

**FEDERAL COURT OF APPEAL**

BETWEEN:

**AIR PASSENGER RIGHTS**

Applicant

– and –

**ATTORNEY GENERAL OF CANADA**

Respondent

– and –

**CANADIAN TRANSPORTATION AGENCY**

Intervener

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**REPLY OF THE APPLICANT, AIR PASSENGER RIGHTS**

**Motion Regarding the CTA's Affiant's Failure to Attend Cross-Examination  
Motion to Enforce, Vary, and Correct the Court Orders Issued by Gleason, J.A.  
(pursuant to Rules 8(2), 97, 397(2), and 369.2 of the *Federal Courts Rules*)**

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**FEDERAL COURT OF APPEAL**

BETWEEN:

**AIR PASSENGER RIGHTS**

Applicant

– and –

**ATTORNEY GENERAL OF CANADA**

Respondent

– and –

**CANADIAN TRANSPORTATION AGENCY**

Intervener

**REPLY OF THE MOVING PARTY / APPLICANT**

1. The CTA misdescribes its affiant's non-attendance to the Court's May 2, 2022 Direction. The Court never directed the examination to be postponed pending resolution of the dispute over the Cross-Examination Materials (defined in the Motion Record). Rather, the Court soundly rejected the CTA's invitation for preliminary intervention before the examination. The CTA also relies on the meritless and premature Rule 94 motion as the pretext for avoiding a cross-examination that the Court had expressly contemplated. This evasive tactic was strongly rebuked by Nadon, J. (as he then was).<sup>1</sup>

2. The CTA's submissions on its five failures to comply with the Court's October Order and April Order are *again* replete with bald assertions. For four of the five failures, the CTA did not advance any serious argument and is not objecting to some of the requested relief, while tacitly acknowledging its non-compliance with court orders. For the CTA's failure to produce Twitter private messages and @Info emails, the CTA is engaging in wordplay to re-argue the April Order, backtracking on its admissions, and challenging the accuracy or completeness of its own submissions in the earlier motion.

<sup>1</sup> *Héneault et Gosselin Inc. v. Entreprises P.F. St-Laurent Inc.*, [1998] F.C.J. No. 281 [*Héneault*] at paras. 1-3, 4(4), and 8 [Tab 7, pp. 58-59].

3. The CTA did not oppose two aspects of this motion, a request for an extension of time to file the Applicant's affidavits and correcting a clerical error in the April Order.

4. The AGC is not opposing the Applicant's motion. This motion should be granted, and the CTA's related Rule 94 motion be dismissed, all with costs against the CTA payable forthwith. The CTA is creatively circumventing Court Orders using every imaginable technicality. Without serious consequences, the CTA's ongoing conduct will indefinitely delay this Application and inhibit the Court's truth-seeking functions.

**A. The CTA's Frivolous Excuses for Its Failure to Attend a Cross-Examination**

5. The CTA advances two frivolous excuses for its affiant's failure to attend cross-examination. First, the CTA mischaracterizes the Court's May 2, 2022 Direction as requiring the CTA to bring a preliminary Rule 94 motion *prior* to its affiant's cross-examination.<sup>2</sup> Second, the CTA claims that its affiant is not refusing to attend, but rather that the CTA's Rule 94 motion bars the examination from proceeding as scheduled.

6. For the first excuse, the Court's Direction never stated that a Rule 94 motion, or even the dispute over the Cross-Examination Materials, is to precede the examination. Rather, when the Direction is read with reasonable lenses, it is clear that the Court expressly refused the CTA's urgent request for intervention before the examination.<sup>3</sup>

7. The usual practice in the federal courts is that all objections, whether relating to the Cross-Examination Materials or the questions that would be posed at the cross-examination, are dealt with concurrently at a single refusals motion *after* the examination occurs.<sup>4</sup> Without an examination transcript, the CTA is asking the Court to rule on its objections in a factual vacuum, without the proper evidentiary context.

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<sup>2</sup> CTA's Written Representations (May 26, 2022) at paras. 25 and 32.

<sup>3</sup> The CTA has previously utilized the same tactic as an excuse to avoid cross-examination (see Applicant's Written Representations (May 15, 2022) at para. 73).

<sup>4</sup> *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2015 FC 1292 at paras. 67-68 [Tab 8, pp. 71-72].

8. For the second excuse, Nadon J. rebuked the same pretext in a case involving similar cross-motions.<sup>5</sup> This is a complete answer to the CTA's Rule 94 motion, and the Applicant's motion to compel attendance and for the CTA to bear all the wasted costs.

9. In its Rule 94 motion reply, the CTA backtracked on its requests for a preliminary ruling on the "existence" of the Cross-Examination Materials and assertions of solicitor-client privilege, deferring them to the cross-examination.<sup>6</sup> The CTA accepts that objections should properly be made at the examination itself, and not in advance. However, the CTA remained mum on *why* it did not simply make its relevance objections for the Cross-Examination Materials at the examination. The CTA is attempting to burden the Court with a myriad of motions, with an endless interlocutory saga.

10. For the relevance of the Cross-Examination Materials, the Applicant relies on its Rule 94 response at paragraphs 48-52 and 69-71. In its Rule 94 reply, the CTA made a hairsplitting argument that *GCT Canada* did not address inspection of materials. Both the scope of cross-examination and materials for inspection therein are determined by relevance to the disputed issues, such as the inadequacy of the CTA's document search.

11. The CTA also shifted the scope of cross-examination on the CTA Document Search Affidavit from relevance to the bias issues, to a new argument that the examination be confined to the eight sample topics only.<sup>7</sup> That affidavit was to "[detail] the CTA's efforts to comply with the [October Order]," *without* being confined to the eight topics. The CTA is defying the April Order by omitting search efforts that are not explicitly spelled out in the eight examples, such as the Twitter and @Info messages. The CTA also relies on a narrow view of relevancy, contrary to the federal courts' guidance.<sup>8</sup>

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<sup>5</sup> *Héneault* (per Nadon, J., as he then was) at paras. 1-3, 4(4), and 8 [Tab 7, pp. 58-59].

<sup>6</sup> CTA's Rule 94 Motion Written Representations (May 12, 2022) at paras. 22 and 58-62; and CTA's Rule 94 Motion Reply (May 27, 2022) at p. 3.

<sup>7</sup> CTA's Rule 94 Motion Reply (May 27, 2022) at pp. 1-2.

<sup>8</sup> *Nguesso v. Canada (CI)*, 2015 FC 102 at paras. 105-106 [Tab 10, p. 121]; see also *Stanfield v. Canada (MNR)*, 2004 FC 584 at paras. 27-28 [Tab 11, pp. 141-142].



**B. The CTA's Five Failures to Comply with this Court's Orders**

12. *Failure to assert privilege by motion.* The CTA argued that the informal motion process in the October Order no longer applies.<sup>9</sup> The CTA's hairsplitting distinction between the general October Order and specific April Order was addressed in the Applicant's response on the Rule 94 motion at paragraphs 69-71. The CTA accepts that some of the April 20, 2022 documents were from its search for the October Order, since Ms. Cuber's affidavit did not refer to a new search and the CTA also claimed that the April Order did not require a new search.<sup>10</sup> This begs the question why the privilege procedure in the October Order would suddenly cease to apply to that previous document search. The CTA cannot selectively comply with a Court Order as it prefers.

13. The CTA tacitly admitted that documents were withheld on the basis of privilege, and does not object to bringing an informal motion on its own, without the AGC. However, in light of the CTA's limited role as intervener,<sup>11</sup> the terms of the October Order, and the serious concerns about the CTA's document production and inaccurate submissions in that regard,<sup>12</sup> the AGC should be bringing that motion, not the CTA.

14. *Failure to produce Twitter Private Messages and @Info emails.* The CTA is engaging in wordplay to mislead this Court.<sup>13</sup> The CTA is saying that, in its previous admission in the motion for the April Order for this category that "such documents exists [...] consist[ing] of messages and inquiries from individuals to the [CTA]"<sup>14</sup> was actually not referring to third-party correspondences concerning the Statement on Vouchers, but rather wholly unresponsive documents. This is another attempt by the CTA to move the goal posts after the Court has overruled the CTA's baseless scattershot objections.

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<sup>9</sup> CTA's Written Representations (May 26, 2022) at para. 42.

<sup>10</sup> CTA's Rule 94 Motion Reply (May 27, 2022) at p. 1, last paragraph.

<sup>11</sup> *Air Passenger Rights v. Canada (AG)*, 2021 FCA 112 at para. 13 [Tab 2, p. 12].

<sup>12</sup> Applicant's Written Representations (May 15, 2022), paras. 122-125.

<sup>13</sup> CTA's Written Representations (May 26, 2022) at para. 44-49.

<sup>14</sup> CTA's Written Representations on the previous Motion (Feb. 1, 2022) at para. 54.

15. ***Failure to produce the March 24, 2020 Members' Meeting Documents.*** It is obvious that the CTA Members did not telepathically set up this meeting using the lone comparison chart the CTA has produced.<sup>15</sup> The CTA is avoiding this Court's ruling that all the documents for such meetings, irrespective of whether the face of the document mentions the Statement on Vouchers, are within the scope of the Meeting Documents term of the October Order.<sup>16</sup> The CTA continues to knowingly defy the Court Orders.

- (a) The CTA is falsely claiming that the CTA Document Search Affidavit addresses the concerns about the missing agendas, minutes, or notes, and deflected this issue to be dealt with at the cross-examination. In fact, Ms. Cuber's barebones affidavit resembles a scripted Q&A for the eight sample topics only, and does not even mention the March 24, 2020 Members Meeting or these missing items.
- (b) The "scheduler" file is clearly covered by the October Order, but the CTA is tacitly ignoring the Orders by withholding it. A person should not need to be specifically called upon, or micromanaged by the Court to comply with Orders.
- (c) For the agenda(s) for the March 24, 2020 meeting, the CTA relies on a bald assertion about alleged differences between regular Members' Meetings, *in camera* Meetings, and EC Meetings, without any evidence.<sup>17</sup> The CTA Members do not set their discussion agenda, or exchange pertinent documents, telepathically.

16. ***Improper Redaction of the April Order Documents.*** The CTA baldly asserted that the ninety (90) redacted pages cover EC meetings over several months that were beyond the time periods covered by the October Order. The CTA failed to provide *any* evidence to support its say-so. The CTA enjoys no special status as a litigant in regards to proof and is bound by the same rules as other litigants, particularly Rule 363.<sup>18</sup>

<sup>15</sup> Lukács Affidavit (May 15, 2022) at para. 20 [Motion Record (**MR**), Tab 2, p. 21].

<sup>16</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), para. 34 [MR, Tab 8, p. 505].

<sup>17</sup> CTA's Written Representations (May 26, 2022) at para. 56.

<sup>18</sup> *Alaktsang v. Canada (CI)*, 2006 FC 1168 at para. 19 [Tab 3, p. 16]; *Lukács v. C.T.A.*,

17. The CTA filed the Affidavit of Meredith Desnoyers (May 26, 2022), which lacks any substance except attaching three uncontested exhibits. The jurat for this affidavit does not identify the affirming commissioner, contrary to standard practice. Although a non-compliant affidavit should be struck, nothing substantive turns on this affidavit.

18. ***The CTA's Fraudulent Certificate of Authenticity.*** The CTA refused to explain why Ms. Hamelin falsely impersonated as an “Information Technology Manager,” and why its Secretary shirked the duties in the *Canada Transportation Act* and the April Order to issue a certificate. The CTA did not claim any oversight. The CTA also falsely asserted that Ms. Hamelin was “in the Agency’s IM Department assigned to assist with the document search[...],” when she was actually from a different “Information Technology Services Division.”<sup>19</sup> Moreover, the CTA’s assertion is contradicted by the CTA Document Search Affidavit, which is entirely silent on Ms. Hamelin’s involvement.<sup>20</sup>

19. The CTA employed a “so what” attitude in trying to paper over the serious issues by claiming it “will re-file a certificate if the Court finds it necessary.” Its Secretary must authenticate the documents, and a CTA analyst should not shoulder this solemn duty.

### **C. Wasted Costs/Expenses for the Failure to Attend and Costs for this Motion**

20. As in the case of *Héneault*,<sup>21</sup> the CTA should be ordered to pay the wasted costs for the failure to attend. The CTA’s attempt to shift blame to the Applicant for “failure to cancel” the examination is without merit. The Applicant acted reasonably to comply with the schedule specified by Gleason, J.A. for the cross-examination.<sup>22</sup> The CTA should also bear the cost of attending the new examination, considering the evasive tactic the CTA has employed to avoid the timetable specified by Gleason, J.A.

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2014 FCA 239 at paras. 8-9, 11, and 13 [Tab 9, pp. 93-95].

<sup>19</sup> Lukács Affidavit (May 15, 2022), Exhibit “BF” [MR, Tab 2BF, p. 449].

<sup>20</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), para. 47(c) [MR, Tab 8, p. 509].

<sup>21</sup> *Héneault* (per Nadon, J., as he then was) at para. 2 [Tab 7, p. 58].

<sup>22</sup> Reasons of Gleason, J.A. (Apr. 11, 2022), para. 50 [MR, Tab 8, p. 510].

21. With respect to the costs of this motion, the CTA did not address the Applicant's submissions that the CTA was misleading the Court.<sup>23</sup> The CTA cited one authority from a B.C. court, arguing that the CTA should be shielded from costs, except in the case of misconduct only. The CTA misses the point in at least three material respects.

22. Firstly, in the federal courts, costs are not limited to misconduct but rather tribunals are also exposed to costs if they participate in the adversarial debate and come across as a winner or a loser.<sup>24</sup> On this motion, the CTA engaged in the adversarial debate, exceeding the scope of its intervention. The CTA raised numerous technicalities to inhibit the Court's ability to adjudicate the bias issues on a proper evidentiary record.

23. Secondly, the CTA has repeatedly engaged in questionable conduct to interfere with the production of relevant documents, which includes defying the Court's Orders, filing a fraudulent certificate, failing to attend a court-sanctioned cross-examination, making repeated bald assertions, and providing misleading representations to the Court.

24. Thirdly, the CTA did not cite any authority from the federal courts that would immunize administrative tribunals from the usual cost consequences under the *Federal Courts Rules*. Indeed, the authority in the federal courts confirms that the usual costs rules apply to administrative tribunals,<sup>25</sup> including in interlocutory motions.<sup>26</sup>

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 30, 2022

"Simon Lin"

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**SIMON LIN**

**Counsel for the Applicant,  
Air Passenger Rights**

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<sup>23</sup> Applicant's Written Representations (May 15, 2022) at paras. 121-125.

<sup>24</sup> *Canadian Pacific Railway Company v. Canada (TA)*, 2021 FCA 69 at para. 102 [Tab 6, p. 56].

<sup>25</sup> *Belzberg v. Canada (CP)*, 2009 FC 657 at para. 48 [Tab 4, p. 30].

<sup>26</sup> *Canada (CP) v. Belzberg*, 2009 FCA 275 at para. 25 [Tab 5, p. 36].

## LIST OF AUTHORITIES

### Case Law

*Air Passenger Rights v. Canada (Attorney General)*, 2021 FCA 112

*Alaktsang v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 1168

*Belzberg v. Canada (Commissioner of Patent)*, 2009 FC 657

*Canada (Commissioner of Patents) v. Belzberg*, 2009 FCA 275

*Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69

*Héneault & Gosselin Inc. c. Entreprises P.F. St-Laurent Inc.*, [1998] F.C.J. No. 281

*Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2015 FC 1292

*Lukács v. Canada Transportation Agency*, 2014 FCA 239

*Ngnesso v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 102

*Stanfield v. Canada (Minister of National Revenue)*, 2004 FC 58

2021 CAF 112, 2021 FCA 112  
Federal Court of Appeal

Air Passenger Rights v. Canada (Attorney General)

2021 CarswellNat 1698, 2021 CarswellNat 8283, 2021  
CAF 112, 2021 FCA 112, 333 A.C.W.S. (3d) 233

**AIR PASSENGER RIGHTS (Applicant) and THE  
ATTORNEY GENERAL OF CANADA (Respondent)**

Mary J.L. Gleason J.A.

Judgment: June 4, 2021  
Docket: A-102-20

Counsel: Simon Lin (written), for Applicant  
J. Sanderson Graham, for Respondent  
Allan Matte, for Canadian Transportation Agency

***Mary J.L. Gleason J.A.:***

1 The Court has before it a motion made by the applicant under [Rules 369, 318\(4\)](#), and in the alternative, under [Rule 41 of the Federal Courts Rules, SOR/98-106](#), seeking disclosure of documents in the possession, control or power of the Canadian Transportation Agency that relate to statements the Agency made on its website in March 2020. This motion for disclosure has been brought in the context of a pending application for judicial review in which the applicant seeks to challenge the Agency's statements, alleging they are non-binding, violate the Agency's *Code of Conduct* and mislead passengers as to their rights. The applicant also claims that the statements give rise to a reasonable apprehension of bias, disqualifying Agency members from ruling on any complaint in which a passenger seeks reimbursement for flights cancelled in relation to the COVID-19 pandemic.

2 In its response to the disclosure request, the Agency filed detailed submissions, resisting the requested disclosure and setting out its intended position on the various issues that arise in the application, including in respect of the applicant's bias allegations.

3 On February 19, 2021, this Court issued a Direction, requesting submissions from the parties on whether the Attorney General of Canada should be substituted as the respondent. The Direction noted that this application is not an appeal under [section 41 of the Canada Transportation Act, S.C. 1996, c. 10](#), but, rather, an application for judicial review under [section 28 of the Federal](#)

Courts Act, R.S.C. 1985, c. F-7 and that, under paragraph 303(1)(a) and subsection 303(2) of the *Federal Courts Rules*, it would appear that the Attorney General ought to have been named as the respondent. A copy of the Direction was forwarded to the Attorney General, who, following receipt, filed a Notice of Appearance.

4 The Court received submissions from the parties and from the Attorney General of Canada on the issue of the appropriate respondent in this application.

5 The Attorney General takes the position that it should be substituted for the Agency as it would be inappropriate for the Agency to defend its decision or to take a position on the bias allegations and the Attorney General is the proper respondent under the *Federal Courts Rules*.

6 The Agency takes the opposite position, asserting that, as it has a statutory right to be heard in respect of appeals brought under section 41 of the *Canada Transportation Act*, it should be afforded standing to participate as the respondent to this application. In the alternative, the Agency requests that it be afforded the opportunity to make a motion to intervene in this application if the Attorney General is substituted as the respondent.

7 The applicant, for its part, takes the position that the Agency is the appropriate respondent, but submits that the Agency should be strictly circumscribed in the types of submissions it may make to avoid taking inappropriately adversarial positions.

8 I am of the view that the Attorney General of Canada should be substituted for the Agency as the respondent in this application given the nature of the application and the Attorney General's willingness to appear and act as respondent.

9 It is true that subsection 41(4) of the *Canada Transportation Act* affords the Agency the right to be heard in the context of an appeal from one of its decisions. However, as the parties acknowledge, the present application is not an appeal of an Agency decision, but, rather, is an application under section 28 of the *Federal Courts Act*.

10 The proper parties to such applications are governed by the *Federal Courts Rules*, which are regulations passed under the *Federal Courts Act*. Rule 303 provides:

### **Respondents**

303 (1) Subject to subsection (2), an applicant shall name as a respondent every person

(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or

(b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.

### **Application for judicial review**

(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.

### **Substitution for Attorney General**

(3) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent after having been named under subsection (2), the Court may substitute another person or body, including the tribunal in respect of which the application is made, as a respondent in the place of the Attorney General of Canada.

### **Défendeurs**

303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur:

- a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;
- b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.

### **Défendeurs — demande de contrôle judiciaire**

(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.

### **Remplaçant du procureur général**

(3) La Cour peut, sur requête du procureur général du Canada, si elle est convaincue que celui-ci est incapable d'agir à titre de défendeur ou n'est pas disposé à le faire après avoir été ainsi désigné conformément au paragraphe (2), désigner en remplacement une autre personne ou entité, y compris l'office fédéral visé par la demande.

11 By virtue of paragraph 303(1)(a), it is clear that the Agency should not be named as the respondent. Moreover, as the Attorney General has indicated that he is willing to appear and act as the respondent, there is no basis to substitute any other party as the respondent.

12 Contrary to what the applicant asserts, it is not necessary to name the Agency to ensure that any order is effective. Judicial review applications proceed regularly before this Court and the Federal Court, with the named respondent being the Attorney General, and the Courts' judgments are effective against the tribunals whose decisions are being reviewed: see for example [Adebogun v. Canada \(Attorney General\)](#), 2017 FCA 242, 2017 CarswellNat 7140 at paras 9, 13-14, [Canada \(Attorney General\) v. Galderma Canada Inc.](#), 2019 FCA 196, 2019 CarswellNat 3012 at paras



1-2, 8, 24, 75, *Bissessar v. Canada (Attorney General)*, 2019 FCA 305, 2019 CarswellNat 7639 at paras 20-24, 29-30.

13 While the foregoing is sufficient to dispose of this issue, I also note that it is likely more appropriate that submissions on the merits of the issues that arise in this application - and most notably in respect of the bias issue - be made by the Attorney General and not the Agency. In this regard, a tribunal should refrain from embarking into the merits of a decision in such a way as to call into question its impartiality (see, for example, *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147 at paras 50 and 71, *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3 at para 16, *Northwestern Utilities Ltd, Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69, 2021 CarswellNat 1402 at paras 102-103).

14 Thus, the Attorney General will be substituted as the respondent in this application.

15 If the Attorney General wishes to make additional submissions in response to those of the applicant on the disclosure issue, including in respect of the applicant's informal motion of May 12, 2021 to add additional materials in support of the disclosure motion, the Attorney General may do so within 30 days of the date of these Reasons. The applicant shall have 15 days to file responding submissions, if it wishes. The informal motion to add additional materials and the disclosure motion shall then be returned to the undersigned, for disposition.

16 If it still wishes to do so, the Agency may bring a motion, seeking leave to intervene in this application. Should such motion be made, the Agency's materials should demonstrate how its proposed intervention will meet the test for intervention under [Rule 109 of the Federal Courts Rules](#) and should be mindful of the appropriate scope of tribunal submissions.

*Order accordingly.*

2006 FC 1168, 2006 CF 1168  
Federal Court

Alaktsang v. Canada (Minister of Citizenship & Immigration)

2006 CarswellNat 3016, 2006 CarswellNat 4636, 2006 FC 1168,  
2006 CF 1168, 151 A.C.W.S. (3d) 916, 300 F.T.R. 175 (Eng.)

**Tashi Dolma Alaktsang, Applicant and The Minister  
of Citizenship and Immigration, Respondent**

M.L. Phelan J.

Heard: September 27, 2006

Judgment: October 2, 2006

Docket: IMM-1728-06

Counsel: Ms Geraldine MacDonald, for Applicant  
Ms Leena Jaakkimainen, for Respondent

***M.L. Phelan J.:***

**I. Background**

1 The Applicant, a Convention refugee and Tibetan citizen of China, had her application for permanent residence denied by an Immigration Officer (Officer) on the grounds that she was an Indian citizen. The Applicant was held to be a member of a prescribed class listed in [s. 177 of the \*Immigration and Refugee Protection Regulations \(Regulations\)\*](#). This is the judicial review of that decision.

2 In the course of this matter, the Applicant brought a motion to require the Respondent to produce those parts of the certified tribunal record which had been excluded on the grounds of solicitor-client privilege. That motion was dismissed for reasons set forth herein.

**II. Facts**

3 The Applicant claims that she is a Tibetan citizen of China. She was found to be a Convention refugee on July 23, 1999. The Respondent, who could have participated in the immigration hearing, chose not to do so and did not object to the refugee application. That refugee application was based on the Applicant's assertion that she is a Tibetan citizen and feared persecution in Tibet.

4 On November 4, 1999, the Applicant applied for permanent residence. By letter dated March 3, 2006 - 6 <sup>1</sup>/<sub>2</sub> years after her application was filed — the Officer refused to grant the application for permanent residence on the basis that she was a citizen of India, a country other than the one where she feared persecution. The provision at issue, [s. 177 of the Regulations](#), reads:

177. For the purposes of subsection 21(2) of the Act, the following are prescribed as classes of persons who cannot become permanent residents:

- (a) the class of persons who have been the subject of a decision under section 108 or 109 or subsection 114(3) of the Act resulting in the loss of refugee protection or nullification of the determination that led to conferral of refugee protection;
- (b) the class of persons who are permanent residents at the time of their application to remain in Canada as a permanent resident;
- (c) the class of persons who have been recognized by any country, other than Canada, as Convention refugees and who, if removed from Canada, would be allowed to return to that country;
- (d) the class of nationals or citizens of a country, other than the country that the person left, or outside of which the person remains, by reason of fear of persecution; and
- (e) the class of persons who have permanently resided in a country, other than the country that the person left, or outside of which the person remains, by reason of fear of persecution, and who, if removed from Canada, would be allowed to return to that country.

177. Pour l'application du paragraphe 21(2) de la Loi, les catégories réglementaires de personnes qui ne peuvent devenir résidents permanents sont les suivantes:

- a) la catégorie des personnes qui ont fait l'objet d'une décision aux termes des articles 108 ou 109 ou du paragraphe 114(3) de la Loi rejetant la demande d'asile ou annulant la décision qui avait eu pour effet de conférer l'asile;
- b) la catégorie des personnes qui sont des résidents permanents au moment de présenter leur demande de séjour au Canada à titre de résident permanent;
- c) la catégorie des personnes qui se sont vu reconnaître la qualité de réfugié au sens de la Convention par tout pays autre que le Canada et qui seraient, en cas de renvoi du Canada, autorisées à retourner dans ce pays;

d) la catégorie des personnes qui ont la nationalité ou la citoyenneté d'un pays autre que le pays qu'elles ont quitté ou hors duquel elles sont demeurées par crainte d'être persécutées;

e) la catégorie des personnes qui ont résidé en permanence dans un pays autre que celui qu'elles ont quitté ou hors duquel elles sont demeurées par crainte d'être persécutées et qui seraient, en cas de renvoi du Canada, autorisées à retourner dans ce pays.

5 The Applicant had entered Canada using an Indian passport which she admitted was false having been secured by bribery. As proof of her Tibetan citizenship, she produced a "green book", a recognized document establishing Tibetan identity.

6 In 2003 another immigration official who was handing the Applicant's permanent residence application became suspicious that the Indian passport was genuine. It would appear that this officer, who had experience in India, embarked on this inquiry more by instinct than evidence. He did so at a time when third parties, including the local MP, were entreating the department to get on with issuing the permanent residence card after a four-year delay.

7 This official forwarded "tombstone" information to the Canadian Visa Office in New Delhi who then inquired of the Indian authorities as to the genuineness of the passport.

8 The Government of Indian Regional Passport Office in July or August 2005 stated that the passport was issued after a CID clearance (presumably a police clearance). The advice from the Indian Passport Office contained a caveat that the verification was performed without a photograph.

9 On November 25, 2005, the Officer advised the Applicant that she was satisfied that the passport was legitimately issued and that the Indian government considered her a citizen of India. The Officer then invited the Applicant to make submissions on the matter.

10 Prior to receipt of the submissions the Officer went back to the Appeals and Hearings section of the Canadian Border Services Agency (CBSA), the organization responsible for bringing motions to vacate a Board finding that a person was a refugee. The CBSA had earlier advised that there was insufficient evidence to seek to vacate the Board decision because "the genuineness of a passport is not determinative of citizenship".

11 Armed with the new information from the Indian Passport Office, the Officer again raised the issue of vacating the refugee finding. The CBSA advised that it would take another look at the file — that was 10 months ago and no follow-up action has been taken.

12 In response to the Officer's invitation to make submissions, the Applicant's then counsel outlined the proper steps to be taken to confirm whether the Applicant is truly a citizen of India

including the use of forensic study of the passport and/or submitting the passport itself to Indian authorities for verification. The submissions as to the proper method of verification were supported by affidavit evidence.

