litigation privilege.

46. THESL submits that the National Energy Board proceeding referenced in this case is analogous to the Ontario Energy Board's administrative proceedings, and that the Privacy Commissioner of British Columbia's reasoning in this case is very persuasive in light of this similarity.

Other Case Law

47. THESL notes that its position that the Board's proceeding constitutes "litigation" is fully supported by other case law which CCC, CANDAS and Board Staff have failed to cite. THESL attaches to these submissions a copy of each of these cases for convenience and reference.

48. In *Ontario Human Rights Commission v. Dofasco Inc.*, 2001 CanLII 2554 (ON CA) at paragraph 52 the Ontario Court of Appeal determined that a board of inquiry under the Ontario *Human Rights Code*, RSO 1990, c. H.19 "had no power to order the production of privileged documents" based on Section 5.4(2) of the SPPA.

49. In *Brewers Retail Inc. v. United Food and Commercial Workers International Union, Local 326W*, [1998] O.L.A.A No. 185 at paragraph 25 the labour arbitrator held "[f]urther, litigation is not confined only to court proceedings but encompasses administrative tribunals and arbitration as well." While this labour arbitration decision has no binding precedential value over the Board, the reasoning is again persuasive.

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[35] *Ibid*. at para. 41.

50. In addition THESL also conducted a search of administrative tribunal decisions. While admittedly, there are not very many decisions available addressing claims of litigation privilege at the administrative level, THESL was able to find several examples where other administrative tribunals have upheld claims of litigation privilege in their proceedings, including:

(a) the Canada Competition Tribunal in *Canada (Director of Investigation and Research, Competition Act) v. NutraSweet Co.*, [1989] C.C.T.D. No. 54;[36]

(b) the British Columbia Environmental Appeal Board in *Beazer East Inc. v. British Columbia (Ministry of Environment, Lands and Parks)*, [2000] B.C.E.A. No. 53;[37] and

(c) the British Columbia Human Rights Tribunal in *Gardiner v. British Columbia (Ministry of Public Safety and Solicitor General*), [2007] B.C.H.R.T.D. No. 306.[38]

51. THESL submits that the position advocated by CCC, CANDAS and Board Staff confuses the Board's public interest mandate with the adversarial processes the Board has adopted fulfill that mandate. This position does not find any support in the case law – either the law that CCC filed and relies upon nor in any of the case law that THESL was able to find in preparing this reply.

52. It is important not to confuse the Board's (and its Staff's) public interests with the diverging interests of each of the participants in Board proceedings. These interests are separate

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[36] This is an Order Regarding Questions on Discovery of the Canada Competition Tribunal. Litigation privilege is claimed over interview notes made by counsel for the Director when he interviewed customers, competitors, and others at the inquiry stage of the proceeding. Counsel for the Director stated to the Tribunal that these notes were made at the inquiry stage of the proceeding and that "once the Director goes on inquiry… he is preparing for litigation." At pages 5-6 of the Order, the Tribunal states that on the basis of the above assertion by counsel for the Director, it is its conclusion that that the documents fit into the litigation privilege category. Their dominant purpose, it states, was for use in litigation.

[37] This is a decision of the British Columbia Environmental Appeal Board in which the Board is considering issues relating to a stay application. The third issue to be decided is whether a summons can be issued for documents relating to an independent review since it is argued that the results of the independent review are relevant to the stay application. The Board finds at paras. 96-97 that the independent review was created for the dominant purpose of preparing for litigation and is therefore covered by litigation privilege, which has not been waived. The Board therefore does not order disclosure of the independent review.

[38] This is an interim decision of the British Columbia Human Rights Tribunal which considers whether some items of evidence are admissible or privileged. The Tribunal finds that various types of privilege apply to the items of evidence and litigation privilege is found to apply to certain items based on the dominant purpose test.

and distinct (a fact that is well recognized by in the case law cited above). It is worth noting that Board Staff implicitly acknowledges the adversarial nature of the current proceeding when they elect not "to take a position with respect to whether or to what extent disclosure of each of the disputed documents should be required."[39] A motion against a party for the production of documents is clearly adversarial, and Board Staff have chosen not to take a position one way or the other in this debate.

CANDAS may be using the Board's current regulatory process as a way to facilitate improper discovery of THESL in advance of bringing a future civil claim.

53. THESL is concerned that CANDAS may in-fact be using the Board's current regulatory process as way to facilitate discovery of THESL in advance of bringing a future civil claim. CANDAS brought its application on the "urgent" basis that Public Mobile had no other way to enter the cellular market. We have since learned during the technical conference that Public Mobile has already launched its service in Toronto using a macrocell alternative, and that Public Mobile has no intent of abandoning its macrocell network to revert to the DASCom solution even if it is installed.[40]

54. THESL is concerned that CANDAS may be misusing the Board's current regulatory process as a way to facilitate discovery of THESL in advance of bringing a future civil claim. In this circumstance, THESL asks the Board to be extra vigilant not to require production of information that is covered by litigation privilege and which could be used against THESL in a future civil claim.

THESL has not waived its claim of privilege

55. CCC argues that by filing the expert reports of Dr. Yatchew and Mr. Starkey as intervenor evidence in response to the CANDAS Application, THESL has somehow waived any claim of

[39] Tr. pg. 114, ln 7-15.
[40] Technical Conference Tr. at pg. 61, ln. 6 to pg. 62, ln. 12.

litigation privilege over the documents identified in the Privileged Documents list as "draft reports" of Dr. Yatchew and Mr. Starkey.[41]

56. CCC's argument overlooks the fact that the expert reports filed by THESL in this proceeding were prepared for the stated purpose of responding to the CANDAS Application and interrogatory responses.

57. Specifically, pages 3-4 of the Starkey Affidavit dated September 2, 2011 states:

> "**Q. DESCRIBE THE PURPOSE OF YOUR TESTIMONY AND STATE YOUR CONCLUSIONS.**
>
> **A.** I've been asked by THESL to review the CANDAS Application, supporting materials and the interrogatory responses, as well as the Board's CCTA Decision and evaluate the extent to which the findings therein can reasonably be attributed to attachments for wireless equipment of the type proposed by CANDAS in its Application."

58. Similarly, page 2 of the Yatchew Affidavit dated September 2011 states:

> **"Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**
>
> **A.** Toronto Hydro-Electric System Limited ("THESL") has experienced a dramatic increase in applications for attachments to its distribution poles, many of which are for wireless antenna mounts on behalf of companies seeking to launch new cellular telephone networks in the Toronto area.
>
> In this connection, I have been retained by THESL to review the CANDAS Application and to examine economic and regulatory issues related to the Application."

59. It is impossible for Dr. Yatchew and Mr. Starkey to have prepared drafts of their expert reports for the current proceeding prior to April 21, 2011 since this was the date that CANDAS

[41] Tr. pg. 57, ln. 17-24.

filed its Application. THESL can confirm that it did not retain Dr. Yatchew and Mr. Starkey to review and consider the CANDAS Application until nearly a month later on May 31, 2011.

60. CCC argues that the draft reports identified among the Privileged Documents with dates ranging from June to August 2010 must be the same reports that were filed in respect of the CANDAS Application. Because the reports involve the same authors, to suggest otherwise, in CCC's view simply "is simply not credible."[42]

61. However, CCC does not offer to the Board an explanation about how the experts THESL retained in this proceeding could possibly have known of the substance of the CANDAS Application some 6 months before it was filed. Simply asserting that evidence is not credible is not sufficient to undermine credibility.

62. THESL has provided detailed evidence that the Privileged Documents were prepared for the sole purpose of litigation that THESL intended to commence, but which THESL elected, at the end of the day, not to pursue. In Mr. McLorg's words, the draft reports of Dr. Yatchew and Mr. Starkey that are included among the Privileged Documents were prepared "[f]or the purpose of a road that THESL ultimately chose not to go down."[43]

63. In this context, it is not surprising that the draft reports of Dr. Yatchew and Mr. Starkey were not finalized – THESL chose not to proceed with its intended litigation.

64. Similarly, it is hardly surprising that six months later, after the CANDAS Application was filed, that THESL went back to the same experts that it already had an existing relationship with and asked them to consider the CANDAS Application and to prepare the expert reports that were eventually filed in this proceeding.

65. THESL's use of the same experts in respect of two separate matters does not, in any way, evidence that the reports prepared in respect of the first matter are somehow drafts of the separate and distinct reports prepared in respect of the other matter.

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[42] Tr. pg. 66, ln. 1-5.
[43] Tr. pg. 36, ln. 17-pg. 37, ln. 1.

66. If CCC truly wanted to explore and question the basis of the conclusions reached by Dr. Yatchew or Mr. Starkey in their expert reports, as CCC claims it wants to do in its submissions, it was open for CCC to ask interrogatories about those reports. CCC chose not to do so.

67. The Board has already established a formal process through its amended *Rules of Practice and Procedure* and through Procedural Order No. 9 to hold an expert pre-hearing conference for the purposes of, among others, narrowing issues; identifying the points on which their views differ and are in agreement; and preparing a joint written statement to be admissible as evidence at the hearing of this matter. In this context, THESL submits that the probative value of the draft reports requested by CCC is marginal. Any substantive disagreements between experts that would go to a matter of Board policy or the public interest will be identified and brought to the Board's attention as part of the expert pre-hearing conference.

68. CANDAS argues that THESL waived its right to assert privilege over the Privileged Documents when it filed the August 13, 2010 letter.[44] THESL disagrees. CANDAS provides no legal basis for its bold assertion that the sending of a letter itself constitutes waiver of litigation privilege.

Review of Privileged Documents

69. CANDAS argues that, notwithstanding their acknowledgement that litigation is a reasonable prospect, it is not apparent to them why litigation privilege would apply to various Privileged Documents. In this circumstance, CANDAS suggests to the Board that it is entitled to ask for the document and examine it.[45]

70. To support its argument that the Board should examine the documents, CANDAS asserts "We have no idea what these reports are in respect of. We have heard a submission from counsel

[44] Tr. pg. 87, ln. 1-4.
[45] Tr. pg. 105, ln. 9-28.

- not the witnesses, but from counsel - that these drafts were for some other litigation contemplated by Toronto Hydro, but we don't have any evidence about that."[46]

71. THESL submits that there is no need for the Board to examine the Privileged Documents, since THESL has already fully discharged its burden of proof to claim litigation privilege. THESL submits that CANDAS is deliberately choosing to ignore the evidence. The Affidavit of Documents executed by Mr. McLorg clearly identifies the Privileged Documents as being documents prepared in contemplation of potential litigation. The Affidavit of Ivano Labriciossa clearly explains the contextual circumstances that gave rise to THESL's reasonable anticipation of litigation. These circumstances are supported by CANDAS' own recitation of events and CANDAS' own admission that litigation was a reasonable prospect. Mr. McLorg and Mr. Labriciossa made themselves available for cross-examination, but CANDAS chose not to ask further questions. The timeline of documents in the Affidavit of Documents further evidences that counsel was retained in January 2010 and continued to give legal advice and to be integrally involved in the preparation of anticipated litigation in connection with all of the Privileged Documents.

72. In the alternative, should the Board decide that a more detailed review of one or more of the Privileged Documents is required to make a determination on THESL's claim of litigation privilege – in light of the reasonable prospect of a potential compliance proceeding as detailed in paragraphs 23-25 above, the fact that the Board itself would be adverse to THESL in such a compliance proceeding – THESL submits that the Board must refrain from completing a review of the Privileged Documents itself and should instead state a case to the Divisional Court pursuant to Section 32 of the *Ontario Energy Board Act, 1998* to review the Privileged Documents and to make a determination on the question of litigation privilege.

E. SPECIFIC CHALLENGES

73. **Part 2 of the Privileged Documents:** Board Staff expressed a concern that they were confused, based on the description of these documents, about the nature of these

[46] Ibid.

documents and how they relate back to the original inquiry about safety and operation issues.[47] THESL would like to clarify this concern. All of the operational and safety reports that were not prepared in contemplation of anticipated litigation were listed in Schedule "A" of the Affidavit of Documents. However, the operational and safety issues asked about by the Board also formed an integral part of the ongoing legal advice that was being given in contemplation of anticipated litigation. Because many of these documents did touch on certain operational and safety concerns in the course of giving legal advice in contemplation of litigation, THESL erred in favour of transparency by disclosing the existence of documents and then justifying its claim of privilege over those documents.

74. **Privileged Document Number 12:** CANDAS expressed a concern that on the basis of the description of the document alone THESL's evidentiary basis for an assertion of privilege over this document was not clear.[48] CANDAS chose not to ask the witnesses for clarification (which would have been the appropriate means of addressing this concern). Board Staff expressed a similar concern, noting that on all outward appearances the document appears to be a pole attachment survey. Board Staff goes on to explain that "if the pole attachment survey is done as a matter of course, as a matter of normal business activities of Toronto Hydro, the question then becomes whether litigation privilege can properly be extended to such a document."[49] THESL can confirm that this "Pole Attachment Survey" was not completed as a matter of normal business activities at THESL, rather it is a confidential survey conducted by THESL for the sole purpose of contemplated litigation. THESL does not routinely complete surveys of this nature.

75. **Privileged Documents Numbered 14 and 17:** CANDAS seeks production of Privileged Documents numbered 14 and 17 on the basis that they are drafts of the reports that should be filed on the record in this proceeding.[50] THESL disagrees. These reports prepared by THESL's operational staff for the sole and exclusive purpose of reporting on the status of

[47] Tr. pg. 139, ln. 27 to pg. 130, ln. 13.
[48] Tr. pg. 104, ln. 22 to pg. 105, ln. 4.
[49] Tr. pg. 127, ln. 10 to pg. 128, ln. 28.
[50] Tr. pg. 138, ln. 9-26.

the pole attachment situation in contemplation of anticipated litigation. As noted in response to Undertaking J.1.1, these draft reports were finalized by way of a report dated May 3, 2010. This report was not presented to THESL's board of directors and is privileged as being in contemplation of litigation.

76. **Privileged Documents Numbered 13 and 24:** Board staff inquired about the description of these reports included in the Affidavit of Documents to confirm that the documents were in fact prepared for the purposes of providing legal analysis in preparation for contemplated litigation. THESL confirmed on the record that this was in-fact the case.[51]

F. CONCLUSIONS

77. For all of the forgoing reasons, THESL submits that the Board should uphold THESL's claims of solicitor-client privilege and litigation privilege, and to refuse to order production of information that is of limited, if any probative value in the present application.

[51] Tr. pg. 22, ln. 9 to pg. 23, ln. 6.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 9, 2012

BORDEN LADNER GERVAIS LLP

Original signed by J. Mark Rodger

J. Mark Rodger

Original signed by John A.D. Vellone

John A.D. Vellone

Counsel to Toronto Hydro-Electric System Limited

TOR01: 4847526: v4

Tab 1: *Sinclair v. Roy*, [1985] B.C.J. No. 3085

Case Name:
SINCLAIR v. ROY

[1985] B.C.J. No. 3085

20 D.L.R. (4th) 748

British Columbia Supreme Court

Huddart L.J.S.C.

Judgment: August 8, 1985

(34 paras.)

Counsel:

Joyce C. M. Maykut, for applicant.

Diana M. Davidson, for petitioner.

Jill Routhwaite, for respondent.

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1 HUDDART L.J.S.C.:--This application by Linda Neville to set aside a subpoena directed to her to testify in this matter raises a matter of considerable significance to those persons involved in the process of mediation of family disputes in British Columbia. For that reason, I advised counsel that I would give written reasons for my decision to grant the application. These are those reasons.

2 Ms. Neville is a family court counsellor. In that capacity, she was assigned this case in September, 1984, for the purpose of assisting the parties to resolve their differences out of court. Another family court counsellor, Douglas Donald, had been assigned earlier to prepare the custody and access report that had been directed by this court. I am advised that he will be testifying later in the trial. Before undertaking her task, Ms. Neville made available to both Ms. Sinclair and Mr. Roy a copy of a brochure published by the Ministry of the Attorney-General entitled "Confidentiality and The Family Court Counsellor". In the course of her discussions with the parties she emphasized their confidentiality in order to encourage frank and open communication with her so that the dispute as to access to Lindsay could be resolved pending trial. Mr. Roy has not consented to her disclosing any information she received from him. Ms. Neville deposes in her unchallenged affidavit, "THAT any opinions I may have regarding the parties or the matters in dispute, have been influ-

enced and indeed formed, as a result of my meetings with both parties." At no time did she meet with the parties together. At no time did she meet with either party for any purpose other than settlement of their dispute as to access.

3 Ms. Neville brings this application pursuant to the Supreme Court Rules (B.C.), Rule 40(39), which reads as follows:

> 40(39) A person who has been served with a subpoena may apply to the Court for an order setting aside the subpoena on the grounds that compliance with it is unnecessary or that it would work a hardship upon him; and the Court may make any order, as to postponement of the trial or otherwise, as it thinks just.

4 This rule supplements the inherent power of the court to control its own process which has included historically the right to set aside a subpoena if the privilege of summoning a witness is being abused.

5 Counsel for Ms. Sinclair advised the court that the evidence she anticipates eliciting from Ms. Neville is first, her observations of the behaviour and condition of Ms. Sinclair during the period of the attempted mediation, and secondly, communications by Ms. Sinclair to her during the discussions that formed part of that mediation process. (Incidentally, although purists might argue that there is a distinction between conciliation and mediation in that the former uses a more directed approach, for the purposes of these reasons any such distinction is not material.)

6 Counsel for Ms. Neville submits that it is neither necessary nor reasonable for Ms. Neville to be called to give such evidence. Evidence of the first type is available through other witnesses who observed Ms. Sinclair during the same period of time. Evidence of the second type is available through Ms. Sinclair, if previous statements of Ms. Sinclair are admissible for any reason. Alternatively, she argues that it is Ms. Neville's status as a family court counsellor that inclined Ms. Sinclair to issue the subpoena. Ms. Davidson agrees that the status of Ms. Neville as a family court counsellor and her considerable experience in that position, compared to that of Mr. Donald, are factors in her decision to call Ms. Neville. This underlying reason for the subpoena constitutes an ulterior purpose, and thus, an abuse of the court's process, Ms. Maykut submits. Finally, she argues that any relevant evidence Ms. Neville might give is privileged by statute (s. 3 of the *Family Relations Act*, R.S.B.C. 1979, c. 121), or at common law, and therefore inadmissible.

7 Because I am persuaded that Ms. Neville cannot testify as to any matter than might be relevant to the custody of or access to Lindsay Roy, I need consider only the third argument.

8 Ms. Neville cannot divulge any information she received from either Ms. Sinclair or Mr. Roy during the course of her meetings with them. Communications she received from either of them were made in furtherance of settlement of the litigation or in an attempt to reconcile differences with regard to access pending the trial. Communications can be by word or conduct. In my view, there can be no distinction between them.

9 The law has long excluded from evidence admissions by word or conduct made by parties during negotiations to settle litigation: *Pirie v. Wyld* (1886), 11 O.R. 422. The privilege attaching to such communications belongs to both parties. The waiver of both parties is required if any communication is to be admissible: *Pais v. Pais*, [1970] 3 All E.R. 491. For privilege to attach to communications made during the course of settlement negotiations two conditions must be met: there must be a litigious dispute in existence or at least contemplated: *Warren v. Gray Goose Stage Ltd.*, [1937]

1 W.W.R. 465 at p. 472, and the communication must be made for the purpose of effecting settlement or in response to such a communication.

10 The first condition poses no problem. The discussions between Ms. Sinclair and Ms. Neville took place after this litigation commenced.

11 The second condition poses more difficulty. While words and conduct constituting admissions made in furtherance of settlement are inadmissible, it is suggested that objective facts which may be ascertained during negotiations may be proved by direct evidence. The statements sought to be introduced are said to relate to allegations Ms. Sinclair made to Ms. Neville of abuse by Mr. Roy during cohabitation. These previous statements, which in the ordinary course would be excluded as self-serving, will be determined to be admissible, argued Ms. Sinclair's counsel, as an exception to that exclusionary rule, to rebut allegations Mr. Roy will make of recent fabrication by Ms. Sinclair. Assuming that to be the case, those statements and the observations of Ms. Sinclair by Ms. Neville will be relevant, probative and trustworthy, and should be admissible as objective facts ascertained by Ms. Neville during mediation, submits Ms. Davidson.

12 Their admission would be gravely prejudicial to Mr. Roy. Effective cross-examination may well require him to waive the privilege given to him by s. 3 of the *Family Relations Act*, which provides:

> 3(3) Subject to the law of Canada, where
>
> > (*a*) a family court counsellor receives under subsection (2) evidence, information or a communication in confidence from a person who is a party to the proceeding, or from a child; and
> >
> > (*b*) the person who gave the evidence, information or communication to the family court counsellor under subsection (2) does not consent to the family court counsellor disclosing the evidence, information or communication,
>
> the family court counsellor shall not disclose the evidence, information or communication in a proceeding in a court or tribunal, and no person shall examine him for the purpose of compelling him to disclose that evidence, information or communication.

13 Subsection (2) provides, *inter alia*:

> 3(2) A family court counsellor
>
> > (*a*) ...may offer the parties to the dispute any advice and guidance which, in his opinion, will assist in resolving the dispute...

14 The nexus between the expected evidence of Ms. Neville and the issue before the court is tenuous. It is the experience of Ms. Neville as a skilled observer of people that makes her evidence significant to Ms. Sinclair. I have no doubt that her presence is sought to rehabilitate the impaired reputation of Ms. Sinclair. Her reputation was impaired when Ms. Sinclair removed Lindsay from the jurisdiction almost immediately following an order of this court restraining that very action. Ms.

Neville met with Ms. Sinclair during the months preceding that action. Those meetings occurred because litigation had commenced and the family court counsellor assigned this case was preparing a custody and access report. That duty meant that whatever he heard or observed could become evidence at the trial, within the confines of the provisions of s. 15 of the *Family Relations Act*. Ms. Neville became involved solely because of the desire for confidentiality in the mediation process. It is the confidentiality of that process which is threatened by the issue of the subpoena on behalf of Ms. Sinclair.

15 These observations suggest the desirability of the broader approach taken to the issue of privilege by Gravely U.F.C.J. in *Porter v. Porter* (1983), 40 O.R. (2d) 417, 32 R.F.L. (2d) 413, when he ruled a report of a registered psychologist inadmissible because it originated in a relationship of privilege. In the course of his opinion, Gravely U.F.C.J. said (at pp. 419-20):

> I do not think that the contents of the report are relevant to the issue that I am to decide. It seems to me that the existence or otherwise of the privilege must be determined as of the time that the relationship of privilege is said to have been formed. Once that relationship is established, it is not open to the court thereafter to weigh the information generated through the relationship by reference to Wigmore's four conditions.

16 He reached that conclusion by analogy from the solicitor-client relationship, and found support for it in *Slavutych v. Baker et al.* (1975), 55 D.L.R. (3d) 224, [1976] 1 S.C.R. 254, [1975] 4 W.W.R. 620. In that case the Supreme Court of Canada found a tenure form sheet inadmissible because it had originated in a confidence that it would not be disclosed. In the course of that judgment the court approved the doctrine of privilege as [at p. 229 D.L.R., p. 626 W.W.R.] "so ably considered in Wigmore", although their judgment did not require the application of that doctrine.

17 Wigmore's [*Wigmore on Evidence*, 3rd ed. (McNaughton Revision, 1961)] four fundamental conditions were cited in the judgment of Spence J., at p. 228 D.L.R., p. 625 W.W.R., in these terms:

> "(1) The communications must originate in a *confidence* that they will not be disclosed.
>
> "(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> "(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> "(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."

18 Ms. Davidson, however, aruges that s. 3 of the *Family Relations Act* is exhaustive of the privilege to which Mr. Roy is entitled. The enactment of those provisions states the "opinion of the community" as to the extent to which mediation efforts of family court counsellors are to be protected and form the limit of the confidentiality that the parties could have anticipated when entering the mediation process.

19 I do not agree. Mediation with a view to resolving a litigious issue without a trial is encouraged by both the federal and provincial governments. The *Divorce Act*, R.S.C. 1970, c. D-8, includes provisions relating to confidentiality of efforts to promote reconciliation. Indeed, earlier in this trial Ms. Davidson asserted the provisions of s. 21(2) in a successful effort to limit the testimony of a marriage counsellor who had worked with Mr. Roy and Ms. Sinclair prior to their separation to his observations of Mr. Roy before and after the series of counselling sessions whose purpose was reconciliation of the spouses' differences within the context of continuing the marriage. Neither counsel suggested that the provisions of this section were relevant to the testimony of Ms. Neville.