13 Without further inquiry, including affording the Applicant an interview, the Officer confirmed the finding that the Applicant was a citizen of India and refused the application for permanent residence.

### III. Analysis

14 There are three matters which must be addressed in this judicial review:

- the claim of solicitor-client privilege over, principally, e-mails contained in the certified tribunal record;
- the finding that the Applicant is an Indian citizen and is precluded from permanent resident status; and
- the fairness of the process by which the Respondent reached its decision.

#### *A. Solicitor-Client Privilege*

15 The certified tribunal record contained documents for which all or a portion of the information was blacked out on the grounds of solicitor-client privilege. The Applicant brought a motion challenging this claim of privilege.

16 The motion was filed late but in order to avoid potential adjournment of this judicial review, the Court directed that the matter be heard at regular motions some 10 days in advance of the scheduled judicial review hearing.

17 The Respondent's counsel objected to the matter being heard then citing a busy schedule, inability to secure assistance in her office and other personal matters which prejudiced the ability to fully respond to the motion. Therefore, this motion was heard immediately preceding the judicial review.

18 At the motion hearing the Respondent tendered to the Court and served on the Applicant a letter of the Officer explaining her reasons for claiming privilege including an assertion of litigation privilege as well as solicitor-client privilege. No affidavit evidence was filed. It was curious that there was sufficient time to prepare a letter but insufficient time or unwillingness to file an affidavit.

19 This procedure of filing a letter from the client unsupported by an affidavit on the day of the hearing is unacceptable practice. The government enjoys no special status as a litigant as regards proof and is bound by the same rules as are private litigants in this Court.

20 As I advised counsel, the excuse for the postponement of the motion was tenuous and the failure to file an affidavit would be taken as the failure to file any evidence. The Court was left with only the review of the records upon which to base its decision, the Applicant having waived the right to cross-examination so that this matter could proceed as scheduled. Fortunately for the Respondent, the contents of the records over which privilege was claimed was so clearly solicitor-client advice that the Applicant's motion had to be dismissed.

### ***B. Indian Citizenship***

21 As a general rule, the findings as to citizenship in another country are a factual inquiry for which the standard of review is patent unreasonableness (*Adar v. Canada (Minister of Citizenship & Immigration)*, [1997] F.C.J. No. 695 (Fed. T.D.)). This was the standard accepted by the parties and the one which the Court will use for its purposes because nothing turns on the standard of review on this issue.

22 However, in this case, the conclusion that the Applicant was an Indian citizen was based on the conclusion that the passport was genuine and that it was determinative of citizenship under a foreign law. This analysis is clearly a matter of mixed law and fact which should attract a standard of reasonableness *simpliciter* (*Canada (Minister of Citizenship & Immigration) v. Choubak*, 2006 FC 521, [2006] F.C.J. No. 661 (F.C.)).

23 In reaching her conclusion, the Officer relied on the verification of the Indian passport which came with a caveat from the Indian Passport Office as to the absence of a photograph; clearly an important point if the very subject is raised by the verifying authority. It must have been taken as a warning that any such verification was tentative.

24 The reliance on this verification is undermined by the affidavit evidence of the Applicant as to the proper procedure for verification as related by an official of the Indian government. The Respondent neither challenged the evidence in cross-examination nor did it file rebuttal evidence.

25 The Officer's conclusion is directly contrary to a finding by the Board that the Applicant is a Tibetan refugee and which the CBSA has so far refused to challenge by way of an application to vacate the Board decision. The CBSA specifically concluded that the genuineness of a passport is not determinative of citizenship; a conclusion which is directly at odds with the Officer's own conclusion.

26 The Officer's decision does not address the evidence which contradicts her findings. There is no mention of the Tibetan identity document nor of the conclusions of the Board nor of the CBSA or even the veracity of the Applicant's story of bribery.

27 The Respondent filed an affidavit in which the Officer tries to elaborate on what issues she considered. However, the notes in the file and the e-mail traffic being contemporaneous with the events are a more reliable source of evidence and generally lack the *ex post facto* justification nature of the affidavit. That affidavit is of questionable weight.

28 In the face of all the other evidence contrary to the Officer's conclusion and absent better evidence against the Applicant, this decision is patently unreasonable. This patently unreasonable finding is compounded by the manner in which the decision was made.

### ***C. Fairness***

29 The decision is essentially a finding that the Applicant falsely secured refugee status and that her explanation of how she secured an Indian passport is a lie.

30 At no time was the Applicant confronted with the challenge to her story of how she secured the Indian passport. At the time the Applicant's counsel was invited to make submissions, the issue raised was the genuineness of the Indian passport - only one aspect of the issue of the Applicant's citizenship.

31 It is unfair to now say, as was argued and referred to in the Officer's affidavit, that counsel should have reiterated the story of the bribery and given further and better details of the event. At no time was the Applicant alerted to a challenge to this facet of the case and nothing in the invitation to make submissions would have reasonably alerted counsel that the matter of the bribery was being challenged.

32 While an applicant is not entitled to an interview as of right, where the circumstances of fairness dictate that an interview should have been accorded, the failure to do so is a fatal flaw of natural justice and fairness (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.)).

33 In this instance the Respondent was directly challenging the Applicant's credibility and notice of that challenge and an opportunity to be heard was denied. An interview would have eliminated this breach of natural justice if the Respondent still had an open mind.

34 However, the record confirms that in this instance, the Officer's conclusions about the Applicant had been reached prior to any submission, not just in some preliminary fashion. The invitation to make submissions was form over substance. Not only was the Applicant misled as to the issue being challenged, there is little likelihood that any submissions would have altered the ultimate result.

35 The Applicant asks that the Respondent be ordered to approve the application for permanent residence. That application is almost seven years old and by now the Respondent must have (or

should have) considered all the steps for approval. Further, the Respondent has not indicated that there are any other issues which would hold up or prevent the issuance of the necessary authorization. The Court expects that the approval will follow shortly after this decision unless there is some legal impediment to approval.

#### **IV. Conclusion**

36 The application for judicial review will be granted, the decision of the Board must be quashed and the matter remitted to the Respondent for approval within thirty (30) days by a different decision maker without the involvement of the Officer or the other immigration official mentioned in this decision. The Court will remain seized of this matter if either party has difficulty with implementation of this Court's decision.

#### **Judgment**

*IT IS ORDERED THAT* the application for judicial review is granted, the decision of the Board quashed and the matter remitted to the Respondent for approval within thirty (30) days by a different decision maker without the involvement of the Officer or the other immigration official mentioned in this decision. The Court remains seized of this matter to address any difficulties with implementation of this Judgment.



2009 FC 657, 2009 CF 657  
Federal Court

Belzberg, Re

2009 CarswellNat 1918, 2009 CarswellNat 5384, 2009 FC 657, 2009 CF 657, 178  
A.C.W.S. (3d) 1029, 307 D.L.R. (4th) 664, 345 F.T.R. 282 (Eng.), 75 C.P.R. (4th) 283

**Sydney H. Belzberg, Applicant and The Commissioner of  
Patents and the Attorney General of Canada, Respondents**

M.M.J. Shore J.

Heard: November 20, 2008

Judgment: June 23, 2009

Docket: T-248-08

Proceedings: affirming *Belzberg, Re (2007)*, 2007 CarswellNat 3619, 2007 CarswellNat 3620, 60  
C.P.R. (4th) 322 (Can. Pat. App. Bd. & Pat. Commr.)

Counsel: Fraser Rowand, Paul V. Lomic, Jeffrey M. Tracey, for Applicant  
Jacqueline Dais-Visca, for Respondent

***M.M.J. Shore J.:***

1 Sydney H. Belzberg (the Applicant) seeks judicial review pursuant to [section 18.1 of the Federal Courts Act, R.S.C. 1985, c. F-7](#), of the failure, refusal and/or neglect of the Commissioner of Patents (the Commissioner) to grant a patent in respect of Canadian Patent Application No. 2,119,921 entitled "Computerized Stock Exchange Trading System" (the Patent Application) following the Commissioner's decision dated January 25, 2007 (the Commissioner's decision).

2 At issue in this application is whether the Commissioner may restart an examination of a patent application after disposing of all the defects alleged in an examiner's rejection labeled "Final Action" under [section 30 of the Patent Rules, SOR/96-423 \(the Rules\)](#).

**Overview of the Patent Application Regime, the Act and the Rules**

3 The Commissioner has power to grant a patent under [subsection 27\(1\) of the Patent Act, R.S., 1985, c. P-4 \(the Act\)](#).

27. (1) The Commissioner shall grant a patent for an invention to the inventor or the inventor's legal representative if an application for the patent in Canada is filed in accordance with this Act and all other requirements for the issuance of a patent under this Act are met.

27. (1) Le commissaire accorde un brevet d'invention à l'inventeur ou à son représentant légal si la demande de brevet est déposée conformément à la présente loi et si les autres conditions de celle-ci sont remplies.

4 The Commissioner may also refuse to grant a patent. [Section 40 of the Act](#) provides that the Commissioner *shall refuse* an application where he or she is *satisfied* that an applicant is *not by law entitled to be granted a patent* [my emphasis]. If a patent is refused, an applicant has a statutory right of appeal to the Federal Court under [section 41 of the Act](#).

5 [Section 44 of the Act](#) provides that for a patent granted upon an application filed after October 1, 1989, the term is 20 years from the date of filing the application in Canada. This means that the period of patent protection begins to run before a patent is granted.

6 Applicants may request expedited examinations. Such requests are granted when the Commissioner determines that the failure to expedite an application is likely to prejudice the Applicant's rights.

7 If an examiner has objections based on non-compliance with the Act or the Rules, he or she shall inform the applicant of the application's defects by issuing a requisition. Requisitions of this kind are also referred to as "office actions", pursuant to [subsection 30\(2\) of the Rules](#). In response, an applicant amends the application or provides arguments about why the application does comply. The exchange of requisitions and responses may continue until either the examiner allows the application under [subsection 30\(1\)](#) or rejects the application in a final action under [subsection 30\(4\)](#). [Subsection 30\(6\)](#) provides that where the rejection is not withdrawn pursuant to [subsection 30\(5\)](#), it shall be reviewed by the Commissioner and the applicant shall be given an opportunity to be heard by the Patent Appeal Board (PAB) before the Commissioner makes a decision.

8 The patent review system is very flexible and responsive to new objections. For example, the Commissioner may, under [subsection 30\(7\)](#), withdraw a notice of allowance before the patent is issued if a problem is identified. Even after issuance patents can be examined. [Section 48.1](#) provides third parties an opportunity to request a re-examination of any claim of an *issued* patent by filing prior art with the Commissioner. [Subsection 48.4\(3\)\(b\)](#) provides that where the re-examination cancels all claims of the patent, the patent shall be deemed never to have been issued.

9 Accordingly, the parties' submissions regarding statutory interpretation will be considered bearing in mind the fact that [the Act](#) provides opportunities to revoke some or all the patented claims based on prior art even after a patent is granted.

10 The Manual of Patent Office Practice (MOPOP) is a guideline prepared by the Patent Office outlining best practices for the Patent Office. Although it does not have the force of law, I regard the guideline as a useful interpretive tool.

11 Chapter 21 of the MOPOP which is entitled "The Final Action report" reads as follows:

The final action report must be comprehensive and deal with every grounds [sic] for which the application is considered to be defective. The appeal process is restricted to the particular issues discussed in the final action and there is no further opportunity for the examiner to make objections which may have been missed in the final action. Similarly there is no opportunity for the applicant to amend the application other than to make any revisions required by a Commissioner's decision on the patentability of the case.

12 As well, [sections 21.07](#) is entitled "Commissioner's Decision". It provides in part:

The Commissioner reviews the findings of the PAB and if satisfied that:

[...]

(b) the examiner's rejection was not justified, the application will be returned to the examiner for further prosecution ([subsection 31\(b\) of the Patent Rules](#)[...])

13 Finally, [section 21.08](#) reads as follows:

A rejected application may not be amended after the expiry of the time for responding to the examiner's requisition made pursuant to [subsection 30\(4\) of the Patent Rules](#) except

[...]

(b) where the Commissioner is satisfied after review that the rejection is not justified and the applicant has been so informed[...]

[...]

In the case of (b) above, where the Commissioner is satisfied that the rejection was not justified, the applicant is so notified and the application is returned to the examiner and normal prosecution resumes. The application is normally allowed at this stage but may be amended voluntarily by the applicant ([subsection 31\(b\) of the Patent Rules](#)). [My emphasis.]

## The Facts

14 The facts are not in dispute.

### *A. The Patent Application*

15 The Applicant filed the Patent Application on March 23, 1994. He asked for an examination of the Patent Application on October 18, 1996 and applied for a Special Order expediting the examination of the Patent Application under [section 28 of the Rules](#) on October 31, 1996. The Special Order was granted on December 9, 1996. Fifteen years of the Applicant's 20-year period of potential patent protection have already lapsed.

16 From December 9, 1996 until May 30, 2002, the Examination Division of the Canadian Intellectual Property Office examined the Patent Application. This examination included the issuance of seven examiner's reports raising requisitions under [subsection 30\(2\) of the Rules](#) and seven third party protest submissions from third parties, pursuant to [section 10 of the Rules](#). Although two Notices of Allowance were issued under [subsection 30\(1\) of the Rules](#), both were withdrawn by the Commissioner prior to the issuance of a patent.

17 On May 30, 2002, the Patent Application was rejected by an eighth examiner's report under [subsection 30\(3\) of the Rules](#). However, that report differed from earlier reports in that it was labelled a "Final Action" in accordance with [subsection 30\(4\) of the Rules](#) (the Final Action Report). It alleged that the Patent Application was defective on the basis that: i) it was obvious in view of a combination of references; ii) it had insufficient disclosure and indefinite claim language; and iii) it claimed improper subject-matter (collectively the Alleged Defects).

18 The Applicant responded to the Final Action Report with a submission dated October 30, 2002, pursuant to [subsection 30\(4\) of the Rules](#). A PAB hearing was convened on March 23, 2005 to review the rejection of the Patent Application, as required by [subsection 30\(6\) of the Rules](#). The Board concluded that none of the Alleged Defects had been substantiated.

### ***B. The Commissioner's Decision***

19 On January 25, 2007, the Commissioner issued a decision. Its cover page describes the document as one which includes both the findings of the PAB and the Commissioner's decision (the Decision).

20 Regarding the PAB's finding, the document says:

In summary, the Board finds that the invention is disclosed in sufficient detail and is claimed sufficiently clearly to allow an ordinary worker who is skilled in the art to implement the invention. The claimed invention is not obvious in view of the prior art and the application is directed to subject matter which falls under the definition of invention.

This Board therefore recommends that the examiner's rejection of the application be reversed and that the application be returned to the examiner for further prosecution consistent with these recommendations (the Recommendation).

21 Immediately following the PAB's Recommendation is the Decision, which consists of one paragraph. It reads:

I concur with the recommendation of the Board that the Examiner's rejection of the application be reversed and return the application to the Examiner for further prosecution consistent with the Board's recommendation.

22 The Decision adopts the final paragraph of the PAB's Recommendation without reasons. Accordingly, the PAB's findings may be regarded as the reasons for the Commissioner's decision.

23 Both the PAB's Recommendation and the Decision appear bizarre. The PAB made no recommendations for further prosecution. This means there was no basis for returning the Patent Application to an Examiner for further prosecution. The Commissioner used the same meaningless language when he returned the Patent Application for further prosecution consistent with the PAB's Recommendation when, in fact, no such recommendation existed.

24 The MOPOP, described above, sheds some light on the language used by the PAB and the Commissioner. It indicates that this disposition is a longstanding formulation which actually means in the circumstances of this case that the Applicant is given a final chance to amend the Patent Application before it is approved.

25 The MOPOP makes it clear that the Final Action Report does lead to a disposition of the Patent Application and not to further examination based on concerns which were not raised in the Final Action Report.

### ***C. Treatment of the Patent Application After the Decision***

26 Following the Decision, two subsequent Examiner's reports and related requisitions were issued, under [section 30\(2\)](#) and [30\(3\) of the Rules](#). They were numbers 9 and 10 (the Post Decision Reports and Requisitions). The basis of these requisitions was a problem which had arisen during earlier examinations but which had not been raised in the Final Action Report and not considered by the PAB. As described below, the Applicant challenged the propriety of these Post Decision Reports and Requisitions and asserted that the Commissioner lacked the jurisdiction to restart prosecutions following the Decision.

27 The ninth examiner's report and requisitions were issued on July 26, 2007, over six months after the Decision. The report provided in part as follows:

Further prosecution is commenced in accordance with the Commissioner's Decision of 25 January 2007.

The following reference, although cited in earlier actions, was not applied in the final action of 30 May, 2002.

28 On September 28, 2007, the Applicant's agent wrote to the Commissioner requesting that the Commissioner immediately address the propriety of the latest examiner's report.

29 On October 31, 2007, the Assistant Commissioner of Patents wrote to the Applicant's agent. The letter provided in part as follows:

In his decision of January 25, 2007, the Commissioner concurred with the Board's recommendation to have the application returned to the Examiner for further prosecution consistent with the Board's recommendation. The application has now been examined by the Examiner further to the Board's recommendation and the Examiner has informed the applicant of the defects by letter dated July 26, 2007 pursuant to [section 30\(2\) of the Patent Rules](#).

As the matter is on-going and back in regular prosecution, it would not be appropriate for the Commissioner to review the application and make a decision at this point. The applicant has been provided six months from July 26, 2007, with an opportunity to amend the application to comply with the Act and Rules, or to provide arguments as to why the application does comply. Recognizing the time during which this application has been in prosecution, I can assure you that the Office will make every reasonable effort to expedite any further steps in prosecution of this application.

30 On November 15, 2007, the Applicant filed a minor clerical amendment under [subsection 31\(b\) of the Rules](#) (the Voluntary Amendment). At that time, the Applicant repeated the request for the withdrawal of the ninth examiner's report and commented that the Commissioner lacked jurisdiction to issue it because it raised issues of obviousness which had been earlier considered and were not among those raised in the Final Action Report. I have excerpted the relevant portions as follows:

### **The Present Application**

The obviousness rejections contained in the office action of July 26, 2007, clearly violate the *Patent Rules* and CIPO's own policy reflected in Chapter 21. These rejections were available to the Examination Division prior to the Final Action. Indeed they were raised by other examiners in the prosecution history and were presumably overcome by the Applicant since they did not form part of "the outstanding defects" in the Final Action. In other words, the Examination Division has already conceded that these grounds of rejection do not constitute outstanding defects.

All of the alleged outstanding defects were contained in the Final Action, as is required by law. The Commissioner has ruled that none of those alleged defects is valid. Accordingly,

the present application complies with the *Act* and *Rules*. Any ground of rejection that the Examination Division chose not to include in the Final Action cannot now be raised in an improper attempt to re-prosecute this application.

The Commissioner and Examination Division do not have discretion to dispense with compliance with the *Act* and *Rules*. The only reasonable interpretation of the *Act* and *Rules* compels allowance of this application on the basis of the Decision of the Commissioner of Patents rendered January 25, 2007.

The Applicant respectfully requests that the Commissioner comply with her obligations under [subsection 27\(1\)](#) and issue a notice of allowance forthwith.

31 On December 21, 2007, the tenth examiner's report was issued. It was the second to be described as a "Final Action" under [subsection 30\(4\) of the Rules](#). It rejected the Patent Application under [subsection 30\(3\) of the Rules](#). It treated the Applicant's November 15, 2007 correspondence as a response to the requisition of July 26, 2007, but rejected the Applicant's claims that the Commissioner lacked jurisdiction based on its finding that the matter was back in further prosecution. The tenth examiner's report provided in part as follows:

With the correspondence of November 15, 2007 and as required by the examiner pursuant to [subsection 30\(2\) of the Patent Rules](#), the applicant has amended the application and provided arguments as to why the application complies with the *Patent Act* and the *Patent Rules*. The office therefore considers the applicant's correspondence received in this office on November 15, 2007 to be a response to the requisition of July 26, 2007. This application has been examined taking into account the applicant's amendments and arguments.

[...]

#### **Applicant's presented arguments**

Applicant has argued that the Commissioner lacks jurisdiction to issue further requisitions under [section 30 of the Patent Rules](#) in connection with this matter. The Office considers, however, in accordance with the direction of the Commissioner in the Commissioner's Decision dated 25 January 2007, that this matter is back in further prosecution and that the examiner has the jurisdiction to issue further requisitions under [section 30 of the Patent Rules](#).

32 On February 14, 2008, the Applicant filed the present application for judicial review.

#### **Proper Forum**

33 The Respondent has argued that [section 18.5 of the Federal Courts Act](#) bars the present application on the grounds that judicial review is only available in the absence of a statutory right of appeal. [Section 41 of the Act](#) provides a statutory right of appeal when the Commissioner refuses

to grant a patent under [section 40](#). However, since there was no refusal in the present case, there is no right of appeal to act as a bar to this application.

### **Standard of Review**

34 The parties both submit and I agree that the appropriate standard of review of a decision of the Commissioner on a question of law such as the interpretation of [the Act](#) and [the Rules](#) is correctness: *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R. 45 (S.C.C.); *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.).

### **Issues**

35 Against this background, the following questions require consideration:

1. Did the Commissioner err in not granting a patent after the Decision?
2. What is the appropriate remedy in the present case?

### **Analysis**

#### ***Issue 1 - Whether the Commissioner Erred in Not Granting the Patent***

##### *The Position of the Parties*

36 The Applicant submits that the Decision disposed of all outstanding objections to the granting of the patent. On the Applicant's construction, the Commissioner's direction that the Patent Application be returned for "further prosecution" does not permit new objections to be raised at this stage as this phrase must be read in light of the Board's decision and the qualifier that further prosecution be "consistent with the Board's recommendation". The Applicant protests that the only permissible interpretation of the Commissioner's decision is to read it as implicitly granting the patent.

37 In contrast, the Respondent asserts that examiner's reports under [subsection 30\(4\)](#) labeled "Final Action" need not list all outstanding objections to the granting of the patent. Accordingly, the Respondent argues that the phrase directing "further prosecution" must be interpreted according to its meaning under the regime, namely returning the patent application to the investigation process to determine if it can be allowed.

38 The Respondent further submits that the Commissioner's choice of this phrase was deliberate in the circumstances and indicated that he was not satisfied that the Applicant had met all the requirements for the granting of a patent under [the Act](#) and [the Rules](#). The Respondent submits



that the Commissioner has a duty to ensure that the statutory requirements are satisfied at all stages of the patent application process.

*Application of Section 30 of the Rules to the Present Case*

39 The relevant Rules are [subsections 30\(3\), 30\(4\), and 30\(6\)](#), and they are reproduced below. Essentially, they provide that if a good faith impasse is reached between an examiner and an applicant, the applicant becomes entitled to a hearing about the validity of the outstanding issues that cause the examiner to reject a patent application.

40 These subsections read as follows:

**30. [...]**

(3) Where an applicant has replied in good faith to a requisition referred to in subsection (2) within the time provided but the examiner has reasonable grounds to believe that the application still does not comply with [the Act](#) or these Rules in respect of one or more of the defects referred to in the requisition and that the applicant will not amend the application to comply with the Act and these Rules, the examiner may reject the application.

(4) Where an examiner rejects an application, the notice shall bear the notation "Final Action" or "Décision finale", shall indicate the outstanding defects and shall requisition the applicant to amend the application in order to comply with the Act and these Rules or to provide arguments as to why the application does comply, within the six-month period after the requisition is made or, except in respect of Part V, within any shorter period established by the Commissioner in accordance with [paragraph 73\(1\)\(a\) of the Act](#).

[...]

(6) Where the rejection is not withdrawn pursuant to subsection (5), the rejection shall be reviewed by the Commissioner and the applicant shall be given an opportunity to be heard.

[My emphasis.]

**30. [...]**

(3) Lorsque le demandeur a répondu de bonne foi à la demande de l'examineur visée au paragraphe (2) dans le délai prévu, celui-ci peut refuser la demande s'il a des motifs raisonnables de croire qu'elle n'est toujours pas conforme à la Loi et aux présentes règles en raison des irrégularités signalées et que le demandeur ne la modifiera pas pour la rendre conforme à la Loi et aux présentes règles.

(4) En cas de refus, l'avis donné porte la mention « Décision finale » ou « Final Action », signale les irrégularités non corrigées et exige que le demandeur modifie la demande pour la

rendre conforme à la Loi et aux présentes règles ou fasse parvenir des arguments justifiant le contraire, dans les six mois qui suivent ou, sauf pour l'application de la partie V, dans le délai plus court déterminé par le commissaire en application de l'alinéa 73(1)a) de la Loi.

[...]

(6) Lorsque le refus n'est pas annulé selon le paragraphe (5), le commissaire en fait la révision et le demandeur se voit donner la possibilité de se faire entendre.

41 The Respondent argued that the phrase "outstanding defects" as it is used in [subsection 30\(3\) of the Rules](#) cannot be read as "*all* outstanding defects" as such an interpretation would go against the spirit of [the Act](#). However, I do not find that a requirement that final actions detail "all" outstanding defects is unduly onerous or contrary to the spirit and intent of the patent regime. The Canadian patent application process can be quite lengthy and uncertain, as evidenced by the present case. It seems sensible to me in that context to give the word "final" its ordinary meaning. At the point when a requisition is issued that potentially triggers a hearing, it is reasonable to conclude that all outstanding issues would be before the PAB.

42 The Applicant highlighted the fact that the phrase "outstanding defects" was a recent addition to [the Rules](#), absent from the provision relating to final actions in force prior to October 1, 1996. Section 47(2) of the former *Patent Rules*, C.R.C. 1878, c. 1250, stated:

A notice to the applicant of any final action shall bear the notation "Final Action" and shall prescribe the time within which the applicant may amend the application as required by the examiner or lodge a request that that the action by the examiner be reviewed by the Commissioner.

43 I view the word "outstanding" in the amended provision as indicating that the defects identified in a final action are comprehensive rather than a mere selection. This interpretation is not only harmonious with the object and intention of the scheme, but also gives meaning to the amendment.

44 In my view, the MOPOP, the language of [section 30](#), the scheme of [the Act](#) and the amendment to the provision regarding "Final Actions", make it clear that a final action is to dispose of a patent application. In other words, following a PAB hearing the Commissioner is to make one of two decisions:

- i) refuse the patent application under [section 40 of the Act](#) if the PAB has found alleged defects to be justified; or
- ii) grant the patent application under [section 27 of the Act](#).

## ***Issue 2 - The Remedy***

45 The Applicant submits that the Decision was, in fact, complete because even though the Commissioner did not use the wording "grant the patent", that was the conclusion actually reached. Based on the PAB's findings that none of the Alleged Defects were outstanding, the Applicant says that I should order the Commissioner to grant the Patent Application.

46 The Respondent submits that the only reasonable conclusion that can be made by logical inference from the wording of the Commissioner's Decision is that the Commissioner needed more prosecution of the Patent Application in order to satisfy himself that it met the requirements of the regime. However, since there is no evidence that the PAB or any examiner recommended new areas for investigation, I find this submission unreasonable.

### Costs

47 The Respondent submitted that the Commissioner, as represented by the Attorney General of Canada, is immune from an order to pay costs pursuant to [section 25 of the Patent Act](#).

48 I reject this submission. Although [section 25 of the Act](#) provides that costs shall not be awarded against the Commissioner, this provision is limited to proceedings under the [Patent Act](#). This application for judicial review was brought under the [Federal Courts Act](#) and thus [Rule 400 of the Federal Courts Rules, SOR/98-106](#), applies, affording the Court full discretion to decide costs.

### Order

*UPON* hearing the submissions of counsel for both parties in Toronto on Thursday, November 20, 2008;

*AND UPON* considering the written submissions of the Applicant dated June 2, 2009 and the Respondent dated June 5, 2009;

*THIS COURT ORDERS that*, for the reasons given above,

1. This application for judicial review is allowed and the Commissioner's Decision dated January 25, 2007 is hereby set aside.
2. The Post Decision Reports and Requisitions are hereby set aside and the Patent Application is hereby reinstated as an active application. This means that the Respondent's submissions about outstanding fees and deemed abandonment of the Patent Application are moot.
3. The Commissioner is to forthwith make a decision granting the Patent Application under [section 27 of the Act](#) as it was amended by the Applicant in the Voluntary Amendment.

4. Costs are to the Applicant, pursuant to [Rule 400 of the \*Federal Courts Rules\*](#). If not agreed, those costs should be assessed based on the midpoint of Column III on the table in Tariff B of the *Federal Courts Rules*.

*Order accordingly.*

2009 CAF 275, 2009 FCA 275  
Federal Court of Appeal

Canada (Commissioner of Patents) v. Belzberg

2009 CarswellNat 2920, 2009 CarswellNat 7863, 2009 CAF 275, 2009  
FCA 275, 180 A.C.W.S. (2d) 961, 396 N.R. 342, 78 C.P.R. (4th) 81

**The Commissioner of Patents and the Attorney General of  
Canada, Appellants and Sydney H. Belzberg, Respondent**

K. Sharlow J.A.

Judgment: September 25, 2009  
Docket: A-316-09

Counsel: Jacqueline Dais-Visca, for Appellants  
Fraser D. Rowand, Paul V. Lomic, Jeff M. Tracey, for Respondent

***K. Sharlow J.A.:***

1 The Commissioner of Patents and the Attorney General of Canada (collectively, the "Crown") have moved for a stay of the order of Justice Simpson dated June 23, 2009 pending the disposition of this appeal of that order. The respondent Sydney H. Belzberg opposes the motion. The reasons for Justice Simpson's order are reported as *Belzberg v. Commissioner of Patents*, 2009 FC 657.

2 The basic facts appear to be undisputed. Mr. Belzberg submitted a patent application in 1994. His request for an expedited examination was granted in 1996. The patent examination process resulted, in 2002, in a "Final Action Report" alleging that the patent application was defective. A Patent Appeal Board hearing was convened in 2005 to review the rejection of the application. In January of 2007, the Board concluded that none of the alleged defects was substantiated and recommended that "the examiner's rejection of the application be reversed and that the application be returned to the examiner for further prosecution consistent with these recommendations". It is not clear from the material before me what further prosecution was contemplated by the Board, if any. The Commissioner issued a decision concurring with the decision of the Board and returning the application to the Examiner "for further prosecution consistent with the Board's recommendation". The result was that further examinations were undertaken and further requisitions issued in relation to matters that had arisen during the prior examination but were not raised in the Final Action Report or considered by the Board.

3 In 2008, Mr. Belzberg commenced an application for judicial review of the decision of the Commissioner. In paragraph 2 of Justice Simpson's reasons, the issue raised by Mr. Belzberg is stated as follows:

... whether the Commissioner may restart an examination of a patent application after disposing of all of the defects alleged in an examiner's rejection labelled "Final Action" under [section 30 of the \*Patent Rules\*, SOR/96-423](#).

4 Justice Simpson allowed the application for judicial review, set aside the decision and granted ancillary relief, including the following order:

The Commissioner is to forthwith make a decision granting the Patent Application under [section 27](#) of the [*Patent Act*] as it was amended by [Mr. Belzberg] in the Voluntary Amendment.

5 [Section 27 of the \*Patent Act\*, R.S. 1985, c. P-4](#), reads as follows (my emphasis):

27. (1) The Commissioner shall grant a patent for an invention to the inventor or the inventor's legal representative if an application for the patent in Canada is filed in accordance with this Act and all other requirements for the issuance of a patent under this Act are met.

27. (1) Le commissaire accorde un brevet d'invention à l'inventeur ou à son représentant légal si la demande de brevet est déposée conformément à la présente loi et si les autres conditions de celle-ci sont remplies.

6 At the risk of oversimplifying, it seems to me from Justice Simpson's reasons that she was required to consider whether [section 27 of the \*Patent Act\*](#) imposes a mandatory obligation on the Commissioner to issue a patent when the regulatory process reaches a certain point. Having concluded that there was such a mandatory obligation, she was required to consider whether the critical point in the regulatory process had been reached when the Commissioner, rather than granting the patent, made the decision challenged by Mr. Belzberg which prolonged the patent examination process. She concluded that the challenged decision was made after the critical point had been reached, which led her to make the order under appeal.

7 The Crown's appeal is based primarily on its position that the relevant provisions of the [Patent Act](#) should be interpreted to preclude a patent applicant from seeking judicial review of any decision of the Commissioner made before the decision to grant or refuse to grant a patent.

8 The Supreme Court of Canada has established a three part test to determine whether a stay should be granted (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.)). Generally, the applicant for a stay must show that there is a serious question to be

tried, that irreparable harm will be suffered if the stay is not granted, and that the balance of inconvenience favours the granting of a stay.

9 The notice of appeal provides a sufficient basis for concluding that the appeal raises a question of law that is not frivolous or vexatious. Therefore, the first test is met.

10 The question of irreparable harm is problematic in this case. Irreparable harm is a question of fact, but the Crown has submitted no affidavit. To understand why there is no affidavit, it is necessary to consider part of the procedural history of this matter.

11 The Crown's motion record was filed with a request that it be decided after an oral hearing. In an order dated September 3, 2009, Justice Trudel rejected that request. Her order goes on to say this:

The appellants shall also file an affidavit supporting the motion as required by [Rule 364\(2\) \(c\) of the \*Federal Courts Rules\*](#).

12 The Crown has not complied with this order, which in my view is a sufficient basis to dismiss the motion. However, I will consider, first, the letter dated September 9, 2009 to the Court from counsel for the Crown, and second, the question of whether the absence of an affidavit would in any event be fatal to the Crown's motion for a stay.

13 The letter of September 9, 2009 reads in part as follows:

Please be advised that the Attorney General of Canada has elected to not file any affidavit evidence in respect of the motion to stay the Order of Justice Simpson dated June 23, 2009. As can be seen from the Motion Record and Written Submissions, the stay of proceedings is based on the public interest and the only materials relied upon are the applicable legislation and the Decision under appeal.

14 I make three observations about this letter. First, counsel for the Crown has assumed incorrectly that, despite being ordered to file an affidavit, the Crown need not respect the order but is free to "elect" not to do so. Second, counsel for the Crown has assumed incorrectly that it is appropriate, upon receiving an order of this Court to which it objects, to express the objection by way of a letter rather than a motion to reconsider or vary the order. Third, the Crown has failed to appreciate that the order of Justice Trudel actually favoured the Crown, because it provided an opportunity to correct what may be a fatal deficiency in the Crown's motion record (see, for example, *P. (J.) v. Canada (Attorney General)*, [2009 FCA 211](#) (F.C.)).

15 I turn now to the question of whether the Crown's motion record as it stands provides any basis upon which I could determine the question of irreparable harm in the Crown's favour, assuming the motion is not dismissed summarily for failure to comply with a court order.

16 The Crown's written submissions, paragraphs 33 to 37, purport to discuss the question of irreparable harm, but those paragraphs are directed at the proposition that Mr. Belzberg cannot claim to have suffered irreparable harm from the decision of the Commissioner that he successfully challenged in the Federal Court. They do not address the question of whether any irreparable harm would result to the Crown or the public interest if the stay is not granted.

17 Paragraphs 16 to 22 of the Crown's submissions, entitled "Public Interest in Granting a Stay Pending Appeal", sets out the Crown's position that where a statutory authority is seeking a stay of an order pending appeal, there is an overriding public interest that justifies the Court in finding for the Crown on the question of irreparable harm. This position is based primarily on the following excerpt from *RJR-MacDonald* (paragraph 71):

In our view, the concept of inconvenience should be widely construed in *Charter* cases. 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.

18 The quoted statement from *RJR-Macdonald* was made in the context of a case involving a challenge to the validity of a statute, where a party affected by a regulation made under the statute wished to be relieved of an onerous obligation to comply with the regulation until the challenge was resolved. The Crown in this case is seeking a stay of an order in which there was no challenge to the validity of a law, but only a dispute as to its interpretation.

19 I do not read *RJR-MacDonald* as authority for the proposition that, where the Crown seeks a stay of an order pending appeal, it is relieved of the burden of adducing evidence of irreparable harm, if not to the Crown itself, at least to the orderly administration of the law. That burden may be easily met in some cases, but I do not accept that the burden is automatically met simply because the Crown seeks a stay.

20 It may be that the issue of the orderly administration of the *Patent Act* was on the mind of counsel for the Crown when writing, in paragraph 22 of the Crown's submissions, that "the consequence of not granting a stay pending appeal will be confusion, additional delay, and inconsistency in the processing of patent applications in what is already a very litigious area of the law." In my view, this is the kind of submission that cannot be assessed without a factual foundation, because it requires knowledge of the practice of patent examinations, a topic on which I am not prepared to take judicial notice. The Crown argues that it is important to preserve the



"administrative and procedural *status quo*", without purporting to explain what the "administrative and procedural *status quo*" is (apart from its argument that the order under appeal is wrong in law).

21 It might be helpful to know, for example:

- a) whether it is common and accepted practice for the Commissioner to make decisions like the one challenged in this case, or whether the facts of this case are unique;
- b) whether it is common and accepted practice for a patent application to be returned for examination after a Board hearing that appears to favour the applicant on the merits;
- c) whether a patent examination period of 13 to 15 years is considered normal; and
- d) whether it is possible to determine how many other patent applicants may be in a position to raise one or more of the issues determined by Justice Simpson in Mr. Belzberg's favour, and if so, how many other potential cases there are.

22 It would also be helpful to have a factual basis for the Crown's submission that the decision under appeal can be expected to result in confusion, additional delay, and inconsistency. Who is likely to be confused by the decision? Who is obliged to act inconsistently because of the decision, and in what way? There is no evidence on any of these factual questions, and I cannot discern the answers from the decision under appeal or in the legislation.

23 In the absence of any evidence that irreparable harm will result if the stay is not granted, I would be compelled to dismiss the Crown's motion for a stay.

24 The Crown's motion for a stay will be dismissed for failure to comply with the order of Justice Trudel dated September 3, 2009.

25 The respondent has sought costs on a solicitor and client basis. I agree that solicitor and client costs are warranted. An order will be made accordingly. The Crown has submitted that the Commissioner cannot be compelled to pay costs. I am not persuaded that this is so, but I need not decide that point. The order will provide that the costs will be payable by the Attorney General of Canada in any event of the cause.

*Motion dismissed.*

2021 FCA 69  
Federal Court of Appeal

Canadian Pacific Railway Company v. Canada (Transportation Agency)

2021 CarswellNat 947, 2021 FCA 69, 332 A.C.W.S. (3d) 188

**CANADIAN PACIFIC RAILWAY COMPANY (Appellant) and  
CANADIAN TRANSPORTATION AGENCY (Respondent)**

J.D. Denis Pelletier J.A., D.G. Near J.A., Mary J.L. Gleason J.A.

Heard: March 16, 2021  
Judgment: April 9, 2021  
Docket: A-193-20

Counsel: Nicole Henderson, Theodore Milosevic, for Appellant  
Barbara Cuber, Anna Hutchinson-Cox, for Respondent

*J.D. Denis Pelletier J.A.:*

**I. Introduction**

1 Canadian Pacific Railway Company (CP) appeals to this Court from Letter Decision No. LET-R-29-2020 (the Decision) in which the Canadian Transportation Agency (the Agency) modified the basis upon which CP's cost of capital (CoC) is determined. CoC is an element in the determination of CP's volume-related composite price index (VRCPI), which, in turn, affects the maximum revenues it can earn for the movement of western grain in a crop year (Maximum Revenue Entitlement or MRE). More specifically, CP challenges the Agency's position that general purpose debt, including debt incurred for share buybacks, should be included in the CoC determination. In addition, CP appeals from Determination R-2020-81 which determines CP's VRCPI using the CoC arrived at after including general purpose debt in the calculation. Since the fate of Determination R-2020-81 turns on the outcome of the appeal of the Decision, these reasons will focus on the latter.

2 CP advances three grounds of appeal. First, CP argues that the Agency breached its duty of procedural fairness by refusing to consult with it, as it had with its competitor Canadian National Railway Company (CN), as to the inclusion of general purpose debt, including the method of allocating that debt between regulated and non-regulated activities. Secondly, CP alleges that the Agency erred in law by applying to it a determination made with respect to CN's cost of capital. Finally, CP argues that the Agency erred in law when it included non-rail debt in the determination of its CoC.

3 For the reasons which follow, I find that the process followed by the Agency lacked procedural fairness and, as a result, the Decision should be quashed, except for the parts from which no appeal is taken. Given this conclusion, it will not be necessary to deal with the issue of the inclusion of non-rail debt in CP's CoC determination.

## II. Background

4 The cost to producers of transporting western grain to port has been an issue for many decades. It was originally addressed by a statutory rate, the Crow's Nest rate, and more recently by the MRE which is mandated by [section 150 of the Canada Transportation Act, S.C. 1996, c. 10 \(the Act\)](#), and determined according to the formula set out in [section 151 of the Act](#).

5 While the operation of this formula is not implicated in this appeal, it is nonetheless helpful in understanding the issues and for that reason, [section 151](#) is reproduced below:

151 (1) A prescribed railway company's maximum revenue entitlement for the movement of grain in a crop year is the amount determined by the Agency in accordance with the formula

$$[A/B + ((C - D) \times \$0.022)] \times E \times F$$

where

**A** is the company's revenues for the movement of grain in the base year;

**B** is the number of tonnes of grain involved in the company's movement of grain in the base year;

**C** is the number of miles of the company's average length of haul for the movement of grain in that crop year as determined by the Agency;

**D** is the number of miles of the company's average length of haul for the movement of grain in the base year;

**E** is the number of tonnes of grain involved in the company's movement of grain in the crop year as determined by the Agency; and

**F** is the volume-related composite price index that applies to the company, as determined by the Agency.

151 (1) Le revenu admissible maximal d'une compagnie de chemin de fer régie pour le mouvement du grain au cours d'une campagne agricole est calculé par l'Office selon la formule suivante:

$$[A/B + ((C - D) \times 0,022 \$)] \times E \times F$$

où

**A** représente le revenu de la compagnie pour le mouvement du grain au cours de l'année de référence;

**B** le nombre de tonnes métriques correspondant aux mouvements de grain effectués par la compagnie au cours de l'année de référence;

**C** le nombre de milles correspondant à la longueur moyenne des mouvements de grain effectués par la compagnie au cours de la campagne agricole, tel qu'il est déterminé par l'Agence;

**D** le nombre de milles correspondant à la longueur moyenne des mouvements de grain effectués par la compagnie au cours de l'année de référence;

**E** le nombre de tonnes métriques correspondant aux mouvements de grain effectués par la compagnie au cours de la campagne agricole, tel qu'il est déterminé par l'Office;

**F** l'indice des prix composite afférent au volume applicable à la compagnie, tel qu'il est déterminé par l'Office.

6 A brief examination of the formula shows how it is intended to operate. The formula calculates the revenue per tonne of grain moved in the base year (A/B). It adjusts this amount to account for the difference in average length of haul between the year in issue and the base year (C — D) and applies a statutory rate to the total to produce an adjusted rate per tonne per mile based on the base year. This is then multiplied by the tonnes of grain moved in the year in issue and further multiplied by the VRCPI to yield the railway's MRE. Since A, B, and D are fixed in [subsections 151\(2\) and \(3\) of the Act](#) and the statutory rate is fixed in the formula itself, the revenue cap or MRE will only change as the average length of haul, the tonnes of grain moved in a year and the VRCPI change. Length of haul and tonnes of grain moved are factors over which railways have little control, given their level of service obligations: see [subsection 113\(1\) of the Act](#). While the VRCPI is not the only factor affecting a railway's MRE, it is a significant factor.

7 The VRCPI for the 2016-2017 crop year for both CN and CP is set at 1.3275 in [subsection 151\(4\) of the Act](#). Thereafter, the Agency is required to make a separate determination of the VRCPI for each of them before April 30 of the following crop year.

8 One of the elements in the calculation of the VRCPI is the cost of capital which takes into account the cost of a railway's debt as well as the cost of common equity. This appeal concerns the nature of the debt used in the calculation. In order to understand what follows, it is necessary to understand what the parties are referring to. In the exchanges between the parties and in the Agency's decisions, there are references to long-term debt, general purpose debt and non-rail debt.

A short review of Agency decisions shows the distinction which is drawn between these kinds of debt.

9 In 2018, CN approached the Agency about changing the basis on which its debt was allocated to the regulatory balance sheet. In its decision responding to that inquiry, the Agency described the allocation method in place at the time:

In that Decision [Decision No. 125-R-1997], the Agency found that "using the corporate long-term debt reduced by the identifiable non-rail long-term debt is appropriate in assessing CN's long-term debt for cost of capital purposes." Debt is considered part of CN's RBS [regulatory balance sheet] unless CN can prove that the debt was raised for a specific non-rail purpose, or to finance American operations. Each debt instrument is assigned either 100% to Canadian rail operations, partially to Canadian rail operations, or excluded from Canadian rail operations.

Letter Decision No. LET-R-33-2019 (the 2019 RTM [Revenue tonne mile] Decision)

10 This passage shows the kinds of debt which were not considered in determining CN's CoC at the time of CN's inquiry: debt raised for specific non-rail purposes and debt raised to finance CN's American operations. Each debt instrument was allocated in whole or in part to Canadian or US operations. The Agency agreed with CN that this method of allocation distorted the role of debt in its CoC determination. The Agency decided to launch a review of the issue but, in the meantime, it implemented an interim methodology, the RTM methodology, to allocate debt:

The RTM methodology would allocate general purpose debt to CN's RBS based on the proportion of CN's total RTMs that are performed in Canada. The methodology ensures that the allocation of CN's long-term debt to its RBS is closely tied to the scope of CN's operations in Canada. The RTM approach alters the current practice of allocating specific debt instruments as follows:

1. any long-term debt that can be allocated specifically between the two jurisdictions would continue to be allocated in such a manner; and
2. all general purpose debt would be allocated to the RBS based on the proportion of CN's RTM's in Canada in the year in which the debt instrument was issued.

2019 RTM Decision

11 The change of methodology means that, except for debt which can be directly linked to CN's US operations, all long-term debt, both rail and non-rail, will be considered and will be allocated between regulatory and non-regulatory purposes using the RTM methodology. This is the significance of the reference to general purpose in point 2 of the passage quoted above. Thus,

insofar as the Agency is concerned, general purpose debt is all long-term debt (rail and non-rail) except for debt which can be directly linked to CN's US operations.

12 On the other hand, while CP uses the expression general purpose debt in some of its representations to the Agency, it tends to put it in quotation marks, "general purpose debt", which I take to be a subtle expression of disagreement with the concept of general purpose debt as utilized by the Agency. CP's preoccupation is the inclusion of non-rail debt in the determination of its CoC.

13 As a result, I will use general purpose debt in the same way as the Agency does and will refer to non-rail debt when referring to CP's position.

14 Another expression which recurs in the material on the file is "regulatory balance sheet". Regulated entities are required to account to the Agency in a prescribed way in order to ensure accurate and consistent reporting. That reporting results in a balance sheet which is used for regulatory purposes, including, but not limited to, the determination of the entity's CoC. For purposes of these reasons, references to inclusion on CN or CP's regulatory balance sheet should be taken as a reference to the inclusion of the entry in the railway's CoC determination.

15 With that lexicon in mind, I return to the historical narrative. In 2009, the Agency rejected CN's submission that debt incurred for the purpose of buying back shares should be excluded from the CoC calculation because it was an identifiable non-rail activity. The Agency reasoned that since CN's primary, if not exclusive, business line was the railway business, it did not consider such debt to be non-rail debt: see Letter Decision No. LET-R-49-2009 (2009 Buyback Decision).

16 CP alleges that the 2009 Buyback Decision was a confidential decision which it was not aware of until it demanded its production in 2019. The Agency agrees that CP did not receive a copy of the decision in a timely manner but says that the failure to disclose it was an administrative error.

17 As we have seen, one of CN's issues with respect to the CoC determination was the inclusion of debt associated with its US rail operations. In its memorandum of fact and law, at paragraph 25, the Agency described CN's concerns as follows:

In August 2017 and on May 24, 2018, CN raised with the Agency the issue of how it should allocate general purpose debt as part of its CoC determinations, in the context of a re-determination of CN [*sic*] and CP's VRCPI for the 2018-2019 crop year. This re-determination was prompted by legislative amendments to Part III, Division IV of the CTA, which called for a re-determination of the railway companies' VRCPI in that year. Specifically, CN requested that the Agency consider the use of a North American-based approach for determining its capital structure, or in the alternative, establish how CN might apportion its reported debt between its Canadian and American operations.

18 The Agency replied by indicating that this issue should be addressed in the Cost of Capital Determination process. In its subsequent 2019 RTM Decision, which we touched upon earlier in clarifying the terms used by the parties, the Agency advised that it proposed to adopt an interim approach to apportionment, the RTM method. An RTM is the movement of one tonne of revenue traffic over one mile. The RTM method allocates general purpose debt between regulated rail use and other uses in the proportion that RTM's of regulatory traffic are of the railway's total RTM's.

19 The Agency gave CN until May 1, 2019 to respond to its position on the apportionment of long-term debt (which was later extended to July 15, 2019) and April 1, 2019 with respect to the RTM method. The significance of the April date is that the Agency is required to establish a railway's VRCPI on or before April 30 of the following crop year (see [subsection 151\(5\) of the Act](#)) which begins on August 1 of that year (see [section 147 of the Act](#)).

20 In the interim, CP was provided with a copy of the 2019 RTM Decision sometime in April 2019, which prompted it to inquire whether it would be part of the consultation process. The Agency replied that the consultation would occur exclusively with CN.

21 In keeping with the statutory deadline, in Decision No. LET-R-41-2019 (the 2019 CN CoC Decision), the Agency applied the 2019 RTM Decision to the determination of CN's CoC for the 2019-2020 crop year.

22 This decision was not shared with CP at the time.

23 In December 2019, the Agency informed CP that it intended to apply the RTM method to CP's general purpose debt in determining its CoC. CP objected and asked that the Agency launch a consultation process before imposing this method on CP but the Agency declined to do so.

24 A short while later, on January 14, 2020, the Agency wrote to CP (the Call Letter) asking for information for use in determining CP's CoC for the 2020-2021 crop year. Specifically, the Call Letter required CP to submit revenue ton miles data for any years in which CP issued general purpose debt, indicating that, except for debt directly linked to CP's US operations, "all other general purpose debt [would] be allocated to [CP's] regulatory balance sheet based on the proportion of total network Revenue Ton Miles in Canada in the year in which the debt is issued until another methodology is approved by the Agency": Appeal Book, p. 31 (Call Letter). This information was to be provided by February 14, 2020.

25 CP responded to the Call Letter on February 3, 2020 (CP Response). CP questioned the use of the term general purpose debt by putting that expression between quotation marks ("general purpose debt") in its introductory comments. CP's position on the characterization of debt appears later in its letter when it says: "CP issues debt for two primary reasons. The first is to finance the acquisition and maintenance of railroad assets. The second is for general, non-regulated, corporate

purposes which includes share buybacks", in other words, non-rail debt: Appeal Book, p. 40. From CP's perspective, debt issued to fund share buybacks is non-rail debt, but there are other non-rail uses of long-term debt. Thus, while CP's comments focus largely on share buybacks, they are intended to include all non-rail debt:

The CTA's proposal to allocate non-regulatory debt to the regulated railway operation is not consistent with the UCA [described below], it is not consistent with prior practice, and the CTA does not have a mandate to implement this proposal.

CP Response, Appeal Book, p. 40

26 CP's position on non-rail debt was that it could not properly be allocated to CP's regulatory balance sheet because of the direction given in the Uniform Classification of Accounts and Related Railway Records (2014), (the UCA, available online at <https://otc-cta.gc.ca/eng/publication/uniform-classification-accounts-and-related-railway-records-2014>). The UCA "provides accounting instructions and the framework of accounts for the rail operations of such carriers. It also provides instructions for the recording of operating statistics and defines the categories for such data": UCA, Section 1000.

27 CP identified a number of provisions of the UCA which, in its view, precluded treating "general purpose debt" (referring to the non-rail portion of that debt) in the way proposed by the Agency including:

1202.07 The Agency will not receive submission on, or prescribe accounting principles and methods for, non-rail activities of carriers.

...

1203.01 All accounts provided in this UCA are intended to contain only transactions and balances resulting from Canadian Rail operations defined as follows:

1203.02 Rail operations consist of the transportation by rail of goods and passengers (both inter-city and commuter) and include intermodal transportation, which may involve the railway in transport modes other than rail, where such operations are required to complete a rail move.

...

1203.06 When items such as cash, accounts receivable and accounts payable are the responsibility of a separate treasury function and not of the rail division, the prescribed UCA accounts for such items will not be used.

28 To summarize, CP's argument is that to the extent that debt is used for share buybacks, a transaction undertaken by its parent corporation (CPL), that debt relates to non-rail activities so



that its integration into the regulatory accounts is precluded by the provisions identified above. In CP's view, "... the CTA does not have a mandate to regulate debt issuances that were issued for the purpose of financing share buy-back programs": CP Response, Appeal Book, p. 40.

29 In addition, CP argued that the change proposed by the Agency had important consequences for its financial reporting and that of CPL, reporting which was undertaken on the basis of "existing regulations, the accounting standards prescribed by the UCA, and long-established practices of the CTA in the application of these rules and standards": Appeal Book, p. 41.

30 CP concluded by asking that it be placed on an equal footing with its commercial competitor (CN) and that it be allowed a reasonable period of time to assess and address issues related to the proposed new rules for calculating CoC.

31 The Agency's response came in the form of Letter Decision No. LET-R-29-2020, the subject of this appeal.

### **III. The Decision Under Appeal**

32 The Decision deals with three issues: the inclusion of general purpose debt in the determination of CP's capital structure, the inclusion of commercial paper in the calculation of working capital, and the determination of CP's CoC to be used in the calculation of CP's VRCPI for the 2020-2021 crop year. Since no appeal was taken from the decision as to the inclusion of commercial paper in the calculation of working capital, that finding will remain undisturbed regardless of the outcome of this appeal. Obviously, the CoC determination is caught by this appeal.

33 The Agency began its analysis by addressing CP's arguments based on the UCA. It noted that CP did not provide any information as to the proportion of its debt issuance "dedicated" to share buybacks while noting that CP indicated that "general purpose debt" was not used exclusively for share buybacks.

34 The Agency rejected CP's argument that share buybacks are not a rail division treasury function, but rather a CPL treasury function and so, should not be included in its CoC determination pursuant to section 1203.06 of the UCA. The Agency countered this argument by pointing to section 1203.05 of the UCA which states:

1203.05 The rail division will become involved from time to time in non-rail activities, which will result in transactions which will affect current assets and current liabilities, and, in some cases, on a temporary basis, other assets and liabilities. The UCA balance sheet accounts are to be used to record such assets and liabilities.

35 The Agency's view was that the fact that share buybacks are managed through CPL's treasury does not mean that these transactions have no impact on CP or that CP is therefore not relieved of the obligation to account for those impacts.

36 The Agency went on to find that debt issued for share buybacks is rail-related because there is a general corporate benefit derived from buying back issued shares. In the Agency's view, the issuance of debt in lieu of issuing more shares to fund rail-related investments lowers the company's cost of capital because debt costs less than common equity. This means that the lower cost of raising capital "might allow [CP] to increase investments in other rail-related projects, or to lower freight rates paid by its customers": Decision at para. 16.

37 The Agency also commented that share buybacks will reduce the number of outstanding shares on the market which increases the relative ownership stake of the remaining shareholders, including CP employees who receive shares as a form of incentive-based compensation. The Agency reasoned that the possibility of an increase in ownership stake could lead to an increase in employee performance, which is rail-related.

38 Finally, the Agency referred to its 2009 Buyback Decision in which it held that debt incurred for share buyback "in a company whose primary, if not exclusive, business line is the railway business" cannot be classified as identifiable non-rail debt. It concluded that, consistent with that decision, general purpose debt, including when issued for the purposes of share buyback, is rail-related and must be included in the determination of CP's capital structure.