20 Mediation is a new trade or profession. Lawyers are permitted to act as mediators by the Law Society of British Columbia. Persons trained in social work, psychology and family therapy also act as mediators. They are retained by the spouses privately. Mediation is a profession encouraged by the policy of the federal government. Indeed, proposed amendments to the *Divorce Act* reveal that the government is promoting the use of mediation as an alternative to litigation in the resolution of family disputes. Section 3 applies only to family court counsellors. Presumably, Ms. Davidson would agree that the common law privilege still applies to other mediators who do not fall within the ambit of ss. 8 or 21 of the *Divorce Act*. It is untenable that the common law privilege should protect private mediation but not apply to public mediation made available to litigating parties at no charge by the provincial government. It is particularly untenable in the face of the practice of this court to encourage mediation by family court counsellors of custody and access disputes. This practice has developed because of the overwhelming weight of qualified opinion that it is in the best interest of children to avoid litigation between their parents. Psychologists who disagree on many issues agree that continuing, serious, unresolved conflict between parents leads to loyalty conflicts in children that affect their development, often permanently. Judgment after trial resolves the issue, but rarely does it resolve the conflict. Mediation is an effort, not merely to reduce the cost of dispute resolution, but more importantly to assist the parents in coming to a resolution of the conflict. There is hope that the process might also be educational; that it might assist them in resolving future conflicts inevitable when two parents are trying to raise children after they have separated, divorced and most probably, remarried.

21 It has long been consistent jurisprudence that settlements of family disputes are to be encouraged. The words of Anderson J. (as he then was) in *Dal Santo v. Dal Santo* (1975), 21 R.F.L. 117 at p. 120 (B.C.S.C.), must be amongst the most quoted in Canadian law reports.

22 In view of these considerations, not only must the privilege attaching to negotiations for settlement of commercial disputes apply no less to negotiations with respect to settlement of matrimonial disputes, that privilege must be sedulously fostered, to use the words of Wigmore.

23 Viewed in this light, it is more likely that s. 3 was intended to cast a duty of non-disclosure without consent on a family court counsellor and to fix the limit of that duty. This duty is given effect by the provision for non-compellability of the counsellor as a witness. For this duty to arise, there is no need to establish the pre-conditions required to establish common law privilege. A family court counsellor can intervene of his own volition in a dispute and offer advice or guidance to the parties. He or she can be ordered to intervene by the court. The parties can be ordered to attend at the office of a family court counsellor against their will. In such circumstances it might be difficult to establish the conditions necessary to invoke either of the common law privileges. It is this difficulty which s. 3 was designed to meet.

24 Having reached this conclusion, the key issue is whether the expected evidence of Ms. Neville is evidence of objective facts ascertained during the course of negotiations which is not excluded by the doctrine of privilege.

25 The position of counsel for Ms. Sinclair is that words spoken by her during the negotiation sessions are "objective facts" and that her behaviour and condition at those sessions are also "objective facts" about which Ms. Neville is entitled to give direct evidence. Ms. Neville is a skilled observer. To the extent she may have formed any opinion as to the behaviour and condition of Ms. Sinclair she may have recorded some or all of it in her memory. She is skilled at making, recording, retaining and reporting her observations. She is not unlike the doctor in *Field v. Com'r for Railways for New South Wales* (1957), 99 C.L.R. 285. The High Court of Australia considered that there was a double aspect to a medical examination, one of the purposes of which was to enable the defendant to establish the extent of the medical injuries of the plaintiff with a view to arriving at a settlement. The court decided that the observations of the medical examiner and his opinion based on them could be admitted because the parties knew that a second purpose of the examination was to provide evidence of the injuries at trial in the event negotiations were not successful.

26 No such double aspect was known to the parties here who were told that the negotiations would be confidential. However, a careful reading of the brochure made available to each of them could lead the reader to conclude that the counsellor could reveal information given her in confidence with the consent of the party revealing the information. The relevant advice was given in these terms:

> The law and the policies of the B.C. Corrections Branch which employs Family Court Counsellors, say that a Counsellor cannot tell anyone, even in court, anything that you told him or her in confidence unless you consent to the Counsellor revealing that information.

27 This is an explanation of the effect of s. 3. It does not consider the possible application of ss. 8 or 21 of the *Divorce Act* or common law privilege. Thus, its advice is not exhaustive. Ms. Neville deposed:

> THAT my purpose in emphasizing confidentiality to the parties, was to encourage frank and open communications which could assist in resolving the dispute between them. These frank communications often are not forthcoming when the parties feel the communications can be used against them in litigation in the very matter they are trying to resolve.

28 The approach supported by Ms. Davidson emphasizes the need to protect persons from the effect of admissions against their own interests in the ensuing litigation. It does not take into account the effect of the court's intrusion into the settlement negotiations for the purpose of determining admissibility of evidence.

29 The issue of whether the expected evidence formed part of the negotiations or was reasonably incidental to them is a question of fact to be determined by the trial judge, who may hold a *voir dire*, if necessary, to determine the question of admissibility. It may be for this reason that counsel for Ms. Neville brought this application to set aside the subpoena before me as the trial judge, rather than in chambers. It is clear that the trial judge has the right to override the setting aside of a subpoena if the evidence of a witness is found to be necessary at the trial. I need not decide whether

this common law practice applies to applications under Rule 40(39) because I have already heard most of the petitioner's case and I have before me the unchallenged evidence by affidavit of Ms. Neville. No useful purpose would be served by requiring Ms. Neville to appear at the trial for the purpose of a trial within a trial. Indeed, such a procedure was not sought by the petitioner.

30 Oral statements repeated without comment must be complete and accurate. Any person familiar with the court process could testify as to the rarity of a complete and accurate repetition of an oral statement. As observations of the conduct and behaviour of another are filtered through the screen of the observer, so is the hearing, recording and remembering of oral statements. By Ms. Neville's own deposition, her observations of Ms. Sinclair have been influenced by her interaction on the same matters with Mr. Roy whose assertions and conduct cannot be revealed. In these circumstances, any evidence Ms. Neville could give would have tenuous probative value. Were it certain that the court possessed the discretion to refuse to compel a witness to testify because more harm than good would result from the compulsion, I would exercise that discretion in favour of Ms. Neville. However, I am not persuaded that the court does have that discretion if the evidence is relevant and otherwise admissible.

31 As I indicated earlier in these reasons, I am persuaded that the expected evidence of Ms. Neville is privileged and therefore inadmissible. Once the process of conciliation began, negotiations toward the settlement of the parties' dispute over access to Lindsay began. These negotiations were conducted through the person of Ms. Neville. She had no contact with either party except for those purposes. In the course of her duties as a family court counsellor, she was assigned the task of assisting these parties toward a pre-trial settlement of this issue, while another family court counsellor proceeded with the investigation of the best interests of Lindsay with a view to the preparation of a report and recommendations to this court. She was assigned the task because confidentiality was deemed essential to satisfactory conciliation. She emphasized the confidential nature of the discussions with the parties to ensure that they be frank and open with her. In these circumstances, I am satisfied that the court should not intrude into those discussions for the purpose of determining whether specific words or conduct constitute "objective facts". While the facts of this case are different from those in *Porter, supra,* the result should be the same. In that case a psychologist was retained by the parents to mediate a custody and access dispute. It was agreed that any recommendations or proposals he might make could not be used in any court proceeding and that they would be for the "'private purposes of the parties and their solicitors'"only [at p. 419]. It was agreed that he would not be called as a witness and that his primary purpose was settlement of the custody and access issues. The position of the party seeking the admission of the report supplied to the parties by the mediator was that the value of the evidence was of far greater benefit than injury in that custody case. Although the case revolved around the issue of privilege in a confidential relationship, Gravely U.F.C.J. did not restrict his judgment to a finding on the fourth condition of Wigmore in excluding the report. He also held that the principle set out by Cohen L J. in *McTaggart v. McTaggart*, [1949] P. 94, [1948] 2 All E.R. 754 at p. 755, applied, namely: "... discussions and correspondence in negotiations if 'without prejudice' are privileged unless the parties waive the privilege". In so doing he distinguished between the related grounds on which privilege can be claimed.

32 Because litigation was not only contemplated, but, in fact, commenced; because the conciliation effort had as its sole purpose the settlement of a litigious issue, and because the discussions were clearly designed to be without prejudice, there is no need in this case to consider the four conditions of Wigmore to determine if privilege based on a confidential relationship applies to this case. If there were, I would reach the same conclusion as did Gravely U.F.C.J. in *Porter*.

33 In my view, the only issue of fact to be determined is whether the expected evidence formed part of the negotiations toward settlement. If that question is answered in the affirmative, the evidence is privileged and can be disclosed only if privilege is waived by both parties. By this view, the decision in *Field, supra*, is an exception to the general rule as to the privilege attaching to settlement negotiations as stated in *McTaggart* and *Porter, supra.* That interpretation gives appropriate significance to a privilege of long standing, while allowing for appropriate exceptions by agreement, whether explicit or implicit.

34 The obvious conclusion of fact is that Ms. Neville's expected evidence was obtained during such negotiations. As such, it is not admissible. The subpoena was not necessary. Therefore, it is set aside.

Tab 2: *Ontario Human Rights Commission v. Dofasco Inc.*, 2001 CanLII 2554 (ON CA)

DATE: 20011116
DOCKET: C35181

COURT OF APPEAL FOR ONTARIO

MORDEN, ABELLA and ROSENBERG JJ.A.

B E T W E E N :	)	
	)	
ONTARIO HUMAN RIGHTS COMMISSION	)	Naomi Overend and Jennifer Scott for the Appellant
	)	
Applicant (Appellant)	)	Michael Hines for the Respondent Dofasco Inc.
- and -	)	
	)	Fiona Campbell for the Complainant Catherine Jeffrey
DOFASCO INC., CATHERINE JEFFREY and THE BOARD OF INQUIRY (*Human Rights Code*)	)	Margaret Leighton for the Board of Inquiry
Respondents (Respondents in Appeal)	)	
	)	
	)	
	)	**Heard: June 14, 2001**

On appeal from an order of the Divisional Court (Hartt, Carnwath and Matlow JJ.) dated June 22, 2000.

MORDEN J.A.:

[1] This appeal is concerned with the nature and extent of the power of a board of inquiry under the *Human Rights Code*, R.S.O. 1990, c. H. 19 to order a complainant, who alleges that she was discriminated against in her employment on the basis of a physical handicap, to disclose medical and other documents relating to her.

[2] I shall, shortly, describe what has taken place in this proceeding but say now that the board of inquiry ("the board") which is composed of one person, Matthew D. Garfield, made an order, on a motion by Dofasco Inc., requiring the complainant, Catherine Jeffrey, to disclose certain documents. I shall set out the terms of the order, which are considerably more complex than this brief statement indicates, later in these reasons.

[3] The appellant, the Ontario Human Rights Commission ("the commission"), brought an application to the Divisional Court for judicial review of the board's order, which the court dismissed. The commission, with leave, appeals to this court from this decision.

The Underlying Facts Relating to the Disclosure Order

[4] The facts relating to the board's disclosure order and to the judicial review proceeding, which is before the court, are, in the main, those set forth in the pleadings filed with the board. Pleadings are provided for in the Rules 35 to 37 of the board's Rules of Practice.

[5] The commission's pleading alleged that the complainant was employed by Dofasco from 1976 to 1994. She worked as a crane operator. She was injured in 1988 and re-injured in 1990. She was diagnosed with chronic pain disability/ fibromyositis/fibromyalgia. This condition made her incapable of working as a crane operator.

[6] The complainant was off work between 1990 and 1994 but continued to have contact with Dofasco Inc. from time to time. On March 1, 1994 Dofasco, for the first and only time, raised the possibility of assigning her reasonably suitable alternative work, as a switchboard operator. Her response was to defer the decision on whether or not to accept this work until after she had consulted with her specialist doctor. She informed Dofasco of this. Because of her doctor's absence, she was unable to see him until April 26, 1994.

[7] Dofasco was unwilling to wait for this and demanded that the complainant report to Dofasco Medical Services on March 11 and report for work on March 14. She did report to Dofasco Medical Services on March 11. Despite knowing that she was unable to see her specialist until April 26, Dofasco Inc. terminated her employment forthwith after she did not report for work on March 14, claiming that her contract of employment had been frustrated because of her "prolonged and ongoing refusal to report for available and suitable work".

[8] The commission alleged that the facts disclosed the following issues:

> (a) The complainant was terminated because of her handicap, which constitutes *prima facie* discrimination;
>
> (b) Dofasco did not attempt to accommodate the needs arising from the complainant's handicap to the point of "undue hardship", and therefore cannot establish that the complainant was "incapable" of her essential duties;

> (c) In fact, Dofasco was not engaged in a good faith process of accommodation, given the timing of its job offer, its refusal to wait for the complainant to get required medical advice, and its refusal to consider any other options;

(The commission raised additional issues in its pleading relating to harassment and reprisals on the part of Dofasco. They are not relevant to the proceeding before the court.)

[9] This is followed by the general allegation that Dofasco discriminated against the complainant on the ground of handicap contrary to ss. 5 and 9 of the *Human Rights Code*.

[10] The commission sought the following remedies:

> (a) Compensation for lost wages and benefits for the complainant for the period March 15, 1994 to the present, less any amounts of such compensation the complainant received for this period from the WSIB or CPP;
>
> (b) Compensation for the intrinsic value of the rights infringed in the amount of $10,000;
>
> (c) Compensation for mental anguish suffered because of the wilful or reckless manner of infringement in the amount of $10,000;

[11] Dofasco's pleading is relatively long and detailed. A summary set forth in paragraph 37 reads:

> To summarize, for four years the Complainant consistently asserted inability to perform productive work for Dofasco, apparently supported by her physicians, while failing to provide relevant medical information and emphasizing her desire for WCB vocational training. In the four years between her second accident and her termination, the Complainant never stated she was ready to return to work or that her physicians had cleared her to return to work. During that time period, she never suggested there were any particular jobs or bundles of duties that she could productively perform, nor, to the Respondent's knowledge, did any of her physicians. During her four year absence from work, the Complainant repeatedly took the position that (initially) she was not ready to return to work, and

> (later) that she was unlikely to ever be able to return to work at Dofasco. The Commission's Pleadings do not refer to any indication from the Complainant that she was, either prior to or subsequent to her termination, medically fit to return to any productive job at Dofasco. This background, coupled with her refusal to even attempt an ultra-light duty job, the WCB's concurrence that she could do the work and her clear focus on maintaining WCB eligibility, constituted ample grounds for terminating the employment relationship. For four years, the Complainant had not fulfilled the basic "essential duty" of an employee to, ie., perform productive work. Apart from wishful thinking, there was no reason to believe that, whatever accommodation Dofasco made for her, she ever would. A "window of opportunity", arising out of the broader corporate restructuring process, became accessible for a short period of time [earlier in Dofasco's pleading it was alleged that there was a "pressing" need to fill the switchboard operator's vacancy]. Dofasco acted reasonably in stating its preparedness to accept medical clearance from a doctor other than the absent specialist and its readiness to physically modify the worksite. The Complainant declined to take advantage of this, and the window "closed". There was no prospect that such an opportunity would arise again in the foreseeable future. Dofasco then proceeded to exercise its rights of termination under Section 17 of the *Code*.

Dofasco also pleaded:

> Dofasco has now learned that in August, 1993, the Complainant was awarded disability benefits under the Canada Pension Plan. Dofasco has requested but has not yet received documents explaining why this decision was reached despite the findings of Dr. Darracott in November, 1992 [that "from a physical point of view, there [was] no clinical evidence to suggest she has physically disabling pathology"].
>
> Under the Canada Pension Plan, an applicant can only receive a CPP Disability Pension if they are "incapable regularly of pursuing any substantially gainful occupation" and their disability is "likely to be long continued and of indefinite duration".

[12] Dofasco then raised the following issues:

> At the time of her termination, was the Complainant capable of performing any work, or was she "incapable of pursuing any substantially gainful occupation", as her CPP Disability Pension status would suggest?
>
> If the Complainant now claims to have been capable of performing work in March, 1994, should the Board of Inquiry dismiss this Complaint as an abuse of process, given the fact that such a position directly contradicts the position she has successfully taken before the Canada Pension Plan i[n] respect of the same time period?
>
> If, as her CPP status would suggest, the Complainant was totally unemployable in March, 1994, did Dofasco have any obligation at all to accommodate her "needs"?
>
> Assuming the Complainant was capable of some work in March, 1994, was she capable of the switchboard duties?
>
> Assuming the Complainant's needs were such that some measure of accommodation would have permitted her to perform work in March, 1994, were Dofasco's efforts at accommodation sufficient to accommodate those needs?
>
> Did the Complainant, herself, take all reasonable steps available to her to participate in the accommodative process?

The Motion Before The Board

[13] After the exchange of pleadings, Dofasco brought a motion for:

> An Order compelling production of the files of Dr. Leong, Dr. Buckley, Dr Kean and Dr. Forrest relating to the Complainant during the period between March 22, 1990 and the present date;
>
> An order compelling production of the files of any other medical practitioner who examined or treated the

> Complainant during the period between March 22, 1990 until the present date;
>
> An order compelling production of all files maintained by the Workplace Safety and Insurance Board regarding the Complainant;
>
> An order compelling production of the Complainant's medical file maintained by the Medical Department of Dofasco Inc.
>
> An order compelling production of the Complainant's disability pension file maintained by the Canada Pension Plan;
>
> An order compelling production of true copies of the Complainant's income tax returns from 1993 until the present as well as true copies of any documents received by the Complainant from Revenue Canada which confirm or correct any of those returns.
>
> Alternatively, an order requiring the Complainant's written consent to the disclosure of each of the foregoing documents to the Respondent's counsel.
>
> Such further and other relief as to this Board of Inquiry seems just.

[14] The board heard the motion on December 16, 1999 and gave its decision orally that day. It stated the competing submissions of the parties as follows:

> Dofasco brings a motion for production of medical files, WCB file, CPP file and income tax returns (T1s and notices of assessment) from the Complainant. Dofasco argues that it should have the same degree of access to original documents in a file as the Complainant. Dofasco also submits that it is being denied the ability to know the case it has to meet, prepare its defence under section 17 of the Code, and deal with central issues in this case including the quantum of damages. Dofasco has highlighted instances of imperfect disclosure in these proceedings including sequentially numbered documents not produced by the Complainant.

> The Commission opposes the motion and argues that the relief sought is too wide and that Dofasco is not entitled to the production of files *per se* and documents not relevant to the handicap of the Complainant (chronic pain disability, fibromyositis, fibromyalgia). The Commission argues that the Board's rules do not contemplate such a wide net of disclosure – a "fishing expedition".
>
> Though not present, the Complainant, through letters by her counsel in the motion materials, indicates that she has met her disclosure obligations under the Rules.

[15] After stating that "[t]he motion is granted in part", the board gave the following reasons:

> The test for production is arguable relevance. Section 5.4(1) of the *Statutory Powers Procedure Act* and Board of Inquiry Rule 42 give me a broad power to order disclosure. Rule 42 confers on me the power to order disclosure of "…anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding."
>
> The threshold for disclosure here, as in the courts, is not a very high one. There must be some relevance and the production must have some nexus to issues before the Board. The general movement is toward greater disclosure. This is reflected by the Ontario Court of Appeal's comments in *Cook v. Ip* (1985), 5 C.P.C. (2d) 81, at 86:
>
> > There can be no doubt that it is in the public interest to ensure that all relevant evidence is available to the Court. This is essential if justice is to be done between the parties…The production of medical records is thus fundamental to a Court's determination of the nature, extent and effect of the injuries which may have been suffered and the appropriate measure of damages flowing from them.

> Dofasco has satisfied me that the nature of the documents sought (some of which are known and some of which are not known) are crucial to knowing its case to be met and preparing its key defence under section 17 of the Code. The motion materials clearly show that production by the Complainant has been incomplete. My goal is to balance the needs of Dofasco to know and prepare its case and the confidentiality of the Complainant inherent in such disclosure.
>
> The Commission argues against an order of disclosure of documents from medical practitioners not enumerated by Dofasco and those parts of the file of Dr. Leong (the Complainant's family doctor) dealing with medical conditions not enumerated above. I find that ailments other than those listed above are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages. Dofasco should not be prevented from presenting such arguments.
>
> I find further that information contained in the Complainant's files at the WSB and CPP will arguably be relevant to the issues in this proceeding. Employment related income is clearly relevant to issues in this proceeding, including the quantum of damages. Information in the Complainant's file at Dofasco's medical department will no doubt be relevant to key issues in this proceeding.

[16] Following this, the board made its "order" as follows:

> 1. The Complainant shall provide to her counsel an executed Consent to the disclosure of the file of Dr. Leong, Dr. Buckley, Dr. Kean and Dr. Forrest relating to the Complainant during the period between March 22, 1990 and the present date. Complainant's counsel shall then provide said Consents to the doctors and request production by January 15, 2000.
>
> 2. The Complainant shall provide a list to Mr. Hines [counsel for Dofasco] by January 31, 2000 of any other medical practitioner who examined or treated her during the period between March 22, 1990 until the present date, the doctor's area of expertise or specialty, the dates of said visits, and the ailment or condition treated.

3. The Complainant shall provide to her counsel executed Consents to the disclosure of her files maintained at the Workplace Safety and Insurance Board, at the Canada Pension Plan regarding her disability and her medical file maintained by Dofasco's medical department, all for the period between March 22, 1990 until the present date. Complainant's counsel shall then provide said Consents to the above entities and request production by January 15, 2000.

4. The Complainant shall produce to Mr. Hines true copies of her T1 income tax returns and notices of assessment from 1993 until the present. Said documents may be edited by the Complainant so that non-employment income parts are expunged. Production of the income tax documents as above shall be given by January 31, 2000.

5. The Complainant shall provide a sworn Affidavit of Documents as stipulated in the Rules of Civil Procedure dealing with documents obtained from the above sources. The Affidavit shall also include a section listing those documents not provided to Dofasco for reason of not being arguably relevant. Said affidavit, including copies of productions shall be provided to Mr. Hines by January 31, 2000. Mr. Hines may see the originals of productions upon request to the Complainant's counsel.

6. Disbursements of the productions above shall be borne by Dofasco.

7. The Complainant's counsel shall get Mr. Hines' approval as to the form and content of the Consents and letters of request.

The Application for Judicial Review

[17] The commission brought an application for judicial review of the board's decision before the Divisional Court. It sought, in the notice of application, an order quashing the board's order and remitting the matter to the board for "a decision in accordance with proper legal principles to be specified" and stated the following grounds:

In making this order, the Board of Inquiry:

i) Made an error of law in its interpretation of s. 17 of the *Human Rights Code*;

ii) Made an error of law in its interpretation of the Rules of Practice of the Board of Inquiry in placing even more onerous procedural and substantive obligations on the complainant with respect to disclosure than would the *Rules of Civil Procedure*, despite the fact that the Rules of Practice of the Board of Inquiry specify, for parties other than the Human Rights Commission, only that disclosure must be made of documents on which that party will rely;

iii) Exercised its discretion unreasonably, or patently unreasonably, in requiring disclosure concerning medical conditions unrelated to the handicaps alleged in the complaint, in the absence of any evidence that the complaint had *any* such conditions which might have affected her ability to work. This constitutes, almost by definition, a "fishing expedition" [emphasis in original].

[18] The Divisional Court (Hartt, Carnwath and Matlow JJ.) dismissed the application. Carnwath J. gave the following reasons for the court orally at the conclusion of the hearing:

> We all agree the application fails. We find it would be unreasonable to interfere with the interim decision of the Board, a decision devoid of exceptional or extraordinary circumstances. The hearing before the Board should not be fragmented and should be permitted to run its course. The section 17 issue should receive a full hearing by the Board. Any aggrieved party may appeal, based on a full evidentiary record. Moreover, records are arguably relevant to the determination of a remedy and quantum of damages.
>
> We find the Board's decision was a reasonable exercise of its discretion at this preliminary stage. In carrying out the balancing of the fourth part of the test in *A.M. v. Ryan*, [1997] 1 S.C.R. 157, we find the Board's exercise of discretion to be reasonable, particularly in the light of the acknowledgment of counsel that the usual undertaking of Mr. Hines to maintain confidentiality is in effect.

> The panel, in the exercise of its discretion, awards party-and-party costs of $3,500.00, inclusive of fees and disbursements, plus G.S.T. to Dofasco Inc. The costs are awarded solely against the Commission.

Legislative Provisions

[19] Before setting forth the issues argued before this court and my reasons relating to them, I set forth the relevant legislative provisions in the *Human Rights Code*, R.S.O. 1990, c. H. 19, as amended, the Rules of Practice made by the Board of Inquiry, and the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, as amended.