39 The Agency concluded by saying that it would hold consultations with CN and CP in the coming year "to confirm a methodology with respect to the allocation of general purpose debt for rail purposes that is consistent for CN and CP" for use in the determination of the CoC rate of each railway. In the interim, the Agency would apply the RTM methodology to CP's general purpose debt.

40 The Agency's decision means that it will allocate long-term debt, including the non-rail portion of that debt, to CP's regulatory balance sheet on a proportionate basis using the RTM method. The consultation which is to follow will deal only with the methodology by which that allocation will be effected.

#### **IV. Standard of Review**

41 Since this is a statutory appeal pursuant to [subsection 41\(1\) of the Act](#), the standard of review is the appellate standard, namely correctness on questions of law: see [Canada \(Minister of Citizenship and Immigration\) v. Vavilov, 2019 SCC 65, 441 D.L.R. \(4th\) 1, at paras. 18, 36-37 and 50](#) [. Since there is no right of appeal from decisions of the Agency on questions of fact and

mixed law and fact, this is sufficient to dispose of the issue of the standard of review on substantive questions.

42 That leaves the question of the nature of questions of procedural fairness, a question which is raised by the statutory exclusion of a right of appeal on questions of mixed fact and law. [Subsection 41\(1\)](#) limits the right of appeal to this Court to questions of law and jurisdiction. Whether a person is owed a duty of fairness is a question of law, while whether that duty has been breached is a question of mixed fact and law. At first blush then, this Court could determine whether a duty of fairness was owed but not whether it was breached. This would bifurcate questions of procedural fairness, with this Court dealing with the legal question and the Governor in Council dealing with the question of whether the duty of fairness found by this Court had been breached: see [section 40 of the Act](#) . Such a result is inimical to any notion of a practical and efficient system of justice.

43 As the Supreme Court observed at paragraph 19 of [Canada \(Attorney General\) v. TeleZone Inc.](#), 2010 SCC 62, [2010] 3 S.C.R. 585: "Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours."

44 However, a careful reading of [sections 40-43 of the Act](#) discloses that Parliament intended this Court to deal with questions of procedural fairness comprehensively. That careful reading was undertaken by this Court, *per* Stratas J.A., in [Canadian National Railway Company v. Emerson Milling Inc.](#), 2017 FCA 79, [2018] 2 F.C.R. 573, paras. 6-57 [

45 The Court reasoned that since the Supreme Court teaches that questions of jurisdiction are essentially questions of statutory interpretation and thus, questions of law, the phrase "a question of law or a question of jurisdiction" contains a redundancy. On the theory that Parliament does not deal in redundancies, the Court examined the scope of "a question of jurisdiction" and concluded that, historically, jurisdiction included questions of procedural fairness, citing the [Toronto Newspaper Guild](#) case, [1953] 2 S.C.R. 18, [1953] 3 D.L.R. 561. This was the state of affairs when the predecessor of [subsection 41\(1\)](#) was included in the predecessor to the Act, the National Transportation Act, R.S.C., 1985, c. N-20. Since the phrase "on a question of law or a question of jurisdiction" has remained in [the Act](#) ever since, it is reasonable to conclude that Parliament intended to continue to treat procedural fairness as an aspect of jurisdiction which means that questions of procedural fairness, even though factually suffused as noted above, can be appealed to this Court which can then deal with them comprehensively: see [Emerson](#) at para. 19.

46 [Vavilov](#) did not address the standard of review for questions of procedural fairness, an issue on which the courts have variously said that there is no standard of review or that the standard is correctness. In [Canadian Pacific Railway Company v. Canada \(Attorney General\)](#), 2018 FCA 69, [2019] 1 F.C.R. 121, at paras. 33-56 [ this Court, *per* Rennie J.A., canvassed this issue and concluded as follows:

A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at para. 20) that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.

*CPR v. Canada*, at para. 54

47 With that in mind, I propose to address questions of procedural fairness by asking whether a fair and just procedure was followed, which, as noted in the passage quoted above, captures what is caught, though awkwardly, by the use of "correctness standard" in the context of procedural fairness.

## V. Analysis

48 In its memorandum of fact and law, CP raises two issues of procedural fairness. First, the Agency's failure to consult on the issue of inclusion of non-rail debt in the determination of CP's CoC. Second, the Agency's failure to give it notice of its intention to rely on the 2009 Buyback Decision which held (in relation to CN) that debt incurred for the purpose of share buyback is rail-related and is therefore included in a railway's cost of capital determination.

49 The Agency appeared and was heard on this appeal, as is contemplated by [subsection 41\(4\) of the Act](#). The jurisprudence has established that where a tribunal is entitled to be heard, it is not entitled to argue the merits of the appeal or to take a position which puts it into an adversarial position with a party who will continue to appear in the future: see [Canada \(Attorney General\) v. Quadrini](#), 2010 FCA 246, [2012] 2 F.C.R. 3, at para.16; [Ontario \(Energy Board\) v. Ontario Power Generation Inc.](#), 2015 SCC 44, [2015] 3 S.C.R. 147, at para. 72.

50 The Agency responded to CP's arguments as to procedural fairness by focussing on the RTM issue and pointing out that its decision on that point is merely an interim decision, meant to ensure fairness and consistency in reporting. As for the issue of debt incurred for share buybacks, the Agency notes that the Decision is simply consistent with its 2009 Buyback Decision. It argues that the disposition of the share buyback issue in the Decision is not a simple application of the 2009 Buyback Decision but a fresh decision which it made after consideration of the arguments made by CP in its response to the Call Letter.

51 In my view, there are two issues to be addressed in this appeal. The first question is whether the Agency was obliged to consult CP with respect to the inclusion of non-rail debt in the determination of its CoC.

52 The next question is whether that duty was discharged when the Agency considered and rejected the arguments which CP made in its response to the Call Letter. I will address each of these questions in turn.

***A. Was the Agency obliged to consult with CP before including non-rail debt in the determination of its cost of capital?***

53 Ever since *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, it has been recognized that administrative decision makers have a duty to act fairly. While the cases in which the question arose often involved adjudicative tribunals, the principle does not flow from the nature of the tribunal but from the effect of the decision on the interested party. This was recognized, though not for the first time, in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, 24 D.L.R. (4th) 44 at 653 when the Court wrote:

...This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual: *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*, [1980] 1 S.C.R. 602; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735. ...

54 In this case, CP alleges that the Decision has very significant financial consequences. While there is no direct evidence on the point, it is indisputable that CP and CN's MRE's are in the hundreds of millions of dollars, as evidenced by the statutory baselines set out in [subsections 151\(2\) and \(3\) of the Act](#). Those provisions show that CN and CP each had revenues from the movement of western grain in excess of \$300 million in the 2000-2001 crop year, the base year. In argument, we were advised that CP's current revenues from the movement of western grains are in the region of \$1 billion. In the circumstances, it is apparent that the Agency's decision affects CP's rights and interests and gives rise to a duty of fairness.

55 Fairness is an elastic concept which varies according to the circumstances. As the Supreme Court wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489, at 682 and confirmed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at para. 21 [, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case".

56 *Baker* sets out a number of factors to be considered in determining the content of the duty of fairness. One of these is the legitimate expectations of the person concerned. In this case, CP claims that it had legitimate expectations that it would be consulted before the manner of determining its CoC was changed, expectations which were based on the Agency's past practice and its own undertaking to act transparently.

57 Legitimate expectations can only arise as a result of an administrative tribunal's conduct or its representations:

...If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. ...

*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 94

58 This Court has explained the interests underlying the legitimate expectations doctrine as follows:

The interests underlying the legitimate expectations doctrine are the non-discriminatory application in public administration of the procedural norms established by past practice or published guidelines, and the protection of the individual from an abuse of power through the breach of an undertaking. These are among the traditional core concerns of public law.

*Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264, 188 D.L.R. (4th) 145 at para. 123

59 To its credit, the Agency has a long history of consulting with stakeholders on CoC issues.

60 In 1996-97, as a result of the passage of [the Act](#), the Agency undertook a review of its 1985 decision setting out the methodology for determining the cost of capital in railway operations. The Agency wrote to interested parties asking for comments, and received responses from CP, CN and from the Provinces of Alberta, Manitoba and Saskatchewan and the prairie Wheat Pools. As a result of that review, the Agency issued Decision No. 125-R-1997 which updated the 1985 methodology.

61 In 1998, the Agency reviewed material filed by CP, CN and the governments of Alberta and Manitoba, and determined that a distinctive CoC rate would be used by CP for regulatory purposes "outside of grain and interswitching rates": see Decision No. 601-R-1998.

62 In 2003, the Agency initiated a dialogue with CP, CN and other interested parties about recurring issues in the Agency's determination of the cost of common equity. This resulted in Decision No. 52-R-2004 in which the Agency reviewed many of the elements in the determination of the cost of common equity.

63 This was followed, beginning in 2009, by another review which led to Decision No. 425-R-2011 (the 2011 Decision) in which the Agency took a fresh look at the many elements going into the determination of the CoC.

64 As part of this review, the Agency initiated consultation and held hearings:

The review has been conducted in two phases: a study phase and a hearing phase. In the study phase, after a consultative process involving a wide range of stakeholders to develop the terms of reference for the study, an independent consultant examined existing cost of capital methodologies and principles, and reviewed the Agency's current cost of capital methodology, as well as the cost of capital methodologies used by other economic regulatory bodies.

...

In Decision No. LET-R-185-2010, the Agency initiated the hearing phase of the review and a consultation with a broad list of stakeholders, including railway companies, shippers, producers and others, on certain recurring issues identified by the Agency for discussion. Interested persons were given the opportunity to express their points of view on these issues and any other issues they thought pertinent to the Agency's examination, as well as to provide comments on the Brattle Report [which resulted from the consultation phase].

2011 Decision, at paras. 3, 5

65 Both CN and CP made submissions in the course of that consultation and provided the testimony of their chosen experts.

66 The 2011 Decision concluded as follows:

[388] The Appendix A methodology [the cost of capital methodology] will be applied by the Agency until at least 2018. The Agency retains the discretion to make adjustments to that methodology in the event of extraordinary circumstances that warrant such adjustments. Where such circumstances apply, any adjustments will be made by the Agency in a transparent manner.

67 Later, in working out how to determine the capital structure for regulatory purposes of all regulated railway companies, the Agency undertook industry consultations from August to

November 2016, and from April to May 2017, in order to seek industry views and comments on issues relevant to capital structure determination: see Determination No. R-2017-198 at para. 12.

68 It is clear from this review that the Agency has a history of consulting with the railways before making changes to the methodology for determining CoC and other issues. In addition to this history, CP emphasizes the Agency's undertaking in the 2011 Decision to act transparently in the event that "extraordinary circumstances" warranted adjustments. CP construes this as a commitment to consult with the railways if a change of methodology is to be made. While making adjustments "in a transparent manner" is not synonymous with consultation, it is reasonable, in light of the Agency's history of consultation both before and after 2011, to construe the Agency's undertaking to act transparently as including a consultation process.

69 As a result, I conclude that CP had a legitimate expectation — based primarily on the Agency's past practice and, to a lesser degree, on the Agency's undertaking to do so — that the Agency would consult with it before altering the basis on which its CoC is determined.

***B. Did the Agency satisfy its duty of procedural fairness when it considered and rejected the arguments which CP made in its response to the Call Letter?***

70 Before dealing with the issue of the Call Letter, it is worth noting that, upon receipt of the 2019 RTM Decision, CP inquired of the Agency whether the review would include consultation on capital structure and if not, would it be involved in any way in the review. The Agency advised CP that the review would be "addressed exclusively with CN", but noted that CP would be notified of a consultation on inter-switching rate methodology to be launched shortly, which would include questions on CoC: Appeal Book, p. 27.

71 When the Agency issued the 2019 CN CoC Decision following the review described above, it decided that, except for debt that could be directly linked to CN's US operations, "all other general purpose debt will be allocated to the regulatory balance sheet based on the proportion of total network [RTM] in Canada in the year in which the debt is issued".

72 I note that this decision dealing with the issue of the treatment of non-rail debt was resolved without hearing from CP.

73 When the Agency sent its Call Letter to CP, it referred to the treatment of general purpose debt found in the 2019 CN CoC Decision. The Agency asked CP for RTM information, explaining that, except for debt directly linked to CP's US operations, "all other general purpose debt will be allocated to the regulatory balance sheet" on the basis of the RTM methodology. The Agency indicated that this methodology would be used "until another methodology is approved by the Agency": Appeal Book, p. 31. CP, which had not previously received a copy of the 2019 CN CoC Decision, requested one, which was duly provided.



74 The Call Letter did not invite submissions on the Agency's decision to subject *all* non-US debt to the RTM methodology.

75 As part of its response to the Call Letter, CP advised the Agency that the decision to allocate all non-US debt to the regulatory balance sheet using the RTM method would "represent a significant change to CP's regulatory financial statements and [might] materially impact CP's regulatory cost of capital". As pointed out earlier in these reasons, CP then went on to explain why some of its debt was not rail-related and should not be included in the determination of its CoC.

76 The Agency rejected CP's submission in the Decision, giving rise to this appeal.

77 With that in mind, can it be said that the Agency discharged its duty to consult CP during the process which began with the 2019 RTM Decision and ended with the Decision?

78 CP says the Agency did not discharge that duty because it was not consulted, it was not advised of the case it had to meet and, in particular, the Agency applied to it a rule about the inclusion of all non-US debt, including debt used for share buybacks, a rule of which CP had no knowledge. The Agency responded by saying that CP received copies of decisions in which these issues were raised and that it responded to the issues raised by CP in its response to the Call Letter in the Decision.

79 CP makes two further points. The first is that even debt incurred by CP itself (as opposed to CPL) can only be included in the regulatory balance sheet if it is rail-related, a position founded in the specific provisions of the UCA such as 1202.07 and 1203.01. CP's second point is that debt incurred by CPL, which is not a regulated entity, cannot be included on the regulatory balance sheet because CPL is not the regulated entity.

80 The answer to the question of whether the Agency respected CP's right to be consulted can be approached in two ways. The first is to ask whether the Agency sought CP's input before making the Decision. The second is to see if, notwithstanding its failure to reach out to CP, the Agency considered CP's objection to the inclusion of non-rail debt on the regulatory balance sheet.

81 It is apparent from the exchanges between CP and the Agency, beginning with the 2009 RTM Decision, that the Agency did not consult with CP. As noted earlier in these reasons, when CP wrote asking if it would be included in the review announced in that decision, the Agency excluded it. When the Agency issued the Call Letter, it did not invite CP's submissions on the inclusion of non-rail debt on the regulatory balance sheet. It simply required CP to provide information on long-term debt, excluding only debt tied directly to CP's US operations. In short, not only did the Agency neglect to consult CP, it refused to do so.

82 As a result, it cannot be said that the Agency consulted with CP prior to making the Decision.

83 The Agency's response is that, nonetheless, CP was aware of the issues and its submissions were addressed in the Decision so that, in substance, CP was heard. This approach focusses on whether CP's voice was heard, despite the absence of a consultation process. It seeks to address the substantive reality rather than the procedural formalities. There is something to be said for this since the point is that CP was entitled to be heard, not that it was entitled to be heard in a particular way or forum.

84 On the other hand, it is apparent that the Agency had made a decision on the inclusion of non-rail debt before the Call Letter went out. To that extent, CP was confronted with a *fait accompli*. It is always more difficult to persuade someone who has already decided a question, than someone who is considering a question. But even this could be overcome if the Agency was prepared to consider CP's submissions with an open mind, that is, with a willingness to change its position as a result of CP's submissions. The only way to determine this is to examine the Decision.

85 CP began its submissions to the Agency by pointing to the provisions of the UCA which make it clear that only rail-related amounts incurred by the regulated entity are subject to inclusion on the regulatory balance sheet. In this case, this referred to debt incurred to fund share buybacks, a non-rail use of capital, undertaken by CPL, which is not a regulated entity.

86 The Agency responded to this by pointing to section 1203.05 of the UCA which provides that:

1203.05 The rail division will become involved from time to time in non-rail activities, which will result in transactions which will affect current assets and current liabilities, and, in some cases, on a temporary basis, other assets and liabilities. The UCA balance sheet accounts are to be used to record such assets and liabilities.

87 The Agency continued by saying that even though transactions are managed through a (separate) treasury function, they may nonetheless impact on the rail entity and must be properly accounted for. This is a reference to section 1203.06 of the UCA quoted at paragraph 27 of these reasons.

88 The difficulty with this is that section 1203.05 deals with non-rail activities *by the rail entity* which will affect its assets and liabilities. CP's argument was that share buybacks were activities by its parent company, CPL, which is not a rail entity (*i.e.* a rail division, as defined in section 1000 of the UCA). As a result, the Agency's answer is not responsive to the point made by CP.

89 In its response to the Call Letter, CP addressed the effect of share buybacks on its operations. CP began by noting that it reports on a consolidated basis the financial holdings and results of all subsidiaries of CPL which are involved in Canadian railway operations. It observed that share buybacks are a CPL corporate treasury function which has no impact on railway operations. CP

concluded its remarks with a literary flourish, pointing out that trains do not run faster or slower after a share buyback event.

90 In response, the Agency took the position that debt issued for share buybacks is rail-related because there is a general corporate benefit from buying back issued shares. It made two arguments in support of this position. The Agency expressed the first argument as follows:

...The issuance of debt in lieu of issuing more shares to fund rail-related investments lowers the company's cost of capital, as the cost rate of debt issuance is lower than the cost of common equity rate that is expected from investors. Lower cost rates paid by the railway company for its investments might allow it to increase investments in other rail-related projects, or to lower freight rates paid by its customers.

Decision at para. 16

91 The Agency's statement that the issuance of debt in lieu of issuing shares lowers the company's CoC may well be true, but it is non-responsive to CP's argument. The fact that debt is cheaper than equity is not a reason for including non-rail debt in the calculation of the CoC. Buying back shares using borrowed money is not a way of raising capital since the amounts used to purchase outstanding shares are no longer available to the company to invest in rail-related assets.

92 The point is not whether the Agency was right but whether its decision was the result of an open-minded assessment of CP's submissions. In my view, it is not. The Agency's response does not engage with the argument which CP was advancing as to non-regulated entities and non-rail expenditures.

93 The Agency's second argument on corporate benefit was based on CP's 2019 Annual Report which reported that CP had awarded \$58 million of stock based compensation, which (according to CP's VRCPI submission) was distributed to approximately 12 percent of CP's workforce. The Agency suggested that the reduction in the number of outstanding shares as a result of a share buyback increases the relative ownership of these employees which *may* lead to an increase in employee performance.

94 In this reasoning, the Agency attributes a motivational factor to a shareholder's relative stake in the railway, over and above the motivational value of the share ownership itself. This point about relative ownership is doubtful since shareholders do not own the corporation's assets, but that is not the issue here. The question is whether this reasoning shows a serious attempt to deal with the arguments advanced by CP against the inclusion of non-rail debt on the regulatory balance sheet. In my view, it does not.

95 If one compares the sophisticated financial analysis in other Agency decisions such as the 2011 Decision to this reasoning, one is struck by its superficiality. Share buybacks may increase

each outstanding share's portion of corporate profits and potential share of property upon winding up, but new share issues decrease that notional share, and debt decreases the notional amount available for distribution on winding up. But the most obvious weakness of this argument is that it was offered only as a possibility. It is simply speculation which is not indicative of a serious attempt to deal with CP's submission.

96 The Agency then invoked the 2009 Buyback Decision, in which it found that debt incurred for a share buyback was rail-related. The Agency argued that this demonstrates a consistency in decision making but once again, that is not the issue here. The juxtaposition of the 2009 Buyback Decision and the Decision under appeal demonstrates consistency of result but not consistency of reasoning. The only reasoning offered in the 2009 case was that the Agency did not consider "debt incurred for the purpose of buying back shares in a company whose primary, if not exclusive, business line is the railway business to be appropriately classified as identifiable non-rail debt". The decision turned on whether share buybacks could be identified as non-rail debt. CP offered reasons why such buybacks could be identified as non-rail debt, arguments which were not addressed by the Agency.

97 In addition, the Agency argued that the RTM Decision as to the allocation of debt is an interim decision until the Agency can conclude its consultations about the allocation methodology. With respect, that argument is beside the mark. CP's issue is not the method of allocation; it is whether non-rail debt should be allocated at all.

98 All of these factors persuade me that the Agency did not give serious consideration to CP's submissions that non-rail debt should not be included in the determination of CP's CoC. The Decision does not grapple in a meaningful way with CP's submissions and gives every indication that it was written to justify a decision which had already been made. As a result, I conclude that the Agency breached its duty of procedural fairness when it failed to consult with CP or, putting it another way, when it failed to consider CP's submissions with an open mind.

### ***C. Remedies***

99 In its memorandum of fact and law, CP asks that the two decisions in issue be quashed and that the Agency be directed to re-determine its CoC on the basis that non-rail debt is not to be considered in the determination of CP's CoC.

100 As was pointed out earlier, this appeal does not challenge the findings as to commercial paper and working capital in the Decision. For that reason, the Decision and the VRCPI Decision can only be quashed to the extent that they relate to the inclusion of non-rail debt in the determination of CP's CoC and the determination of CP's CoC through a method which includes non-rail debt. CP also asks for a declaration that debt issued for share buybacks is not rail-related and should not be included in the determination of CP's cost of capital and VRCPI. It is not this Court's function to identify what is or is not to be included in a railway's cost of capital when that issue will presumably

be the subject of consultation between CP and the Agency. All this Court can do is to set aside the decisions made in breach of the duty of fairness. If the Agency wishes to proceed with the change to the determination of CP's cost of capital, it must give CP a chance to be heard before the decision is made.

101 I would therefore quash the Agency's determination of CP's cost of capital for the 2020-2021 crop year, and return the matter to the Agency with the direction that CP's cost of capital for the 2020-2021 crop year be determined on the same basis as it was for the 2019-2020 crop year. This direction is driven by the statutory deadline for making the cost of capital determination which, given the point in time at which we find ourselves, leaves no time for adequate consultation. I would therefore maintain the status quo, leaving it to the Agency to decide how it wishes to proceed. I would also quash the Agency's determination of CP's VRCPI for the 2020-2021 crop year in Determination R-2020-81 and return the matter to the Agency with the direction that CP's VRCPI for the 2020-2021 crop year be determined using the cost of capital determined as directed by this Court.

102 The Agency has not asked for costs and asks that costs not be awarded against it. CP, on the other hand has asked for costs. When a tribunal such as the Agency appears and provides context as to its procedures and its jurisdiction, it is assisting the Court and should not be ordered to pay costs for doing so. In such a situation, the tribunal neither wins nor loses and should not be treated as if it had. The situation is not the same when a tribunal appears and inserts itself into an adversarial debate against a party who appeared before it and may appear before it again. In that case, the tribunal may well come across as a winner or a loser and may expose itself to costs. This is particularly so when the tribunal is the only respondent.

103 CP alleged that some of the Agency's submissions crossed the line and amounted to defending its decision. While I do not necessarily agree, I can see why CP made the allegation. Some positions were close to the line. But the line was not crossed so I would make no order as to costs.

***D.G. Near J.A.:***

I agree

***Mary J.L. Gleason J.A.:***

I agree

*Appeal allowed.*

[Héneault et Gosselin Inc. v. Entreprises P.F. St-Laurent Inc.](#)

Federal Court Judgments

Federal Court of Canada - Trial Division

Montréal, Quebec

Nadon J.

Heard: March 2, 1998

Judgment: March 2, 1998

Court File No. T-1438-96

[1998] F.C.J. No. 281 | [\[1998\] A.C.F. no 281](#) | [81 A.C.W.S. \(3d\) 800](#)

Between Héneault et Gosselin Inc., plaintiff, and Les Entreprises P.F. St-Laurent Inc. and Pierre St-Laurent, defendants

(6 pp.)

## **Case Summary**

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### **Practice — Discovery — Order for examination for discovery — Production and inspection of documents — Damages — Assessment.**

Motion by the plaintiff to direct the individual defendant to attend an examination for discovery. Motion by the defendants to be relieved of the obligation to produce documents, and to limit the assessment of damages to a specified period. The individual defendant failed to appear at the appointed time for an examination by the plaintiff, claiming that there was insufficient time to obtain the documents required.

HELD: Plaintiff's motion allowed.

Defendants' motion dismissed. The individual defendant should have attended at the appointed time and place to explain why he did not have the required documents. The plaintiff was entitled to recover from the defendants the cost of service of the direction to attend, plus fees paid to the stenographer hired for the examination. The defendants' motion to be relieved from production of documents was premature, and there was no reason to limit the assessment of damages.

## **Counsel**

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Laurent Carrière, for the plaintiff. André Demers, for the defendants.

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[Ed. note: A motion by the Defendants for an order was released on March 2, 1998. Please see Annex A appended at the end of the reasons.]

### **NADON J. (Order and Reasons)**

**1** On February 18, 1998, the plaintiff served a direction to attend on Pierre F. St-Laurent. According to the direction, Mr. St-Laurent was to appear at 10:00 a.m. on February 24, 1998 at 30 McGill St., Montréal, to be examined by the plaintiff. Mr. St-Laurent and his counsel refused to attend on the ground that they could not [TRANSLATION] "comply with your duces tecum . . . ." In my view, this was not a valid reason. If Mr. St-Laurent did not have enough time to obtain the documents required by the plaintiff, he need only have appeared at the examination and explained why he did not have the documents with him.

**2** In these circumstances, the plaintiff is entitled to receive from the defendants, as costs, the cost of service of the direction to attend and fees paid to the stenographer hired for February 24, 1998.

**3** As for the examination of Mr. St-Laurent, he shall be examined by the plaintiff no later than March 31, 1998. The defendants shall do everything necessary to enable the plaintiff to examine Mr. St-Laurent within this period.

Certified true translation:-- M. Iveson

### **ANNEX A**

#### **4 Motion by the defendants for an order :**

1. DIRECTING the plaintiff to produce the work "devis de présentation", on which it relied to obtain the infringement judgments dated January 22, 1996 and September 18, 1996;
2. DIRECTING the plaintiff to specify the significant infringed portions of the document "devis de présentation";
3. DIRECTING the plaintiff to limit the assessment of its damages to the period of January 22, 1996 to September 18, 1996;
4. DIRECTING that the defendants be relieved from the obligation to produce certain documents;
5. DIRECTING that the obligation to produce certain documents be limited to the period of January 22, 1996 to September 18, 1996;
6. DIRECTING the nomination of a referee or any other person designated by the Administrator of the Court to assess the damages;

- 5 The whole with costs in the cause, depending on the outcome of the reference.  
[Rules 480, 500, 501 of the Federal Court Rules]

### ORDER AND REASONS

- 6 The motion is dismissed with costs in the cause.

7 In their motion, the defendants ask me, inter alia, to order that argument on the quantum of the damages sought by the plaintiff be limited to the period of January 22, 1996 to September 18, 1996. This part of the motion is the result of objections made by counsel for the plaintiff during the defendants' examination of the plaintiff on February 11, 1998. Based on the statement of claim in the case at bar and Prothonotary Morneau's judgment dated September 18, 1996, I cannot agree with the defendants' submission. The plaintiff is entitled to damages for the infringement of its copyright as alleged in the statement of claim and confirmed in the judgment of September 18, 1996.

8 As for the defendants' request to be relieved from production of the documents required by the plaintiff in the direction to attend, I consider it premature. If the plaintiff requests the production of these documents during the examination of Pierre St-Laurent, the defendants may object at that time if appropriate, for whatever reasons they consider relevant.

9 It is of course unnecessary to order that the relevant documents be [TRANSLATION] "related" to the period of January 22, 1996 to September 18, 1996.