Human Rights Code

> 5. – (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or handicap.
>
> ....
>
> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.
>
> ....
>
> 17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.
>
> (2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
>
> ....

35.(1) There shall be a board of inquiry for the purposes of this Act composed of such members as are appointed by the Lieutenant Governor in Council.

....

(5) The board of inquiry may make rules regulating its practice and procedure and generally for the conduct and management of its affairs and such rules are not regulations within the meaning of the *Regulations Act.*

....

39. (1) The board of inquiry shall hold a hearing,

(a) to determine whether a right of the complainant under this Act has been infringed;

(b) to determine who infringed the right; and

(c) to decide upon an appropriate order under section 41,

and the hearing shall be commenced within thirty days after the date on which the subject-matter of the complaint was referred to the board.

(2) The parties to a proceeding before the board of inquiry are,

(a) the Commission, which shall have the carriage of the complaint;

(b) the complainant;

(c) any person who the Commission alleges has infringed the right;

(d) any person appearing to the board of inquiry to have infringed the right;

....

(4) Where the board exercises its power under clause 12 (1) (b) of the *Statutory Powers Procedure Act* to issue a summons requiring the production in evidence of

documents or things, it may, upon the production of documents or things before it, adjourn the proceedings to permit the parties to examine the documents or things.

Rules of Practice – Ontario Board of Inquiry – Effective November 1, 1996

1. These Rules apply to all proceedings of the Board of Inquiry….

MUTUAL DISCLOSURE

40. The Human Rights Commission, shall provide full disclosure of the results of its investigation including, but not limited to, witness statements, documents, and evidence relating to the complaint, to all parties and to any other person the panel directs, at least ten (10) days prior to the first scheduled mediation date or thirty (30) days before the case management-prehearing if no mediation is scheduled.

41. All other parties except the Human Rights Commission, shall deliver to all parties full disclosure of the information and evidence including, but not limited to, witness statements and documents it will rely on to support its case at least ten (10) days prior to the first scheduled case management-prehearing.

42. At any time in a proceeding, a panel may order any party to deliver to any other party further particulars, physical or documentary evidence, expert(s)' reports, lists of witnesses and witness statements for the purposes of the hearing, and anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding.

43. If a party fails to disclose in accordance with these Rules or an order of the panel, the party may not refer to or enter the document or physical evidence at the hearing without an order or a ruling of the panel which may be on such conditions as the panel considers appropriate.

Statutory Powers Procedure Act

2. This Act, and any rule made by a tribunal under section 25.1 shall be liberally construed to secure the just,

most expeditious and cost-effective determination of every proceeding on its merits.

. . . .

5.4(1) If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

(a) the exchange of documents;

(b) the oral or written examination of a party;

(c) the exchange of witness statements and reports of expert witnesses;

(d) the provision of particulars;

(e) any other form of disclosure.

(1.1) The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding.

(2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information.

. . . .

8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

. . . .

12(1) A tribunal may require any person, including a party, by summons,

. . . .

(b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal,

relevant to the subject-matter of the proceeding and admissible at an oral or electronic hearing.

....

25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,

(a) make orders with respect to the procedures and practices that apply in any particular proceeding; and

(b) establish rules under section 25.1.

25.1(1) A tribunal may make rules governing the practice and procedure before it.

(2) The rules may be of general or particular application.

(3) The rules shall be consistent with this Act and with the other Acts to which they relate.

(4) The tribunal shall make the rules available to the public in English and in French.

(5) Rules adopted under this section are not regulations as defined in the *Regulations Act*.

(6) The power conferred by this section is in addition to any power to adopt rules that the tribunal may have under another Act.

32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply despite anything in this Act, the provisions of this Act prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.

The Issues Raised by the Commission

[20] The basic issues raised by the commission are that the Divisional Court erred in applying the review standard of reasonableness rather than correctness and that the board committed jurisdictional error in ordering extensive disclosure and productions of records that (a) were in the hands of non-parties to the proceeding and (b) were privileged. The commission also argued that the Board erred in ordering disclosure of documents that were not arguably relevant to the proceeding and documents other than those on which the disclosing party intended to rely.

What the Board and the Divisional Court Decided

The Board's Order

[21] Before the issues raised by the commission can be properly addressed, it is essential to have an accurate understanding of the meaning and scope of the board's order. No doubt, and I say this with respect to the board, its order could be expressed more clearly than it is. Following the hearing of this appeal, we sought further submissions in writing from counsel for each party on particular questions relating to the meaning of the order. On the basis of all the submissions made, I now express my opinion on what the board did order in so far as it relates to the issues in this proceeding.

[22] I think that paragraph 5 in the order, which relates to the provision of an affidavit of documents, is the key paragraph in the order. It refers to the "documents obtained from the above sources." I take this to refer to the documents ("files") referred to in paragraphs 1 and 3 of the order. I do not interpret it as referring to paragraph 2, which does not refer to either files or documents, or to paragraph 4, which relates to the complainant's income tax returns and provides that they be produced to Mr. Hines, counsel for Dofasco. No argument was directed to paragraph 4 and I do not regard it is being a contentious matter in this proceeding.

[23] The difficulty in interpreting paragraph 5 is that, literally, it provides that both the affidavit of documents and copies of the productions are to be provided to Mr. Hines by a certain date. In my view, the only sensible meaning of the paragraph is that the complainant is obliged to produce only those documents for which no claim of privilege (provided for in an affidavit of documents) or for which no claim to withhold production on the ground of non-arguable relevance is asserted in the affidavit. I say this because there would be no point in requiring the use of the affidavit of documents if all of the documents listed in it, including those, on proper grounds, sought to be withheld, had to be produced to the opposite party at the outset of the process. The purpose of the affidavit, as in ordinary civil litigation, is to provide a framework within which the board may subsequently determine whether claims of privilege and irrelevance should be upheld. I shall expand on this point further later in these reasons.

[24] It may be noted that this interpretation is consistent with the second sentence in paragraph 5: "The affidavit shall also include a section listing those documents *not provided to Dofasco* for reason of not being arguably relevant" (emphasis added).

[25] The commission and the complainant argue against this interpretation largely on the basis that the board had earlier said in its reasons: “I find that ailments other than those listed above are arguably relevant to Dofasco’s section 17 accommodation defence and the quantum of damages.” In the context of the reasons and order as a whole, I do not read this as expressing a final decision on the producability of every document. I read it as being subject to the affidavit of documents procedure contemplated by paragraph 5.

[26] Further, it may be noted that earlier in its reasons the board stated its basis conclusion in these words: “The motion is granted in part”. This meant that the moving party, Dofasco, was not successful in obtaining immediate production of the documents it sought or, at least, all of them.

[27] I would also note that my interpretation of paragraph 5 of the board’s order is in accord with the meaning contended for by counsel for the board itself. Because the correct interpretation of the order relates to the question of whether the board acted within or exceeded its jurisdiction, I think that it was appropriate for the board to make a submission on the subject (Brown and Evans, *Judicial Review of Administrative Action in Canada* (1998-) at pp. 4-49 to 4-54).

The Divisional Court’s Reasons

[28] It is clear that the Divisional Court did not read the board’s order as I have. The court assumed that the complainant was required to produce all of the documents sought by Dofasco. For the purpose of analyzing the court’s reasons, I shall accept its interpretation. The first paragraph in its reasons indicates that the commission’s application was premature and that the issues respecting the production of documents should await determination until after the board had heard the complaint on its substantive merits. The court said that the “records are arguably relevant to the determination of a remedy and quantum of damages” and, further, that an aggrieved party could appeal “based on a full evidentiary record”. With respect, all of this overlooks the fact that the right of the complainant to protection from production of documents that are privileged or not arguably relevant would be irreparably infringed the moment the documents were handed over to Dofasco, whether or not they were used against the complainant at the hearing.

[29] I move on to the next paragraph in the Divisional Court’s reasons. I do not think that it can rightly be said that the board carried out “the balancing of the fourth part of the test in *A.M. v. Ryan*, [1997] 1 S.C.R. 157”. The board made no reference to this decision. The board did say that “my goal is to balance the needs of Dofasco to know and prepare its case and the confidentiality of the Complainant inherent in such disclosure”. That “goal” was to be carried out at the next stage of the proceeding, before the main hearing, after the documents for which privilege and non-relevance was claimed had been identified in the affidavit of documents.

[30] The Divisional Court went on to say that the exercise of the board's discretion was reasonable particularly in light of the "usual undertaking of Mr. Hines to maintain confidentiality [being] in effect."

[31] There is no document in the material setting forth an undertaking and no undertaking is referred to in the order, as would be expected if an undertaking was material to the order made. The board, through its counsel, informed us that "[t]he undertaking referred to by the Divisional Court was not given to the Board. The Board has no knowledge of the specific terms of the undertaking and was not asked to consider or rule on this issue."

[32] Mr. Hines informed us that he gave an undertaking "not to disclose any document (or information contained therein) to my client *or anyone else* (including, for example, potential expert witnesses) without the permission of the Board of Inquiry. It was expressly acknowledged that such permission for further disclosure could only be obtained after argument involving the commission and Mrs. Jeffrey". (Emphasis in original.)

[33] Mr. Hines said that he could not explain why the Divisional Court referred to it as "the usual undertaking". He agreed with counsel for the commission that the undertaking was "unusual."

[34] The commission informed us that, during the hearing of the motion, Mr. Hines offered an undertaking not to disclose the documents ordered produced to him to his client Dofasco but that the undertaking did not form part of the board's order on production.

[35] I, of course, have no hesitation in accepting Mr. Hines' statement that, in the course of argument he offered the undertaking he described. It appears, however, that it had no effect on the board's decision. In the circumstances, I have no doubt that the undertaking should not be taken into account in determining the meaning and legal effect of the board's order.

[36] I might add that the foregoing discussion shows that, if it is intended that an undertaking be material to the making of an order, the undertaking should be in writing and, also, referred to in the order.

The Board's General Powers relating to Disclosure

[37] Before addressing the specific jurisdictional issues raised by the commission, I shall deal with matters of a more general nature relating to the board's powers respecting disclosure.

[38] As far as history is concerned, it was the generally held view that administrative tribunals did not have an inherent power to order pre-hearing

disclosure of documents (see Mullan, *Administrative Law* (2001) at p. 242) but this could be subject to a tribunal's duty, in some cases, to order pre-hearing disclosure as part of its duty to give effect to principles of natural justice or procedural fairness: *Ontario* (*Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital*) (1993), 115 D.L.R. (4th) 279 (Ont. Div. Ct.)); *Howe v. Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.), Laskin J.A. in dissent.

[39] When the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, as amended, was first enacted in 1971, S.O. 1971, c. 47, it conferred the right on a person whose "good character, propriety of conduct or competence was an issue" in a proceeding "to be furnished *prior to the proceeding* with reasonable information of any allegations with respect thereto" (emphasis added). This was the only right to pre-hearing disclosure conferred by the Act until 1994 and the enactment of s. 5.4 by S.O. 1994, c. 27, s. 56(12). This amendment was preceded by a proposal by the Society of Ontario Adjudicators and Regulators to amend the *Statutory Powers Procedure Act*, in several respects. The proposal respecting disclosure read as follows:

> A tribunal may require disclosure at any stage of the proceedings, including
>
> (a) the disclosure and exchange of documents;
>
> (b) the examination of a party or witness;
>
> (c) an examination by written questions;
>
> (d) the inspection of property;
>
> (e) the filing of witness statements;
>
> (f) the provision of particulars.

See Appendix III of *Administrative Law – Issues and Practice*, Anisman and Reid ed., (1995) at page 266.

[40] The Society's brief explanation for the proposal was that it was "for greater certainty and to expedite proceedings". Before the amendment it may not have been that clear that tribunals could provide for pre-hearing disclosure, at least to the extent of having the power to order such disclosure. In any event, it can be seen from s. 5.4(1) that the Legislature did not enact a general provision conferring powers relating to disclosure on all tribunals. It restricted the power to only those tribunals that had made rules dealing with disclosure under s. 25.1.

[41] Having regard to the foregoing, if a tribunal was of the view that power relating to pre-hearing disclosure was not relevant to or appropriate for its proceedings, it would not make rules dealing with disclosure. Obviously, the Board of Inquiry provided for in the *Ontario Human Rights Code* thought that power to make orders relating to pre-hearing disclosure was important to its processes because it made Rules of Practice which included rules dealing with disclosure (Rules 40-44) which came into effect on November 1, 1996. It appears that these rules were made under both s. 25.1 of the *Statutory Powers Procedure Act* and s. 35(5) of the *Human Rights Code*. It may be noted that each of these statutory enabling provisions was enacted by the same statute, S.O. 1994, c. 27: s. 56(38) for the *Statutory Powers Procedure Act* and s. 65(10) for the *Human Rights Code*.

[42] I shall now consider some of the terms in the disclosure scheme. The first observation relates to the meaning of the key word "disclosure" in s. 5.4 of the *Statutory Powers Procedure Act* and in the board's rules. As the context of s. 5.4 and the rules make clear, the word clearly extends to the obligation of a party to furnish to the other party documents in its possession for the other party's inspection. I mention this because in the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, as amended, "disclosure" means something less: the disclosure in a party's affidavit of documents of the existence of documents and does not extend to making the documents available to the other side for inspection. This latter step is called production. Disclosure and production in the *Rules of Civil Procedure* together comprise the total process of documentary discovery. See, in particular, rules 30.01 to 30.05.

[43] The foregoing analysis does not mean that under s. 5.4 and the board's rules the board cannot make orders which are part of, or a step in, the complete disclosure process as long as their purpose is to lead to the proper production of documents, e.g. an order directing the preparation and delivery of an affidavit of documents. This power would be included in the board's general power relating to disclosure. This observation is relevant to the board's order in this case, which provided for an affidavit of documents as a prelude to ruling subsequently on what documents should be produced.

[44] My second observation relates to the first. It can be seen at a glance that the disclosure provisions relating to the board are substantially fewer and much less detailed that those provided for in the *Rules of Civil Procedure*. It appears to me that what is expected with respect to the board's powers is that, in many proceedings before the board, the powers would not have to be exercised because parties would voluntarily exchange all relevant documents. In other proceedings the board might be required to make any one or more of a wide range of particular orders provided that they are directed toward the ultimate proper production of documents to the party seeking production.

The Jurisdiction of the Board to Make the Orders Challenged in this Proceeding

[45] I should mention at this point that, by reason of my interpretation of the board's order, which is different from that of the Divisional Court, it is not necessary to

consider the appropriate standard of review. For the reasons I shall give, whether the standard be reasonableness or correctness, paragraphs 1, 3, and 5 in the order are within the board's authority and paragraph 2 is not. I now address the remaining issues raised by the appellant.

Did the Board Err in not Confining its Order only to Documents on which the Complainant Intended to Rely to Support Her Case?

[46] The commission submits that the board's order should have been confined to only those documents on which the complainant intends to rely to support her case. It relies upon Rule 41 in making the submission. Rule 41, standing alone, appears to support the commission's submission. There is, however, more in the governing legislation than Rule 41. Rule 42, which is backed up by s. 5.4(1) of the *Statutory Powers Procedure Act*, confers on the board the power to order any party to deliver to any other party "further … documentary evidence … for the purposes of the hearing, and anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding". This would clearly include any documents in a party's possession that are relevant to an issue in the proceeding and which may be helpful to the other party.

[47] This interpretation accords with one of the recognized purposes of discovery, which include not only enabling a party to know the case he or she has to meet but, also, to obtain documents "which *may* … enable the party requiring the affidavit [of documents] either to advance his own case or to damage the case of his adversary" (*Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.) at 63; and see Williston and Rolls, *The Law of Civil Procedure* (1970) at pp. 894-898). This, in turn, facilitates more accurate fact-finding at the trial or hearing, if the proceeding has not earlier resulted in a settlement. I refer, generally, to *Cook v. Ip* (1985), 52 O.R. (2d) 289 (C.A.) at 292.

[48] Section 5.4(1) of the *Statutory Powers Procedure Act*, which confers power on the board to "make orders for [a] the exchange of documents", should be read as meaning the exchange of documents to carry out the basic purposes of pre-hearing disclosure and so should not be read as confined to documents on which a party intends to rely.

[49] The commission has referred to Rule 43, which is concerned with the sanction for failing to disclose, as being some indication that a party's disclosure rights are confined to receiving only those documents on which the other party will rely. Clearly, this sanction relates only to the case of non-disclosure of a document on which a party wishes to rely, but this consideration cannot reasonably result in the conclusion that the whole of the disclosure scheme is confined to documents on which the producing party intends to rely.

Did the Board Err in Ordering Non-Parties to Disclose Documents?

[50] The commission submits that the board had no power to order disclosure from the complainant's doctors because they are not parties to the proceeding. It is not necessary to determine whether the disclosure provisions in the board's rules and s. 5.4 of the *Statutory Powers Procedure Act* confer power to order disclosure by non-parties because I think that the order in question is confined to imposing disclosure obligations on a party (the complainant) and not on her doctors, who are not parties. The complainant has a general right of access to her medical records in the form of obtaining copies of them from her doctors: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138. This is consistent with the general position in civil proceedings that a party has control over his or her doctors' records and has the obligation to produce them: Holmested and Watson, *Ontario Civil Procedure* [1984-) at pp. 30-38 to 30-39; and 30-49 to 30-62.

[51] It is generally agreed that if documents under the control of non-parties are important to the fair and accurate resolution of issues it is preferable that they be produced before the hearing to avoid almost inevitable adjournments if they are produced for the first time at the hearing (see s. 39(4) of the *Human Rights Code*) and to enable each side to prepare its case more effectively. In this regard s. 2 of the *Statutory Powers Procedure Act* (which provides that the Act and rules made under it "shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits") may be of assistance in interpreting s. 5.4(1)(e) in a way that would support pre-hearing disclosure from third parties. This point was not argued and I express no final opinion on it.

Did The Board Err in Ordering Production of Documents that are Privileged or are Not Arguably Relevant?

[52] I mention at the outset that Mr. Hines conceded that the board had no power to order the production of privileged documents. This is correct (*Statutory Powers Procedure Act*, s. 5.4(2)) and, in the same vein, I think that the board has no power to order the production of documents that are not arguably relevant. The exercise of such a power would invade a party's privacy rights without any countervailing advantage to the administration of justice. This does not mean that a court should not show deference to a decision by the board that a particular document is arguably relevant but this, of course, is a different issue.

[53] This is an appropriate place to deal in general terms with the question of substantive relevance in this proceeding. In its reasons, the board found that "the ailments other than those listed above [chronic pain disability, fibromyositis, and fibromyalgia] are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages." In my view, the board had a reasonable basis for this finding. There was material before the board that the complainant had satisfied the Canada Pension Plan administrators that she was "incapable of pursuing any substantially gainful occupation."

[54] Dofasco's position, accepted by the board, is that the evidence relating to this disability benefit is relevant to its defence under s. 17(1) of the *Human Rights Code* that

the complainant was "incapable of performing or fulfilling the essential duties or requirements" of work at Dofasco. Further, there was a rational basis for the board's finding that the "motion materials clearly show that production by the complainant has been incomplete."

[55] In dealing with the specific issues of privilege and non-relevance I shall first consider paragraph 5 in the board's order which relates to the provision by the complainant of an affidavit of documents and copies of production. I have, earlier in these reasons, set forth my interpretation of this paragraph. It appears to be concerned with the documents in the possession of the doctors named in paragraph 1 and with the documents referred in paragraph 3, which are in the files of the Workplace Safety and Insurance Board, the Canada Pension Plan, and Dofasco's medical department. I shall then consider paragraph 2 of the order which requires the complainant to furnish to counsel for Dofasco the medical information referred to in it.

[56] I shall not consider paragraph 4, which relates to the production to Mr. Hines of income tax returns and notices of assessment, because, as I have earlier noted, no complaint was made with respect to it.

[57] If paragraph 5 were interpreted to require the complainant to provide to Mr. Hines *all* of the documents referred to in it, without any screening of them by the board to exclude those which are privileged or not arguably relevant, there would, to put it mildly, be a serious problem with respect to the validity of the order. However, as I have determined, the board's order should not be interpreted as providing for such unrestricted production. The requirement of an affidavit of documents, which contains a paragraph in which privilege may be claimed for specified documents (Form 30A, para. 3) and, by virtue of the board's order, a further section in which protection may be claimed for documents which are not arguably relevant, is in my view, within the powers of the board. Further, the requirement of the use of the procedure contemplated by the affidavit ensures that the order does not exceed the powers of the board. This procedure enables Dofasco to challenge the objections to production of identified documents on the basis of privilege and non-relevance, if it sees fit, and enables the board to deal with the challenges on a document by document basis. In carrying out this function the board, if it considers it to be helpful, could examine the document in question. Cf. rule 30.06(d) in the *Rules of Civil Procedure*.

[58] The requirement merely to disclose the existence of a document in an affidavit of documents does not involve a breach of privilege (*MacPhayden v. Employers Liability Assurance Corporation*, [1933] O.W.N. 72 (H. Ct.) and Williston and Rolls, *op. cit*., at p. 897). It is an essential step to enable claims to privilege to be determined in an orderly and fair way.

[59] In short, paragraph 5 in the order and those paragraphs related to it (paragraphs 1 and 3) do not involve an infringement of the complainant's right to privilege or to keep from Dofasco documents which are not arguably relevant. On the contrary, they afford protection for these rights.

[60] I do not think that the same can be said for paragraph 2 in the order. It requires the complainant to furnish to counsel for the Dofasco a document setting forth all medical practitioners not mentioned in paragraph 1 who treated the complaint between March 22, 1990 and the present, their area of expertise or speciality, the dates of the visits, and the ailment or condition treated. It is not known what particular information would be set forth in this document but the requirement to produce it inevitably carries with it the grave risk that, in complying with the order, the complainant would be providing to Dofasco information of a most intimate nature relating to her physical and emotional condition that is completely unrelated to her claims in this proceeding from both Dofasco's and her point of view. In my view, this particular part of the order, which contains no terms or conditions to protect the privacy interests of the complainant, exceeds the board's power under s. 5.4(1) and (2) of the *Statutory Powers Procedure Act* and its own rules.

[61] I appreciate that the board has, and should have, wide latitude in making procedural orders but, it appears to me, in paragraph 2, the board has made no attempt at all to balance the complainant's right to protect privileged or irrelevant information with Dofasco's right to obtain production of relevant material. In this respect, paragraph 2 stands in stark contrast to paragraphs 1, 3, and 5.

[62] What is required to be produced by paragraph 2 may, of course, include information and material which is not privileged and is relevant to Dofasco's defence. If this be the case, the board has sufficient powers under s. 5.4(1) of the *Statutory Powers Procedure A*ct, and its own rules, to make an order which would require the information to be produced after the complainant's claims respecting privilege and non-relevance have been resolved.

An Observation

[63] I appreciate that the foregoing will make discouraging reading for those who value the speed and efficiency of the administrative process as an alternative to the cost, delay, and apparent red tape of the procedure which is generally thought to be part of the process in the ordinary courts. The discovery process in these courts has been subjected to severe criticism as a factor contributing to increased cost and delay (see Report of the Canadian Bar Association *Task Force on Systems of Civil Justice* (1996) at p. 43 and Andrews, *Principles of Civil Procedure* (1994) at para 21-041) and yet, in the present case, we have a serious example of discovery undoubtedly causing substantial delay and expense in the proceedings before an administrative tribunal.

[64] No doubt, the discovery process cannot work effectively, in either civil or administrative proceedings, without substantial cooperation between the parties in voluntarily disclosing the existence of all relevant documents. This has been lacking in the present case but, in saying this, I wish to make it clear that I do not intend to criticize the parties or their counsel. This case arose relatively early in the history of a right to disclosure under the *Statutory Powers Procedures Act* and the Rules of the Board of

Inquiry and it appears to me that the main cause of the difficulties has been growing pains with the new procedure.

Disposition

[65] I would allow the appeal, in part, set aside the order of the Divisional Court, and in its place make an order setting aside paragraph 2 in the board's order but otherwise dismissing the commission's application. In the circumstances, I would not make any costs order with respect to the application, the motion for leave to appeal, or this appeal.

"J.W. Morden J.A."

"I agree R.S. Abella J.A."

"I agree M. Rosenberg J.A."

RELEASED: November 16, 2001

Tab 3: *Brewers Retail Inc. v. United Food and Commercial Workers International Union, Local 326W*, [1998] O.L.A.A No. 185

Case Name:

Brewers Retail Inc. v. United Food and Commercial Workers International Union, Local 326W

IN THE MATTER OF an arbitration
AND IN THE MATTER OF the grievance of Sherry Dionne
Between
Brewers Retail Inc. (hereinafter referred to as "the company"), and
United Brewers Warehousing Workers Provincial board, UFCW - Local 326W (hereinafter referred to as "the union")

[1998] O.L.A.A. No. 185

71 L.A.C. (4th) 28

File No. MPA 9704086

Ontario
Labour Arbitration

A.P. Aggarwal, Arbitrator

Heard: Toronto, Ontario, January 27, 28 and 29, 1998
Award: March 4, 1998

(26 paras.)