Certified true translation: M. Iveson



2015 FC 1292, 2015 CF 1292  
Federal Court

Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology

2015 CarswellNat 10849, 2015 CarswellNat 6491,  
2015 FC 1292, 2015 CF 1292, 261 A.C.W.S. (3d) 57

**Hospira Healthcare Corporation, Plaintiff/Moving Party and The  
Kennedy Institute of Rheumatology, Defendant/Responding Party**

The Kennedy Trust for Rheumatology Research, Janssen Biotech, Inc.,  
Janssen Inc. and Cilag GmbH International, Plaintiffs by Counterclaim/  
Responding Parties and Hospira Healthcare Corporation, Celltrion Healthcare  
Co. Ltd. and Celltrion Inc., Defendants by Counterclaim/Moving Parties

Catherine M. Kane J.

Heard: July 7, 2015  
Judgment: November 18, 2015  
Docket: T-396-13

Counsel: Warren Sprigings, for Moving Parties, Appellants  
Andrew Skodyn, Vanessa Park Thompson, for Responding Parties, Respondents

***Catherine M. Kane J.:***

**I. Overview**

1 This is an appeal from the Order of Prothonotary Martha Milczynski, made on January 15, 2015, arising from the motion by Hospira Healthcare Corporation [Hospira] and Celltrion Healthcare Co. Ltd. and Celltrion Inc. [collectively, the appellants] to compel the respondents, the Kennedy Institute of Rheumatology and the Kennedy Trust for Rheumatology Research [Kennedy], to answer questions refused at the examination for discovery of Kennedy's representative.

2 The underlying dispute is a patent impeachment action. The appellants, the plaintiffs in the underlying action, seek a declaration that claims 1-42 of Canadian Patent No 2,261,630 are invalid and that the appellants' proposed product will not infringe these claims. The respondents, the defendants in the underlying action, counterclaim and seek a declaration that the claims of the patent are valid and that the appellants have or will infringe the patent. Janssen Biotech Inc,

Janssen Inc and CILAG GmbH International, who are licensees, distributors of the licensees and manufacturers of the licensees [Janssen], are plaintiffs by counterclaim. Celltrion Healthcare Co Ltd and Celltrion Inc are defendants to the counterclaim. The pleadings were closed on January 28, 2014.

3 On February 24, 2014, the Court issued a bifurcation order; the liability issues will proceed before the quantification of damages issues. The order provides that the liability phase would include the respondents' entitlement to damages, that during the liability phase there shall be no documentary or other discovery on matters solely relating to the quantification issues, and that the quantum of damages would be decided during the quantification phase.

4 The examination for discovery of Mr Espinasse, the representative for Kennedy, took place in May 2014. After two full days and before discovery was complete, the respondents refused the re-attendance of Mr Espinasse. The respondents were subsequently ordered to produce Mr Espinasse for two additional days.

5 The appellants brought a motion to compel the respondents to answer 354 questions that were taken under advisement or refused at the examination for discovery of Mr Espinasse,

6 Prothonotary Milczynski heard the motion on September 10-11 and October 1-2, 2014 and ordered that the respondents answer nineteen of the 354 questions which were either refused or taken under advisement at the examination for discovery.

7 The appellants now appeal 85 rulings in the order.

8 The Court notes that the examination for discovery which gave rise to the refusals and the subsequent motion lasted two days (with two additional days subsequently ordered). The hearing of the motion by the prothonotary was also four days. The hearing of this appeal was one day. The Court's review of the record, including the pleadings, the examination for discovery and the transcript of the motion hearing, has required many additional days. Despite the Court's comprehensive review of the record, the Court does not have the same grasp of all the issues at stake, the history of the proceedings and the context which the prothonotary has acquired over the two years she has case managed this litigation. However, the Court has a sufficient grasp of the issues on this appeal to reach a determination. Even if a *de novo* review were warranted, which it is not, it would require a great deal more time than a one day hearing and the additional days of review to do so. These observations highlight the importance of proportionality as a consideration in the management of complex litigation.

9 The motion hearing before the prothonotary provided ample opportunity for the appellants to make submissions on the relevance of the questions they sought to have answered. The decision of the prothonotary reveals that careful consideration was given to the appellants' arguments. Several of the prothonotary's rulings were based on balancing the degree of relevance of the question or

request and the onerousness of requiring the respondents to answer or provide documents, often in circumstances where the respondents had already indicated that they had provided what they possessed, the information had been provided by others, or the appellants could not elaborate on why the information was relevant. There are several instances where the prothonotary encouraged the appellants to provide an explanation or elaborate on why a question was relevant, but rather than do so, the appellants preferred to regard the question as dismissed.

10 It would be impractical to pen a decision of hundreds of pages to address each question refused and each argument the appellants raised on appeal with respect to each of those questions. The Court's Order, as long as it is, cannot address every argument raised by the appellants on the questions they submit should have been ordered to be answered.

11 For the reasons that follow the appeal is dismissed.

## **II. The Prothonotary's Order**

12 By order dated January 15, 2015, Prothonotary Milczynski ordered that 19 of the questions be answered, at least in part, and dismissed the balance of the motion. (There are some minor discrepancies regarding the number of questions posed and refused because several were multi-part questions.)

13 The prothonotary noted that the purpose of examinations for discovery is to advance the case; discoveries ought to be conducted to obtain omissions from the opposing party, narrow the issues for trial, and, through gathering the facts, "shape the case that must be met at trial without risk of ambush or surprise".

14 The prothonotary then noted the principles governing the scope of examinations, including: that questions must be relevant, in that they advance a party's case or damage the opposing party's case; questions that call for privileged information to be disclosed, for speculation, or for expert or legal opinion do not need to be answered; and, that vague or overbroad questions are improper. The prothonotary added that while questions that could lead to a "train of inquiry" may be relevant, they must not go off track or show little prospect of reaching their destination. Finally, the prothonotary explained that the principle of proportionality must be applied: questions that require onerous or costly efforts will not be compelled when the information is of limited usefulness and not likely to advance a party's legal position.

15 The prothonotary found that, for the oral reasons she provided at the hearing of the motion, many of the questions did not need to be answered. She also found that many questions had been resolved by the respondents providing or agreeing to provide answers.

## **III. The Issues**

16 The issues raised in the appeal are:

1. What is the applicable standard of review?
2. Should the decision as a whole be reviewed on a *de novo* basis?
3. Should specific rulings be reviewed on a *de novo* basis?

#### IV. The Standard of Review

17 The parties agree that the current standard of review of a prothonotary's discretionary decision is that established in *R. v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, 149 N.R. 273 (Fed. C.A.) [*Aqua-Gem*].

18 In *Merck & Co. v. Apotex Inc.*, 2003 FCA 488 (F.C.A.) at para 19, (2003), [2004] 2 F.C.R. 459 (F.C.A.), leave to appeal to SCC refused, [2004] S.C.C.A. No. 80 (S.C.C.) [*Merck*], the standard of review previously established in *Aqua-Gem* was restated as follows: "Discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless: (a) the questions in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of facts."

19 Prothonotaries are given wide discretion by virtue of their case management role; see e.g., *j2 Global Communications Inc. v. Protus IP Solutions Inc.*, 2009 FCA 41 (F.C.A.) at para 16, (2009), 387 N.R. 135 (F.C.A.) [*j2 Global*]:

[16] It has often been said in this Court that, because of their intimate knowledge of the litigation and its dynamics, prothonotaries and trial judges are to be afforded ample scope in the exercise of their discretion when managing cases: see also *Federal Courts Rules*, rules 75 and 385. Since this Court is far removed from the fray, it should only intervene in order to prevent undoubted injustices and to correct clear material errors. None have been demonstrated here. [...]

20 The Court should only intervene in a prothonotary's decision "in the clearest case[s] of a misuse of judicial discretion" (*Sawridge Band v. R.*, 2001 FCA 338 (Fed. C.A.) at para 11, (2001), [2002] 2 F.C. 346 (Fed. C.A.) [*Sawridge Band*]). The Federal Court of Appeal clarified in *Merck & Co. v. Apotex Inc.*, 2003 FCA 438 (F.C.A.) at para 13, (2003), 28 C.P.R. (4th) 491 (F.C.A.) [*Apotex*] that this principle does not permit the prothonotary to deny a party the legal right to have questions answered on examination for discovery that are relevant to the issues in the pleadings. The prothonotary must direct their mind to several considerations in discovery, including relevance (at para 15). Other considerations were noted at para 10:

[...] It is clear that the primary consideration is relevance. If a prothonotary or a judge does, however, find a question to be relevant he or she may still decline to order the question to be answered if it is not at all likely to advance the questioner's legal position, or if the answer to a question would require much time and effort and expense to obtain and its value would appear to be minimal, or where the question forms part of a "fishing expedition" of vague and far-reaching scope.

21 In *Soderstrom v. Canada Revenue Agency*, 2011 FC 575, 2011 D.T.C. 5092 (Eng.) (F.C.) [*Soderstrom*], Justice Paul Crampton considered both the *Aqua-Gem* test and the principle that deference is owed to prothonotaries, at para 10, noting that the principle in *j2 Global* does not appear to apply when the question is vital to the final issue in the case:

[10] More recently, the Federal Court of Appeal has stated that discretionary decisions of prothonotaries should stand unless intervention is warranted "to prevent undoubted injustices and to correct clear material errors" (*j2 Global Communications, Inc v. Protus IP Solutions Inc*, 2009 FCA 41, at para 16). However, the latter statement appears to have been made solely with respect to the second prong of the test set forth above, as the Court in that case agreed with the motions judge that the issue that had been raised was not vital to the final issue of the case (*j2 Global Communications*, above, at para 15). Based on a more recent decision of the Federal Court of Appeal, it is clear that this Court is still obliged to conduct a *de novo* review of a prothonotary's decision in respect of a question that is vital to the final issue in the case (*Apotex Inc v. Bristol-Myers Squibb Company*, 2011 FCA 34, at paras 6 and 9).

22 The respondents submit that the test in *Aqua-Gem* has been the subject of commentary in the Federal Court of Appeal and that there is some support for moving toward deference to the prothonotary's decision even on issues that are vital to the final outcome of the case (*Bristol-Myers Squibb Co. v. Apotex Inc.*, 2011 FCA 34 (F.C.A.) at paras 6-9, (2011), 91 C.P.R. (4th) 307 (F.C.A.) [*Bristol-Myers Squibb*]) and toward following the normal appellate standard of review articulated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) [*Housen*] of "palpable and overriding error".

23 In *Fraser v. Janes Family Foods Ltd.*, 2011 FC 569 (F.C.) at paras 11-12, (2011), 390 F.T.R. 82 (Eng.) (F.C.), Justice Donald Rennie referred to *Bristol-Myers Squibb*, noting that it articulated "sound policy reasons" for the application of the *Housen* standard, but found that the comments were *obiter* and applied the *Aqua-Gem* standard.

24 In *Soderstrom* at para 12, Justice Crampton also cited *Bristol-Myers Squibb* and found that, because the prothonotary's decision was vital to the final issue in the proceeding, he was obliged to perform a *de novo* review of the decision. However, he noted that he was "attracted to the view that deference should be given to determinations made by a prothonotary, even where they raise a question vital to the final issue of the case."

25 In the present case, the parties agree that the current or prevailing standard of review is that set out in *Aqua-Gem*. While the respondents have raised good arguments for breaking new ground regarding the standard of review, I do not find that this case is the case to do so. Moreover, the result would be the same whether the *Aqua-Gem* test is applied or whether the palpable and overriding error standard is applied.

## **V. Is the decision as a whole clearly wrong and should a de novo review be conducted?**

### ***The Appellants' Position***

26 The appellants argue that the prothonotary's decision fails both parts of the *Aqua-Gem* test.

27 The prothonotary's decision discloses a lack of appreciation of relevant evidence, a misapprehension of the facts, and her exercise of discretion was based upon a wrong principle of law.

28 Alternatively, or in addition, the appellants submit that the prothonotary improperly exercised her discretion on matters that relate to an issue vital to the final outcome of the case.

29 The appellants claim that the order does not address why the questions, either individually or categorically, were dismissed. While the order refers to oral reasons, many of the oral reasons were "inaudible" on the transcript. It is unclear whether the questions were dismissed because they lacked relevance or because, while relevant, they were unduly onerous or otherwise improper.

30 The appellants argue that the respondents provided no evidence that the questions were unduly onerous or would require an inordinate amount of time, effort or cost that would be disproportionate to the results. There were only submissions by counsel on this issue, rather than an affidavit attesting to how or why this would be onerous.

31 The appellants submit that the litigation is complicated, the litigants are sophisticated and the stakes are high, as these proceedings relate to the highest selling drug in Canada. Although this should not impact the scope of discovery, the respondents cannot complain about the extra time needed to look for the answers or the documents because they have the resources to do so.

32 The appellants point to the Federal Court's Practice Direction dated June 24, 2015, "Case Management: Increased Proportionality in Complex Litigation Before the Federal Court," which provides that "[q]uestions should be answered unless clearly improper or prejudicial, or would require the disclosure of a privileged communication."

33 The appellants submit that the prothonotary made a broad ruling based on Rule 3 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] to provide an expeditious determination without regard

to other principles, including that answers cannot be refused on issues relevant to an issue in the pleadings and justice cannot be subordinated to expediency.

34 The appellants allege several errors of law and fact by the prothonotary.

35 The appellants allege that the prothonotary applied the wrong test of relevance by asking whether a document was "relevant enough" rather than "relevant". She further erred by requesting privileged information, trial strategy and how documents would be used at trial as a measure of relevance.

36 The appellants note that the test for relevance is whether something will lead to information or a train of inquiry which may directly or indirectly allow a party to advance its own case or damage the case of its adversary (*Bristol-Myers Squibb Co. v. Apotex Inc.*, 2007 FCA 379 (F.C.A.) at para 30, (2007), 162 A.C.W.S. (3d) 911 (F.C.A.)). The purpose of discovery is to inform the adverse party of the case it has to meet. There should be flexibility in examinations and the production of documents. Relevant questions should only be disallowed when they are abusive. The appellants argue that the prothonotary did not apply the train of inquiry approach, but rather took a narrow approach and improperly put a higher onus on the appellants by asking them to provide the theory of their case.

37 The appellants argue that the prothonotary erred in accepting the oral argument of Kennedy's counsel as evidence of onerousness and undue effort, rather than an affidavit attesting to how or why a question would be onerous.

38 The appellants also allege that the prothonotary erred by not requiring Kennedy to answer a question based on the fact that Janssen had already provided an answer to that question and by not requiring Kennedy to assist Hospira's counsel by directing them to an answer previously given by Kennedy or Janssen. The appellants submit that a party cannot refuse to answer a question or produce a document on the basis that a co-defendant has already answered the question or produced the document (*Havana House Cigar & Tobacco Merchants Ltd. v. Naeini* (1998), 147 F.T.R. 189 (Fed. T.D.) at para 22, (1998), 80 C.P.R. (3d) 132 (Fed. T.D.) (Proth) [*Havana House*]).

39 The appellants also argue that Kennedy's witness, Mr Espinasse, was uninformed and unprepared, which resulted in many refusals and undertakings. The appellants acknowledge that they will have an opportunity to examine Dr Maini, who they initially requested as the witness, and that they have examined Dr Baker, a representative of Janssen.

40 The appellants contend that Kennedy delivered an unsworn affidavit of documents that lacked detail regarding dates, authors, titles or descriptions for the majority of the 770 documents listed. Even if an affidavit with an index was provided afterward, expecting the appellants to sort it out is not reasonable.

41 The appellants dispute the respondents' contention that they simply asked the questions and failed to read the documents provided. The appellants submit that they still needed to ask questions to determine relevance.

### ***The Respondents' Position***

42 The respondents submit that the context is an important consideration in the appeal. The prothonotary has case-managed this protracted litigation with a view to moving it forward for over two years. There have been several discovery motions and many interlocutory decisions, several have been or are being appealed. The respondents suggest that the appellants have not heeded the Court's guidance and their actions are abusive and wasteful.

43 The respondents submit that the 85 questions under appeal out of over 500 cannot be argued to be vital to the final outcome. Additional days of discovery are scheduled, or have already taken place, and if the questions were vital, there will be another opportunity to ask them. Moreover, the disposition of a discovery motion will rarely be vital to the final outcome of the case (*Apotex Inc. v. Warner-Lambert Co. LLC*, 2011 FC 1136 (F.C.) at para 4, [2011] F.C.J. No. 1402 (F.C.) [*Warner-Lambert*]).

44 The respondents submit that the absence of written reasons for each ruling is not grounds for a *de novo* hearing. Although the transcript includes some parts that are inaudible or unclear, the oral reasons and written order as a whole clearly convey that the prothonotary applied the legal principles of discovery and refusals motions to her understanding of the case.

45 The respondents add that even when a question is relevant, the Court has a discretion to disallow it, for example where it would be onerous or cause hardship, where other means exist to address it, or where it is vague or a fishing expedition (*Lehigh Cement Ltd. v. R.*, 2011 FCA 120 (F.C.A.) at para 35, [2011] F.C.J. No. 515 (F.C.A.) [*Lehigh Cement*]).

46 The appellants were aware that Mr Espinasse would be the respondents' representative. The appellants' motion to have an inventor appear as the witness was dismissed. However, the inventors have been subsequently discovered.

47 The respondents dispute that Mr Espinasse was unprepared. No one could have been able to answer the inappropriate questions posed by the appellants, some of which raised ancient events beyond his knowledge.

48 The respondents also note several exchanges between the appellants and the prothonotary where the appellants failed to make submissions on how the documents requested were relevant and simply took the prothonotary's inquiry as a dismissal of the question. The respondents also



submit that the appellants preferred to ask questions rather than review the documents that would have provided the answers to the questions asked.

The decision as a whole is not clearly wrong; the prothonotary did not exercise her discretion based upon a wrong principle or upon a misapprehension of facts

49 None of the questions on the discovery motion will likely be vital to the final outcome of the case (*Warner-Lambert* at para 4). As a result, the applicable standard is whether the prothonotary's order was clearly wrong, in that the exercise of her discretion was based on a wrong principle or a misapprehension of the facts (*Aqua-Gem* at 462-463).

50 The appellants bear the burden of establishing that the prothonotary was clearly wrong and that the Court should intervene. They have not met this burden.

51 With respect to the appellants' submissions that the prothonotary applied the wrong test for relevance, failed to appreciate relevant evidence, misapprehended the facts and did not make clear findings, the appellants make only broad references to the oral reasons.

52 The prothonotary's findings are clear and the decision refers to the appropriate considerations and principles in the jurisprudence. The appellants have not established that the prothonotary's order was based on a wrong principle or a misapprehension of the facts.

53 As noted above regarding the standard of review, the prothonotary must consider relevance, but even if a question is relevant, it may be refused if, for example, it is not at all likely to advance the questioner's legal position, the answer to a question would require significant time, effort and expense to obtain and its value would be minimal, or the question forms part of a "fishing expedition" of vague and far-reaching scope (*Apotex* at paras 10, 13).

54 The prothonotary did not ask or consider whether the questions or issues were "relevant enough". However, if she had, this would not necessarily be an error. The degree of relevance of a question is an appropriate consideration (*Apotex Inc. v. Sanofi-Aventis Canada Inc.*, 2011 FC 52 (F.C.) at para 21, (2011), 383 F.T.R. 37 (Eng.) (F.C.) [*Apotex II*]). Even the train of inquiry approach does not provide a vehicle to permit remotely potentially relevant questions to ride along. As the prothonotary noted, not every question deserves an answer.

55 The appellants' submission that the prothonotary erred by requesting privileged information, trial strategy and how documents would be used at trial as a measure of relevance are also addressed below as they arise in the question-by-question submissions.

56 The prothonotary did not err in asking the appellants to better explain why particular questions or documents were relevant. The onus was on the appellants to provide more than an assertion and, for many requests, they failed to do so.

57 The prothonotary's order reflects that she applied the principles summarised by Justice Yves de Montigny in *Apotex II* at paras 16-21:

[16] Pursuant to [Rule 240](#), a person being examined for discovery is required to answer any questions relevant to any unadmitted allegation of fact disclosed in the pleadings as well as any question concerning the identity of any person, other than an expert witness, who may reasonably be expected to have knowledge of matters in issue.

[17] [Rule 242\(1\)](#) establishes, however, permissible objections during an examination for discovery, if, for example, the question is not relevant, is unreasonable, is unnecessary or would be unduly onerous. Relevance is a matter of law, not discretion. The question of whether a document "relates" to an issue in the case depends upon a reasonable interpretation of the pleadings. The party demanding a document must demonstrate that the information in the document may, either directly or indirectly, advance its own case or damage the case of an opponent.

[18] More recently, the Federal Court of Appeal has adopted the "train of inquiry test" with respect to which documents may be deemed to advance a party's case. In other words, the Court must determine whether it is reasonable to conclude that the answer to a particular question might lead the questioning party to a train of enquiry that may either advance its case or damage the case of its opponent: see *Apotex inc. v Bristol-Myers Squibb Company*, 2007 FCA 379 at para 30.

[19] It is fair to say, therefore, that the Court will apply a generous and flexible standard of relevance in determining whether a question should be answered. A fair amount of latitude will be allowed on discovery provided that a question is relevant to issues raised by the pleadings. The standard of relevance on discovery is lower than at trial and doubt as to the propriety of the question will be resolved in favour of disclosure: see *Monit International Inc. v Canada* (1999), 175 FTR 258; *Glaxo Group Ltd. v Novopharm Ltd.*, [1998] FCJ No 1808, at para 4 (FCA).

[20] That being said, the Court retains a residual discretion to decide not to compel the production of technically relevant documents where such production would have no benefit or could not be used to advance a party's case. Although there is a broad right of examination, there are limits on that right of discovery and the Court will not permit the discovery process to be used as a fishing expedition: see *Apotex Inc. v Merck & Co. Inc.*, 2004 FC 1038, at para 16; *Eli Lilly Canada Inc. v Novopharm Limited*, 2007 FC 1195, at para 19, aff'd 2008 FC 281; aff'd 2008 FCA 287, at paras 69-70; *Pharmacia S.p.A. v Faulding (Canada) Inc.* (1999) 3 CPR(4th) 126, at paras 2-3 (F.C.A.).

[21] Moreover, the simple fact that a question can be considered "relevant" does not mean that it must inevitably be answered. Relevance must be weighed against matters such as the

degree of relevance, how onerous it is to provide an answer, whether the answer requires fact or opinion of law, and so forth: *GSC Technologies Corp. v Pelican International*, 2009 FC 223, at para 11; *AstraZeneca Canada Inc. v Apotex Inc.*, 2008 FC 1301.

58 The Federal Court of Appeal in *Lehigh Cement* at para 35 also clearly stated that relevance is not the only consideration and that questions can be disallowed following a balancing of other factors:

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

59 The appellants argue that the stakes are very high in this litigation and that the determination of the issues in the appeal should be assessed in this context and, therefore, relevance should be more broadly interpreted. While I agree that context is important, high stakes are not the only contextual consideration and cannot trump other well-established principles.

60 Moreover, the corollary cannot be supported, i.e., that where the stakes are not as high, the determinations of relevance would be less important or the scope of relevance would be narrower.

61 It is apparent that while the prothonotary may have found some of the questions and requests to have some relevance, she also went on to consider the other factors, and in many instances properly concluded that the value of requiring an answer was disproportionate for varying reasons, including onerousness, vagueness or that the information had already been provided by others.

62 With respect to the appellants' submission that the prothonotary erred in accepting the oral submissions of Kennedy's counsel as evidence of onerousness and undue effort, rather than requiring an affidavit, the appellants have not cited any authority to support that this is an error. It was open to the prothonotary to accept the explanations offered by the respondents regarding the onerous impact of producing particular documents in the context of her awareness of the case, given her experience case managing the litigation. Similarly, the appellants do not point to a legal principle that requires the prothonotary to order the respondents to assist the appellants by directing them to an answer previously given. The prothonotary pointed out that many documents appeared not to have been read by the appellants and, rather than read them, the appellants simply asked the respondents to pinpoint particular information.

63 With respect to the appellants' argument that the prothonotary erred by dismissing questions based on the fact that Janssen had already provided answers to the questions, *Havana House*, relied on by the appellants, does not, in my view, support the broad proposition advanced by the appellants. *Havana House* dealt with gaps in the production of documents and referred to circumstances where the documents had been provided by another source, i.e., a third party. In the present case, the questions have been answered by a party to the proceedings, i.e., Janssen. Kennedy had clearly stated that it provided all it had in its possession. Moreover, even if Kennedy had the documents, it would be a waste of resources to require them to provide answers or documents already known to the appellants. Even if the respondents have adequate resources, there is no reason to exploit them.

64 With respect to the appellants' submission that there were no reasons provided for some of the prothonotary's determinations due to inaudible portions of the transcript, I do not agree that the inaudible portions make it impossible for the Court to consider the issues raised on this appeal. The motion occurred over four days, the record is voluminous and the majority of the transcript is audible. Moreover, the appellants were present and heard the prothonotary's rulings as the motion proceeded. If there were examples of the oral reasons that are not transcribed that the appellants take issue with, the appellants should have been able to provide some of the specific examples.

65 The Saskatchewan Court of Queen's Bench addressed a similar issue in *Fehr v. Robinson Diesel Injection Ltd.*, [1986] S.J. No. 179, 47 Sask. R. 12 (Sask. Q.B.):

When I read the impugned portion of the transcript by itself I am able to ascertain the basic content and effect of the evidence. This portion of the transcript relates only to the rebuttal evidence of Robinson and when I read it in conjunction with the preceding portion of the transcript I am confident that I have a proper understanding and appreciation of the deficient portion of the transcript. More importantly, I am satisfied from a perusal of the portions of the transcript surrounding the inaudible portions that whatever has not been transcribed would not have brought about a different decision. In short, I am not persuaded that the interests of justice require a trial *de novo*. Accordingly, the application for such a trial is dismissed.

66 Although the absence of parts of a transcript or record may, in some cases, affect a party's right to know the reasons for a decision and the Court's ability to determine if the decision is clearly wrong, this is not such a case. The inaudible parts of the transcript were heard by the appellants in person, they have not provided specific examples of the errors alleged and the inaudible portions would not likely have brought about a different decision.

67 With respect to the appellants' suggestion that the prothonotary misapplied the June 24, 2015 Practice Direction and focussed only on expediency, I note that the appellants have selectively extracted one part of that Practice Direction (which was not in effect at the time of the motion or the prothonotary's order) without reference to its overall purpose and the related principles. The

Practice Direction is intended to bring about increased proportionality in proceedings before this Court. Among other recommendations, it proposes limits on documentary and oral discovery and limits on refusals motions "to ensure the proportionate use of the Court's scarce resources by parties."

68 The appellants referred only to the proposal that questions should be answered unless they are clearly improper or prejudicial, or would require disclosure of privileged information. Equally applicable are the following proposals:

- No refusals motions will be permitted until discoveries are complete.
- Such motions will be limited to one hour per day of discovery of each party's representative.
- Potentially significant cost sanctions may be imposed against unsuccessful/unreasonable parties.
- No questions will be taken under advisement.
- Answers provided under objection will be considered by the trial judge, if the objection is not sustained.

69 The prothonotary did not place expediency ahead of the need to assess the relevance of the questions and the other considerations. Moreover, had the June 24, 2015 Practice Direction been in effect at the time of the motion, the appellants would have been far more limited in their approach to discovery.

#### **VI. Are any of the prothonotary's specific rulings clearly wrong?**

70 As noted above, the appellants appealed 85 of the prothonotary's rulings on the refusals motion and have raised some similar and some specific arguments regarding the rulings on this appeal, several of which are addressed below.

71 The applicable test for each ruling remains whether the prothonotary was clearly wrong: did the prothonotary exercise her discretion based upon a wrong principle or upon a misapprehension of facts?

#### ***Category 1: Standing and entitlement of the relief sought***

*Motion items 29, 30, 38, 40, and 41*

#### **The Appellants' Submissions**

72 The appellants submit that the standing of Janssen and its entitlement to relief goes to the final outcome of the case. It is unclear what type of license was granted to any Janssen entity, who

plead they are licensees of the patent and are claiming under the patentee. The appellants dispute the standing of the parties and the existence of the license and submit that the type of license is essential, particularly to the issue of accounting for profits. There was no clear finding on the relevance of these questions by the prothonotary.