Evidence -- Privilege -- Grievor was not obligated to turn over a diary in which she detailed events that caused her to believe she was being discriminated against -- Privilege attached, as the diary was kept in expectation of eventual litigation

The grievor alleged that she had been overlooked for a full-time position and that she had been discriminated against on the basis of her gender. Prior to the interview for the position she had sought, the grievor had contacted the Ontario Human Rights Commission to discuss her concerns. On the Commission's advice, the grievor began to keep a diary in which she detailed the events that caused her to believe that she was being discriminated against. She eventually decided to proceed with a grievance instead of a human rights complaint, and gave the diary to her lawyer. The employer demanded that the grievor's diary be produced, claiming that it was relevant to the merits of the griev-

ance and that it was required if the employer was to make a full defence to the allegations. The union refused to produce the diary, claiming litigation privilege.

HELD: Production denied. The grievor had only begun to keep the diary on the advice of the Human Rights Commission. There was no reason for the diary other than to be used eventually in litigation. Litigation included administrative tribunals and arbitration as well as court proceedings. Privilege attached to the diary and it could not be produced.

Statutes, Regulations and Rules Cited:

Human Rights Code, R.S.O. 1990, c. H.19,

Appearances:

Keith Billings and Kirsten Ramage, counsel,
W. Fin-Melville, Manager, Employee Relations, and Greg George, Operations Manager, for the company.
Sheri D. Price, counsel, John Montgomery, President, UBWW Provincial Board, Dave Marleau, Secretary, UBWW Provincial Board, Steve Booth, President, Local 326W, UBWW, Mille Keating, Secretary-Treasurer, Local 326W, UBWW, Chris Feker, President, Barrie Division of UBWW, Mia Tulluch, steward, and Sherry Dionne, grievor, for the union.

INTERIM AWARD

RULING ON PRODUCTION OF GRIEVOR'S DIARY

1 This arbitration concerns a grievance filed by an employee, Sherry Dionne ("the grievor"), alleging that the Company violated the Collective Agreement by failing to select her for a full-time position. Counsel for the Union in her opening statement alleged that the Company acted in bad faith and discriminated against the grievor and other female employees on the basis of their gender. The Company had predetermined that the position in question would be awarded to a male person even though the grievor had more seniority, ability and skill to perform the job.

2 The grievor testified that she felt that she had been discriminated against throughout her employment because of her gender, and prior to her interview for the position in question, she had telephoned the Ontario Human Rights Commission ("the OHRC"), and on the advice of the Commission she started to keep a diary.

3 The Company demanded production of the grievor's diary, and the Union has opposed the request claiming that the diary is a privileged document. The parties made their submissions and requested that I issue a written award in this regard.

THE ARGUMENTS OF THE UNION

4 In support of its position that it is entitle to claim privilege from disclosure of the grievor's diary, the Union argued that the diary is protected by litigation privilege and by confidentiality:

* The grievor began to keep a diary after being advised to do so by the Ontario Human Rights Commission in anticipation of litigation. She was contemplating litigation through which she would seek redress against sex discrimination at work.

* The grievor ultimately made a complaint to the Ontario Human Rights Commission.

* The diary was subsequently given to her counsel in preparation of this arbitration hearing.

* The grievor's diary contains her private thoughts and impressions about the sex discrimination in the workplace.

* It would be extremely invasive to allow the employer to get into the grievor's head and learn her thoughts.

* The purpose of litigation privilege is to encourage the parties to conduct thorough investigation and preparation for their case.

* Forcing disclosure of the diary would cause a "chilling effect" of discouraging women who are discriminated against in the workplace from documenting the discrimination and their personal feelings about it.

* The purpose for which the grievor kept the diary was to keep an accurate account of events to assist her in bringing forward a sex discrimination complaint.

* The purpose of preparing a diary was to instruct the counsel.

* Apart from litigation privilege, a document can be protected for confidentiality.

5 In response to the Company's arguments, the Union further submitted that:

* Privileges can be attached to certain documents even if they were not made in contemplation of litigation, such as a doctor's patient's records.

* All the criteria of Wigmore's Rule have been met.

* An order to the grievor to disclose her diary would be an invasion of privacy. The arbitral jurisprudence recognizes the privacy of employees.

* The grievor kept her diary confidential until she gave it to her counsel in this litigation.

* Finally, the Company has not established the relevancy of the diary.

6 In support of its position, the Union made reference to Sopinka and Lederman's The Law of Evidence In Canada at p. 653-658; Gorsky: Evidence & Procedure in Canadian Labour Arbitration at p. 11-88. The Union also cited several cases including:

1. Regina v. Westmoreland, (1984), 48 O.R. (2d) 377 (H.C.J.)
2. Vernon v. Board of Education for the Borough of North York, (1975), 9 O.R. (2d) 613 (H.C.J.)
3. Re: Cuddy Food Products & UFCW, Local 175, (1997), 63 L.A.C. (4th) 365 (Snow)

POST HEARING

4. Ciba-Geigy Canada Ltd. v. Canada (Patented Medicine Review Board) [1994] F.C.J. No. 884 (F.C.A.)
5. Howe v. Institute of Chartered Accountants (1994), 19 O.R. (3d) 483 (Ont. C.A.).

THE ARGUMENTS OF THE COMPANY

7 In support of its contention that the grievor's diary be disclosed, the Company argued that the diary is a relevant document which is not protected by privilege. It stated:

* The diary is relevant, it goes to the grievor's credibility.

* It is not a fishing expedition. There is a very close nexus between the information requested.

* The disclosure of the diary would not cause undue hardship.

* Litigation privilege applies to documents for the conduct litigation - such as solicitor's ideas, plans, records which were made while preparing for the actual purpose of litigation.

* The grievor's diary was not made for the Ontario Human Rights Commission. Neither was it for Ms. Price's instruction or purposes. Thus it does not fall under the exemption.

* This diary has nothing to do with the grievance in question. Rather, it was made on the advice of the Ontario Human Rights Commission. It was not made for existing or contemplated litigation. There is no evidence that the dominant purpose of the document was litigation.

* There is no evidence of injury if the diary is allowed. All the four conditions of Wigmore must be met. In this case, none of the conditions are met. The case before us does not meet the criteria of privilege document.

* Whether it would have a chilling effect on women is not a reasonable consideration.

* It is absolutely essential that privileged communication originate with the intent of confidential.

* The Union has failed to establish that it is entitled to litigation privilege.

* Finally, the Company is entitled to the production of the diary as it has met the criteria.

8 In support of its position, the Company has referred to a series of cases including:

1. Great Atlantic & Pacific Co. of Canada & UFCW Local 175 & 663, (1995), 47 L.A.C. (4th) 59 (Samuels)
2. Liffey Custom Coating Inc. & London & District Service Workers Union, Local 220, (1996), 59 L.A.C. (4th) 7 (Williamson)
3. Ontario Ministry of Correctional Services & OPSEU, (1994), 39 L.A.C. (4th) 205 (Kirkwood)
4. Ontario Human Rights Commission v. Ontario Board of Inquiry ("House") (1993), 67 O.A.C. 72; 20 C.H.R.R. D/498 (Ont. Div. Ct)
5. West Park Hospital & ONA, (1993), 37 L.A.C. (4th) 160 (Knopf).

THE DETERMINATION

9 I have carefully considered the submissions of the parties and the materials placed before me. The facts in this case indicate that the grievor created the diary in question upon the advice of the OHRC. The grievor did not file a formal complaint with the OHRC initially because she was afraid that it would ruin her chances for a full-time position, but she began to keep a diary as advised by the OHRC. The grievor subsequently filed a formal complaint with the OHRC (Exhibit #12), however, the diary was never disclosed to the OHRC, and the complaint was not pursued by the Commission on the grounds that the arbitration process may be more viable. Counsel for the grievor stated that only she had used the diary for preparation of this case.

10 The basic governing principle for production of documents is that in search of the truth all documents which are arguably relevant should be made available unless they are excluded on the basis of specific privilege. The purpose and scope of "litigation privilege" has been discussed by Professor Gorsky in Evidence & Procedure in Canadian Labour Arbitration as follows:

(g) Litigation Privilege

Although most frequently invoked by lawyers, this privilege should not be confused with solicitor-client privilege. It has an entirely separate rationale and thus its own distinctive requirements. This privilege attaches to documents that have been prepared for the conduct of litigation. This "work product" privilege encompasses material such as reports, notes of interviews with potential witnesses and other material produced in preparing the case. The rationale is two-fold. First, the thorough preparation of cases might be discouraged if any resulting un-

> favourable material had to be disclosed for use by the other side. Rather than leaving no stone unturned, counsel might be reluctant to lift some rocks because of the potentially damaging evidence that might emerge. Second, it is unfair to allow one side to take advantage of the other side's work.
>
> Although this common law privilege does not bind an arbitrator, the rationale underlying a court's exclusion is compelling and applies equally in arbitrations. As well, THE PRIVILEGE IS NOT LIMITED TO A LAWYER'S WORK. IT APPLIES TO MATERIAL PREPARED BY NON-LAWYERS IN ANTICIPATION OF LITIGATION. THE KEY IN ALL CASES IS THAT THAT MATERIAL WAS PREPARED FOR THE PURPOSE OF ACTUAL OR CONTEMPLATED LITIGATION. HOWEVER, WHERE A DUAL PURPOSE UNDERLIES THE CREATION OF THE MATERIAL, IT WILL BE SUFFICIENT IF PREPARATION FOR LITIGATION WAS THE "DOMINANT PURPOSE".
>
> [Emphasis added]

11 In Re: Cuddy Food Products & UFCW, Local 175, supra, the arbitrator while dealing with the question of litigation privilege reviewed the jurisprudence in this regard at 381 as follows:

> Litigation privilege is sometimes referred to as a work product privilege. Litigation privilege attaches to documents that have been prepared for the conduct of litigation. It can include reports, notes of interviews with potential witnesses and other material prepared to assist in the conduct of the case. The rationale generally given for this privilege is that the preparation of cases might be discouraged if unfavourable material had to be disclosed for use by the other side. Thus, rather than preparing thoroughly, lawyers might be reluctant to pursue some avenues of inquiry for fear that they would turn up damaging evidence which they would then have to provide to the other side. Secondly, it is thought to be unfair to allow one party to take advantage of the work done by the other side in preparation for the hearing.
>
> Litigation privilege is not limited to material prepared by a lawyer. It can apply to documents prepared by other persons in anticipation of litigation. As such, it is clear that it could apply to documents prepared by Stewards or by Union Representatives.
>
> There are two key elements of litigation privilege. First, the material has to have been prepared at a time when either (a) litigation was pending, or (b) if litigation was not yet pending, litigation was reasonably contemplated. Secondly, the material has to have been prepared for purposes of that litigation. If material has been prepared for multiple purposes, it is sufficient for purposes of litigation privilege if the "dominant purpose" was preparation for litigation.

12 In Vernon v. Board of Education for the Borough of New York, supra, the Ontario High Court stated in no uncertain terms at p. 66 that: "It is not necessary that litigation should actually be underway or in preparation at the time that the report is made for the purpose of claiming privilege.

The test is whether legal proceedings were pending, threatened or anticipated." The court concluded:

> If the reports were prepared in anticipation of litigation and at such time there was a definite prospect thereof then privilege attaches.
>
> In Regina v. Westmoreland, supra, the court concluded at 379:
>
> In the present case the facts indicate that prior to obtaining any statements the insurance company had probably cause to believe that litigation was contemplated from this accident, EVEN THOUGH NO SOLICITOR WAS CONSULTED UNTIL LONG AFTER. The statements and other items in the file are privileged, not on a solicitor-and-client basis, but on the right afforded to a party to gather information in contemplation of probable litigation.
>
> [Emphasis added]

13 In Liffey Custom Coating Inc. v. London and District Service Workers' Union, Local 220, supra, the Company, after receipt of the grievances from the Union, instructed its lawyers to conduct an investigation into allegations of sexual harassment at the workplace. At the arbitration hearing, the Union requested production of interview notes, the investigation reports, and any other material relating to this matter. The Company refused to produce those documents claiming litigation privilege, as both the interview notes and the investigation reports were put together in preparation for litigation which had already commenced with the filing of the grievances.

14 The Union, in that case, argued that the documents requested were not prepared for the dominant purpose of litigation as there was a duty on the employer to investigate the grievances.

15 The arbitrator held that the interview notes were not protected by litigation privilege because the dominant purpose of the interviews was not litigation. However, the arbitrator held that the investigation report which draws upon the interview notes and other material, was protected by litigation privilege because the dominant purpose of the investigation report was litigation. Accordingly, the employer was not required to produce the investigation report. The arbitrator stated at p. 13:

> Given the nature of the issues raised in the grievances, there is a duty on the employer to investigate the matters alleged and to make appropriate enquiries. The conclusion, which must be reached is that the interview served more than one purpose. Furthermore, it cannot be concluded in my view, that preparation for litigation was the dominant purpose of the interviews. As such, the interview notes made by Ms. Johnson are not subject to litigation privilege and are to be produced to counsel for the union.
>
> ***
>
> The investigation report is deemed to fall inside the litigation privilege as it is considered it was prepared by employer counsel for the dominant purpose of litigation. It is therefore not required to be produced to the Union. For all the foregoing reasons, the interim production order is that the interview notes in the in-

> stant case are not subject to litigation privilege, while the investigation report which draws upon the interview notes and other materials is covered by litigation privilege.

In a nutshell, the arbitrator held that only documents created for the dominant purpose of litigation (or in contemplation of litigation) are privileged. Further, where a party is otherwise obliged to create certain documents as part of their business routine or as required by law, those documents are not regarded as having been created for the dominant purpose of litigation and thus would not be protected under litigation privilege.

16 Similarly in Ontario Ministry of Correctional Services & OPSEU, supra, it was held that the dominant purpose of the investigation reports in question were not in anticipation of litigation, but were to assess the basis of allegations made by the employee. No litigation was contemplated at that time, rather, it was "in the ordinary course of business" of the employer and therefore no privilege attached.

17 I have also reviewed West Park Hospital & ONA supra, and Great Atlantic & Pacific Co. & UFCW, Local 175 and 633, supra, however, I did not find that these two cases shed any additional light on the case before us.

18 In Ontario Human Rights Commission v. House, supra, the OHRC had applied for judicial review of the decision of the Board of Inquiry ordering production of witnesses' statements and other documents related to the investigation of complaints by registered nurses alleging discrimination in employment. The Commission argued that the documents in question were privileged as they were obtained for litigation purposes. In rejecting the litigation privilege, the Board of Inquiry separated the investigative stage from the conciliation and prosecution stages.

19 The Ontario Divisional Court dismissed the Commission's application and upheld the Board of Inquiry's order for production of documents. In doing so, the Divisional Court relied heavily on Justice Sopinka's decision in R. v. Stinchcombe, [1991] 3 S.C.R. 326, and analogized the proceedings before the Board of Inquiry to criminal proceedings; and the role of the OHRC to that of the Crown prosecutor in criminal cases. The Court stated:

> R. v. Stinchcombe also recognized that the "fruits of the investigation" in the possession of the Crown "are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice be done" (p.331). We are of the opinion that this point applies with equal force to the proceedings before a Board of Inquiry and that the fruits of the investigations are not the property of the Commission.
>
> We are also of the opinion, while not necessary to our decision, that the role of Commission counsel is analogous to that of the Crown in criminal proceedings.
>
> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to bring before a jury, what the Crown considers to be credible evidence relevant to what is alleged to be a crime.
>
> And at 341:

> The tradition of Crown Counsel in this country is carrying out their role as "Minister of Justice" and not as adversaries has generally been very high.

20 The rationale of the Divisional Court decision in House was distinguished by the Federal Court of Appeal in Ciba-Geigy Canada Ltd. v. Canada (Patented Medicine Prices Review) Board, [1994] F.C.J. No. 884, which quoted with approval from the decision of the Motion Judge McKeown:

> There is no point in the legislature creating a regulatory tribunal if the tribunal is treated as a Criminal Court ...
>
> To require the Board to disclose all possibly relevant information gathered while fulfilling its regulatory obligations would unduly impede its work from an administrative viewpoint. Fairness is always a matter of balancing diverse interests. I find that fairness does not require the disclosure of the fruits of the investigation in this matter.

The Court concluded:

> The only real issue between the parties is as to the effect to be given in this non-criminal case to the powerful reasons for decision of Sopinka J. in R. v. Stinchcombe, [1991] 3 S.C.R. 326 that in a criminal case the Crown has a legal duty to make total disclosure to the defence. Stinchcombe was applied by a Divisional Court in Ontario to the requirements of natural justice under an Ontario Human Rights Code Board of Inquiry in Ontario Human Rights Commission v. House, decided 8 November 1993 (No. 520/93). The Court in House analogized the proceedings in question to criminal proceedings and the role of Commission counsel to that of the Crown in criminal proceedings ...
>
> THIS IS WHERE ANY CRIMINAL ANALOGY TO THE PROCEEDINGS IN THE CASE AT BAR BREAKS DOWN. There are admittedly extremely serious economic consequences for an unsuccessful patentee at a s. 83 hearing, and a possible effect on a corporation's reputation in the market place. But at McKeown J. found, the administrative tribunal here has economic regulatory functions and has no power to affect human rights in a way akin to criminal proceedings.
>
> [Emphasis added]

See Howe v. Institute of Chartered Accountants, (1994), 19 O.R. (3d) 483, where the Ontario Court of Appeal considered, but also did not follow, the Divisional Court decision in House. Further, it may be noted that in a forceful dissent, Laskin J.A. discussed the application of R. v. Stinchcombe and stated:

> STINCHCOMBE CONCERNED THE DISCLOSURE OBLIGATIONS OF THE CROWN IN INDICTABLE OFFENCES, NOT THE DISCLOSURE OBLIGATIONS OF ADMINISTRATIVE SOPINKA J. INDICATED THAT MANY OF THE FACTORS THAT HE CANVASSED MAY NOT APPLY AT ALL, OR APPLY WITH LESS FORCE EVEN TO OTHER KINDS OF

> CRIMINAL OFFENCES. IN THIS SENSE, THE CHAIR OF THE DISCIPLINE COMMITTEE WAS LITERALLY CORRECT IN STATING, THAT STINCHCOMBE DOES NOT APPLY TO PROFESSIONAL REGULATORY PROCEEDINGS. But several of the observations made by Sopinka J. in that case seem apt to determine the content of the fairness obligations of administrative tribunals.
>
> [Emphasis added]

21 In my opinion, arbitration proceedings cannot be said to be analogous to criminal proceedings by any stretch of the imagination, rather arbitration is an adversarial process. Thus, the rationale of the House case is not applicable to the case in hand.

WAS THE DIARY KEPT IN ANTICIPATION OF LITIGATION?

22 The grievor approached the OHRC because she felt that she had been discriminated against, but she did not file a complaint with the OHRC at that time as she was afraid of losing her chances for a full-time position. She was then advised by the Commission to keep a record and she began to keep a diary. Thus, it is evident that litigation was reasonably contemplated.

23 The Courts recognize that documents which are privileged are exempt from the general rules of procedure. Documents which are created in anticipation of litigation are privileged and are not required to be produced.

24 In Vernon, "anticipation of litigation" was characterized as not requiring that litigation be underway at the time that a report was created, only that legal proceedings were pending, threatened or anticipated.

25 Materials created in anticipation of litigation are protected from disclosure under the litigation privilege doctrine. Litigation privilege protects notes, investigative reports and other materials prepared to assist with litigation. As held in Cuddy, litigation privilege is not limited to materials prepared by lawyers and can include materials prepared by clients. In Cuddy, although the Steward, Ms. Brown, did not explicitly state that she was preparing notes to further the grievance, the arbitrator, however, found that Ms. Brown's notes were prepared principally for the purpose of advancing the grievance which might be filed and that the notes were thus covered by litigation privilege. In the case before us there appears to be no other reason for the maintenance of a diary by the grievor upon the advice of the OHRC except for use in anticipated litigation. Further, litigation is not confined only to court proceedings but encompasses administrative tribunals and arbitration as well.

CONCLUSION

26 Having regard to the submissions of the parties, and having reviewed the materials put before me, and for the foregoing reasons I think it is clear that at the time when the grievor began to keep her diary, she was justified in coming to the conclusion that litigation in respect of discrimination against her could well be anticipated. Therefore, it is my opinion that the grievor is entitled to claim privilege in respect thereof and is not required to produce the same upon discovery.

qp/s/qlsdm/qlhcs

Tab 4: *Canada (Director of Investigation and Research, Competition Act) v. NutraSweet Co.*, [1989] C.C.T.D. No. 54

Indexed as:

Canada (Director of Investigation and Research, Competition Act) v. NutraSweet Co.

Order Regarding Questions on Discovery
IN THE MATTER OF an application by the Director of Investigation and Research under sections 79 and 77 of the Competition Act, R.S.C., 1985, c. C-34, as amended;
AND IN THE MATTER OF The NutraSweet Company
Between
The Director of Investigation and Research, Applicant, and
The NutraSweet Company, Respondent, and
Tosoh Canada Ltd., Intervenor

[1989] C.C.T.D. No. 54

Trib. Dec. No. CT8902/79

Canada Competition Tribunal
Ottawa, Ontario

Before: Reed J., Presiding Member
F. Roseman, Lay Member

Heard: November 9, 1989
Decision: November 29, 1989

(34 pp.)

Counsel for the Applicant:

Director of Investigation and Research

Warren Grover, Q.C.

Counsel for the Respondent:

The NutraSweet Company

Bruce C. McDonald
James B. Musgrove

. . . . . .

Order Regarding Questions on Discovery

The respondent, The NutraSweet Company ("NutraSweet"), brings an application to require the representative of the Director of Investigation and Research ("Director"), who is being examined on discovery, to produce certain documents and to answer certain questions. The applicant, the Director, brings an application to require the respondent, NutraSweet, to produce more detailed information regarding its costs, price trends for its product outside of Canada ad its interpretation of contract terms.

The main action to which these motions relate is an application pursuant to sections 77 and 79 (formerly sections 49 and 51) of the Competition Act, R.S.C., 1985, c. C-34. That application seeks an order prohibiting the respondent from engaging in certain allegedly restrictive trade practices (abuse of dominant position, exclusive dealing, tied selling).

Respondent's Motion

The information which NutraSweet seeks from the Director has been divided into ten roughly drawn categories, They are as follows:

(1) the written complaint which was filed with the Director which led to the initiation of the Director's investigation;
(2) the memoranda which record interviews with 21 to 23 customers, distributors and competitors and one other person, conducted by the Director in the course of his investigation into the complaint or, failing this, the names of the persons interviewed;
(3) copies of contracts (contractual type documents) which NutraSweet entered into and upon which the Director intends to rely to make his case, other than those which NutraSweet has already produced pursuant to its obligation to produce all relevant documents of which it has knowledge;
(4) the factual basis of the Director's allegations in paragraphs 5(g) and 61 of the application, i.e., what does the Director mean when he refers to "acquisition cost" and what does he mean when he refers to "long run average cost";
(5) the identity of specific customers, competitors or others, specific advantages, specific contracts or other documents which form the basis of the Director's allegations that NutraSweet engaged in pricing practices that:

    (i) prevented other manufacturers from entering the market,
    (ii) NutraSweet priced below cost,
    (iii) NutraSweet engaged in differential pricing, and
    (iv) NutraSweet used the bargaining strength of its Canadian patent to negotiate advantageous contracts;

(6) facts on which the Director relies for his conclusion that NutraSweet engaged in differential pricing, facts on which the Director relies for his conclusion that NutraSweet coerced customers into placing its brand on the customer's product as a condition of ob-

taining supply, facts on which the Director relies for his conclusion that NutraSweet used the strength of its patent as a bargaining lever, and the factual underpinning for other assertions made by the Director;

(7) explanations of the Director's position on certain matters (e.g., what is the tied product and what is the tying product; whether it is the Director's position that exclusive use or supply clauses in contracts beyond one year in duration are anti-competitive);

(8) the relevance of certain documents which are among those produced by the Director;

(9) the origin and authorship of certain of the documents produced by the Director;

(10) the Director's knowledge, information and belief regarding statements made in certain documents he has produced (e.g., the assertion that selective underselling has taken place); information which the Director has as to why one potential NutraSweet customer decided to buy from Tosoh Canada Ltd. ("Tosoh").