73 The prothonotary dismissed question 38, which asked Kennedy to provide the nature of the damage that it refers to as "significant damage" that will be caused as a result of the acts of alleged infringement, on the basis that it was not relevant at this stage of the proceedings and would be relevant only to the quantification stage. The appellants argue that the prothonotary based her decision on the wrong principle because the question is directed to the nature of the harm, including causation and proximity, not simply the quantum of liability. The appellants should not be surprised at trial when the nature of the "significant damage" and its relationship to the appellants' actions is disclosed.

74 The appellants make a similar argument regarding questions 40 and 41, which asked Kennedy to provide its knowledge, information and belief regarding how the respondents would suffer "irrevocable damage" if the case succeeds.

### **The Respondents' Submissions**

75 The respondents submit that the threshold for standing is very low and the appellants' own evidence shows that Kennedy and Janssen have repeatedly confirmed their relationship as one of patentee and licensee. The transcript and order reveal that these questions were dismissed because the respondents' interpretation of their agreement is not relevant to any issue in the proceedings.

76 The damages information that is relevant to the first phase of the trial has already been produced (data on sales in Canada). Causation and proximity are established by the appellants' pleadings that their products are a biosimilar version of the respondents' products. The appellants did not provide any evidence about the relevance of the additional information requested and did not point to any deficiencies in the information that has been produced.

### ***The prothonotary did not err***

77 Although the prothonotary's reasons on the issue of the nature of the license are inaudible, the respondents are correct: the threshold to establish standing is low and Kennedy and Janssen have repeatedly described their relationship.

78 The prothonotary did not misapprehend the facts or base her discretion on a wrong principle in finding that the nature of the damages is not relevant at the first stage of the proceeding, given the bifurcation order.

### ***Category 2: Deposition Transcripts from Foreign Proceedings***

*Motion items 45 and 53*

### **The Appellants' Submissions**

79 The questions at issue request that Kennedy produce the deposition transcripts from proceedings in the US and UK that Mr Espinasse reviewed in preparation for his examination for discovery. The deposition transcripts were from the inventors, Drs Maini and Feldmann, and Mr Espinasse in those US and UK proceedings.

80 The appellants argue that because Mr Espinasse prepared for discovery using evidence from a previous action, these transcripts are clearly relevant to the present proceedings. Transcripts from other proceedings should be produced where they may provide useful information to assist the Court in determining the true facts (*Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, 1988 ABCA 282 (Alta. C.A.) at para 34, (1988), 22 C.P.R. (3d) 290 (Alta. C.A.) [*Ed Miller*]).

81 The appellants also argue that the Canadian position regarding production from one jurisdiction to another was summarized by Prothonotary Kevin Aalto in *Gap Inc. v. G.A.P. Adventures Inc.*, [2011] F.C.J. No. 1582, 95 C.P.R. (4th) 377 (F.C.) [*Gap*], where he found that production should be guided by the principles that: (a) where prejudice to the examinee is virtually non-existent, and the material is regarding the same or similar issues and the same or similar parties, leave will generally be granted; (b) the order should be almost automatic, provided there is sufficient connection between the two actions, the parties, their interests, and the issues between them; and, (c) the overall question is whether the evidence given by the witness at discovery in the earlier action may have some bearing or relevance, directly or indirectly, on the evidence he or she may give in the second action.

82 The transcripts are not expert evidence and, despite their obvious relevance, the prothonotary dismissed the requests "with the proviso that it is open ... at the appropriate time to seek the transcripts ... for the purposes of impeaching a witness." The appellants submit that the prothonotary ignored the law.

### **The Respondents' Submissions**

83 The respondents submit that the prothonotary did not err in refusing the requests for transcripts from foreign proceedings. The Court has held that foreign depositions and trial testimony are not relevant or admissible at trial in Canada and admissions from those proceedings cannot be relied upon in *Canada (Astrazeneca Canada Inc. v. Apotex Inc.*, 2011 FC 862 (F.C.) at para 6, [2011] F.C.J. No. 1071 (F.C.) [*AstraZeneca*]; *Apotex II* at para 66).

84 The respondents add that the transcripts would also include expert opinion which is not admissible in the Canadian proceedings (*Apotex II* at para 66). The testimony in the other

proceedings can only be used for the purposes of impeachment, if it is inconsistent, as found by the prothonotary.

85 The respondents also submit that the appellants' reliance on *Gap* is misplaced. In *Gap* Prothonotary Aalto held that a Canadian discovery transcript could be used in US proceedings, but "solely for the purposes of impeachment, if necessary," noting that the circumstances were exceptional. In *Gap*, there were parallel proceedings in the US and Canada involving the same parties and the trial was imminent. In this case, the parties in the proceedings in the US and Canada are not the same, the US law on discovery differs from the law in Canada, and the trial is not imminent.

86 The respondents note that the US depositions included two types of questions and answers: questions that would also be answerable in Canada, noting that both Drs Feldman and Maini will be examined (or have been examined) and these questions can be put to them directly during their examinations; and, questions that would not be proper in Canada, for example expert or opinion evidence, which may have been allowed in the US where the rules differ.

87 There is an implied undertaking to not use the discovery in another proceeding and the circumstances of this case do not justify an exception to this principle.

88 The respondents also submit that the appellants did not identify any particular area where the transcripts would be relevant. The prothonotary stated that the transcript may become relevant for the purposes of impeaching a witness and a new request could be made at that time. The prothonotary did not err in so finding.

### ***The prothonotary did not err***

89 In *Ed Miller*, relied on by the appellants, the Alberta Court of Appeal found that transcripts from foreign proceedings can be ordered to be produced. The Court found that "discoveries are confidential in the sense that they may not be used for an improper purpose. That caveat on their use, however, does not mean that the transcripts are privileged" (at para 35). At paras 34 and 39, the Court of Appeal affirmed the Court of Queen's Bench, which found:

I find the case of *Abernethy v. Ross* (1985) 1985 CanLII 550 (BC CA), 65 B.C.L.R. 142 (B.C.C.A.) applicable in these circumstances. The Court ordered the Defendants to produce transcripts of discoveries of those defendants from another action. The Court recognized that discoveries from previous actions could not be used for improper purposes but this did not make them privileged. They refused to adopt a rule that would prevent the court from learning what a party had said under oath in the past.

I see no reason why the same principles should not be applied in the present circumstances. The depositions in the U.S. action may provide useful information to assist this court in



determining the true facts in the present case. In my view, this would not be using the documents for an improper purpose. As far as these documents are possibly relevant to the present case, and may be of assistance in ascertaining the truth, they should be produced by the Defendant.

90 However, *Ed Miller* does not support the view that transcripts of discoveries must be produced; it simply provides that, if they are relevant and may be of assistance in ascertaining the truth, they should be produced.

91 *Gap*, also relied on by the appellants, can be distinguished from the present case in several ways. As noted by the respondents, it was about the production of Canadian discovery transcripts in US proceedings. The transcripts were admitted shortly before the trial in the US for the purpose of impeaching witness testimony, not for discovery purposes. The circumstances which permitted an exception to the implied undertaking to not use discovery evidence in other proceedings do not exist in the present case.

92 Moreover, the jurisprudence of this Court supports the ruling made by the prothonotary that the transcripts in the foreign proceedings were not relevant and need not be produced.

93 In *Astrazeneca*, at para 6, Justice Roger Hughes noted:

[6] [...]

5. Justice Layden-Stevenson [in *Johnson & Johnson Inc v Boston Scientific Ltd*, 2008 FC 552, 327 FTR 49], properly pointed out that admissions made in foreign litigation expressly for the purpose of that litigation only cannot be relied upon in litigation in Canada. She also correctly pointed out that one cannot readily assume that a foreign patent "corresponds" to a Canadian one and that the Court must be mindful of the differences in claim construction, which is a matter of law.

[...]

94 In *Apotex II* at para 66, Justice de Montigny also noted the applicable principles:

[66] These arguments are not persuasive. First of all, the expert opinion of an individual given in another jurisdiction is not relevant or admissible at trial in respect of the issues before the Court in this proceeding. Apotex has already sought, by way of motion, extensive production from litigation in other jurisdictions and this Court has deemed such production unnecessary: *Apotex Inc. v Sanofi-Aventis*, 2010 FC 77, at paras 61-62. Second, deposition and trial testimony of an individual given in another jurisdiction is not relevant or admissible at trial in respect of the issues before the Court in this proceeding: *Novopharm Limited v Eli Lilly Canada*, 2007 FC 1195, at paras 47-50; aff'd 2008 FC 281; aff'd 2008 FCA 287. Such trial testimony and deposition could only be used to impeach a witness at trial, and as such,

this information need not be produced on discovery. Third, the expert opinion and testimony would have been created after the filing of the '777 Patent and this would not be relevant to the issues of obviousness and sound prediction. Finally, Apotex can obtain the testimony if the information is publicly available; if it is not, then it would still be subject to confidentiality and its production would be restricted. For all of these reasons, I believe the prothonotary did not err in exercising her discretion to refuse this request.

[Emphasis added.]

95 The prothonotary's decision was based in the jurisprudence of the Federal Court and not based on any wrong principle or a misapprehension of the facts.

### ***Category 3: Validity***

#### *The Appellants' Submissions*

#### **Category 3B - Anticipation: Motion item 72**

96 The appellants allege that the patent was anticipated and in order to prepare for trial, they require a factual basis for Kennedy's assertion that the prior art is not properly citeable. The question asked Kennedy to provide its knowledge, information and belief regarding its allegation that particular documents are not properly citeable prior art.

#### **Category 3F - Obviousness: Motion items 100, 111-112, 115-119, 126-127, 140-142, 145, 167**

97 The appellants submit that the actual course of conduct of the inventors which culminated in an invention is a relevant consideration to the obviousness analysis (*Sanofi-Synthelabo Canada Inc. v. Apotex Inc.*, 2008 SCC 61 (S.C.C.) at para 70, [2008] 3 S.C.R. 265 (S.C.C.)). Therefore, the documents relating to the development of the invention, research plans, advisory board reports, other reports, awards and correspondence are all relevant.

98 With respect to motion item 100, the prothonotary refused production of Appendix A of the Agreement between Kennedy and Centocor, including the research plan and the budget for the research, not because it was not relevant, but because it would require time, effort and resources to obtain. There is no evidence to suggest production would be unduly onerous.

99 With respect to motion items 111-112, the prothonotary dismissed the request for production of the Arthritis Research Council [ARC] Annual Reports as a "make work project." The relevance of the reports is clear because the respondents produced other versions of the reports. The prothonotary failed to apply the test of whether the reports would "lead to a train of inquiry" that would advance the appellants' case.

100 With respect to motion items 115-118 and 126, regarding production of the Kennedy Institute Advisory Board reports (motion item 115), Centocor Reports (motion items 116-118) and the Kennedy Annual Reports (motion item 126), the appellants submit that the prothonotary's reasons for dismissing their request are not clear. Kennedy has produced Annual Reports for 1993, 1994 and 1997, but not for 1995 and 1996. These reports are relevant to how the inventors conceived of and characterized their alleged invention and whether they encountered any difficulty in arriving at the invention. There is no evidence that this will be onerous to produce.

101 With respect to motion item 127 about the conception of the invention, the appellants seek documents on the clinical trials to substantiate the answer given by Kennedy about the administration of the drug. The prothonotary did not consider the relevance of the questions to the issue of whether the claimed invention was obvious and provided no reasons for dismissing the question.

102 With respect to motion items 140-141 relating to questions about the design, results, conclusions, correspondence and documentation on the T09 Monotherapy Study, the appellants submit that this information is also relevant to obviousness and to Kennedy's assertion that the alleged invention was not arrived at directly or with difficulty.

103 With respect to motion item 142 regarding the Phase II study, the appellants refer to a letter from an inventor dated in 1992 that suggests that the study was being contemplated. The appellants argue that whether this study was discussed, designed, conducted or implemented is relevant to the obviousness analysis. The prothonotary's reasons are recorded as inaudible.

104 Motion item 145 relates to a draft manuscript of the T14 study which was referred to as "enclosed" in a letter that was disclosed. While the letter was produced, the enclosure was not.

105 With respect to motion item 167, regarding questions about how the prior art relates to the pleadings, the appellants note that the respondents' Amended Statement of Defence states that "[t]he art and prevailing views taught away from the invention of [the patent]." The prothonotary dismissed the request for particulars about what is meant by "the art" on the basis that it was seeking expert evidence. The appellants note that there are 101 scientific articles cited and they should know which ones taught away. The particulars of "the art" are required for the appellants to know the case to meet and are relevant to obviousness.

### **Category 3G - Commercial success of the alleged invention: Motion items 175-179**

106 With respect to motion items 175, 176 and 177, the appellants note that the product monograph for Janssen's product (Remicade/infliximab) lists nine different indications, only one of which relates to a use that Kennedy and Janssen allege is not obvious (infliximab as an adjunctive therapy with methotrexate for the treatment of rheumatoid arthritis). The appellants allege that

the respondents' reliance on the total sales of Remicade as an indicator of commercial success is misplaced, because eight out of nine indications do not relate to methotrexate or rheumatoid arthritis.

107 The appellants submit that Kennedy has put the issue of commercial success into play and should be compelled to produce these documents. The payment of royalties is also relevant to the issue of commercial success, which is relevant to the issue of obviousness. The prothonotary erred by finding that this information does not need to be produced because it had already been produced by Janssen.

108 With respect to motion item 178 and 179, the appellants submit that the prothonotary erred by refusing to require the respondents to identify the awards that were received by the inventors. The appellants argue that they need to know what the awards were specifically for, including whether the awards relate to this invention or other work, hence their request for photos of the awards. The appellants refer to the related US invalidity action, which found that the inscription on the award for discovery of anti-TNF therapy as an effective treatment for rheumatoid arthritis and other autoimmune diseases does not mention the adjunctive use of methotrexate.

109 They are not prepared to take Kennedy's word that the awards were for this invention.

### **Category 3H - Broad claims: Motion items 193, 194, 198-201**

110 The appellants plead, among other allegations, that the patent is invalid for overbreadth. The appellants asked for the correspondence between the patent agent, Kennedy and the inventors regarding what the inventors made, which is a question of fact, the communications of the inventors regarding their invention, and whether the inventors conceived independently of the examples of the patent.

111 The appellants submit that correspondence and documents exchanged by inventors relating to the development of an invention should be produced and that questions relating to the substance of discussions involving an inventor and the prosecution of a patent are compellable on discovery (*Foseco Trading A.G. v. Canadian Ferro Hot Metal Specialties Ltd.* (1991), 46 F.T.R. 81, 36 C.P.R. (3d) 35 (Fed. T.D.)), cited approvingly in *Free World Trust c. Électro Santé Inc.*, 2000 SCC 66 (S.C.C.) at para 67, [2000] 2 S.C.R. 1024 (S.C.C.) [*Free World*]).

### ***"Resolved" questions within Category 3***

112 Motion items 90-94, 153, 189, 191-192 and 202 were dismissed as "resolved" because Janssen had answered or will answer them. The appellants argue that because the prothonotary declined to order that Kennedy adopt Janssen's answers and that Kennedy identify the documents, it was improper to find that these issues were resolved. One of the purposes of discovery is to obtain

admissions from the party being examined, i.e., Kennedy, and this is not possible if the answers from Janssen must be relied on. The prothonotary erred in treating these questions as resolved.

### ***The Respondents' Submissions***

113 The respondents submit that the prothonotary considered the relevance of each of the questions regarding validity and properly dismissed them. The questions were either irrelevant, resolved at the motion or otherwise improper because: (a) they were overly broad or onerous to answer; (b) they were duplicative; (c) there were other means of obtaining the information; or (d) they sought legal or expert opinion.

114 The respondents note that in many instances, counsel for the appellants did not respond to the prothonotary's request to make submissions on why the question was relevant and counsel simply indicated he would "take it as dismissed."

115 The respondents point to items 72, 100, 126-127, 140-142, 145, 153, 175 and 177 as examples of questions that were overly broad and onerous to answer.

116 The respondents submit that questions seeking information that has already been provided do not need to be answered (*Merck & Co. c. Apotex Inc.*, 2005 FC 582 (F.C.) at para 27.2, (2005), 273 F.T.R. 160 (Eng.) (F.C.)). The respondents point to items 127, 140, 190 and 192 as examples of duplicative questions. The same reasoning applies to the resolved items.

117 Many of the questions requested that Kennedy provide information that Janssen had already produced or is in a better position to provide. For example, Janssen already produced the information requested in items 90-94. Even if the appellants would like this information to come from Kennedy, the respondents have already advised that they had produced all relevant information in their possession, power and control.

118 The respondents acknowledge that it is not appropriate to refuse to answer a question because a co-defendant has already answered; however, the Court must consider who the appropriate custodian is and the most proportionate means of getting relevant information. They simply cannot produce what they do not have.

119 The appellants' request regarding commercial success around the world was dealt with in a previous order which narrowed this to production of the documents related to commercial success in Canada. Information has been provided by Janssen regarding commercial success in Canada. Kennedy has provided information regarding awards and honours the inventors have received for their work on the invention.

120 The respondents submit that some questions, including those alleged to be related to anticipation and obviousness, sought expert or legal opinion and were properly refused. Items 72

and 167 asked Mr Espinasse to provide what "the art" was that taught away from the patent. The respondents note that *Sanofi-Aventis Canada Inc v Apotex Inc* (3 July 2008), T-161-07, relied on by the appellants, was a speaking order of Justice Judith Snider that does not have precedential value. The respondents point out, however, that Justice Snider noted the fine distinction between proper questions asking for particulars and improper questions asking a party for the facts supporting its pleadings. The appellants' request is for the facts supporting its pleadings and is an improper question. The respondents add that it is improper to ask a question where the answer would depend on or be expert evidence.

121 The respondents add that these rulings are fair, because the prothonotary made similar rulings on the respondents' refusals motions.

122 The respondents further submit that the prothonotary did not err by refusing the appellants' request for internal correspondence between Kennedy or the inventors and Kennedy's patent agent regarding the drafting and prosecution of the patent. Patent prosecution history is not relevant to patent construction, construing a claim or varying the scope of a claim. The cases relied upon by the appellants to support the claim that the substance of discussions between Kennedy or the inventors and the patent agent are compellable on discovery relate to public interactions with the Patent Office (i.e., the "file wrapper") rather than internal files with the patent agent.

123 With respect to motion items 111-112, the respondents note that ARC is an arm's length charity that provided some funds to Kennedy Trust for research. The annual reports of ARC were public at the relevant times, but may not have been retained in the archives of Kennedy, and there was no obligation for them to do so. Kennedy Trust is not ARC. The prothonotary noted that there was no need to repeatedly go back to look for documents that Kennedy did not have. The respondents submit that the prothonotary properly asked why the other parts were needed by the appellants, but the appellants simply took the request as dismissed.

124 With respect to questions about the Kennedy Research Advisory Board, the respondents note that the same questions were asked the previous day by co-counsel.

125 With respect to item 126 regarding the Kennedy Annual Reports, the respondents note that they provided the reports for 1993, 1994, and 1997 and advised they were making inquiries for the other years requested. Since that time, the 1995 report has been provided and only the 1996 report remains outstanding, which Kennedy continues to look for.

126 The respondents argue that it is improper for the appellants to include this in this appeal. The Court cannot order what is impossible to produce, nor should it order what Kennedy has agreed to produce.

*The prothonotary did not err*

### Category 3B: Motion item 72

127 The appellants challenge the prothonotary's dismissal of questions related to why the respondents stated that documents listed in the Second Amended Statement of Claim were not properly citable prior art (motion item 72).

128 The appellants relied on *Hayden Manufacturing Co. v. Canplas Industries Ltd.*, [1998] F.C.J. No. 1234 (Fed. T.D.) at para 16, (1998), 173 F.T.R. 229 (Fed. T.D.), a decision of Prothonotary Hargrave:

[16] Turning to prior art, an invention must not have been anticipated by some other patent or publication for in such an instance it would lack the novelty required to be patentable. When a litigant attacks novelty or refers to prior art, the opposing party is entitled to know which parts of prior patents or publications are relied upon and this information must be specific: see for example *Dek-Block Ontario Ltd. v. Béton Bolduc (1982) Inc.*, [1998] F.C.J. No. 680, a 20 May 1998 decision of Mr. Justice Richard (as he then was), in Action T-1334-97, at pages 4 and 5. Mr. Justice Richard then went on to point out that questions of this nature do not require interpretation of a patent and are thus proper on discovery. I have looked at the questions in this category from the point of view of the definition of obviousness, keeping in mind the entitlement of the Plaintiff under the *Dek-Block* case and have also considered whether they are truly follow-up questions.

129 In the present case, the prothonotary did not misapprehend the facts or base her ruling on a wrong principle. The prothonotary assessed the questions as seeking the respondents' legal arguments about why some of the prior art is not citable and the facts supporting the respondents' pleadings. The prothonotary is best placed to characterize the questions and did not err in doing so.

### Category 3F - Motion item 167

130 They appellants also questioned what "prior art" the respondents assert taught away from the invention in its Amended Statement of Defence (motion item 167), which is relevant to obviousness.

131 As the respondents note, the appellants' submissions to the prothonotary on this issue were brief and the prothonotary reasonably assessed the question as seeking expert evidence based on those brief submissions. Deference is owed to her characterisation of the question.

### Category 3G - Commercial success submissions

132 *Équipements d'Érablière CDL Inc. c. Ératube Inc.*, [2001] F.C.J. No. 265 (Fed. T.D.) at para 11, (2001), 107 A.C.W.S. (3d) 752 (Fed. T.D.) provides:

[11] Both questions involve consideration of the principle of commercial success. On this point, academic commentary and case law have clearly established that commercial success is only relevant in certain marginal cases and cannot be used as a pretext for "fishing expeditions" (see Fox, *Canadian Patent Law and Practice*, 4th ed., Toronto, The Carswell Company Limited, at pp. 76 and 78, *CAE Machinery Ltd. v. Fuji Kogyo Kabushiki Kaisha* (January 21, 2000), T-730-97 (F.C.T.D.), *Canadian Buttons Limited v. Patrician Plastic Co.*, 35 F.P.C. 87 and *Edison and Swan Electric Light Co. v. Holland* (1889), 6 R.P.C. 243, at 277).

[Emphasis added.]

133 The prothonotary did not base her ruling on any wrong principle; she understood that the obviousness analysis includes many aspects and factors and will require expert evidence. She characterized the broad request as not relevant or so minimally relevant to the issue of obviousness that the proportionality analysis did not support the request.

134 As noted above, the appellants' questions about commercial success around the world had been narrowed by a previous order to focus on Canada and that information had already been provided.

135 In my view, the appellants' unwillingness to take Kennedy's word that the awards had been for this invention is no basis for arguing that the prothonotary erred; rather, it buttresses the need to consider proportionality.

### **Category 3H - Broad claims submissions**

136 In *Free World* the Supreme Court of Canada noted that the use of file wrapper estoppel in Canada was rejected in *Lovell Manufacturing Co. v. Beatty Brothers Ltd.* (1962), 23 Fox Pat. C. 112 (Can. Ex. Ct.) and that this Court (the Federal Court) has confirmed the exclusion of file wrapper materials tendered for claims construction (at para 64).

137 At para 66, the Court acknowledged the commentaries that support the admissibility of prosecution history in some circumstances to obtain consistent claims interpretation, but took a narrower approach:

[66] In my view, those references to the inventor's intention refer to an objective manifestation of that intent in the patent claims, as interpreted by the person skilled in the art, and do not contemplate extrinsic evidence such as statements or admissions made in the course of patent prosecution. To allow such extrinsic evidence for the purpose of defining the monopoly would undermine the public notice function of the claims, and increase uncertainty as well as fuelling the already overheated engines of patent litigation. The current emphasis on purposive construction, which keeps the focus on the language of the claims, seems also to be inconsistent with opening the Pandora's box of file wrapper estoppel. If



significant representations are made to the Patent Office touching the scope of the claims, the Patent Office should insist where necessary on an amendment to the claims to reflect the representation.

[67] This is not to suggest that prosecution history can never be relevant for a purpose other than defining the scope of the grant of the monopoly: *Foseco Trading A.G. v. Canadian Ferro Hot Metal Specialties, Ltd.* (1991), 36 C.P.R. (3d) 35 (F.C.T.D.), at p. 47. That point does not arise in this case for decision and lies outside the scope of these reasons.

[Emphasis added.]

138 The prothonotary did not err in refusing to order production of the correspondence between Kennedy, the inventor and the Patent Office. She applied the principles of the jurisprudence.

### **Category 3G - "Resolved" questions**

139 The prothonotary did not misapprehend the facts or base her ruling on a wrong principle of law in finding that several questions had been resolved, previously answered or answered by Janssen, the co-respondent. The prothonotary understood the context of the litigation, the previous discoveries and the planned discoveries, and Kennedy's role as a charity, which differs from Janssen's role as licensees, distributors and manufacturers. It would be a waste of time, effort and money to require Kennedy to provide the same information that was already provided or that would be provided by another party. If the appellants dispute the questions found to be resolved, they may have (and may have already had) other opportunities to revisit the questions.

140 More generally, in addressing the appellants' submissions on the questions refused or taken under advisement by Kennedy at the examination for discovery, the prothonotary engaged in the discretionary proportionality analysis. She did not base her decision on a wrong principle or any misunderstanding of the facts. The transcript of the motion reveals the prothonotary's effort to provide an opportunity for the appellants to advise her how or why the question was relevant to advance its case. Many of the instances where the appellants submit that the prothonotary did not give clear reasons dealt with inaudible parts of the transcript, for which the appellants did not provide their recollection of why the reasons were deficient. The appellants also "took" the items as dismissed without providing or elaborating on the relevance of the question as invited by the prothonotary, negating the need for reasons. In other instances, the prothonotary accepted the respondents' explanation that a document could not be located and, therefore, did not put them to a futile search. For example, the Kennedy Annual Reports had been provided with the exception of one year, which Kennedy undertook to continue to search for. I agree it is futile to demand that the respondents continue to look for what they have already made unsuccessful efforts to locate. It is also futile to appeal the ruling with respect to reports already received.

### **Category 4 - Particularizing Kennedy's Pleadings: Motion items 217, 221-223, 225**

### ***The Appellants' Submissions***

141 The appellants submit that the prothonotary erred by dismissing their request that the respondents indicate where in the Inflectra product monograph adjunctive therapy with methotrexate for the treatment of rheumatoid arthritis is mentioned (motion item 222).

142 The appellants argue that the prothonotary dismissed the question because the representative had to read and interpret the document and not because it was not relevant. The appellants submit that this is inconsistent with the prothonotary's order for the respondents to answer where it is mentioned in the Remicade product monograph that Remicade had been approved for adjunctive therapy with methotrexate for the treatment of rheumatoid arthritis.

143 The appellants argue that paragraphs in the Amended Statement of Defence are open-ended pleadings and improper. The appellants requested particulars, including what "in general" means within the pleadings. The prothonotary refused the request finding that it required expert evidence.

144 The appellants submit that the Court has previously held that open-ended pleadings are improper and that the examining party is entitled to know the case to meet. The Court has held that pleadings that use the term "including" must detail what it is that "including" means (*Manufacturier de bas de nylon Doris Ltée/Doris Hosiery Mills Ltd. v. Victoria's Secret Stores Inc.* (1994), 84 F.T.R. 222 (Fed. T.D.) at paras 19-22, (1994), 58 C.P.R. (3d) 62 (Fed. T.D.); *Johnney Enterprises Co. v. Rui Royal International Corp.* (1998), 144 F.T.R. 265 (Fed. T.D.) at paras 26-31, (1998), 79 C.P.R. (3d) 20 (Fed. T.D.) (Proth)).

145 Regarding motion items 221, 223 and 225, the prothonotary did not provide reasons; the statement "the Court doesn't see anything necessary to order" does not address relevance.

### ***The Respondents' Submissions***

146 The respondents submit that the request regarding the Inflectra product monograph is an abuse of the discovery process because the requested information is within the appellants' knowledge. It is not inconsistent with the prothonotary's order for the respondents to point to information in the Remicade product monograph, because that order required the respondents to indicate information about their own activities. This request regarding Inflectra would require the respondents to indicate information about the appellants' activities.