The fundamental disagreement between counsel for the parties, as to the proper scope of discovery in these proceedings, has arisen because of the hybrid nature of the proceedings. The respondent is not being prosecuted for anti-competitive behaviour by way of a criminal process. Indeed, the enactment of the Competition Act, in 1986, was specifically designed to establish a civil procedure to evaluate certain business practices and, where necessary, to control them. Criminal law was seen as too blunt an instrument. At the same time, the new procedure which was devised was not private litigation simpliciter. A private person is not empowered to commence an action directly against a competitor or supplier. Only the Director can commence such actions.

The Director commences an application before the Tribunal in response to complaints which are filed with him. In the usual course of things, the Director is not likely to know as much about the industry or industries being investigated as the industry participants themselves. (This is particularly true in an abuse of dominant position case where much of the information will be with the person who holds the dominant position.) It is the Tribunal's understanding that the procedure the Director follows after a complaint is filed, is to conduct an investigation. When that investigation is completed, if it is determined that proceedings before the Tribunal might be commenced, inquiries are held for the purpose of collecting evidence.

In the context of the hybrid procedure established by the Competition Act, the Competition Tribunal Rules provide a requirement for discovery by one party of the other. The questions raised in the present motions concern the proper scope of that process. Counsel for the respondent argues that the Director is using the discovery process as a sort of investigation tool, that the discovery is all one-sided, that the Director is not disclosing any of the sources of the information which he holds but is requiring the respondent to provide full discovery.

As we understand counsel for the Director's position, he does not fundamentally disagree with the respondent's characterization. He notes that in this case the Director did not attempt to use his powers of seizure to obtain documents from the respondent. Nor did the Director choose to proceed under section 11 of the Competition Act. That section provides a mechanism for obtaining documents and information prior to the bringing of an application even when the documents are outside the country. I quote from counsel for the Director's argument (at p. 58 of the confidential transcript of the hearing of November 9, 1989):

> ...the NutraSweet Company has no Canadian subsidiary; it has a tremendously tiny Canadian operation. My friend keeps talking about: "Could not we have

> gone and taken their documents?" I can just see the RCMP walking into Deerfield, Illinois to swoop down on The NutraSweet Company. ...it seemed to me that the obvious place to get the information; so far as The NutraSweet Company was going to be concerned, was from discovery, which was a procedure set out to help the Director find out what NutraSweet had.

As has been noted, the Director chose to proceed by way of discovery to obtain the relevant documents and, as counsel for the Director argues, discovery in such a case is necessarily one-sided.

Part of the Director's argument seemed to be that the Tribunal, because it has expertise of its own, by virtue of the inclusion of lay members on its panels, operates in a fashion different from a court. He seemed to argue that, therefore, he does not, at this stage of the proceedings, have to disclose the totality of his case to the respondent but could wait for the hearing. If this was indeed the Director's argument, the Tribunal disagrees. Although the expertise of the non-judicial members allows the Tribunal to assess the evidence, which is presented by the parties or intervenors, in a more searching fashion than could be done by a body lacking that expertise, the procedure is a normal civil proceeding in which there is a lis between the parties. The Director is inserted between what in a strictly civil proceeding would be the plaintiff (applicant) and the defendant (respondent). It was clearly contemplated that the Director would act somewhat like a public prosecutor and respondents thereby would be protected from frivolous actions.

The respondent contends that the Director, through his witness, on discovery must provide the respondent with the factual information which the Director has which underlies the case he is making against the respondent. Counsel argues that the respondent must be given this information so that it can know the case that it has to meet. Three areas are in dispute: whether certain information is privileged and therefore does not have to be provided by the Director; whether facts contained in documents that may enjoy privilege must be disclosed, if they are relevant to the issues at hand; and whether, under a proper interpretation, certain information constitutes facts or evidence, since there is agreement that only the former have to be provided. The Tribunal is of the view that the respondent's argument is basically correct. The respondent should be provided, on discovery, with the factual information which underlies the Director's application.

In this context, then, it is necessary to turn to the discovery which the respondent seeks of the Director.

(1) Complaint Document - Public Interest Privilege

The first document sought to be produced is the complaint which led to the Director's investigation in this case. The Director argues that it should not be produced because it falls under the public interest privilege. The public interest test is sometimes referred to as the "Wigmore test". It was set out in Slavutych v. Baker (1975), 55 D.L.R. (3d) 224 (S.C.C.), at p. 228 as follows:

> "(1) The communications must originate in a confidence that they will not be disclosed.
>
> "(2) This element of confidentiality must be essential to the full ad satisfactory maintenance of the relation between the parties.

> "(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> "(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

Applications of the principle that disclosure should be refused, when it is in the public interest to do so, are also found in D. v. National Society for the Prevention of Cruelty to Children, [1977) 2 W.L.R. 201 (H.L.) and in Rogers v. Secretary of State for the Home Department, (1972] 2 All E.R. 1057 (H.L.). At page 1061 of the Rogers decision, the following passage is found:

> The letter called for in this case came from the police. I feel sure that they could not be deterred from giving full information by any fear of consequences to themselves if there were any disclosure. But much of the information which they can give must come from sources which must be protected and they would rightly take this into account. Even if information were given without naming the source, the very nature of the information might, if it were communicated to the person concerned, at last give him a very shrewd idea from whom it had come.

The courts in the two above-mentioned cases determined that the public interest in non-disclosure outweighed the right to disclosure of all relevant documents. The Director argues that in the present circumstances there is a public interest which requires that documentation and information collected by the Director at the inquiry stage be protected from disclosure: the public interest of encouraging individuals to come forward and complain about perceived anti-competitive behaviour, in confidence and without fear of reprisals from the dominant player in the market.

It is to be noted that it is not the identity of the complainant in the present case which it is sought to protect. It is known that the complainant is Tosoh. It is the contents of the complaint and presumably the identity of the sources that provided information to the complainant which it is sought to protect.

It is to be noted that Tosoh applied for and was granted intervenor status in these proceedings. Tosoh sought, in that context, to be given the right to make discovery of the respondent, NutraSweet. Tosoh did so on the understanding that if such right were given, Tosoh itself would be subject to discovery by NutraSweet. Nutrasweet argued that discovery rights should not be granted to Tosoh and the Tribunal accepted that argument. Consequently NutraSweet did not obtain discovery of Tosoh.

The Tribunal accepts the Director's argument that documents created at the investigation stage, including the complaint, fall within what has been described as the public interest privilege. The public interest in protecting their confidentiality, in order to allow complainants to come forward in an uninhibited fashion, outweighs the respondent's right to have all relevant documents produced. For the reasons given, the Director will not be required to produce the complaint document.

(2) Interview Notes - Litigation Privilege

The second category of documents sought to be produced are the interview notes made by counsel for the Director when he interviewed customers, competitors, and others, at the inquiry stage of the proceeding. Mr. Grover, counsel for the Director who appeared before the Tribunal, conducted

those interviews. He stated to the Tribunal that these were done at the inquiry stage of the process and that "once the Director goes on inquiry ... he is preparing for litigation". On the basis of that assertion it is the Tribunal's conclusion that these documents fit into the litigation privilege category. The dominant purpose of their preparation was for use in litigation. See Waugh v. British Railways Board, [1979] 2 All E.R. 1169 (H.L.) and Susan Hosiery Limited v. Minister of National Revenue, 69 D.T.C. 5278 (Exch. Ct.), for a discussion of the applicable legal principles. This is consonant with the Tribunal's decision of July 5, 1989 in The Director of Investigation and Research v. Chrysler Canada Ltd (CT 8814).

(3) Contractual Documents of which the Director has Knowledge

The third category of documents which the respondent seeks are contracts or contractual type documents which NutraSweet has entered into, which the Director has in his possession, and upon which the Director relies. As has already been noted, the Competition Tribunal Rules require each party to disclose to the other party all relevant documents of which it has knowledge. The documents sought by NutraSweet are ones to which it would be a signatory and of which it should have copies.

Counsel for NutraSweet argues that the request for disclosure of contracts in the Director's possession is made because it is possible that there are some documents which the Director has, upon which he intends to rely, which NutraSweet does not recognize as contractual in nature and therefore has not produced. Counsel for the Director argues that NutraSweet's request is really a disguised attempt to find out what the Director already knows and then to produce only those documents which the Director already has, in his possession, rather than giving full and complete discovery. Also, he argues that to require disclosure of the documents he has, will result in disclosure of the identity of his informants. He states that he intends to ask the respondent whether it has any further documents respecting certain customers and thus obtain the relevant documentation out of the mouth of the respondent without having to disclose the sources of the Director's information.

This is a very strange cat and mouse situation. Under the Competition Tribunal Rules both parties are obligated to file a list of documents of which they have knowledge and which are relevant to these proceedings. Thus, the Director should have disclosed, already, the documents in his possession. Equally, the respondent should have produced, already, all documents of which it has knowledge which are relevant. If it is clear, after that process, that there are documents which the respondent should have produced, pursuant to its obligation to produce, which it did not produce, then an adverse inference can be drawn against the respondent in that regard. Also, while counsel for the Director says he will seek further documents from the respondent, with respect to certain customers and certain years, and thereby obviate the need to disclose the sources of the information which he has obtained, this surely should have been done some time ago. The Director shall produce the documents of which he has copies, if he has not done so already. If these are not among the respondent's productions and there is no patently clear reason why they are not, then an adverse inference in that regard will be drawn against the respondent.

(4) "Acquisition cost" and "long run average cost"

The fourth category of information which the respondent seeks is a definition of what the Director means by the terms "acquisition cost" and "long run average cost". As we understand the Director's response, it is that the term "acquisition cost" is an undefined term in subsection 78(i) of the

Competition Act. The Director's witness did state, on discovery, that the Director believed that acquisition cost was synonymous with long run average cost (p. 28 of the transcript of discovery). Mr. Grover indicated, however, that information that has come to light during the examination of NutraSweet's witness could affect that belief (p. 72 of the confidential transcript of the hearing of November 9, 1989). Until the Tribunal makes a ruling on what that term means he does not want to bind himself, by way of admission, to one definition as opposed to another.

With respect to "long run average cost", counsel for the Director sent to counsel for the respondent an excerpt from a book which tried to define "long run average cost". He also asserts that expert evidence will be called to speak to this concept. At page 73 of the confidential transcript of the hearing of November 9, 1989, counsel for the Director argues:

> "It seems to me, my job is to put before the Tribunal: all the items of cost that the NutraSweet Company says goes into the total costs and I mean fixed, variable, any other cost, advertising. Then, I will make my submissions as to which of those I think should be counted and whether or not it is a predatory or a negative abuse of the dominant position, but it will be the Tribunal that will decide."

Both questions (i.e., that with respect to acquisition cost and that with respect to long run average cost) relate to the position which the Director proposes to take as opposed to the facts upon which that position is based. On discovery it is facts which have to be disclosed, not the conclusion, which either party intends to argue, should be drawn from those facts. We note that counsel for the Director did provide a fairly explicit explanation, of what might be called his "theory of the case", to counsel for the respondent. He did explain why and on the basis of what evidence, available to him prior to discovery, he based his tentative conclusions (pages 113 to 120 of the transcript of the In camera hearing of November 9, 1989).

(5) Identity of Customer Contracts and Activities which Form

The Basis of Director's Allegations

The fifth category of information which counsel for the respondent seeks, relates to: the identity of specific customers, competitors or others, specific advantages, specific contracts or other documents which form the basis of the Director's allegation that NutraSweet engaged in certain pricing practices and used the bargaining strength of its Canadian patent to negotiate advantageous contracts.

It must be admitted that some of the question and answer sequences have a strange quality about them. For example:

> NutraSweet asked the Director:
>
> "...How many world-wide contracts does NutraSweet have?" (Q. 453).
>
> The Director's representative replied:
>
> "I believe I have answered ... [number]." [indicate information deleted at the request of the respondent who considers the information to be confidential]

> NutraSweet then asked: "Who are they with?" (Q. 454).
>
> The Director's representative replied:
>
> "Well our position remains unchanged ... confidential."
>
> And NutraSweet's counsel responded:
>
> "[names]."
>
> The Director's counsel then stated:
>
> "... We are not prepared ..."
>
> NutraSweet's counsel said:
>
> "You are not prepared to admit that those are the [number] corporations ..."
>
> And the Director's counsel stated: "No we are not."

The above exchange has a rather "Alice-in-Wonderland" character. One would assume that NutraSweet knows how many world-wide contracts it has and that the Director's knowledge of this would be secondary at best.

In any event, the Director resists answering questions in category five on the grounds that: (1) the contractual documents have been produced, they are not voluminous and the respondent can read them, itself, to ascertain the portions relevant to the allegations made against it; (2) the Director does not have to answer questions which would disclose the source of his information, the identity of his informants; (3) the information which the respondent seeks is evidence not facts and a party is not required, on -discovery, to disclose evidence.

Questions 144 and 148 will be considered first. These relate to the allegation by the Director that the respondent sold aspartame in Canada below cost so as to result in a lessening of competition. When asked as to what facts the Director relies upon for this information (Q. 131), the Director's representative replied:

> It is the Director's information based on the interviews conducted with customers and competitors or potential competitors ad based on information contained in the documents that the Director has supplied that this pricing practice along with the other practices have resulted in an inability of competitors to enter the market.

Question 144 seeks an answer to the question which documents of those produced by the Director are relied upon for this allegation. Question 148 seeks an answer to the question which specific transactions were below cost. The Director answers with respect to question 144 that he does not need to specify the exact documents in the three binder collection provided to the respondent and that the answer to question 148 is a matter of evidence which need not be answered.

Questions 144 and 148 need not be answered. The concept of sale below cost as used by the Director need not relate to specific individual transactions. Based on information provided by Mr. Grover the Director's position was initially arrived at using global cost and revenue figures rather than specific sales. In addition, the requirement that the Director identify exactly which documents he is relying upon for this allegation is not necessary (the documents are not voluminous) and many are from public sources, drawn on, apparently, for background information on the industry.

With respect to the various questions which ask the Director to identify the particular document, or part thereof, upon which he relies for certain allegations of fact (Q. 161-163; Q. 415-416 (October 12)), these do not need to be answered. The requirement of a witness to specifically identify where, in documents, certain facts are to be found, was discussed by Mr. Justice Mahoney in Foseco International Ltd. v. Bimac Canada (1980), 53 C.P.R. (2d) 186, at p. 188:

> ...I accept that documentation produced may be so voluminous or otherwise so complex that an opposing party is entitled to have the sort of identification or definition asked for. The party seeking an order to that effect must establish the complexity and the Court is entitled to take account of that party's own probable capability of coping with what, to a layman, seems complex.

See also Loewen, Ondaatje, McCutcheon & Co. Ltd. v. Snelling (1985), 2 C.P.C. (2d) 93 (Ont. Sup. Ct.) and Leliever v. Lindson (1977), 3 C.P.C. 245 (Ont. Sup. Ct.). The documentation in the present case is not voluminous. The respondent has not demonstrated that the complexity of the material is such as to require the order sought.

The remaining questions in the fifth Category are: Q. 150, 154, 155 and 164; Q. 158-162 ad 165; Q. 962-9631966, 1033, 1042-1044, 1045-1046, 1052, 1055-1059, 1060-1065, 1134, 1138/ 1141, and 1158. These are to be answered, The respondent is entitled to know the details of the Director's case against it before trial. Discovery is designed to allow each side to gain an appreciation of the other side's case, If the Director does not disclose the facts on which he is relying, until trial, the respondent will be disadvantaged. While the Director can assert a privilege and protect the identity of informers, he cannot refuse to disclose the information upon which he is basing his allegations, once he decides to proceed against a respondent.

It may very well be that some of that information, in this category and in other categories where information is ordered to be provided, should be provided to counsel for the respondent under protection of a confidentiality order but it should, in any event, be provided.

Where the Director does not intend to rely on calling his sources of information as witnesses and there is a desire to protect the identity of the sources, who probably have continuing commercial relations with the respondent, the information provided to counsel for the respondent may be disclosed under protection of a confidentiality order. There is a confidentiality order existing in this case, for the purpose of protecting information the disclosure of which could cause commercial harm. It must be recognized, however, that there are limits to which this type of information can be kept totally confidential in a case such as the present. The purpose of providing the information to counsel is to allow him to learn the facts surrounding the alleged events. To do so he must examine documents and interview employees of his client.

Also, it should be noted that in the context of the Director's investigations there is no reason to believe that much of the information collected is really of the "informer" type. The information

which the Director collected through interviews, while technically given voluntarily, could have been obtained by using more formal means had voluntary disclosure not occurred. In providing the respondent with the information sought, the Director does not thereby necessarily disclose where he first obtained that information (e.g., from Tosoh or from others, as opposed to from the particular customer or distributor being interviewed, who may in The context of an interview merely have confirmed what the Director already knew). The Director does not have to disclose the source of his information but he does have to disclose that information.

With respect to the argument that the questions seek evidence rather than facts, the Tribunal does not share that view. Counsel for the Director cites Scott Paper Co. v. Minnesota Mining and Manufacturing Co. (1980), 49 C.P.R. (2d) 240 (F.C.T.D.); Leco Industries Ltd. v. Union Carbide Corp. and Union Carbide Canada Ltd. (1970), 64 C.P.R. 246 (Ex. Ct.); Owens-Illinois, Inc. v. AMCA International Ltd. (1987), 14 C.P.R. (3d) 357 (F.C.T.D.); and Beloit Canada Ltee/Ltd v. Valmet OY (1981), 60 C.P.R. (2d) 144 (F.C.A.). The Scott Paper Co. case does not assist the Director. That case held that the questions requesting the names of individuals who might be witnesses need not be answered. It was held that the source of information is evidence not fact. What the respondent seeks in this case, however, is not the names of prospective witnesses. It seeks the names of customers, competitors, distributors and others who allegedly were subjected to certain pricing practices by the respondent. That these might eventually be called as witnesses does not obviate the fact that what the respondent is seeking is the factual underpinnings to the Director's case and not disclosure of the prospective roster of witnesses.

The Leco and Owens-Illinois cases held that on discovery, a party is not required to discover and disclose the precise details of facts it hopes to establish through witnesses, as opposed to disclosing facts within the knowledge of that party. In the Beloit case it was held that on discovery a party is required to disclose only information within the knowledge or means of knowledge of the party being examined. It was held that a party is not required to disclose on discovery all the evidence on which it will rely at trial. In the present case none of the crucial facts are a matter of direct knowledge of the Director. All his information comes from third parties and all must be proven through them. This does not, however, insulate the Director from being required to provide to the respondent on discovery the information which the Director has at that time which underlies his case. The respondent is entitled to be made aware of the factual basis of the Director's allegations.

(6) Facts re: Differential Pricing, Coercion of Customers, etc.

The sixth category of information sought is described as facts or documents relied upon by the Director in making certain allegations in the application. Insofar as these questions seek the Director's position as opposed to the facts underlying that position, they need not be answered. See: Philips Expert B.V. v. Windmere Consumer Products Inc. (1986), 8 C.P.R. (3d) 505; Sperry Corp. v. John Deere Ltd. (1984), 82 C.P.R. (2d) 1 (F.C.T.D.); and Owens- Illinois, Inc. v. AMCA International Ltd. (1987), 14 C.P.R. (3d) 357 (F.C.T.D.). If the questions seek facts, they are to be answered. The same considerations apply with respect to these questions as are set out with respect to category five above. In this regard the following questions are to be answered: Q. 172-173 and 435; Q. 927-928, 932-933, 943, 952-953, 976-977, 982-984, 994-995, 996-1001, 1012-1014, 1026, 1039, 1078-1079, 1093, 1110-1112, 1150-1151/1153, 1173/1175/1179-1180, 1190, 1194/1197, 1201-1202, and 1219-1221 shall be answered. Questions 1008 and 1181 are too imprecisely worded for answers to be required. To the extent that the Director has facts or information underlying his allegations or that may be useful to the respondent, they should be disclosed on discovery.

(7) Positions of the Director

The seventh category of information sought relates to the position which the Director proposes to take. It is sufficient to quote some of these questions:

> Q. 934 ...is it the Director's position that every customer that places the NutraSweet brand on its packaging in Canada does so because NutraSweet has made it a condition of supply that it do so?

> Q. 968 ...does the Director say that [certain terms] in respondent contracts, that are not beyond one year in duration, are anti-competitive?

> Q. 1090 Does the Director accept, for the purposes of this proceeding, that Aspartame as a tabletop sweetener is reasonably interchangeable with sugar?

Questions of this nature need not be answered. They elicit conclusions and arguments which the Director proposes to make, on the basis of whatever facts are proven. They are not questions of fact which must be answered at the discovery stage.

(8) Relevance of Certain Documents

The eighth category of information sought seeks the Director's view as to the relevance of some of the documents which were produced by him. Counsel for the Director has answered the respondent's questions: the documents may not be relevant. Counsel for the Director indicated that the Director had produced all documents which had been sent or given to him in the course of his inquiry (except those for which confidentiality was claimed). At the moment he is not, himself, entirely sure of the relevance of all of these documents but he produced them because they were in his possession and had been sent to him by persons who thought they were relevant. This is a sufficient answer to the respondent's questions. In addition, the question of relevance is a question of law. It is not a question that can or should be addressed by a witness on discovery.

(9) Authorship/Source of Documents

The ninth category of questions seeks information as to the authorship and origin of certain of the documents produced by the Director, counsel for the Director responded to this request by saying that the questions, in fact, had been answered to the extent the Director knew the origin of the document. A review of certain of the answers, however, indicates that on some occasions the Director did purport to have information about a document's source which he was not willing to disclose. For example, in question 82 the Director's representative was asked: "So are you saying to me, then, that even if the Director does know what corporation was the author of this document it will not tell

us...". The response was affirmative. To the extent that the Director knows the authorship and origin of the documents referred to, the questions shall be answered.

(10) Director's Knowledge. Information or Belief

The last category of unanswered questions, in issue, are those seeking the Director's knowledge, information or belief regarding statements made in certain documents he has produced. It is instructive to quote one exchange in this category:

Q. 152 Then, under paragraph (c) Trade name NutraSweet, the second full paragraph there provides in a bracket at the end of the paragraph that there has been selective underselling of potential H.S.C. clients with the intention to get rid of H.S.C. as the last one from the market.

A. I see that.

Q. 153 ...The question is, what selective underselling has been done? In other words, what customers or potential H.S.C. clients are we talking about? ...on what grounds are you objecting to that question?

A. Don't have to get into the precise details in relation to who was affected.

For reasons similar to those set out, under category five above, this type of question is to be answered. To the extent that the Director has information concerning the factual basis for the allegations he is making, those facts should be disclosed to the respondent on discovery. It is not enough for the Director to say that the facts he relies upon are, for example, the underselling of potential entrants in order to exclude them from the market. Without knowing the identity of the customers and the time periods during which the alleged events occurred, the respondent is not given a reasonable opportunity to prepare a defence. More detailed facts are required to enable the respondent to properly prepare. A distinction must be drawn between the conclusion of facts which are drawn and the specific facts which underlie that conclusion. The information respecting the specific facts is to be provided on discovery. The conclusions of fact (e.g., whether there was underselling of potential entrants concerned) is a matter which the Tribunal will decide. The questions listed in category ten are to be answered except for question 1258. Question 1258 has been answered. The answer given was: "I'm sorry, I don't know."

Applicant's Motion

To turn then to the Director's motion seeking: more detailed financial statements from the respondent; documents and answers to questions relating to its marketing, selling and pricing practices in Europe and the United States; answers to questions listed in schedule 1 to the Applicant's Pre-Hearing Conference Memorandum dated November 8, 1989.

The Director's request for more detailed financial information (see particularly questions 1132 and 1146 of the examination for discovery of Andrew G. Balbirer) was refused by counsel for the respondent on the ground that no such information would be produced until the Director described, in more detail, his position with respect to costs. The Director's position, as we understand it and as described above, is that in the absence of jurisprudence defining the meaning of acquisition cost and long run average costs, he is entitled to keep his options open and to present alternative arguments. As noted above, he has provided the respondent with an explanation of his tentative conclusions and the basis on which he reached those conclusions. He has provided some indication, by reference to the relevant literature (Areeda) of the arguments he proposes to make. It would be premature to require the Director to limit the scope of his argument in this regard. The information sought should be provided.

With respect to the information regarding the respondent's marketing, selling and pricing practices in Europe and the United States (see Question 149), counsel for the respondent argues that it is premature to order that those questions be answered because the respondent has not yet refused to answer. Counsel indicated on discovery that the question would be taken under advisement and that the respondent would "do what we think might be reasonable". counsel for the Director argues that he has included these questions in his motion because it is the most expeditious way of proceeding, given that the status of unanswered questions arising out of discovery was to be put before the Tribunal in any event. The Tribunal agrees that it was an expeditious way of proceeding. The questions are relevant. They should be answered.