147 The respondents further submit that the questions require expert evidence and ask for the facts the respondents rely on in support of particular pleadings.

148 With respect to open-ended pleadings, the respondents submit that there is no sweeping principle that such pleadings are improper. The cases referred to by the appellants where the pleadings were found to be improper related to the activities of third parties and found that it

would be unfair if a defendant could come up with new examples of third parties' activities at trial. Here, the open-ended pleadings relate to the appellants' behaviour which will be explored through the discovery process. The respondents also submit that because this information is about the appellants' own activities, it will not narrow the proceedings or allow the appellants to know the case to meet.

149 The prothonotary did not err in her application of the proportionality principle to these items.

*The prothonotary did not err*

150 The appellants have not established how the prothonotary based her ruling on a wrong principle of law or on a misapprehension of the facts. The appellants appear to acknowledge that expert evidence would be required to interpret the product monograph. Moreover, Inflectra is the appellants' product and they must be taken to already know what is in the product monograph.

**Category 5 - Minimum Required Basic Information for Documents: Motion items 239, 242, 253, 265-267, 269-270, 298, 300-302, 309, 319-323, 325, 330, 340-351**

*The Appellants' Submissions*

151 The appellants raised questions about authorship, the recipient of documents, dates of documents, and whether the documents were published and when. The questions were refused for lack of relevance, because the information was clear from the document or because Kennedy stated that it was unable to locate the document.

152 The appellants submit that the affidavit of documents provided by the respondents was grossly deficient in providing basic information. The unsworn affidavit was a "mish-mash" listing 770 documents, 576 of which had no title, description or date. Without this information, the appellants argue that they cannot discern the materiality, degree of relevance and usefulness of the relevant documents. [The Rules](#) require the respondents to provide this information. The prothonotary erred by dismissing these questions.

153 The appellants submit that if a party lists a document, then that document is relevant and should be produced in its entirety. Similarly, duplicate documents are a burden to the appellants and should have been identified. There were many drafts of the same documents which should have been clearly dated or marked. The appellants should not be required to demonstrate why they needed dates and other details.

154 The appellants argue that they should not have to go through all the documents to get the fundamental information. Even if the dates of the documents could be inferred, the dates should have been provided. If the information requested is clear on the face of the document, as asserted by the respondents, the respondents should not refuse to provide that information.

## The Respondents' Submissions

155 The respondents agree that an affidavit should list all relevant documents (*Havana House* at para 22), but with respect to the dates of the documents and the studies referred to in the patent, events have overtaken the request. The appellants' submissions ignore that the respondents served an affidavit of documents, with an index indicating the title, date and document type, by the time of the motion. The respondents' indexed affidavit indicated the dates of the documents, where those dates were known. It is clearly onerous to require the respondents to track down the authors of documents, some of which were twenty years old, to ascertain dates, particularly given that the appellants could not indicate how this would be relevant.

156 The respondents add that the details requested by the appellants are irrelevant and the request for information is abusive.

157 The respondents note that Kennedy produced all the documents in its possession. Janssen completed the studies for submission to the US Federal Drug Administration and produced those documents. There is no reason for Kennedy to even have this information since it did not conduct the three studies at issue.

158 Kennedy explained at the motion that the appellants had been provided with the data in the most useful manner. The prothonotary directed the appellants to look at what had been produced first and then ask questions, if relevant, at the next discovery. The prothonotary correctly noted that there was no value in asking Kennedy to search for documents that had already been provided.

159 The respondents submit that the onerousness of the request was apparent. There would be no point in providing an affidavit to identify the details of how onerous it would be, the time involved or how they would have to conduct the search. This is common sense.

160 The prothonotary did not err in finding that asking the respondents to review and confirm information that is apparent in the document is unnecessary and contrary to [Rule 242\(c\)](#).

161 In addition, the prothonotary did not err in applying the proportionality principle.

### *The prothonotary did not err*

162 Although the affidavit of documents in its unsworn and unindexed state lacked complete information, the respondents ultimately provided an indexed affidavit with the details possible to provide.

163 The prothonotary did not err in refusing to order the respondents to search for more or seek out details, such as dates, publication sources that would have been obviously very onerous

to track down. Similarly, the appellants should not expect answers to questions they can readily glean by reviewing the information and documents produced.

164 As noted by the prothonotary, once the appellants have reviewed the information, they will have a further opportunity to ask more questions at the next discovery.

165 The prothonotary noted that many of the questions were irrelevant and many of the answers to the appellants' questions were self-evident from the documents. In other cases, the appellants could not or would not indicate how the information would advance their case or respond to the prothonotary's request that they explain further.

## **VII. Conclusion**

166 The appellants have not established that the prothonotary was clearly wrong in that the decision was based on a wrong principle of law or on a misapprehension of the facts as a whole or with respect to specific questions. The prothonotary's decision refers to and applies the appropriate considerations and principles in the jurisprudence.

### **Order**

*THIS COURT ORDERS that:*

1. This motion is dismissed; and
2. The respondents shall have their costs in respect of this motion fixed at \$6,500, in any event of the cause.

*Appeal dismissed.*

Federal Court of Appeal



Cour d'appel fédérale

Date: 20141023

Docket: A-357-14

Citation: 2014 FCA 239

Present: WEBB J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

And

CANADA TRANSPORTATION AGENCY

Respondent

**REASONS FOR ORDER**

**WEBB J.A.**

[1] The respondent has brought a motion to determine the content of the appeal book in this matter because the respondent wants to include a document and the appellant objects to the inclusion of this document. The document in question is the “Annotated Dispute Adjudication Rules” (Annotation) and the version that the respondent is seeking to include in the appeal book, based on the submissions of counsel for the respondent, is the version that was amended and

published on the respondent's website on or around August 22, 2014 (paragraph 17 of the respondent's written representations).

[2] The appellant has, with leave, appealed to this Court from the *Canadian Transportation Dispute Adjudication Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* (Dispute Adjudication Rules) made by the respondent. In particular, the appellant is asking that paragraphs 41(2)(b), 41(2)(c), and 41(2)(d) of these Dispute Adjudication Rules be quashed as being *ultra vires* the powers of the respondent or "invalid because they are unreasonable and establish inherently unfair procedures that are inconsistent with the intent of Parliament in establishing the Agency" (appellant's notice of appeal, paragraphs (i) and (ii)). Although couched in different terms, it appears that essentially the appellant is questioning the authority of the respondent to make the Dispute Adjudication Rules in question.

[3] The right of appeal to this Court is granted by section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10:

41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

41. (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

[4] Therefore, appeals only lie on questions of law or jurisdiction. In this case the legal issue is essentially related to the authority of the respondent to make the Dispute Adjudication Rules in question. As a preliminary matter, it is difficult to discern how a document (the Annotation):

- (a) purportedly created by the respondent to explain or clarify the Dispute Adjudication Rules;
- (b) amended and published on its website over two months after the Dispute Adjudication Rules were adopted; and
- (c) which, as part of the disclaimer at the beginning thereof, includes the statement that:  
  
“This document is a reference tool only. It is not a substitute for legal advice and ***has no official sanction***” (emphasis added)

would assist in determining whether as a matter of law the respondent had the authority to adopt the Dispute Adjudication Rules in question.

[5] As noted by the respondent there was no prior hearing in this matter and therefore there were no documents that had been previously introduced before a tribunal or a court. The respondent is requesting that either this Court determine under Rule 343 of the *Federal Courts Rules* that the Annotation should be included as part of the appeal book, or that this Court grant leave under Rule 351 of the *Federal Courts Rules* to include the Annotation as new evidence.



[6] Since there was no prior hearing, the only facts submitted to any tribunal or court related to the Annotation will be those as submitted as part of this motion. In its motion record the respondent submitted an affidavit of Alexei Baturin. However, there is no mention of the Annotation in this affidavit.

[7] The written submissions of counsel for the respondent include the following:

12. The Dispute Adjudication Rules that are the subject of this appeal came into force on June 4, 2014. On that date, the Agency published the Annotation on its website.
13. The Annotation was designed, as its introduction states, as a companion document to the Dispute Adjudication Rules, with the intention of providing explanations and clarifications of the Rules for those unfamiliar with the Agency and its processes.
14. The Annotation was prepared by Agency staff and was approved for publication by the Agency's Chair and Chief Executive Officer. The document is intended as a soft law instrument to provide guidance on the Agency's procedures but is not intended to fetter the Agency's discretion in the adjudicative decision-making process.
15. The Annotation is also intended to be an evergreen document, to be updated as needed.
16. Having received comments from the appellant respecting concerns about the Agency's procedures under the new Dispute Adjudication Rules, the Agency amended its Annotation on or around August 22, 2014, to address the following issues:
  - a. The Agency's continued commitment to providing reasons for its decisions;

- b. The possibility of requesting an opportunity to respond to a request to intervene in dispute proceedings before the Agency;
- c. The possibility of requesting an opportunity to conduct a cross-examination on affidavit; and
- d. The possibility of proceeding by way of oral hearing.

[8] There are a number of facts related to the creation and amendment of the Annotation in these written submissions. In dissenting reasons in *R. v. Schwartz*, [1988] 2 S.C.R. 443, Dickson C.J. (as he then was) stated certain general principles. There is no indication that the majority of the Justices of the Supreme Court of Canada disagreed with the general principles as expressed by Dickson C.J. In his reasons, Dickson C.J. stated that:

59 One of the hallmarks of the common law of evidence is that it relies on witnesses as the means by which evidence is produced in court. As a general rule, nothing can be admitted as evidence before the court unless it is vouched for viva voce by a witness. Even real evidence, which exists independently of any statement by any witness, cannot be considered by the court unless a witness identifies it and establishes its connection to the events under consideration. Unlike other legal systems, the common law does not usually provide for self-authenticating documentary evidence.

60 Parliament has provided several statutory exceptions to the hearsay rule for documents, but it less frequently makes exception to the requirement that a witness vouch for a document. For example, the *Canada Evidence Act* provides for the admission of financial and business records as evidence of the statements they contain, but it is still necessary for a witness to explain to the court how the records were made before the court can conclude that the documents can be admitted under the statutory provisions (see ss. 29(2) and 30(6)). Those explanations can be made by the witness by affidavit, but it is still necessary to have a witness....

[9] Facts are to be introduced by a witness, not as part of the written representations of counsel. Once introduced, counsel can refer to the facts. However, it does not seem to me that it is appropriate for counsel to refer to facts that have not been introduced by any witness, unless a Judge could take judicial notice of such facts. There was no suggestion by counsel in the written submissions submitted as part of the respondent's motion record that a Judge could (or should) take judicial notice of the alleged facts as set out in the paragraphs referred to above.

[10] In response to the written submission of the appellant, the respondent submitted a reply and included an affidavit of Mary Catharine Murphy. Rule 369(3) of the *Federal Courts Rules* provides that:

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

[11] The reply is to contain written representations only – not another affidavit. The appropriate manner in which the facts should have been introduced by the respondent was in the affidavit that was submitted as part of the respondent's record – not in the written submissions of counsel for the respondent or in an affidavit included with the reply.

[12] In the reply submissions, counsel for the respondent indicated that “since the Annotation is an Agency document that is prominently displayed on the home page of its Government website and is available to any member of the public, evidence of its existence by way of

affidavit is unnecessary”. No authority for this proposition was provided. The reference to the document being available to any member of the public could suggest that perhaps the respondent is arguing that a Judge could take judicial notice of the existence of the Annotation. However, since this argument was not raised by counsel, I will not address it. In any event, it appears that the respondent is attempting to introduce the Annotation for what it says about the Rules in question, not simply to show that it exists.

[13] Therefore, none of the facts that the respondent has attempted to introduce in the written representations of counsel or in the affidavit included in the reply will be considered in this motion.

[14] As a result, the only facts submitted by the respondent that are properly part of this motion are the facts as set out in the affidavit of Alexei Baturin. Since there is no reference to the Annotation in this affidavit, there is no witness to introduce this document and the result is that the respondent is attempting to include in the appeal book a document without any facts related to the document.

[15] As a result the Annotation is not to be included in the appeal book, whether it is considered as existing evidence or new evidence under Rule 351 of the *Federal Courts Rules*.

[16] The respondent's motion to include the Annotation in the appeal book is dismissed. Since the appellant did not ask for costs, no costs are awarded.

“Wyman W. Webb”

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J.A.

**FEDERAL COURT OF APPEAL****NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-357-14

**STYLE OF CAUSE:** DR. GÁBOR LUKÁCS v.  
CANADA TRANSPORTATION  
AGENCY

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** WEBB J.A.

**DATED:** OCTOBER 23, 2014

**WRITTEN REPRESENTATIONS BY:**

Self-represented FOR THE APPELLANT

Barbara Cuber FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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

2015 FC 102, 2015 CF 102  
Federal Court

Nguesso c. Canada (Ministre de la Citoyenneté et de l'Immigration)

2015 CarswellNat 3285, 2015 CarswellNat 3286, 2015 FC  
102, 2015 CF 102, 257 A.C.W.S. (3d) 672, 474 F.T.R. 217

**Wilfrid Nguesso, Applicant and The Minister  
of Citizenship and Immigration, Respondent**

Marie-Josée Bédard J.

Heard: January 14, 2015  
Judgment: January 26, 2015  
Docket: IMM-1144-14

Counsel: Johanne Doyon, pour le demandeur  
Normand Lemyre, Lyne Prince, pour le défendeur

***Marie-Josée Bédard J.:***

*[UNREVISED ENGLISH CERTIFIED TRANSLATION]*

1 The current proceeding deals with an application for judicial review of a decision dated December 20, 2013, by Constance Terrier (the officer or Ms. Terrier), immigration officer in the Immigration Section at the Canadian Embassy in Paris. In her decision, the officer declared the applicant inadmissible on grounds of organized criminality and rejected his application for permanent residence in the family class.

2 Before the Court are three motions that were heard in the case management of this proceeding.<sup>1</sup> These motions were filed following numerous disagreements between the parties with respect to which documents should be included in the certified tribunal record (CTR) filed under Rule 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [Immigration Rules] and the scope of the right to cross-examine Ms. Terrier on her affidavits.

**I. The context of the application for judicial review**

***A. The processing of the permanent residence application***

3 The applicant is a citizen of the Republic of the Congo but lives in France and holds a residence card there that is valid until December 31, 2022. He is married to a Canadian citizen and is the father of six children, all of whom are Canadian citizens. On December 20, 2006, he filed an application for permanent residence as a member of the family class at the Canadian Embassy in Paris.

4 The processing of the application became long and drawn-out, and on May 22, 2012, the applicant applied for a *mandamus* order from this Court (Docket IMM-4924-12) to require the Embassy to render a decision. That dispute was settled out of court on July 3, 2012, on the basis of a timetable proposed by the respondent.

5 Thus, in July 2012, the applicant received a letter inviting him to attend an interview scheduled for September 19, 2012. Following a request by counsel representing the applicant at the time, a new invitation letter was sent with the interview date having been amended to September 25, 2012.

6 On September 5, 2012, the applicant received a "procedural fairness letter" from the Embassy's Immigration Section notifying him that there existed a number concerns regarding his admissibility under paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

7 The interview was held on September 25, 2012, and was conducted by the officer. On September 28, 2012, the Embassy's Immigration Section sent the applicant a letter containing a detailed list of additional documents and information to be provided, requesting that this be submitted within 90 days.

8 The applicant's current counsel, Johanne Doyon, began working on this case in January 2013. On February 1, 2013, she asked for additional time to provide the documents requested in the letter dated September 28, 2012. She further requested disclosure of the "open, convergent and consistent documentation" referred to in the procedural fairness letter of September 5, 2012. The officer granted the applicant additional time to submit the requested documentation, but she refused the disclosure request on the grounds that [TRANSLATION] "at this stage of the process, there is no requirement to provide all of the sources or copies of the documents consulted, given that your client has been provided with a reasonable opportunity to review the information which we intend to use as a basis for our decision". In addition, on February 27, 2013, the officer provided her interview notes to the applicant's counsel.

9 On April 30, 2013, the applicant, by way of Ms. Doyon, filed a complaint with the Director of the Embassy's Immigration Section alleging a breach of procedural fairness by reason of the officer's refusal to disclose the documents and information requested by him. The applicant also invoked bad faith on the part of the officer in the way she had conducted her examination. In the same letter, Ms. Doyon provided some of the information and documentation that had been requested in letter of September 28, 2012. The complaint was dismissed by the Immigration



Program Manager in a letter dated December 6, 2013, and Ms. Terrier remained the immigration officer assigned to applicant's file.

***B. The decision under review***

10 In her decision, the officer declared the applicant inadmissible to Canada on grounds of organized criminality pursuant to paragraph 37(1)(a) of the IRPA. She found that she had reasonable grounds to believe that the applicant was a member of a criminal group through his family connections (the applicant is the nephew and adopted son of the President of the Republic of the Congo), that he had been involved in organized criminal activity that included embezzlement and misappropriation of funds, misappropriation of company property and money laundering, and that he had participated in opaque financial arrangements for his own personal enrichment at the expense of corporate entities.

11 In her decision, the officer also noted that she had consulted information provided by the applicant, publicly accessible information, and information provided by the Canada Border Services Agency (CBSA) and by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), and that this information had raised doubts about the applicant's advancement in the professional world and the origins of his personal enrichment. She indicated that the documents provided by the applicant in response to her request were incomplete and did not dispel her doubts; on the contrary, certain documents had actually confirmed those doubts. She then set out the factors underlying her decision.

***C. The application for leave and judicial review***

12 On February 25, 2014, the applicant filed an application for leave and judicial review of that decision. The application was allowed on August 14, 2014, by Justice Mosley.

13 In support of his judicial review application, the applicant raises a number of grounds. He argues, among other things, that the decision issued by the officer is tainted by errors in law, that it is unreasonable and that the process leading to the decision was marred by breaches of the rules of procedural fairness. In his allegation with respect to procedural fairness, the applicant argues in his memorandum that the officer failed to first disclose her real allegations against him and refused to disclose the documents and sources of information on which she based her allegations, which hindered his ability to prepare for and respond adequately to the questions at the interview and to the inadmissibility allegations. He further submits that the officer conducted the interview in an improper and unfair manner and that she based her decision on inadmissibility grounds that were different than those that were cited in the fairness letter of September 5, 2012.

14 In the affidavit he submitted in support of his application for leave and judicial review, the applicant placed much emphasis on the manner in which the officer conducted the interview. More specifically, he claims that during the interview the officer repeatedly used or made reference to

documents or information that had not been previously disclosed to him and that she had conducted the interview in an inappropriate manner. The applicant contends that the questions the officer asked him and the manner in which they were asked evince prejudice, insinuations and negative comments for which there was no basis in the evidence. The applicant further alleges that the officer's interview notes reveal multiple breaches of procedural fairness and cast doubt upon the impartiality of the process.

***D. The order granting leave and timetable***

15 On August 14, 2014, Justice Mosley allowed the application for leave and established a timetable which was later amended at the request of the parties.

***E. First motion for the complete disclosure of CTR***

16 On August 25, 2014, the Immigration Section of the Embassy in Paris sent the CTR to the applicant. On September 15, 2014, the applicant filed a first motion pursuant to Rule 17 of the Immigration Rules for the complete disclosure of the CTR. The applicant first argued that numerous documents contained in the CTR had not been disclosed to him in the process of reviewing his application. He further argued that the CTR was incomplete and that the following specific documents of which he sought disclosure were missing:

- Communications between the Immigration Section at the Embassy in Paris and CBSA regarding the applicant and the processing of his file;
- Communications between the Immigration Section at the Embassy in Paris and/or Citizenship and Immigration (CIC) and/or CBSA (including its Organized Crime Section) with FINTRAC and any requests received by it regarding the applicant;
- Communications and requests between the Immigration Section at the Embassy in Paris and/or CIC and/or CBSA (including its Organized Crime Section) with Interpol regarding the applicant;
- Communications and requests between the Immigration Section at the Embassy in Paris and/or CIC and/or CBSA (including its Organized Crime Section) with the ICES regarding the applicant;
- All of the requests made to courts in France regarding the investigation in France of a complaint against the applicant's family and the responses received;
- Handwritten notes, summaries, memoranda and/or exchanges related to and following the CBSA recommendation dated November 1, 2012, to the effect that there were no reasonable grounds on which to declare inadmissibility under section 37 of the IRPA, if applicable.

17 In his arguments, the applicant maintained that these documents must exist and that these were among the documents and materials considered in the decision-making process that led up to the decision under review. The applicant further argued that if some of these documents were not used by the officer in rendering her decision, they were nonetheless relevant as they were necessary for him to be able to fully exercise his right to judicial review. More specifically, the applicant maintained that the documents in question were necessary in order for him to be able to prove his allegations of breaches of procedural fairness and bias.

18 In response to the motion, the respondent submitted an affidavit sworn by Ms. Terrier on September 19, 2014. In her affidavit, Ms. Terrier stated that she had supervised the preparation of the CTR. She further stated that the CTR contained all of the relevant documents she had consulted when making her decision and that were in the possession or control of the Embassy's Immigration Section at the time she made her decision. At paragraph 7 of her affidavit, Ms. Terrier declared in a more specific manner that the following documents were contained in the CTR:

- All of her communications with CBSA and CIC, including those related to information received from FINTRAC and Interpol;
- All communications between her colleagues from the Immigration Section of the Canadian Embassy in Paris and CBSA and CIC that had been communicated to her, including those related to information received from FINTRAC and Interpol;
- All of her documentary sources;
- All of her notes.

19 Ms. Terrier's affidavit also describes communications she claims to have had with investigating judges. She stated that on April 8, 2011, she contacted the senior investigative judge in Paris regarding an investigation into the ill-gotten gains acquired by certain African presidents and their families. She added that the senior investigative judge told her that the judge in charge of the matter was bound by professional privilege, but that the investigation was progressing and that he was hoping to see it concluded in early 2012. Ms. Terrier indicated that the senior investigative judge had authorized her to contact him again about the matter. She further indicated that on May 15, 2013, she contacted the investigative judge tasked with investigating the case, but that no information was disclosed to her due to the fact that investigations of this nature were protected by professional privilege.

20 Furthermore, she stated, at paragraph 12 of her affidavit, that there were no documents missing from the CTR that had been determinative of her decision.

21 The motion was heard by Justice Martineau on September 23, 2014. I listened to a recording of the hearing. During the hearing, counsel for the applicant waived cross-examination of Ms.

Terrier about her affidavit. The parties subsequently presented their respective positions with regard to the notion of relevance within the meaning of Rule 17 of the Immigration Rules and more specifically the documents of which the applicant sought disclosure. The respondent argued that the documents in question were either non-existent or were not relevant. Justice Martineau dismissed the applicant's motion in an order dated September 24, 2014. The relevant excerpt from his order reads as follows:

[TRANSLATION]

**CONSIDERING** that "all papers relevant to the matter that are in the possession or control of the tribunal" were included in the Tribunal Record (TR), as stated in the September 19, 2014, affidavit of immigration officer Constance Terrier, who issued the impugned decision in this case;

**CONSIDERING** that it remains open to the applicant to submit in his supplementary memorandum or to argue at the hearing that the immigration officer's failure to disclose, before the impugned decision was issued, any document or information mentioned at paragraph 3 of the notice of motion or in Ms. Terrier's affidavit raises a reasonable apprehension of bias or resulted in the applicant being denied the opportunity to a hearing or to make representations or to produce helpful evidence with a direct link to the impugned decision;

22 The matter subsequently pursued its course and the respondent filed a second affidavit sworn by Ms. Terrier on September 24, 2014, in support of its position on the merits of the application for judicial review. In that affidavit, Ms. Terrier recounts the various steps in the processing of the applicant's permanent residence application. Ms. Terrier was examined about her affidavit dated October 7 and 8, 2014.

23 During this examination, the respondent objected to Ms. Terrier being examined about her affidavit from September 19, 2014. The respondent also objected to a number of questions directed at Ms. Terrier and to several of the undertakings that were asked of her.

## **II. The October 14, 2014, motion subsequently amended on October 16, 2014**

24 On October 16, 2014, the applicant filed a motion to amend the timetable on the ground that the objections raised by the respondent during the examination of Ms. Terrier and the delays caused by the need to dispose of those objections, required that the timetable ordered by Justice Mosley be amended. The motion also identified a disagreement between the parties as to the length of the supplementary memoranda.

25 The timetable is no longer at issue due to the fact that at the hearing the parties and I agreed that a new timetable would be established after the issuance of this order.

26 Accordingly, the sole remaining issue arising from this motion is that relating to the length of the supplementary memoranda.

27 The respondent is seeking leave to file a supplementary memorandum not to exceed 60 pages in length that would completely replace the memorandum filed by it at the application for leave stage.

28 Rule 70(4) of the *Federal Courts Rules*, SOR/98-106 [Rules] applies to immigration proceedings by way of Rule 4(1) of the Immigration Rules. Rule 70(4) of the Rules provides that a memorandum cannot exceed thirty pages unless otherwise ordered by the Court.

29 In *Canada v General Electric Capital Canada Inc*, 2010 FCA 92 at para 5, [2010] FCJ No 461, Justice Stratas insisted on the importance of concision in the preparation of memoranda while recognizing that in certain circumstances, leave should be granted to the parties to file memoranda in excess of thirty pages and that the need for procedural fairness is a paramount principle to be applied by the Court.

30 In this case, I am of the view that it is appropriate to grant leave to each party to file a supplementary memorandum that would replace the memorandum each of them filed at the application for leave stage and which would not be in excess of 60 pages. This matter raises a number of issues, some of which involve an allegation of bias and several aspects of procedural fairness. In addition, the processing of this file has extended over a long period and entailed the analysis of a large volume of documents. In short, the factual background is lengthy and the judicial review application raises a number of issues.

31 Therefore, I find that, given the specific circumstances of this case, the respondent's application is reasonable and it would be difficult for the parties to provide effective explanations of their respective arguments in a thirty-page memorandum. I am also of the view that the Court would benefit from the parties being provided with an opportunity to develop their arguments more fully in their respective memoranda.

### **III. The October 29, 2014, and November 20, 2014, motions**

32 Following Ms. Terrier's examination, the applicant filed a motion dated October 29, 2014. That motion was followed by a second motion dated November 20, 2014. Some of the issues raised in each of the motions are connected and/or overlap.

#### ***A. Applicant's position***

##### *(1) The October 29, 2014 motion*

33 The applicant filed a motion in which he sought five different findings. First, the motion sought a ruling on the objections raised by the respondent during the cross-examination of Ms. Terrier about her affidavit of September 24, 2014. At the time the motion was heard, 37 objections remained unresolved.

34 Second, the applicant sought leave to cross-examine Ms. Terrier about her affidavit of September 19, 2014.

35 Third, the applicant sought leave to cross-examine Susan Bradley about two affidavits sworn by her on April 25, and 28, 2014, in support of the memorandum filed by the respondent at the application for leave stage.

36 Fourth, the motion sought an order requiring the respondent to add documents to the CTR. The documents in question are in the possession of the applicant but were not included in the CTR and differ from the documents whose disclosure was sought in the motion presented before Justice Martineau.

37 Fifth, the motion sought an order requiring the respondent to add other documents to the CTR. Those documents were identified in the requests for undertaking made during Ms. Terrier's examination.

38 The applicant submits that he is entitled to cross-examine Ms. Terrier about the affidavit sworn by her on September 19, 2014, and that the Court should grant leave to re-examine her to that end. The applicant further submits that a number of the questions to which the respondent objected were in regard to the affidavit sworn by Ms. Terrier on September 24, 2014, and were relevant.

39 With respect to principles, both parties recognize that the fundamental principles that govern the right to cross-examine the deponent of an affidavit were set out by Justice Hugessen in *Merck Frosst Canada Inc v Canada (Minister of Health)*, [1997] FCJ No 1847 at para 7, 146 FTR 249 [*Merck Frosst*].

40 However, their positions differ with respect to the actual scope of those principles and others that have been recognized in certain decisions.