Counsel for the respondent argues that certain questions should not be answered because they seek interpretations of contracts and this is essentially a matter of law. This argument relates to questions 393 and 412. In any event, counsel notes that question 412 was answered. While the questions may have been infelicitously framed and on their face appear to require the interpretation of contracts, what is really sought by the question is information concerning the conduct of NutraSweet: information as to the kind of conduct NutraSweet considered the contract required. This is not a question of the legal interpretation of the contract. Counsel is correct, however, with respect to question 412. That question has been answered.

Question 418 relates to what is described as [certain terms) in the contracts, specifically as it relates to [name]. It is instructive to quote part of the transcript:

> Q. 416 Director's counsel: Well, specifically, as in a contract with [name]. Has it in any way been relative to Canada, discussed with (name], as to what it mans? Do you have any information ad belief about that?
>
> NutraSweet's counsel: The parties negotiated this clause.
>
> Director's counsel: No, but since that time, Mr. McDonald. That was in [date].
>
> Q. 417 Director's counsel: My understanding is that there may have been some

conversations in [date] with respect to it.

NutraSweet's counsel: I've not personally had any conversations with respect to it.

Q. 418 Director's counsel: Has the company any information with respect to that clause?

NutraSweet's counsel: Why don't you tell us what information you have, and we'll tell you whether we understand that or not.

Director's counsel: Well, I'm not sure what information we have. We have hard, and that's why I'm asking you if you have information.

NutraSweet's counsel: No idea.

Director's counsel: Can you look into it?

NutraSweet's counsel: No. If you want to give me some specifics, Mr. Grover, we can check. But to have an open-ended inquiry as to whether someone has ever discussed this clause with [name], no.

There is no doubt that the question as framed is too vague and broad to require an answer.

As put, question 548 which counsel for the Director seeks to have answered does not permit an easy reply. Moreover, it does not directly address the information that the Director is seeking according to the argument put forward at page 145 of the transcript of the hearing of November 9, 1989, i.e., whether there is a technical or other reason (beyond the obvious commercial advantage) that explains why NutraSweet requires through its contract with a customer that it use NutraSweet aspartame exclusively. This type of question must be answered, but the questions must be posed in a way that clearly states the information being sought.

The next question to be considered is question 580. The relevant portion of the transcript reads as follows:

Q. 579 Is their volume in Europe as large or larger than [names] Canadian volume? I guess we should say Canadian plus European volume, if they're both -- I don't know if [names] are over there.

A. I'm not certain. I believe our volume for [name] in Europe is probably somewhere between [name] and [name], in Canada.

Q. 580 Director's counsel: If that turns out not to be true, will you let me know?

NutraSweet's counsel: No. We're not going to inquire for this.

Counsel for the respondent argues that the information is marginally relevant and therefore should not be answered. It is the Tribunal's view that the relevance is sufficient to require the question to be answered.

The next question to consider is question 1341. The question seeks information as to whether an extension of NutraSweet's present contract with [name] is anticipated.

Q. 1341 And in terms of the actual negotiations, you would not be aware whether or not this sort of extension would be anticipated?

Counsel for the respondent argues that the question is not a proper one for the witness, that the ansWer is irrelevant. The Tribunal is of the view that the relevance is sufficient to require that the question be answered.

The last two questions to be considered are question 1435 and question 1574. The respondent considers that the answers should not be required because to do so would be unduly burdensome. Question 1435 seeks information concerning who made certain handwritten notes on a particular paper. Question 1574 seeks information concerning NutraSweet's Swirl Spotters campaign. Both questions should be answered.

Scheduling

Counsel for the respondent raised the possibility that the date for filing expert reports might be revised given the unanswered questions and undertakings arising out of discovery. We also understood his submissions to contemplate a postponement of the hearing date now scheduled for January 9, 1990.

As indicated at the hearing of these motions, the Tribunal is willing to entertain a revised schedule for the filing of expert evidence providing such is agreed to by both counsel. Any such revision, however, shall take place within the context of a hearing which is to begin on January 9, 1990. As was indicated to counsel, the Tribunal is not receptive to changing the January hearing date for two reasons.

Firstly, prior to the setting of a schedule for this application, counsel were asked to choose a schedule which was reasonable and realistic. They were asked to build into that schedule allowances for "slippage" as, for example, can occur consequent on unanswered discovery questions. At the same time, the Tribunal indicated that once a schedule was set it would expect that that schedule would govern this application in a fairly rigorous fashion.

Secondly, the Tribunal does not have much internal scheduling flexibility. For whatever reason, the government has not chosen to appoint the lay members which the legislation contemplates. Subsection 3(2) of the Competition Tribunal Act contemplates that the Tribunal should be composed of

four judicial members and eight lay members. While four judicial members have been appointed, only two lay members have been appointed. One of these is part time. This situation certainly hobbles the Tribunal. It creates scheduling difficulties. It provides no opportunity to build up a body of experienced members, of the kind the legislation seems to contemplate, so as to provide the Tribunal with the requisite expertise. Sickness of one or more members, or absence for other reasons, can bring the operation of the Tribunal to a standstill. This is indeed unfortunate. In any event, under present circumstances if their application is to be rescheduled it would require a six month or longer postponement. Given that the legislation has asked the Tribunal to proceed as expeditiously as possible, it is not appropriate to consider such a postponement in these circumstances.

DATED at Ottawa this 29th day of November 1989.

SIGNED for the Tribunal by the presiding judicial member.

(s)"B. Reed"
B. Reed

Tab 5: *Beazer East Inc. v. British Columbia (Ministry of Environment, Lands and Parks)*, [2000] B.C.E.A. No. 53

Indexed as:

Beazer East Inc. v. British Columbia (Ministry of Environment, Lands and Parks)

IN THE MATTER OF an appeal under section 44 of the Waste Management Act, R.S.B.C. 1996, c. 482.
Between
Beazer East Inc.; Atlantic Industries Limited; Canadian National Railway, appellants, and
Assistant Regional Waste Manager, respondent

[2000] B.C.E.A. No. 53

Appeal Nos. 2000-WAS-012; 00-WAS-013; 00-WAS-014

British Columbia Environmental Appeal Board

A. Andison, Chair
Conducted by way of written submissions concluding on

September 1, 2000.
Decision: October 12, 2000

(99 paras.)

Appearances:

For Appellant, Beazer East Inc.
Spokesperson: Nicholas Hughes

For Appellant, Atlantic Industries Spokesperson: David Searle

For Appellant, Canadian National Railway Spokesperson: Richard Bereti

For Respondent
Spokesperson: Joyce Thayer

APPLICATIONS

1 The Respondent has made a number of applications to the Board in relation to the above-captioned appeals. They include as follows: an application for a summons duces tecum; an application to exclude the Appellants' expert reports from consideration in their application for a stay; and, alternatively, an application to convert the hearing of the stay from a written hearing into an oral hearing.

2 All parties have had an opportunity to respond to these applications, which have been conducted in writing.

BACKGROUND

The Appeals

3 On June 1, 2000, Douglas Pope, Regional Waste Manager (the "Manager"), issued amended order OS-15343 (the "Amended Order") to Canadian National Railway Company ("CNR"), Atlantic Industries Limited ("Atlantic") and Beazer East, Inc. ("Beazer"), requiring the named parties to remediate the property at 8335 Meadow Avenue, Burnaby, B.C, legally described as Lot 1, District Lot 155, Group 1, New Westminster Land District, Plan 67851 and [Water] Lot 5743, Group 1, New Westminster Land District, and adjacent, contaminated Fraser River sediments. The site was contaminated with wood preserving chemicals, such as polycyclic aromatic hydrocarbons ("PAHs"), as a result of a wood treatment operation that took place at the site from 1931 to 1982.

4 In the Amended Order, the Manager advised the parties that he had reasonable grounds to believe that contaminants originating from industrial activities at the site were present at concentrations which exceed the applicable standards in the province, and were likely causing pollution of the environment, including the Fraser River. In accordance with section 27.1 of the Waste Management Act, he ordered the parties to do as follows by specific dates:

1. Design and implement a hydraulic control system to prevent the migration of dissolved and non-aqueous phase contaminants in groundwater from the upland area to the Fraser River.
2. Dredge contaminated sediments to a depth of 2.0 m or the 100 ug/g total PAHs contour, whichever is less, inside Area 1....
3. Dredge contaminated sediments to a depth of 4.0 m or the 200 ug/g total PAHs contour, whichever is less, inside Area 2....
4. Install an impermeable cap or reactive containment layer to cover Area 2....
5. Post financial security pursuant to the Act and Regulations.... The financial security shall cover the replacement costs as well as ongoing operating costs of items 1 and 4 above.

5 Beazer, Atlantic, CNR and the present lessee of a portion of the subject property, Schenker of Canada Ltd., filed separate appeals of the Amended Order. Schenker subsequently withdrew its appeal and did not make submissions on these applications.

6 In its Notice of Appeal, Beazer requested a stay of all requirements in the Amended Order except for the requirement that it develop a design for the hydraulic control system. At that time, Beazer advised the Board that it intended to file expert reports in support of its stay application. Atlantic and CNR support Beazer's request for a stay.

7 The Board advised the parties that the stay application would be conducted by way of written submissions and established a submission schedule for the stay, as well as a schedule for the provision of expert reports.

8 Given the similar interests of Beazer, CNR and Atlantic in respect of the stay application, counsel for Beazer filed one stay submission on behalf of the three Appellants (hereafter referred to as the "Client Group"). The Client Group also filed five expert reports in support of its application:

*	August 6, 1999	Aquatic Risk Assessment for 8335 Meadow Avenue, Burnaby B.C., prepared by Golder Associates Ltd.
*	February 2000	Feasibility Review of Remedial Alternatives, 8335 Meadow Avenue, Burnaby B.C., prepared by Golder Associates Ltd.
*	July 31, 2000	Expert report of Guy Patrick
*	July 31, 2000	Expert report of Paul Anderson
*	July 31, 2000	Expert report of Alan Fowler

9 Atlantic filed an additional submission on the stay and an additional expert report:

*	July 2000	Atlantic Industries Limited: Financial Impact of Environmental Remediation Order, prepared by Grant Thornton.

The Respondent's Applications

10 In the course of preparing its response to the stay application, the Respondent noted that the Client Group had not provided it with a report that had been referenced by Golder; specifically, an "independent review" of the Golder Aquatic Risk Assessment. The Client Group refused to produce the review, claiming privilege over the document. The Respondent then wrote to the Board requesting that a summons duces tecum be issued pursuant to the Inquiry Act requiring Mike Z'Graggen, Trish Miller and Guy Patrick, all of Golder Associates, to produce the following documents:

> All documents in the control or possession of Golder Associates produced in the course of, or relating to, any independent review of Golder Associates Ltd.'s Au-

> gust 6, 1999 'Aquatic Risk Assessment for 8335 Meadow Avenue, Burnaby, B.C.'

11 Prior to considering the summons request, the Board asked the Respondent to make submissions on the Board's jurisdiction to issue the summons in the context of a stay application conducted in writing. The Board noted that subsections 15(1)(a) and (b) of the Inquiry Act give the Board the authority to require a person to "attend as a witness, at a place and time mentioned in the summons, which time must be a reasonable time from the date of the summons", and "to bring and produce before them all documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry."

12 Further, subsection 15(2) states that:

> A person named in and served with a summons must attend before the commissioners and answer on oath, unless the commissioners direct otherwise, all questions touching the subject matter of the inquiry, and produce all documents, writings, books, deeds and papers in accordance with the summons.

13 As these provisions suggest that a summons under this Inquiry Act is limited to situations where there is an oral hearing, and the Board has no express power to order the production of documents, the Board asked the Respondent to provide submissions on the Board's jurisdiction to issue the requested summons in the context of a written hearing.

14 On August 16, 2000, the Respondent made submissions on the jurisdiction issue.

15 Also on August 16th, the Respondent wrote to the Board requesting "direction" from the Board on five matters, which the Respondent states may make it unnecessary for the Board to rule on the above-noted jurisdictional issue. The essence of the Respondent's submission is as follows:

1) The Board should not consider expert evidence in determining whether the balance of convenience favours granting a stay in this case.

16 The Respondent submits that the findings in the Client Group's expert reports are contested by the Respondent's experts and the Board cannot make findings on such contested and complex issues as those raised in the reports except in the context of an oral hearing. In later submissions, the Respondent's emphasis shifted. In the bulk of its submissions, the Respondent argued that the expert reports should be excluded because they address evidence which relates to the merits of the appeal. The Respondent argued that, when a government authority issues an order within its statutory jurisdiction, with the intention of protecting the environment and, thereby, furthering the public good, a tribunal should not, on an interlocutory motion, assess the actual benefits which will result from the specific terms of the order, or consider contested evidence which is relevant to the assessment of these benefits.

2) If the expert reports are excluded, the stay application can continue in writing.
3) However, if the Board decides that it will consider the expert evidence, an oral hearing is required, with the right of full disclosure and the right to cross-examine the experts on their reports.

17 The Respondent submits that if an oral hearing is required, the full hearing of the appeal should be heard on an expedited basis. The Respondent submits that an expedited hearing would negate any requirement for a stay, since the Client Group has agreed to comply with those requirements in the Amended Order that come into effect before September 30, 2000, and the Manager is prepared to consider reasonable requests for extensions of the timelines set out in the order, provided they are justified "by a defensible technical rationale."

4) Finally, if the Board decides that it will consider the expert evidence, and will continue to conduct the stay application by way of written submissions, then the Respondent asks that the Board rule on its request for a summons duces tecum.

18 In its August 23, 2000 submissions, the Respondent provided a list of the expert reports upon which it intends to rely for the purposes of the stay and the appeal. There are 11 reports ranging in dates from October 7, 1999 to August 18, 2000.

19 The Board has received extensive submissions and authorities from the parties in relation to these applications.

20 The Board has cancelled the remaining stay submission schedule and will reschedule the submissions once this decision has been rendered.

ISSUES

21 The issues to be decided by the Board are:

1. Whether the Board should exclude the expert evidence from consideration in the stay application.
2. Whether the stay application should continue in writing, orally, or whether the merits of the appeal should be heard on an expedited basis.
3. Whether a summons duces tecum can be issued, as requested.

   (a) Do the documents fall under a litigation privilege.
   (b) Does the Board have jurisdiction to issue the summons.

DISCUSSION AND ANALYSIS

1. Whether the Board should exclude the expert evidence from consideration in the stay application.

22 When considering a stay application, the Board applies a three stage test set out in RJR-Macdonald Inc. v. Canada (Attorney General) (1994), 111 D.L.R. (4th) 385 (S.C.C.). That test requires an applicant to demonstrate the following:

1) There is a serious issue to be tried;
2) Irreparable harm will result if the stay is not granted; and
3) The balance of convenience favours granting the stay.

23 The Respondent is primarily concerned with the Client Groups use of the expert reports in relation to the balance of convenience branch of the test, although it also makes submissions on the

use of the reports in the serious issue test. As noted earlier, the Respondent's main concern with the Client Group's expert reports is that they are being used to address issues that go to the merits of the appeals. The Respondent argues that:

> At the heart of both the appeal and the stay application is the Client Groups contention that their risk assessment establishes that the scope of the ordered work is not necessary to protect the environment. In their stay submissions, the Appellants and their experts specifically disagree with the need for '(1) the pump and treat system envisaged by the Manager; and (2) the aggressive dredging program required by the Amended Order'.

24 The Respondent states that, to decide the issues as framed by the Client Group in its stay application, the Board will be required to make findings of fact which will be determinative of the grounds of appeal.

25 The grounds for appeal and remedies sought by each of the Appellants forming the Client Group are virtually identical. They are as follows:

1. The Manager erred by prescribing the remedial works set out in the Amended Order in circumstances in which the remedial works are not required to prevent or mitigate any potential adverse on-site or off-site environmental impacts;
2. Alternatively, in ordering the prescribed remedial works, the Manager erred by ordering the named parties to carry out remedial works that go beyond what is required to prevent or mitigate any potential adverse on-site or off-site environmental impacts;
3. The Manager erred in rejecting and/or failing to consider, the results of Golder Associates' risk assessment;
4. In ordering the remedial works, the Manager erred by failing to consider, or, alternatively, failing to adequately consider, the following:

    (i) the lack of any potential adverse effects that the environmental conditions of the site pose to human health and the environment;
    (ii) the risks to the environment associated with the dredging required pursuant to requirements 2 and 3 of the Amended Order;
    (iii) the unreasonably high costs associated with the remedial works required by the Manager; and
    (iv) the impracticality and lack of feasibility of the remedial works required by the Manager;

5. The Manager erred in imposing excessive and unnecessary financial security obligations.
6. The Manager erred in imposing unreasonable deadlines for the completion of the design and remedial tasks set out in the Amended Order.
7. The Manager erred in imposing an unreasonable deadline for the development of an alternate remedial option.
8. Such other and further grounds as counsel may advise.

26 In relation to its application for a stay, the Client Group uses the expert reports to support the following claims in relation to the serious issue branch of the test:

* Neither the dissolved phase PAHs nor the PAHs in the sediments pose any significant risk to human health, fish or birds. (p. 6)
* There are cheaper remedial alternatives to those ordered by the Manager which address contaminants at the site to the level required in the Amended Order (100 ug/g). (p. 7-8)
* The dredging requirement is unlikely to be an effective remedial approach given the feasibility risks and environmental risks. (p. 9)
* The expensive hydraulic control system is not warranted. (p. 10)

27 In the balance of convenience portion of the test, the Client Group identifies 11 factors to be considered. Of those factors, the ones that are specifically supported by the expert reports are as follows:

* There are no effects or risks, directly or indirectly, to human health or to fish or bird populations. The effects if any are limited to certain benthic organisms that reside in the top 0.3 to 0.6 metres of sediment in isolated areas of high PAH presently existing in the river.
* The contamination is not expanding.
* The pump and treat system envisaged by the Manager may not be an effective remedial solution for controlling NAPL [non-aqueous phase liquid] at the site.
* The dredging is unlikely to be an effective remedial solution for the site.
* There are significant risks to the environment associated with the dredging and other remedial requirements ordered by the Manager, including dispersion of contaminated material, resulting in the spreading of contaminated material to areas that are not currently impacted, and the risk of a failure of the control mechanisms used during dredging, and impact on members of the benthic community that are not currently being impacted by the contamination.
* Risks to the structural integrity of Schenker's warehouse.
* The Client Group and their consultants legitimately believe that the ordered remedial works are ill conceived.
* The remedial alternatives presented by the Client Group to the Manager will effectively address the environmental conditions at the site at a substantially lower cost and without the risks associated with the ordered remedial works. (pp. 15-16)

28 It is clear from a comparison of the proposed use of the expert reports on the stay and the issues raised in the grounds of appeal that there will be a significant overlap between the submissions on the stay, and on the merits of the appeal. Most, if not all of the above-noted submissions on the stay go to the heart of, or to the underlying rationale for, the requirements set out in the Manager's order: the Client Group is using the expert evidence in the stay to put into question the propriety of the specific requirements in the Amended Order. The apparent purpose of the Client Group's evidence and argument on the stay is to establish that the rationale underlying the Manager's order is

questionable and, therefore, the Client Group should not be forced to comply with what it refers to as an "unachievable aggressive remediation program" before the hearing on the merits.

29 The Respondent states that, if this expert evidence is accepted by the Board for the purposes that it is offered, the opinions contained in the Respondent's 11 expert reports will also have to be considered by the Board and those opinions are "diametrically opposed" to those of the Client Group's experts. The Respondent's experts are said to dispute the methodology, findings and interpretation of the findings contained in the reports of the Client Group's experts. As stated above, the Respondent asserts that, if these reports are accepted, the Board will be required to review and weigh the differing opinions of the experts on these issues and make findings of fact, which will be determinative of the grounds of appeal.

30 The Board agrees that, for it to consider the evidence tendered by the Client Group for the purposes it is offered, the Board will inevitably be drawn into an assessment of conflicting evidence, much of which addresses issues and facts which also go to the merits of the appeal. The question is whether it is appropriate to do so in this case.

In an interlocutory application, is it appropriate to assess the validity of the decision being appealed or assess conflicting evidence which also goes to the merits of the appeal?

31 As the Board has become faced with more and more complex appeals, the stay applications have also become more complex. Evidence that goes to the validity of the decision under appeal is often tendered in a stay application to put into question whether the decision should be enforced while the appeal is in progress. This is the first time that the appropriateness of this evidence has been placed squarely before the Board.

32 It is commonly stated by the courts that an injunction or a stay of proceedings is an extraordinary remedy as the decision-maker is called upon to make a "drastic order" without the benefit of a full trial (R.J. Sharpe, Injunctions and Specific Performance, Release No. 7 (Ontario, Canada Law Book, 1999) (p. 2-7).

33 There were numerous authorities provided to the Board, which address various aspects of the test for a stay. One of the general themes in the cases is that the amount of evidence to be considered at the interlocutory stage is limited relative to what is tendered and accepted at the trial or hearing of the merits.

34 In Re Attorney General of Manitoba and Metropolitan Stores (MTS) Ltd. et al. (1987), 38 D.L.R. (4th) 331 (S.C.C.), Beetz J. stated for the Court at p. 335:

> The limited role of the court at the interlocutory stage was well described by Lord Diplock in the American Cyanamid case, at p. 510:
>
> > It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

35 Beetz J. went on to note that, while the American Cyanamid case was a complicated civil case, Lord Diplock's dictum, (above) "should a fortiori be followed for several reasons in a Charter

[Canadian Charter of Rights and Freedoms] case and in other constitutional cases when the validity of a law is challenged." Those reasons are as follows:

> 1. The extent and exact meaning of the rights guaranteed by the Charter are often far from clear and the interlocutory procedure rarely enables a motion judge to ascertain these crucial questions. He states "Constitutional adjudication is particularly unsuited to the expeditious and informal proceedings of a weekly court where there are little or no pleadings and submissions in writing,...."
> 2. In many Charter cases ... some party may find it necessary or prudent to adduce evidence tending to establish that the impugned provision, although prima facie in violation of a guaranteed right or freedom, can be saved under s. 1 of the Charter. "But evidence adduced pursuant to s. 1 of the Charter essentially addresses the merits of the case" (p. 335). [emphasis added]

36 Although not a Charter case, these reasons have some relevance to stay applications before the Board: the stay applications are generally in writing, they are usually dealt with on an expedited basis and, as has occurred in this appeal, parties often find it "necessary or prudent" to tender evidence to establish that the impugned order or decision is fraught with legal or factual difficulties and, therefore, should not remain in force pending a hearing on the merits. Like the section 1 evidence, this evidence "essentially addresses the merits of the case."

37 In Wall v. Horn Abbot Ltd., [1999] N.S.J. No. 124, the Nova Scotia Court of Appeal considered whether a contentious affidavit should be considered in an interlocutory application for security for costs when much of its contents went to the merits of the case and the bona fides of the plaintiff. When considering the general principles, the Court noted first that the system of civil litigation is based on the principle that "disputed issues of fact are to be determined at a trial" (p. 11). This principle is equally applicable to quasi-judicial appeals to the Board.

38 The Court then considered the appropriateness of determining disputed matters of fact or law in other summary judgment and interlocutory processes. It noted that:

> Similar reluctance to engage in pre-trial assessment of the merits may be found in the test for granting of interim and interlocutory injunctions before trial. The general rule, approved by the Supreme Court of Canada, is that the assessment of the merits is limited to determining whether there is a serious issue to be tried: RJR-Macdonald.... The Court described the threshold as 'a low one' ... Even in the case of stays of execution pending appeal, where there has generally been a determination at trial, the same test is applied: RJR-Macdonald....
>
> This reluctance to assess the merits of a claim or defence before trial is based both on procedural values and practical concerns. The prime procedural value is that 'plenary trial on the merits' is a key element of fair procedure.... Practical concerns relate to the difficulty of making correct factual determinations on the limited material available on interlocutory applications and the important advantages of a trial court in evaluating evidence in light of the factual context of the entire case rather than on a selective and partial record at the interlocutory stage....

39 In the Wall case, the Court found that an interlocutory application for security for costs "should not be the occasion for the determination of the merits of the case where it is complex or depends on disputed facts and findings of credibility" (p. 7).

40 The Client Group states that the determinations to be made on the stay are not "the same as" those to be decided in the full hearing and that it is not asking the Board to make "findings of fact" on the issues in the appeals. It notes that the determinations on a stay are "interim interlocutory determinations to be made in a summary fashion." It states that a stay order does not finally determine any rights between parties - it merely holds an order in abeyance pending the outcome of an appeal.

41 However, given the evidence and arguments that the Client Group presented in support of its stay application, it is difficult to imagine how the Board could consider that evidence, as well as the Respondent's contradictory evidence, and then address its arguments without resolving conflicts in the expert evidence, and without making findings of fact that could equally apply to the merits. As noted in the cases above, an interlocutory application is not the place to be resolving conflicts of evidence on which the claims of a party "may ultimately depend". Although the Board agrees with the Client Group that a stay is an "interim determination" to be made in a "summary fashion", and does not normally result in a final determination of the rights between the parties, due to the evidence presented and the arguments made by this Client Group, it may well have that effect.

42 The Client Group also argues that the Board is an appellate body created by statute to review on a de novo basis and, where appropriate, overturn a manager's decision. The Client Group submits that the Board has full jurisdiction to grant a stay of the Manager's orders provided that the applicant meets the appropriate test. Therefore, it can assess the core issues in the stay application in its role as the ultimate reviewing body under the Act.

43 The fact that the Board is an appellate body created to review and, where appropriate, overturn a Manager's decision, has no bearing on the principles which apply in considering whether or not to grant a stay of an order. A stay is an exceptional remedy and the considerations involved in assessing whether to grant such extraordinary relief at the interlocutory stage are distinct from its powers and responsibilities when it comes to a hearing of the merits.

44 According to the test set out in RJR-Macdonald, the only time it is appropriate to get into a review of the merits is when the interlocutory motion will effectively amount to a final determination of the action, and when the question of constitutionality presents itself as a simple question of law alone (p. 403-4). In these two instances, the Court found that a review of the merits at the serious issue stage may be appropriate. However, instances of this sort are acknowledged to be "exceedingly rare" (p. 411), and neither instance applies in the appeal before the Board.

45 It is key that an interlocutory injunction is an interim procedure, the nature of which is to balance the relative risks of granting or withholding a remedy. This is different in nature to the trial or hearing of the appeal at which time the merits of the case are at issue. If the same issues were to be addressed at the interlocutory stage, there would be a duplication of effort and questions of issue estoppel and res judicata may also arise.

46 Further, the expert reports and the claims of the Client Group's experts are vigorously disputed by the Respondent. As stated in Metropolitan Stores, the interlocutory stage is not the place to resolve conflicts of evidence as to the facts.

47 Therefore, the Client Group's expert reports should not be used in order to challenge the basis of the Amended Order in the context of its stay application. The Client Group claims that this means there will "never be a successful stay application" because it will never be able to show that the balance of convenience favours the granting of a stay. This is simply not correct. However, as noted by R.J. Sharpe, "[t]oo readily availability of interlocutory relief against government and its agencies could disrupt the orderly functioning of government" (cited with approval by Beetz J. in Metropolitan Stores, p. 35).

48 Accepting that it is generally not appropriate for the Board to delve into conflicting evidence that goes to or could determine the merits of the case, it is also clear that a court, and this Board, can accept some evidence in support of application for a stay. The Board will therefore discuss the nature of the evidence that is appropriate for consideration at each stage of the test.

First Branch of the Stay: Serious question

49 The Client Group states that it is appropriate to consider its expert reports in the context of this branch of the test. It states that, without the expert reports, there would be no basis for the assertion that there is a serious issue to be tried.

50 In RJR-Macdonald, the Supreme Court of Canada states at page 403 that:

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable. [emphasis added]

51 The Court also notes that the test is not onerous: the threshold is "a low one" (p. 402), and the test should be determined "on the basis of common sense and an extremely limited review of the case on the merits" (p. 410).

52 In light of the low threshold for this test, the Board can and has relied upon the grounds of appeal in a Notice of Appeal to evaluate whether there is a serious issue to be tried. Particularly when an appellant is represented by counsel, the grounds of appeal tend to provide enough information for the Board to perform a "limited review of the case on the merits." While expert reports can and have been submitted, it is rarely necessary to consider the content of expert reports at this stage. Generally, the mere presence of expert reports, particularly conflicting expert reports, is viewed as an indication that there is a serious issue to be tried. Accordingly, the Board finds that the use of the Client Group's expert reports to support its particular claims that the basis of the Manager's order is flawed, is neither necessary nor desirable at this stage of the test. While the Board will not exclude them on this basis, neither will it be necessary to evaluate their contents in order to make an assessment of this branch of the test.

Second Branch of the Stay: Irreparable Harm

53 The irreparable harm branch of the test is clearly evidentiary based. Evidence tendered in relation to the cost of complying with the Amended Order, the financial impact on the operation of the companies and an estimation of the harm to be suffered prior to completion of the appeal are appropriate and necessary considerations at this stage.

Third Branch of the Stay: Balance of Convenience

54 The analysis of the balance of convenience involves "a determination of which of the two parties will suffer the greater harm from the granting of or refusal of an interlocutory injunction, pending a decision on the merits" (RJR-Macdonald, p. 406). The Court in RJR-Macdonald noted that the factors that must be considered in the balance of convenience are numerous and will vary in the individual case. Further, there may be special factors to be taken into account and that, in constitutional cases, the public interest is a "special factor" which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry" (p. 406-7).

55 The Court then quotes with approval the approach of Blair J. in Ainsley Financial Corp. v. Ontario (Securities Commission) (1993), 106 D.L.R. (4th) 507 (Ont. Gen. Div.) at p. 530:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants. [emphasis added]

56 The Court then looked at the public interest component in more detail. It accepts that both parties in an interlocutory Charter proceeding may rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it may suffer prior to a decision on the merits. In doing so, the Court states that either party may tip the balance of convenience in its favour by demonstrating a compelling public interest in the granting or refusal of the relief sought. It states that "public interest" "includes both the concerns of society generally and the particular interests of identifiable groups" (p. 408).

57 At pages 407-8 of RJR-Macdonald, Justices Sopinka and Cory state the following with respect to the right of a private litigant to invoke pubic interest:

> When a private applicant alleges that the public interest is at risk, that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits that will flow from the granting of the relief sought. [emphasis added]

58 Conversely, the Court states at page 409 that:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights. [emphasis added]

59 The Client Group argues that RJR-Macdonald and its predecessor, Metropolitan Stores, involved applications to stay legislation pending a final decision on its validity, and that Ainsley Financial Corp. involved an application to stay the applicability of an Ontario Securities Commission policy statement that had the effect of creating a new law of general application. It submits that these cases involve fundamentally different considerations than those involved in the stay application before the Board. In this case, the Amended Order from which the Client Group seeks temporary relief is not a government act of general application. Therefore, it argues that granting a stay will not impact on the ongoing administration of the Act. The Client Group seeks a halt to the required works until the hearing of the appeal of the Amended Order is over.

60 The Board does not agree. While not exactly on point, the Board finds that the policy or rationale for considering the public interest in cases involving a specific order or decision of a government official is more akin to constitutional cases than to interlocutory applications involving private litigants. Further, the Board finds that the Court's comments in Ainsley should not be construed as narrowly as suggested by the Client Group. After quoting from the Metropolitan Stores case, in which an injunction was sought to prevent the operation of laws of general application, Blair J. made the following comments in Ainsley:

> While these remarks are made in the context of an attack upon the constitutional validity of provincial legislation, I see no distinction in principle between that kind of situation and one in which what is challenged is the validity of a measure imposed by an administrative tribunal or law enforcement agency acting within its jurisdiction. (p. 531)

61 In the case before the Board, the competing harms to be balanced in this branch of the test will be the harm to the government if the stay is granted, versus the harm to the Client Group if a stay is denied.

62 With respect to the harm to government, the Respondent must show that it was charged with the duty of promoting or protecting the public interest and that the Amended Order was issued pursuant to that responsibility. Upon proof of these two things, the Court in RJR-Macdonald stated that the onus of demonstrating harm to the public interest will nearly always be satisfied. The Court also notes that, generally, it will not be necessary to prove that actual harm would result from the restraint sought.

63 This harm is to be balanced against the harm to the applicant, which in this case is the Client Group. That harm is comprised of any irreparable harm found in the second branch of the test, as well as evidence that a different "public interest" will be harmed should a stay be denied. In making

its case, an applicant may also make submissions to counter the government's claims that the impugned order was made pursuant to valid statutory authority.

64 In addition to evidence mentioned above, the Board is of the view that it must weigh the impact, if any, occasioned by a delay in implementing the remedial works pending a determination of the appeals on the merits. Therefore, it is appropriate for the Board to consider evidence in relation to the impact that a stay of the order or decision would have on the "public interest," as represented by the public authority, prior to a decision on the merits. In other words, without getting into an assessment of the substance or validity of the decision under appeal, and provided that the appealed decision is prima facie in the public interest, what is the likely effect on the environment, if any, that will occur during the period of the stay, if granted? In this respect, the Client Group's claim that the contamination is not expanding may be a relevant and acceptable consideration in the assessment of the balance of convenience.

65 In the Board's view, even if the Respondent establishes that the Amended Order is prima facie in the public interest, this does not preclude a balancing of that interest against other interests and evidence.

66 Finally, the Board notes that the courts have made a distinction between exemption and suspension cases in relation to the public interest portion of the balance of convenience test. In Metropolitan Stores, the Court observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason being that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of the law is suspended entirely.

67 The Client Group and Respondent each characterize the case before the Board differently. The Client Group says it is an exemption case, which only affects the Client Group whereas the Respondent argues that it amounts to a suspension case. However, the Board need not address this issue at this stage. The weight to be given to the public interest in this case is properly left to the decision on the merits of the stay application itself.

68 The question then is how to deal with the current application and expert reports in light of the Board's findings on this issue.

69 To the extent that the use of the reports is in furtherance of those matters that the Board has found to be improper considerations in the context of a stay application, the reports are excluded from consideration on the stay. The expert report by Grant Thornton is properly before the Board as it relates primarily to Atlantic's irreparable harm.

70 As the effect of this decision is to severely limit the proposed use of the expert reports, the Client Group will be given an opportunity to make new submissions on its stay application, taking into account the Board's findings above, and may submit new evidence in support of those submissions or refer to the expert reports already submitted, as required.

71 The Respondent will then have an opportunity to reply and submit its own reports also keeping in mind the Board's findings above. The Client Group will then have the right of reply.

2. Whether the stay application should continue in writing, orally, or whether the merits of the appeal should be heard on an expedited basis.

72 The Respondent's request for an oral hearing of the stay was conditional: if the Board decided to consider the Client Group's expert evidence, fairness dictates that the Respondent have a right to cross-examine the experts on their reports in an oral hearing.

73 Although the Board has effectively excluded most of the expert reports from consideration in the stay application, its decision on the first issue leaves it open to the Client Group to tender new expert reports or to use the existing reports, albeit on a limited basis. If the Client Group relies on expert reports, this application for cross-examination may be resurrected. In an attempt to reduce the amount of time spent on interlocutory applications in the future, the Board will proceed to address the Respondent's fairness argument at this time.

74 According to R.J. Sharpe at p. 2.55, "It is not uncommon for a motion for an interlocutory injunction to be adjourned to permit the defendant to file material and to allow for cross-examination on affidavits." In interlocutory applications before the courts, the B.C. Supreme Court Rules provide that the court may order the attendance for cross-examination of the deponent of an affidavit, either before the court or before another person as the court directs (Rule 52(8)).

75 There is no similar power expressly granted to the Board. However, quasi-judicial tribunals like the Board must ensure that its procedures comply with the principles of fairness. These principles apply irrespective of whether parties are before the Board on an interlocutory application or on a hearing of the merits of an appeal. The question is not, therefore, whether the principles of fairness apply in relation to an interlocutory application, but to what extent or degree.

76 The starting point in this analysis is that there is no absolute right to an oral hearing, nor is there an absolute right of cross-examination (Re County of Strathcona et al v. Maclab Enterprises Ltd., (1971) 20 D.L.R. (3d) 200 (Alta. C.A.). Whether natural justice requires an oral hearing and cross-examination depends on a number of factors. As stated in Kane v. Board of Governors of University of British Columbia (1980), 18 B.C.L.R. 124 (S.C.C.):

> In any particular case, the requirements of natural justice will depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter which is being dealt with, and so forth.': per Tucker L.J. in Russell v. Norfolk (Duke), [1949] 1 All E.R. 109 at 118.

77 The nature of the inquiry in this case is essentially a balancing of risks in the context of an interlocutory application. It is summary in nature and, in this case, will not result in a final disposition of the issues between the parties. The Board normally conducts these applications in writing, providing the applicant with an opportunity to make its case, the Respondent with an opportunity to respond, and the applicant with a final right of reply. In doing so, the parties have an opportunity to present evidence and make arguments to correct or contradict statements made by the other party.

78 The entitlement to cross-examination as an element of natural justice was considered by the B.C. Supreme Court in Kuntz v. College of Physicians and Surgeons of British Columbia, [1987] B.C.J. No. 724 (S.C.), affm'd (1988), 31 Admin. L.R. 179 (B.C.C.A.). In that case, an investigation committee had written a report for the College of Physicians and Surgeons stating that Mr. Kuntz did not have the skill or knowledge to practise orthopaedics. Mr. Kuntz was advised by the College that he was suspended from practise. In a subsequent hearing on the report before the Council of the College, Mr. Kuntz requested the opportunity to cross-examine each member of the investigating committee who wrote and signed the report. The Council refused this request (among others). Upon

review of this decision, the B.C. Supreme Court considered the principles of natural justice and then noted:

> If there is a likelihood that the petitioner will not have an opportunity to correct or controvert any relevant statement against him contained in the investigating committee's report unless he is given the right to cross-examine the members of the investigating committee then the standards of natural justice will not be met. (p. 5)

79 Based upon the materials before it, the Court found that Mr. Kuntz had not shown that cross-examination of the members of the investigating committee was necessary in order to afford him the opportunity to correct or controvert any relevant statement against him in the report. This was found even though the Court acknowledged that the consequences of the hearing for the petitioner were "serious" and the hearing was on the merits to determine whether the petitioner had the adequate skill and knowledge to practise medicine.

80 The Client Group points out that, if cross-examination is not always required within a hearing of the merits of a case with significant consequences to ones employment (e.g., Kuntz), the onus is even less in the context of an interlocutory motion.

81 Particularly where the decision is not final and there is an adequate opportunity to reply to conflicting evidence, the Board finds that natural justice will normally be met through an opportunity to make written submissions. The critical point is that stated by the Supreme Court of Canada in Kane: "The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity 'for correcting or contradicting any relevant statement prejudicial to their views'" (p. 134-6).

82 In the circumstances, the Board finds that the stay application should continue in writing.

83 The Respondent also suggested that rather than continue with the stay application, the Board should hold an expedited oral hearing on the merits. The Respondent submits that an expedited hearing would negate any requirement for a stay, since the Client Group has agreed to comply with those requirements in the Amended Order that came into effect before September 30, 2000, and the Manager is prepared to consider reasonable requests for extensions of the timelines set out in the order, provided they are justified "by a defensible technical rationale."

84 Section 48 of the Waste Management Act gives the Board the power to issue a stay of a decision made under this Act. Where a party requests a stay under this section, unless the applicant withdraws its request or there is a voluntary stay of the decision, the Board will not summarily dismiss an application. Accordingly, the application to replace the stay application with an expedited oral hearing is denied.

3. Whether a summons duces tecum can be issued, as requested.

85 The documents sought by the Respondent were created in relation to an "independent review" of Golder Associates August 1999 Aquatic Risk Assessment. The existence of the independent review came to the Respondent's attention through Golder's correspondence with the Ministry. After Golder's Risk Assessment was disclosed to the Ministry, the Ministry raised certain issues in relation to the contents of the assessment. In response, Mike Z'Graggen, Trish Miller and Guy Patrick of Golder Associates wrote to the Manager on November 22, 1999, stating as follows:

> As part of our own review process, Golder's risk assessment was submitted for independent review to a firm with considerable experience in conducting aquatic risk assessments in British Columbia, and whose expertise in this field has frequently been retained by BCE [the Ministry of Environment, Lands and Parks]. In our opinion, the results of that review lend credence to the development and implementation of a remediation standard considerably above either 10 mg/kg or 20 mg/kg total PAH standards suggested for the site by BCE.

86 The Respondent contends that it needs the documents relating to the independent review since "the results of an independent review are highly relevant to the issues raised in the stay application."

87 Given the Board's findings on the propriety of the Client Group's stay submissions and the five expert reports tendered in support of those submissions, the relevance of the independent review to the stay application is also questionable. However, to the extent that there may be portions of the review that are relevant, and this issue is likely to arise again prior to the hearing on the merits, the Board will consider this application so the parties can plan their cases accordingly.

(a) Do the documents fall under a litigation privilege.

88 The Client Group points out that although Golder's November 22nd letter suggests that Golder sought the independent review, the review was not generated as part of Golder's internal review process. It states that CNR's counsel, Richard Bereti, retained EVS Consultants to critique a draft of Golder's Aquatic Risk Assessment on behalf of the Client Group. The Client Group stresses that the review was not given to Golder until after Golder's Risk Assessment had been delivered to the Manager. Therefore, the review was not relied upon by Golder in formulating the Risk Assessment and is, accordingly, not discloseable. The Client Group argues that the independent review and its related documents are covered by litigation privilege.

89 According to Hamalainen v. Sippola (1991), 62 B.C.L.R. (2d) 254 (C.A.), for a claim of privilege to succeed, the party claiming privilege must establish, on a balance of probabilities that:

> (a) litigation was a reasonable prospect at the time the document was produced; and,
> (b) the dominant purpose for which the documents were produced was in order to obtain legal advice or to conduct or aid in the conduct of litigation.

90 The Client Group contends that the documents meet this test. It states that the independent review was commissioned in anticipation of the Manager disagreeing with the conclusions reached in the Risk Assessment, and in order to prepare the Client Group for any litigation (appeals) respecting the remediation work that would ultimately be ordered for the site. It states:

> The dealings with the Manager to that point indicated that litigation was a real possibility due to some of the positions being taken by the Manager in discussions with the Appellants [the Client Group] and its representatives. As it turned out, the risk of litigation was all too real.

91 The Client Group states that the independent review was, at all times, intended to be a confidential document for its use in assessing the strengths and weaknesses of its position in relation to

the anticipated litigation over the remediation requirements for the site. The Client Group states that it did not authorize Golder to disclose the independent review, and Golder's reference to the review in its November 22, 1999 letter cannot be taken as evidence that the Client Group intended to waive the privilege attached to the document (S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd., et al (1983), 45 B.C.L.R. 218 (S.C.)). It notes that privilege will only be lost where the client "deliberately and knowingly" (and not inadvertently) waives the privilege (Somerville Belkin Industries Ltd. v. Brockelsby Transport (1985), 65 B.C.L.R. 260 (S.C.) at p. 264)).

92 It is reasonable to believe that, when the review was commissioned sometime in 1999, there was a reasonable prospect of litigation. Beazer and Atlantic were already involved in appeals to the Board of a manager's 1997 Remediation Order. The Board also accepts that one of its purposes was to aid in the conduct of anticipated litigation. The Client Group claims that this was the "dominant" purpose of the review; the Respondent argues that it was not. When assessing the dominant purpose, the Board notes that, by its very nature, an independent review involves an evaluation or assessment of the strengths and weaknesses of the object of the review, usually a primary witness's report. It is therefore a valuable litigation tool. Furthermore, the Respondent's argument that the documents are not privileged are based upon the statement in Golder's November 22nd letter that the review was created "as part of our own review process." This statement has turned out to be false. Thus the Board is prepared to accept that the dominant purpose of commissioning the review was to assist in the conduct of litigation.

93 Further, this finding is consistent with the policy behind litigation privilege. Quoting from Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co. (1990), 74 O.R. 637 (Div. Ct.), Sopinka, Lederman and Bryant state:

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of the privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counterproductive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forgo conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel.... (The Law of Evidence in Canada (Toronto and Vancouver: Butterworths, 1999), p. 746).

94 Thus, the only question is whether Golder's reference to the review in its November letter constitutes waiver of the privilege. The Board finds that it does not.

95 The Board accepts that Golder did not rely on this document when preparing its report and has not changed its report after considering the review. The Board also accepts the Client Group's evidence that the review was intended to remain confidential, despite the fact that Golder referred to it in its November letter. The privilege belongs to the client. In this case, there is no indication that the client either intentionally or impliedly waived its privilege (Somerville).

96 The Board finds that the case cited by the Respondent, Waugh v. British Railways Board, [1980] A.C. 521 (H.L.), is distinguishable on the facts from the case at hand. In Waugh, the Court found that the report at issue was not created for the dominant purpose of preparing for litigation whereas, in this case, the Board has accepted that the independent review was created for that dominant purpose.

97 Accordingly, the Board finds that the independent review is covered by litigation privilege, which has not been waived. Therefore, the Board will not order its disclosure.

98 In light of this finding, the Board need not address the jurisdiction issue.

DECISION

99 The following decisions have been made after consideration of all the submissions and arguments made, whether or not they have been specifically referenced herein.

1. The application for exclusion of the expert reports is granted to the extent that the use of the reports is in furtherance of those matters that the Board has found to be improper considerations in the context of a stay application.
2. The application for a stay will continue in writing. The Client Group may provide new expert reports and submissions on the stay in light of the Board's decision by October 23, 2000. The Respondent may submit its reply by October 30, 2000. The Client Group will then have an opportunity to reply by November 3, 2000.
3. The summons for the independent review is denied on the grounds that the documents sought are covered by litigation privilege that has not been waived.

qp/d/qlrds

Tab 6: *Gardiner v. British Columbia (Ministry of Public Safety and Solicitor General*), [2007] B.C.H.R.T.D. No. 306

Case Name:

Gardiner v. British Columbia (Ministry of Public Safety and Solicitor General)

IN THE MATTER OF the Human Rights Code R.S.B.C. 1996, c. 210 (as amended) AND IN THE MATTER OF a complaint before the British Columbia Human Rights Tribunal Between Rick A.W. Gardiner, Complainant, and Her Majesty the Queen in right of the Province of British Columbia as represented by the Ministry of Public Safety and Solicitor General, Curt Albertson, Shabnem Afzal and Nav Bassi, Respondents

[2007] B.C.H.R.T.D. No. 306

2007 BCHRT 306

File No. 4269

British Columbia Human Rights Tribunal
Vancouver, British Columbia

K. Neuenfeldt (Member)

Decision: July 11, 2007.

(48 paras.)

Appearances:

On his own behalf: Rick Gardiner.

Counsel for the Respondents: Peter Gall, Q.C., and Marli Rusen.

Counsel for Applicant: Anita Braha.

REASONS FOR INTERIM DECISION

ADMISSIBILITY OF DOCUMENTS

Introduction

1 Rick Gardiner filed a complaint on August 28, 2006 (as amended), against the Her Majesty the Queen in right of the Province of British Columbia as represented by the Ministry of Public Safety and Solicitor General (the "Ministry"), Curt Albertson, Shabnem Afzal, and Nav Bassi. On November 20, 2006, the Tribunal informed the parties that it had accepted Mr. Gardiner's complaint against the respondents, on the basis of discrimination in employment, because of a physical and mental disability, contrary to s. 13 of the *Code*.

2 This decision concerns whether some of the evidence Mr. Gardiner seeks to present at the hearing, both oral and documentary, is admissible, or whether it is privileged.

Structure of Decision

3 In this decision, I first review some of the procedural background of the complaint, after which I set out a synopsis of Mr. Gardiner's allegations as contained in the Complaint Form. I then set out the order sought by Gary Hall of the B.C. Government & Service Employees' Union ("BCGEU"), on the issue of privilege. Mr. Hall is one of Mr. Gardiner's proposed witnesses. I next briefly set out the position of the parties. After setting out the provisions of the *Code* in regard to the admissibility of evidence at a hearing, I give my analysis and decision. The decision ends with an Appendix, listing a number of documents.

Background

4 Prior to the hearing, Mr. Gardiner requested that the Tribunal issue an Order to Attend Hearing for Mr. Hall, requiring him to attend the hearing, May 28 through June 1, 2007. Mr. Hall is a lawyer with the BCGEU, and Mr. Gardiner is a member of that union.

5 On May 2, 2007, Mr. Hall's counsel wrote the Tribunal, requesting background information on the complaint "In order to properly prepare for the hearing and advise my client ...". Mr. Hall and his counsel were present at the commencement of the hearing on May 28, 2007.

6 When the hearing began, Mr. Gardiner produced two document books, designated (for identification purposes only) as Document Books A and B. Book A contains 69 numbered tabs (1-69), while Book B contains 62 numbered tabs (70 -100 and 1-31) and 25 lettered tabs, of which 13 contain documents (A-L and XYZ). Several of the tabs contain more than one document. Some documents appear more than once.

7 Mr. Gardiner advised the Tribunal that he intends to present his case by going through the contents of the Document Books in his oral evidence, and wants all of the documents admitted as evidence in the complaint.

8 Soon after the start of the hearing, counsel for Mr. Hall asked the Tribunal for permission to review both Document Books, to ascertain whether, in her opinion, they contained materials to which privilege applied, in relation to either Mr. Hall or the BCGEU.

9 On June 1, 2007, counsel for Mr. Hall and the parties to the complaint made their submissions in regard to whether some of the documents in Books A and B are privileged. Counsel for Mr. Hall argued that several were privileged, while others were not relevant to the complaint.

10 The respondents to the complaint took no position in regard to the application by counsel for Mr. Hall. Although they have a copy of the Document Books, as I understand their submissions, they do not seek to introduce or cross-examine on the documents objected to by counsel for Mr. Hall.

11 Mr. Gardiner opposed the application, saying all of the materials in the Documents Books are relevant to his complaint, and must be admitted as evidence, in order that the Tribunal is able to get at the truth. He argues that if he is not allowed to refer to the documents, he will be severely prejudiced in the presentation of his case.

The Complaint

12 In order to understand the nature of the application, it is helpful to summarize Mr. Gardiner's allegations. In setting out this information, I make no findings of fact.

1. Mr. Gardiner is an Intersection Safety Camera ("ISC") Officer, in the Police Services Division of the Ministry. He has been employed in that position since July 10, 2000. Mr. Gardiner says he was put in the position pursuant to a "medical placement", because he has a physical and mental disability.
2. Mr. Gardiner alleges that a former supervisor of the ISC program, Mr. Wilson, harassed and abused him from 2002 until Mr. Wilson left his position in the fall of 2005. For example, on October 22, 2004, Mr. Wilson told Mr. Gardiner that he was not going to continue accommodating Mr. Gardiner's disability. As a result, on October 23, 2004, Mr. Gardiner filed a complaint with his employer against Mr. Wilson.
3. Mr. Gardiner alleges that his employer chose to ignore his requests for help, and instead of the discrimination and harassment ending, it escalated. On December 14, 2004, Mr. Gardiner says Mr. Wilson removed one of the medical accommodations he required, and which had been in place since 2000. As a result, on December 15, 2004, Mr. Gardiner wrote another letter to his employer, to again complain about the treatment he was receiving.
4. On January 19, 2005, Mr. Gardiner says he stopped working, because his employer supported the decision made by Brian Wilson to withhold the aforementioned medical accommodation. While away from work, Mr. Wilson was abusive and demeaning towards Mr. Gardiner when they spoke to each other.
5. On February 18, 2005, Mr. Gardiner says his employer wrote a letter which was intended to portray him in a negative light. According to Mr. Gardiner, the intent of the letter was to obtain a medical opinion that he was unsuited for his position.
6. Mr. Gardiner alleges that on May 16, 2005, he returned to work when the aforementioned medical accommodation was reinstated. However, he alleges Mr. Wilson resumed harassing him, and that his employer asked Mr. Gardiner to stay off work until they dealt with Mr. Wilson.

7. On July 6, 2005, Mr. Gardiner was allowed to return to work. However, upon his return, he says he was subjected to "passive aggressive behaviour and disrespectful treatment" by Ms. Bassi and Mr. Wilson.
8. On August 12, 2005, Mr. Gardiner informed Ms. Afzal, a supervisor, that he would file a human rights complaint if she did not take action to stop the abuse he was subjected to.
9. On August 18 and 20, 2005, Mr. Gardiner complained to Ms. Afzal's supervisor about what he perceived to be her negative bias towards him.
10. Mr. Gardiner alleges that in January 2006, a co-worker told him that Ms. Bassi, Ms. Afzal, and other co-workers were making negative comments about him, because he was "not the right colour".
11. On January 26, 2006, Mr. Gardiner wrote Ms. Bassi, requesting that he be involved in discussions as to outfitting his new work vehicle.
12. In February 2006, Mr. Gardiner's work vehicle broke down. When he asked for a replacement vehicle, he alleges that Ms. Bassi was rude and dismissive. When a meeting was held that month to determine the specifications of Mr. Gardiner's new work vehicle, contrary to his request, he was excluded from the discussions. This resulted in him not having health and safety issues that were important to him, considered.
13. On February 27, 2006, Mr. Gardiner complained to Ms. Bassi's supervisor, the associate director of the Police Services Division, as to how Ms. Bassi was conducting herself in the workplace. Mr. Gardiner alleges that the associate director insisted that he bring his concerns to the deputy director of the Police Services Division, Mr. Albertson.
14. Mr. Gardiner alleges that when he brought his concerns to Mr. Albertson on March 1, 2006, Mr. Albertson spoke to Mr. Gardiner in an abusive and discriminatory manner. The same day, Mr. Gardiner filed another complaint about the manner in which Mr. Albertson spoke to him.
15. On March 3, 2006, Mr. Gardiner sent a fax to the Minister of Public Safety and Solicitor General, asking him to intervene.
16. On March 7, Mr. Gardiner again wrote the associate director of the Police Services Division, asking that his complaint against Mr. Albertson be dealt with immediately.
17. On March 23, 2006, Mr. Gardiner wrote the Solicitor General, requesting that he address his concerns about how Ms. Bassi had treated him.
18. On April 7, 2006, Mr. Hall, a lawyer with Mr. Gardiner's union, warned Mr. Gardiner that he was "in danger" at work, and that his employer was trying to force him to quit.
19. On April 10, 2006, Ms. Bassi took a work place accommodation away from Mr. Gardiner. As a result, Mr. Gardiner ceased working.
20. On April 25, 2006, Ms. Afzal wrote to Mr. Gardiner's doctor, "in a defamatory manner" with the intent of getting a medical opinion to the effect that Mr. Gardiner was unsuitable for work.
21. On May 1, 2006, Mr. Gardiner wrote a letter to the Solicitor General, regarding Ms. Afzal's letter of April 25, 2006, and asked for an investigation.

According to Mr. Gardiner, the investigation was not conducted within the required 30 day period.

22. On May 30, 2006, Mr. Gardiner received a letter from his employer that set out an offer for an early retirement settlement. Mr. Gardiner rejected it as unacceptable.
23. On August 3, 2006, Mr. Albertson informed Mr. Gardiner by letter that he accepted a report of an investigation done in regard to a complaint made by Mr. Gardiner. The report stated that Mr. Gardiner's allegations were unfounded. Mr. Gardiner says the letter and report are discriminatory.

The Application

Initial submissions

13 On June 1, 2007, counsel for Mr. Hall argued that 19 of the documents submitted by Mr. Gardiner are solicitor and client privileged, 44 are subject to "Wigmore" and litigation privilege (with six subject to solicitor and client privilege, Wigmore and litigation privilege). Counsel for Mr. Hall also argued that an additional nine documents are irrelevant, unnecessary, or inappropriate as evidence at the hearing.

14 Counsel for Mr. Hall seeks an Order from the Tribunal as follows:

1. Solicitor-client privilege applies to oral and written communications between Mr. Hall and Mr. Gardiner, except where waived, and that those privileged communications are therefore inadmissible.
2. Solicitor-client privilege applies to oral and written communications between Mr. Hall and BCGEU staff and officials and those communications are therefore inadmissible.
3. Privilege under the Wigmore criteria applies to oral and written communications between Mr. Gardiner and BCGEU staff and/or officials with regard to any grievances or complaints and any advice Mr. Gardiner sought or received in connection with his rights under the collective agreement and that therefore those communications are inadmissible.
4. Litigation privilege also applies to any communication in anticipation of or arising in the course of the litigation, this includes communications regarding grievances, complaints and Mr. Gardiner's rights under the collective agreement.
5. Documents with regard to internal BCGEU business are irrelevant and/or not necessary and/or inappropriate and are therefore inadmissible.
6. All documents which the Tribunal finds are privileged, and therefore inadmissible, be returned to the Tribunal, for destruction.

15 Counsel for Mr. Hall notes that privilege is waived on an excerpt from one document. The excerpt is contained in an attachment to a letter, dated November 15, 2006, from a BCGEU staff representative to David Morhart, Deputy Solicitor General. The excerpt is found at Book B, Tab 87, pages 6 and 7. To ensure certainty, I set out the statement over which privilege is waived, in its entirety:

> On April 7, 2006 Gary Hall, union lawyer and staff representative met with me at my house. Mr. Hall advised me that it was his and other senior union representatives opinion that I was "in danger" at work. Mr. Hall related an incident where apparently someone representing my employer made it known to union rep. Linsay Buss that my employer does not like me, and wants to get rid of me. This conversation, apparently took place in Victoria, while Ms. Buss was working on my behalf. Mr. Hall also asked me how long I had until I was eligible for retirement. I told him I had approximately 6.5 years. Mr. Hall then stated that would be a lifetime, referring to how difficult and stressful it would be having my employer harass me for that length of time. I then said to Mr. Hall even if we win this Discrimination and Harassment complaint, they're (employer) are not going to leave me alone are they? Mr. Hall then stated it was his and other union officials belief that my employer is gong to try to make my life miserable for me at work until I can no longer tolerate it and I am forced to leave my employment with the BC government. [Reproduced as in original]

16 A nearly verbatim version of the excerpt is at page 6 of a 9 page attachment to Mr. Gardiner's Complaint Form. The punctuation is somewhat different, and includes the following final sentence:

> This discrimination and harassment comes under employment and retaliation. The grounds are because of physical and mental disabilities.

17 Counsel for the respondents argued that the relationship between employers, unions, and a union's members, require the respective parties to be able to conduct their business in a confidential manner. In this case, the respondents do not want to interfere with the union/member relationship.

18 Mr. Gardiner's position is straightforward. He argues that he must be able to refer to the documents over which the BCGEU seeks to claim privilege, in order that the Tribunal be able to get at the truth of the various issues in his complaint. The materials in question show that he did what he could to deal with the situation he faced. In his view, seeking the truth trumps any other consideration, including privilege, and he should be allowed to refer to the entire range of the documentation related to events concerning his complaint.

Additional submissions

19 After the initial submissions were concluded on June 1, 2007, Mr. Gardiner requested an opportunity to make further submissions on admissibility, saying that he forgot to mention information that he felt was crucial to his argument.

20 On June 13, 2007, I heard oral submissions from Mr. Gardiner, counsel for the respondents, and counsel for Mr. Hall, as to whether I should allow the submissions to be reopened. I also heard the submissions, in the event that I allowed the reopening.

21 Mr. Gardiner argued that as a lay person, he was at a disadvantage in presenting all the arguments he wished to make. He stated that after the June 1, 2007 submissions, he realized that he should have brought a previous decision, where he was also the complainant, to the attention of the Tribunal, *Gardiner v. Ministry of Attorney General*, 2003 BCHRT 41 ("*Gardiner*"). He argued that in that decision, the Tribunal rejected a similar argument by the union as to whether it could claim privilege in regard to evidence Mr. Gardiner wished to present in that complaint. He submitted that I should apply the decision in *Gardiner* to the present complaint, and decline to exclude evidence as

being privileged. He was not able to present a written version of the decision, and his submissions were based on his general, and somewhat vague, recollection of the decision. This is understandable, given that over four years have passed since the final decision in *Gardiner* was made by the Tribunal.

22 Counsel for Mr. Hall stated that she would consent to Mr. Gardiner making further submissions on the issue, if Mr. Gardiner provided her with a copy of the decision he was referring to. She then noted that there is no reference in *Gardiner* to a ruling on privilege concerning the union, and that she could locate no written preliminary rulings on the matter in reference to the complaint in *Gardiner*.

23 Among other points raised by counsel for the respondents, he argued that the vagueness of Mr. Gardiner's recollection of what was said in the earlier hearing severely diminished the value of any ruling that might have been made.

24 In my view, it is appropriate to consider Mr. Gardiner's additional submissions. He is, as he notes, acting on his own behalf, and he may not have been aware of the usual practices with respect to the order of submissions before a Tribunal. In addition, this is the first application he has made of this type.

25 I now address the use to be made by me of any orders made in *Gardiner* as to disclosure of documents and privilege. Regardless of any interim decision on privilege that may have been made in *Gardiner*, the complaint in *Gardiner* did not involve the same issues, parties, witnesses, documents, or time frame. Any previous order as to admissibility of privileged evidence, incidental to the final decision in *Gardiner*, is not binding on me, and in the circumstances of this complaint, would be of little assistance to me. I must make my decision on the matter now before me, within the context of the scope of this complaint, and within the context of documentation Mr. Gardiner seeks to enter and the witnesses he wishes to examine.

Analysis

26 In coming to my decision, I have considered all the submissions of the parties and counsel for Mr. Hall. I have also reviewed all the documents contained in Document Books A and B.

27 Section 27.2(1) of the *Code* deals with evidence before the Tribunal:

> 27.2(1) A member or panel may receive and accept on oath, by affidavit or otherwise, evidence and information *that the member or panel considers necessary and appropriate*, whether or not the evidence or information would be admissible in a court of law.
>
> *(2) Nothing is admissible in evidence before a member or panel that is inadmissible in a court because of a privilege under the law of evidence.*
>
> (3) Despite section 4, subsection (1) of this section does not override an *Act* expressly limiting the extent to which or purposes for which evidence may be admitted or used in any proceeding.
>
> (4) A member or panel may direct that all or part of the evidence of a witness be heard in private. [Emphasis added]

As can be seen from this section, the Tribunal is required by the *Code* to protect evidentiary privilege where it is identified.

Relevance

28 In my view, as indicated in s. 27.2(1), the first issue to be considered when evidence is presented at a hearing is whether it is necessary or appropriate for consideration, given the parties to, and the scope of, the complaint. The testimony and documents a party wishes to present at a hearing must be relevant to what the complaint is about.

29 Upon reviewing the documents in respect of which privilege is claimed, I note that a large number of the documents are faxes, letters, and memorandums, to BCGEU staff and officials, containing Mr. Gardiner's view of his ongoing relationship with his employer, various complaints against his employer, and the BCGEU's responses to his correspondence. Other correspondence concerns Mr. Gardiner's relationship with various BCGEU staff as a result of his dispute with his employer. In my view, on the face of it, such material appears to have little probative value to the issues I must decide in this complaint: did the Ministry and the individual respondents discriminate against Mr. Gardiner? The BCGEU is not a party to the complaint, and neither its internal affairs, nor its conduct, vis-à-vis Mr. Gardiner, are at issue in the complaint, nor do they appear to be relevant to the scope of the complaint.

Privilege

30 In *Vetro v. Klassen and Pacific Transit Cooperative (No. 2)*, 2005 BCHRT 263 (para. 56), the Tribunal sets out a framework for considering the issue of privilege.

> The issue is whether the documents in question are privileged. In *R. v. Gruenke*, [1991] 3 S.C.R 263, the court distinguished between the two categories of privilege recognized at common law. The first type creates a *prima facie* presumption of inadmissibility if it fits within a recognized class of privilege, such as solicitor-client privilege or settlement communication privilege, unless the party seeking production can show an exception to the general rule. The second type is referred to as "case-by-case" privilege. In this type of privilege, the presumption is that the material is not privileged. The party resisting production must show the adjudicator that, in the particular circumstances of the case, privilege should be accorded to the material. This is done by satisfying what is known as the Wigmore test, adopted by the Supreme Court of Canada in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. This test consists of four conditions:
>
> i. The communications must originate in a confidence that it will not be disclosed;
> ii. The elements of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
> iii. The relation must be one which in the opinion of the community ought to be sedulously fostered; and
> iv. The injury which would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation. (para. 56)

31 In *Metcalfe v. International Union of Operating Engineers, Local 882, and others (No. 6),* 2005 BCHRT 78 (para. 44), the Tribunal noted that by reason of s. 27.2(2) of the *Code*, the Tribunal is required to comply, in its strict form, with the law regarding solicitor-client privilege. Put another way, the Tribunal has no discretion as to whether it will consider and apply the law of evidence when that issue is raised. As stated by the Supreme Court of Canada in *Descôteaux v. Mierzwinski*, [1982] S.C.J. No. 43, privilege is a substantive rule, designed to protect the confidentiality of communications.

32 Having said that, it is important to understand the effect that a finding of privilege can have on the hearing process. As stated in *The Law of Evidence*, 4th ed. (2005), D.M. Paciocco & L. Stuesser, c. 7, para. 2 (QL version):

> Privilege, unlike other rules of exclusion, is not designed to facilitate the truth-finding process. In fact, privilege is inimical to the search for truth in that it leads to the loss of otherwise relevant and reliable evidence. It is for this reason that the finding of a privilege is to be exceptional.

33 As also stated in *Metcalfe (No. 6)* (para. 46):

> It is important to note that the privilege belongs to the client, and may only be waived by the client. It is the solicitor's obligation, and that of the court (or in this case, the Tribunal), to protect the privilege.

34 In *Akbar Buksh and Brewery, Winery & Distillery Workers' Union, Local 300 v. Molson Brewery BC Ltd.*, BCLRB No B461/94, the Labour Relations Board made the following observation:

> In the grievance arbitration process, unions frequently retain legal counsel to advise them on their chances of success in any particular case. In this process, legal counsel may well investigate and interview a number of individuals, including the grievor. However, these interviews by legal counsel do not turn the grievor into the counsel's clients.

35 In *Mazur v. B.C. Rail and others (No. 3),* 2006 BCHRT 53, the Tribunal noted that within the labour relations field, the documentation and communications generated are generally recognized as privileged. In those decisions dealing with solicitor-client privilege, as between union counsel and the grievor, it is the union that holds the privilege, and it is the union's to waive. As stated in *Mazur (No. 3)* (para. 44):

> Grievors have not been successful when trying to assert this privilege against the union: *Akbar Buksh and Brewery, Winery & Distillery Workers' Union, Local 300* v. *Molson Brewery BC Ltd.*, BCLRB No B461/94. Communications with an employee may be covered as against the employer by this privilege, but again, it appears that the union is the party who can waive it: *David Dorris*, BCLRB No. B101/93.

36 In *Vetro* (paras. 63 and 64), the Tribunal noted that, where the communications are between a grievor and a union representative, in respect to a grievance, there is an even stronger argument that the communication originated with the understanding that it would not be disclosed, as compared to

the case where the communication is between a union member who is not a grievor and a union representative.

37 In *Vetro* (paras. 65 and 65), the Tribunal goes on to state:

> I note that, in this case, the communications referred to relate to the relationship between Mr. Vetro as grievor and Mr. Watts as his union representative with respect to his grievance. I agree with the general arbitral jurisprudence that such communications are presumptively given in confidence, that the element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties, and that the relation is one which in the opinion of the community ought to be sedulously fostered. Finally, in the absence of exceptional circumstances, I find that the injury which would inure to the grievance process and labour relations more generally, by the disclosure of the communications, is greater than the benefit thereby gained from the correct disposal of the litigation. See, for example, *Duke Point Remand Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-80* (Mutch Grievance), [2002] B.C.C.A.A.A. No. 159 (McPhillips), at para. 31.
>
> For the reasons outlined above, I find that communications between Mr. Vetro and his union representatives with respect to his grievance are privileged pursuant to the Wigmore criteria and therefore disclosure is not required. I note that this finding applies only to those communications which relate to the grievance, and does not apply generally to all communications between Mr. Vetro and his union representatives.

Decision

38 In my view, solicitor-client privilege clearly applies to communications between Mr. Hall and BCGEU staff and officials concerning Mr. Gardiner's ongoing dispute with the Ministry. Any communications concerning settlement discussions, involving Mr. Hall, Mr. Gardiner, BCGEU staff and officials, or the Ministry, are also subject to privilege.

39 In regard to the bulk of the other documents noted by Mr. Hall's counsel, I am of the view that, as in *Vetro,* Wigmore privilege most appropriately applies. The general arbitral jurisprudence continues to be that communications between Mr. Gardiner and Mr. Hall and other BCGEU staff or officials, concerning Mr. Gardiner's ongoing dispute with the respondents, are presumed to be given in confidence, that confidentiality is essential to the full and satisfactory maintenance of the grievance process, and that the relationship is one which, in the opinion of the community, ought to be fostered. Finally, in the absence of exceptional circumstances, the injury which would inure to the relationship by the disclosure of the communications would be greater than the benefit gained by Mr. Gardiner, in regard to the correct disposal of this complaint against these respondents. This final consideration is of particular importance here, given the nature and scope of the complaint, and the aforementioned apparent limited relevance of most of the documents in question. It does not appear to be seriously in dispute, for example, that Mr. Gardiner sought his union's assistance over an extended period of time, because he was dissatisfied with his relationship with his employer.

40 If I am wrong in regard to whether Wigmore privilege applies to specific documentation, it is my view that litigation privilege would also apply to the communications between Mr. Gardiner,

Mr. Hall, and other BCGEU staff and officials, concerning Mr. Gardiner's ongoing dispute with the respondents. In *The Law of Evidence, supra,* c. 7, litigation privilege is defined as communications between a lawyer and a third person, if, at the time of the making of the communication, litigation was commenced or anticipated, and the dominant purpose for the communication was for use in, or advice on, the litigation. In my view, this type of privilege would also apply to staff and officials of BCGEU, in keeping with the special nature of the grievance and arbitration process. Throughout Mr. Gardiner's dealings with the Union in the time period covered by the complaint, it is clear that the information obtained and being exchanged by him and the BCGEU was done in contemplation of, or pursuant to, the grievance and arbitration process.

41 Those documents that counsel for Mr. Hall describes as irrelevant are also subject, in my view, to Wigmore and litigation privilege, in that they relate to aspects of Mr. Gardiner's ongoing relations with the BCGEU, in his continuing dispute with the Ministry.

42 For the sake of clarity, I have attached to this decision, as Appendix 1, a table containing the following information:

1. Column one lists the documents from Books A and B for which privilege is claimed;
2. Column two contains a brief description of the documents;
3. Column three contains a brief description of the privilege claimed. Words in italics indicate the type of privilege I find appropriate for the document listed, rather than that assigned to it by counsel for Mr. Hall;
4. Column four sets out the type of privilege I have assigned to the document.

43 It is my view that, given the specific nature of this complaint, and the types of documents Mr. Gardiner seeks to enter in the hearing, all the documents noted by counsel for Mr. Hall are subject to privilege.

44 As Mr. Hall and the BCGEU have not, except as specifically noted in paragraph 15 above, waived privilege, all documentation that is subject privilege is inadmissible.

45 This decision concerns only those documents that are specifically noted. Any document in Document Books A and B not listed in the table has not been found to be inadmissible.

46 As to the remaining matters raised by counsel for Mr. Hall, I make the following orders in this complaint:

1. Solicitor-client privilege will apply to oral communications between Mr. Hall and BCGEU staff and officials, unless specifically waived.
2. Privilege will apply to oral communications between Mr. Gardiner, Mr. Hall and BCGEU staff and officials, and the respondents, in regard to any settlement discussions.
3. Privilege under the Wigmore criteria will apply to oral communications between Mr. Gardiner and BCGEU staff and/or officials, including Mr. Hall, with regard to any grievances or complaints, and any advice Mr. Gardiner sought or received in connection with his rights under the collective agreement, unless specifically waived.

4. Litigation privilege will apply to any communication in anticipation of, or arising in the course of litigation, including communications regarding grievances, complaints and Mr. Gardiner's rights under the collective agreement, unless specifically waived.

47 I also order that any copies of any inadmissible documents referred to in this decision, in the possession or control of counsel for the respondents, be given to counsel for Mr. Hall. Mr. Gardiner and Mr. Hall may retain their copies of the documents.

48 In closing, I note here that the majority of the documentation Mr. Gardiner seeks to refer to in his complaint, as contained in Document Books A and B, are not affected by my decision. As well, this order does not restrict Mr. Gardiner's ability to give evidence and submit other documentation that concerns his ongoing dispute with the respondents. He is also free to describe what steps he took through his union in relation to his dispute with his employer.

* * * * *

Appendix 1

Notes:

All Tab numbers are set out as they appear in Document Books A and B.

Book A contains tabs A 1 through A 69 (Numbered in submissions as 1 - 69)

Book B contains three sets of tabs, in the following order:

B 70 through B 100 (Numbered in submissions as 70 - 100)

B 1 through B 31 (Numbered in submissions as 101 - 131)

B A through B XYZ

Abbreviations:

RG = Rick Gardiner	S/C = Solicitor/Client Privilege
CA = Collective Agreement	ST = Settlement Privilege
	W = Wigmore Privilege
	L = Litigation Privilege

NB: In the column entitled "Privilege Claimed", words in italics indicate the type of privilege appropriate for the item in question.

[Editor's note: Appendix 1, a table listing documents from Books A and B, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@quicklaw.com and request the following document: 07bch306Appendix1.doc.]

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