41 The applicant begins by arguing that in *Merck Frosst*, the Court acknowledged that the cross-examination of the deponent of an affidavit may centre on the facts sworn by the deponent in that affidavit or in any other affidavit filed in the proceeding. In support of his argument, the applicant also cites *Sam Levy & Associés v Lafontaine (sub nom Sam Lévy & Associés Inc. v Canada (Superintendent of Bankruptcy))*, 2005 FC 621 at para 10, [2005] FCJ No 768 [*Sam Levy*] and *Eli Lilly and Co v Novopharm Ltd*, [1996] FCJ No 465 at para 2, 67 CPR (3d) 362 [*Eli Lilly*], in which the Court quoted Justice Hugessen in *Merck Frosst*.

42 The applicant submits that in *Merck Frosst*, the Court also recognized the legal relevance of a question where it concerns a fact whose existence or non-existence can assist in determining whether or not the remedy sought by an applicant in an application for judicial review can be granted. Accordingly, the applicant views this as an opportunity to question Ms. Terrier about facts that he feels were omitted in her affidavit of September 24, 2014, but that are relevant to disposing of the grounds for his judicial review application.

43 The applicant further submits that the case law recognizes that the cross-examination on an affidavit may extend beyond the facts set forth by the deponent so long as the questions relate to subjects contained in the affidavit (*Maheu v IMS Health Canada*, 2003 FCT 647 at para 5, [2003] FCJ No 902 [*Maheu*]), to relevant matters arising from the affidavit itself (*Sivak v Canada (Citizenship and Immigration)*, 2011 FC 402 at para 13, [2011] FCJ No 513 [*Sivak*]), or where they constitute corollary questions that arise from answers provided by the affiant (*Royal Bank of Scotland PLC v Golden Trinity (The)*, [2000] FCJ No 896, [2000] 4 FC 211). The applicant also relied on *Stella Jones Inc. v Mariana Maritime SA*, [2000] FCJ No 2033, (sub nom *Stella-Jones Inc. v Hawknet Ltd*) 2000 CarswellNat 3006 (FCA) [*Stella Jones*], *Stanfield v Canada (Minister of National Revenue)*, 2004 FC 584 at para 28, [2004] FCJ No 719 and *AgustaWestland International Ltd. v Canada (Minister of Public Works and Government Services)*, 2005 FC 627 at para 12, [2005] FCJ No 805 [*AgustaWestland International Ltd*].

44 The applicant further contends that questions that exceed the scope of the facts set out in the affidavit may be asked where they involve the affiant's credibility or where they concern an allegation of bias on the part of the decision-maker when such issues are raised in the judicial review application (*Sivak*, at paras 15-16).

45 A final element relied upon by the applicant is the contention that where the deponent is an agent or representative of the respondent, he or she may be required to inform themselves in order to respond to questions raised on examination, based on *Maheu*, at para 9. The applicant argues that in his permanent residence application file, Ms. Terrier acted as an agent for the Embassy's Immigration Section.

46 The applicant further suggests that the scope of Justice Martineau's order does not preclude him from cross-examining Ms. Terrier about her affidavit of September 19, 2014, for a number of reasons. First, he argues that Justice Martineau's order is an interim order that did not dispose of the CTR definitively. Second, he contends that Justice Mosley's order provides him with the right to cross-examine the affiants, with respect to all affidavits filed in the record. He further cites, as I noted earlier, his right to examine the deponent of any other affidavit produced in the proceeding.

47 The applicant further submits that all of the objections raised by the respondent to the questions posed to Ms. Terrier should be dismissed in their entirety because the questions were relevant to the two affidavits sworn by Ms. Terrier. In his view, all of the questions were within

the parameters developed in the case law. The applicant argues that the questions to which the respondent objected were all admissible and relevant questions as they dealt with:

- the September 19 affidavit with respect to the composition of the CTR; or
- the affidavit of September 24, 2014, which dealt with the history of the applicant's permanent residence application; or
- Ms. Terrier's credibility; or
- Facts she had omitted from her affidavit of September 24, 2014, and which are relevant to the grounds of the judicial review application and more specifically those related to breaches of procedural fairness and to reasonable apprehension of bias; or
- information or documents that pertain to Ms. Terrier's obligation to inform herself.

48 I will address each of the objections in detail later in my analysis.

49 The applicant is also asking the Court for leave to cross-examine Ms. Bradley about the affidavits sworn by her on April 25 and 28, 2014. Ms. Bradley is a legal assistant at the Department of Justice and her affidavit was filed by the respondent in support of its memorandum filed at the application for leave stage. In her affidavit of April 25, 2014, Ms. Bradley stated that Kathleen Knox-Dauthuille of the Immigration Section at the Canadian Embassy in Paris had consulted the applicant's file and assured the respondent that Ms. Terrier had at her disposal a certain number of documents that she listed when she issued the decision under judicial review. Ms. Bradley attached the documents in question to her affidavit. The purpose of the second affidavit sworn by Ms. Bradley on April 28, 2014, was to add two documents to those listed in her initial affidavit.

50 The applicant submits that Ms. Bradley's affidavit was filed by the respondent in support of its memorandum on the merits of the judicial review application and that it clearly fell within the scope of Justice Mosley's order.

51 The applicant further submits that a number of documents were missing from the CTR, some of which had been addressed during the cross-examination of Ms. Terrier. He is asking that the Court require the respondent to add these documents to the CTR. The missing documents are listed in the affidavit sworn by Ms. Doyon's assistant.

52 The applicant argues that the criterion that must be considered for determining which documents should be included in the CTR under Rule 17 of the Immigration Rules is that of relevance.

53 The applicant argues at the outset that the principles that have been developed with respect to the concept of relevance within the meaning of Rules 317 and 318 of the Rules also apply to the meaning to be assigned to the concept of relevance set out in paragraph 17(b) of the



Immigration Rules (*Douze v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1086 at para 19, [2010] FCJ No 1383 [*Douze*]). The applicant submits that the tribunal has an obligation to produce a complete record that must include all documents relevant to the proceeding that are in its possession or control.

54 The applicant contends that all documentation that was available to the decision-maker at the time the decision was made is presumed to be relevant and must be included in the CTR (*Jolivet v Canada (Minister of Justice)*, 2011 FC 806 at para 27, [2011] FCJ No 1094 [*Jolivet*]; *Kamel v Canada (Attorney General)*, 2006 FC 676 at para 13, [2006] FCJ No 876 [*Kamel*]).

55 Further, the applicant contends that documentation that was not before the decisionmaker but which ought to have been should be included in the CTR (*Kamel*, para 12). The applicant further submits that the CTR is not limited to the documents on which the decisionmaker based his or her decision. It should also include documentation that is relevant in making a determination on the grounds related to procedural fairness and bias he raised in the judicial review application. In this regard, he relies on *Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455 at para 10, [1995] FCJ No 555 [*Pathak*], in which the Federal Court of Appeal indicated that a document is relevant and must be transmitted by the tribunal if it may affect the decision that the Court will make on the judicial review application. The applicant also relies on the decision of the Federal Court of Appeal in *Maax Bath Inc v Almag Aluminium Inc*, 2009 FCA 204 at para 9, [2009] FCJ No 725 [*Maax Bath*]. The applicant submits that it is recognized that documents in the possession of a tribunal may be relevant and should be communicated, even if such documentation is not part of the tribunal record, if it tends to demonstrate bias on the part of a decision-maker or institution (*Majeed v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 908 (QL) at para 3, 68 FTR 75).

(2) *The November 20, 2014, motion*

56 In addition to the proceedings initiated here, the applicant filed access requests under the *Access to Information Act*, RSC 1985, c A-1, with CBSA and CIC. The applicant received the documents sent to him by CBSA on or about October 20, 2014, which was after the cross-examination of Ms. Terrier. The applicant argues that a number of the documents sent by CBSA had not been included in the CTR when they should have been. The applicant further argues that some of these documents contradict answers given by Ms. Terrier during her cross-examination.

57 The applicant also submits that this realization led him to review the documents that CIC had sent him on November 15, 2013, and June 5, 2014, upon which he noticed that some of the documentation sent to him by CIC should have been included in the CTR.

58 In his motion, the applicant first seeks a declaration by the Court noting the incomplete nature of the CTR and the respondent's failure to include documents of critical importance therein. In

addition, the applicant is asking the Court to issue an order requiring the respondent to supplement the CTR by adding the documents in question.

59 Second, the applicant is seeking leave to re-examine Ms. Terrier about her two affidavits from September 19 and 24, 2014. In addition, the applicant seeks an order that would allow him to file additional documents and a supplementary affidavit.

60 The applicant filed, by means of the affidavit of Ms. Doyon's assistant, the documents that, in his view, ought to have been filed in the CTR. The documents in issue that were sent to him by CBSA are as follows:

- Constance Terrier's e-mail to Michelle Sinuita (CBSA), August 30, 2012;
- E-mails from Michelle Sinuita (CBSA) and Ms. Terrier, August 10, 2012;
- Email from Michelle Sinuita (CBSA) to Constance Terrier, July 16, 2012;
- Constance Terrier's e-mail to Marie-Claude Beaumier, Me Joubert and Sean McNair (CBSA), July 13, 2012;
- Constance Terrier's e-mail to Marc Gauthier (CBSA), June 14, 2012;
- E-mails between Constance Terrier and Michelle Sinuita (CBSA), July 16, 2012;
- E-mails between Constance Terrier and Marc Gauthier (CBSA), June 22, 2012;
- E-mail from Marc Gauthier (CBSA) to Constance Terrier, June 22, 2012;
- Message sent by Kathleen Knox-Dauthuille from the Canadian Embassy Canada — Paris to CBSA, February 7, 2008;
- E-mails between Connie Reynolds (CBSA) and Luc Piché (Embassy), June 5, 2012;
- E-mails between CBSA employees, August 26 and 27, 2010, and April 13 and 14, 2011;
- Computerized notes from CBSA;
- FINTRAC report from April 5, 2011, regarding the applicant;
- "Case Log Sheet — OCS" signed by Michelle Sinuita (CBSA) November 1, 2012;
- Handwritten notes;
- E-mail from Sean Curran (CBSA) to Marie-Eve Proulx (War Crimes Section), April 6, 2009.

61 The documents from CIC are the following:

- Constance Terrier's e-mail to Vladislav Mijic (Embassy), June 1, 2012;

- Complaint of April 30, 2013, with handwritten annotations.

62 The applicant maintains that these documents are clearly relevant and that they should have been included in the CTR. He adds that these documents show that others were omitted from the CTR, documentation that relates to:

- All of Ms. Terrier's communications with CBSA and/or Section B of the Embassy's Immigration Section;
- The existence of a second, non-disclosed report prepared by FINTRAC about the applicant;
- All of Ms. Terrier's communications with the investigative judge in France and/or those with Section B of the Embassy's Immigration Section and/or CBSA, where applicable;
- The existence of Ms. Terrier's handwritten notes about the complaint of April 30, 2013, filed by the applicant.

63 The applicant contends that the missing documents show that the CTR was clearly incomplete and that some of these documents contradict a number of the answers given by Ms. Terrier during her cross-examination. The applicant suggests that these circumstances alone are reason enough for the Court to allow him to examine Ms. Terrier about her September 19 affidavit, no matter the scope of Justice Martineau's order. The applicant submits that the discovery of these documents constitutes a new development that calls for the issue of the completeness of the CTR to be re-examined and for the Court to allow Ms. Terrier to be re-examined about her affidavit of September 19, 2014. The applicant further submits that a number of the documents discovered are linked to the objections raised by the respondent during the examination of Ms. Terrier and should have an impact on the fate of those objections.

64 The applicant argues that in light of the grounds raised in the application for judicial review, and in particular his allegations of breach of procedural fairness and reasonable apprehension of bias, the documents that were not included in the CTR are of critical importance to the application for judicial review. The applicant alleges that the discovery of the documents after Ms. Terrier's examination shows that the respondent misled both him and the Court by falsely claiming that the CTR was complete.

### ***B. Respondent's position***

#### *(1) The October 29, 2014, motion*

65 The respondent objects to Ms. Terrier being cross-examined about her affidavit of September 19, 2014. In this regard, the respondent begins by arguing that the affidavit of September 19, 2014, was not filed in support of its position on the merits of the application for judicial review and that in no way does it fall within the scope of Justice Mosley's order.

66 The respondent points out that Ms. Terrier's affidavit of September 19, 2014, was filed in response to applicant's motion in which he claimed that the CTR was incomplete. The respondent argues that during the hearing of the motion before Justice Martineau, the applicant expressly waived cross-examination of Ms. Terrier about her affidavit of September 19, 2014. The respondent submits that the applicant is bound by that waiver and that he cannot suddenly change his mind in mid-proceeding. In support of its position the respondent relies on *Imperial Oil Limited v Lubrizol Corp*, [1998] FCJ No 1089, 1998 CanLII 8152 [*Imperial Oil*]. The respondent further submits that Justice Martineau's order definitively settled the issue as to the completeness of the CTR. There is therefore *res judicata* on this question (*Canada (Attorney General) v Central Cartage Co*, [1987] FCJ No 345, 10 FTR 225, aff'd by [1990] FCJ No 409).

67 The respondent also dismissed the applicant's argument to the effect that he has a right, notwithstanding Justice Martineau's order, to examine Ms. Terrier about all of the affidavits sworn by her during this proceeding. In this regard, the respondent also argues that the authorities on which the applicant relied, in particular *Merck Frosst* and *Sam Levy*, are not relevant because in both cases, there was no issue as to the right to cross-examine the deponent of an affidavit on another affidavit sworn by the same deponent produced in an interlocutory motion of which the Court has disposed.

68 As to the parameters of the applicant's right to cross-examine Ms. Terrier about her affidavit of September 24, 2014, the respondent advocates for a more restrictive view than that of the applicant.

69 The respondent submits that cross-examination on an affidavit in the context of an application for judicial review is much more limited than an examination for discovery in an action. The respondent contends that questions posed to deponents of an affidavit must be limited to questions that involve the credibility of the affiant or facts set out in the affidavit that have a connection to the purposes for which the affidavit was sworn. The respondent relies on *Merck Frosst, Lépine v Bank of Nova Scotia*, 2006 FC 1455 at paras 9, 18, [2006] FCJ No 1839, *Autodata Ltd v Autodata Solutions Co*, 2004 FC 1361 at paras 2, 19, [2004] FCJ No 1653 [*Autodata*] and *Imperial Chemical Industries PLC v Apotex*, 1988 CarswellNat 642 (WL) at para 9, 22 CIPR 226 (FCTD) [*Imperial Chemical*]). In this case, the respondent argues that the sole purpose of the affidavit sworn by Ms. Terrier on September 24, 2014, was to address the issue of procedural fairness and set out the steps that were taken to ensure such fairness. The respondent points out that on the merits, the Court should determine whether the applicant had an opportunity to fully participate in the decision-making process by having been apprised of the information that cast him in an unfavourable light and by having had an opportunity to present his point of view (*El Maghraoui v Canada (Minister of Citizenship and Immigration)*, 2013 FC 883 at para 27, [2013] FCJ No 916).

70 The respondent also insisted on the fact that the affidavit of a decision-maker cannot be used to complete or bolster the reasons for the decision that is the subject of the application for

judicial review (*Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 at para 145, [2012] FCJ No 1158; *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255 at paras 45-47, [2008] FCJ No 1267; *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 40-42, [2013] FCJ No 553). Accordingly, the respondent argues that questions posed during cross-examination on an affidavit cannot be used to get an affiant to testify about the reasons for his or her decision, relying on *Pinto v Canada (Minister of Citizenship and Immigration)*, 2013 FC 349 at paras 8, 10, [2013] FCJ No 368.

71 The respondent further submits that the deponent of an affidavit is not obliged to answer questions of law or to set out the respondent's position on legal questions in issue. Moreover, deponents of an affidavit are not required to inform themselves in order to answer questions to which they do not know the answers (*Ward v Samson Cree Nation*, 2001 FCT 990 at para 3, [2001] FCJ No 1383). The respondent submits that in this case, Ms. Terrier is the officer who handled the applicant's permanent residence application, but that she is not the respondent's agent or representative. As a result, she is under no obligation to answer relevant questions to which she does not know the answers nor is she required to inform herself.

72 The respondent further submits that there is no obligation to give an undertaking on an affidavit and the deponent of an affidavit is under no obligation to produce documents. The respondent relies on *Autodata*, at paras 2, 19.

73 As for the questions to which objections were raised, the respondent submits that they were either:

- related to the affidavit of September 19, 2014; or
- outside the scope of the affidavit of September 24, 2014; or
- not relevant; or
- questions to which Ms. Terrier did not know the answers and about which she had no obligation to inform herself; or
- questions posed to Ms. Terrier dealing with questions of law.

74 As to the undertakings sought, the respondent argues that Ms. Terrier was under no obligation to inform herself or to look for or produce documents that were not in her possession.

75 The respondent also disagrees with the position of the applicant regarding which documents ought to have been included in the CTR. The respondent subscribes to the theory that the CTR need not contain all of the documents in the respondent's possession that related to the applicant's permanent residence application. In its view, the CTR should include only "materials before the Tribunal for the purpose of making its decision" (*Tajardo v Canada (Minister of Citizenship*

*and Immigration*), [2001] 1 FC 591 at para 15, [2001] FCJ No 1450). The respondent argues that the case law has defined relevance within the meaning of Rules 317 and 318 of the Rules and Rule 17 of the Immigration Rules as referring to documents that were of critical importance to the decision. The respondent supports its position on the case law establishing that the absence of documents in the CTR may lead to the setting aside of the decision under review if the missing document or documents were "material to the decision" (*Aryaie v Canada (Minister of Citizenship and Immigration)*, 2013 FC 469 at para 26, [2013] FCJ No 498 [*Aryaie*]).

(2) *The November 20, 2014, motion*

76 The respondent reiterates its position with respect to the documents that must be part of the CTR. It acknowledges that the Court may allow additional documents to be included in the CTR and the parties' records that were not in the possession of the decision-maker at the time he or she made their decision. However, the respondent argues that the filing of additional evidence should only be permitted in very limited circumstances, such as in instances where the documents in question are needed to resolve issues of rules of natural justice or procedural fairness (*Alabadleh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 716 at para 6, [2006] FCJ No 913).

77 In this case, the respondent contends that none of the documents the applicant claims to be "missing" are of critical importance to the grounds raised in support of his application for judicial review. The respondent further submits that the documents in issue are not relevant to determining whether the officer breached rules of procedural fairness or whether there was a reasonable apprehension of bias. Lastly, the respondent submits that a number of these documents had no effect on the impugned decision.

**C. Analysis**

78 Before making any specific determinations with regard to the various conclusions sought by the applicant in his motions or to the objections raised by the respondent during Ms. Terrier's examination, I will turn to some general principles that have influenced my findings.

(1) *The contents of the CTR*

79 I will begin by turning to the principles applicable to the contents of a CTR. At the outset, the parties were at odds over the types of documents that are to be included in the CTR pursuant to Rule 17 of the Immigration Rules. The Rule reads as follows:

17. Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:

- (a) the decision or order in respect of which the application for judicial review is made and the written reasons given therefor,

- (b) all papers relevant to the matter that are in the possession or control of the tribunal,
- (c) any affidavits, or other documents filed during any such hearing, and
- (d) a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review, and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.

17. Dès réception de l'ordonnance visée à la règle 15, le tribunal administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement:

- a) la décision, l'ordonnance ou la mesure visée par la demande de contrôle judiciaire, ainsi que les motifs écrits y afférents;
- b) tous les documents pertinents qui sont en la possession ou sous la garde du tribunal administratif,
- c) les affidavits et autres documents déposés lors de l'audition,
- d) la transcription, s'il y a lieu, de tout témoignage donné de vive voix à l'audition qui a abouti à la décision, à l'ordonnance, à la mesure ou à la question visée par la demande de contrôle judiciaire, dont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux copies de ces documents.

80 The respondent argues that the CTR must contain only those documents that the decisionmaker relied upon when making its decision. It goes so far as to claim that the relevant documents are limited to those of such importance to the decision that their omission from the CTR would be liable to cause the decision to be set aside. With respect, I do not share the respondent's view in this regard and I find the applicant's position to be more in line with the state of the law on this issue.

81 First, the criterion of relevance for the purpose of the contents of the CTR is different from the one to be applied when the Court is called upon to determine whether the failure to include a document in the CTR must result in the impugned decision being set aside.

82 It is true that failing to include certain documents in the CTR may lead to the decision being set aside if the missing documents were "material to the decision" (*Aryaie*, at para 26; see also *Machalikashvili v Canada (Minister of Citizenship and Immigration)*, 2006 FC 622 at para 9, [2006] FCJ 898).

83 There is however an important distinction between an administrative tribunal's obligation to produce a full CTR at the disclosure stage and the consequences that may result from a failure to include certain documents in the CTR. A document may very well have been omitted, which would mean that the administrative tribunal failed to meet its obligation under Rule 17 of the Immigration Rules. It does not necessarily follow that this should entail the setting aside of the decision.

84 A document may be relevant within the meaning of Rule 17 without being material to the decision. In a motion for disclosure, the Court may require that an administrative tribunal add to the CTR missing documents deemed to be relevant or allow the applicant to file additional documents and affidavits. It does not mean that it would be useful or appropriate for the Court to determine, at that stage of the proceeding, whether the documents in question are material to the decision. I find that where such an allegation is made, it is for the judge who will dispose of the application for judicial review on the merits to determine whether the documents not included in the CTR were of such importance that a failure to include them must result in the decision being set aside.

85 However, I find that the respondent has a far too narrow vision of the criterion of relevance within the meaning of Rule 17 of the Immigration Rules.

86 Indeed, the concept of relevance in a judicial review is not based solely on elements that influenced the decision of the *administrative tribunal*, but also on elements likely to influence the decision of the *reviewing court*. In *Pathak*, at para 10, the Federal Court of Appeal clearly held that the relevance of a document within the meaning of Rules 317 and 318 of the Rules must be viewed from the perspective of the grounds raised in the applicant's affidavit and application for judicial review, and indicated that a document is relevant where it may have an influence on the Court's decision:

10 A document is relevant to an application for judicial review if it may affect the decision that the Court will make on the application. As the decision of the Court will deal only with the grounds of review invoked by the applicant, the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the applicant.

87 The relevance rule for the purposes of Rules 317 and 318 of the Rules was reiterated in *Maax Bath*, where Justice Trudel indicated that relevance is not assessed solely on the basis of documents that had an influence on the decision of the administrative tribunal:

9 The relevant documents for the purposes of Rules 317-318 are those documents that may have affected the decision of the Tribunal or that may affect the decision that this Court will make on the application for judicial review (*Telus, supra* at paragraph 5; *Pathak, supra* at paragraph 10).



88 First, depending on the grounds for the application for judicial review, relevant documents could include all documents that were before the decision-maker, including for example, those dealing with the processing of the file. In fact, it is for this reason the case law has held that any document that was before the decision-maker, regardless of whether it affected the decision, is presumed to be relevant. For example, in *Access Information Agency Inc v Canada (Transports)*, 2007 FCA 224 at para 7, [2007] FCJ 814, Justice Pelletier, writing for the Federal Court of Appeal, stated the following with regard to Rules 317 and 318 of the Rules:

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

[Emphasis added.]

89 As such, I share the opinion put forth by Justice Harrington in *Jolivet*, at para 27, wherein he states that any document that was before the decision-maker when it made its decision is presumed relevant and it is not for an administrative tribunal whose decision is under review to determine which documents are relevant. That responsibility belongs to the Court

27 Objectively speaking, we may be able to state that in this case some of the documents that were available to the Group were totally irrelevant, but it is not up to the Group to make that determination. As the reasons of the Federal Court of Appeal in *Maax Bath*, above, and *Telus Communications Inc. v. Canada (Attorney General)*, 2004 FCA 317, [2004] F.C.J. No. 1587 (QL) indicate, it is up to this Court to determine the relevance of the documentation before the Group. I will begin by saying that if a document was before the Group when it made its decision, this document must be presumed relevant (*Access Information Agency Inc. v. Canada (Transport)*, 2007 FCA 224, [2007] F.C.J. No.184 (QL) at paragraphs 7, 21). These documents should therefore be produced, unless one of the above-mentioned exceptions applies.

[Emphasis added]

[See also *Kamel*, at para 3]

90 Second, it is apparent from the principles set out in *Pathak* and *Maax Bath* that a document that was not before the decision-maker when it made its decision may nonetheless be relevant if it is useful to the assessment of, and connected to, an allegation of breach of procedural fairness or bias. Such a document would then be likely to influence the manner in which the Court will dispose of the application for judicial review.

91 In this regard, I cite the words of Justice Teitelbaum in *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities — Gomery Commission)*, 2006 FC 720 at paras 49-50, [2006] FCJ No 917, aff'd 2007 FCA 131, [2001] FCJ No 467:

49 According to *Pathak*, above, and subsequent jurisprudence, documents are relevant for the purposes of Rule 317 if they may affect the decision that the reviewing court will make. The relevance of requested materials is determined by having regard to the notice of application, the grounds of review invoked by the applicant, and the nature of judicial review.

50 It is trite law that in general only materials that were available to the decision-maker at the time of rendering a decision are considered relevant for the purposes of Rule 317. However, the jurisprudence also carves out exceptions to this rule. The Commission's own written representations indicate that, "An exception exists where it is alleged that the federal board breached procedural fairness or committed jurisdictional error": David Sgayias et al., *Federal Practice*, (Toronto: Thomson, 2005) at 695, reproduced in the Commission's Memorandum of Fact and Law (Chrétien, T-2118-05) at para. 24. The above comment is clearly supported by jurisprudence which indicates that materials beyond those before the decision-maker may be considered relevant where it is alleged that the decision-maker breached procedural fairness, or where there is an allegation of a reasonable apprehension of bias on the part of the decision-maker: *Deh Cho First Nations*, above; *Friends of the West*, above; *Telus*, above; *Lindo*, above

[Emphasis added.]

92 In *Canada (Public Sector Integrity Commissioner) v Canada (Attorney General)*, 2014 FCA 270 at para 4, [2014] FCJ No 1167, the Federal Court of Appeal noted the parameters applicable to the right to gain access to documents that were not before the decision-maker when it made the decision:

To obtain the disclosure of material that was not before the Commissioner when he made his decision, the applicant had to prove that the material sought is relevant within the meaning of Rule 317. First, since as a general rule a judicial review case must be decided on the basis of the information in the decision-maker's possession at the time the decision is made, the applicant had to raise in his request a ground of review that would allow the Court to consider evidence that was not before the Commissioner. These exceptions to the general rule are well settled by the case law. In the present case, the only relevant exception was a breach of procedural fairness, namely, the investigator's purported bias, which had allegedly tainted the entire investigation process. Second, the ground of review had to have a factual basis supported by appropriate evidence, as required (*Access Information Agency Inc. v. Canada (Transports)*, 2007 FCA 224, [2007] F.C.J. No. 814, paragraphs 17 to 21). The second criterion is particularly important because it prevents an applicant raising a breach of

procedural fairness simply to gain access to material that the applicant could not otherwise access.

93 In short, relevance in a judicial review is not restricted to documents that influenced the administrative tribunal's decision, but extends to all materials that were before the decisionmaker and possibly, depending on the grounds argued in the judicial review application, to documents that were not before the decision-maker but that are relevant to an allegation of breach of procedural fairness, for example.

94 In *Douze*, at para 19, this Court recognized that the case law and principles developed with respect to the notion of relevance for the purposes of Rules 317 and 318 of the Rules are also helpful to defining the concept of relevance under Rule 17 of the Immigration Rules. I share this view.

95 Therefore, in my view, a priori, all of the documents that were available to Ms. Terrier in the processing of the applicant's permanent residence application are presumed to be relevant and ought to have been included in the CTR. The administrative tribunal must keep in mind that the CTR should be prepared in light of the allegations and grounds put forth in the applicant's affidavit and application for judicial review. In this case, it is clear from the applicant's affidavit and application for judicial review that procedural fairness and apprehension of bias are at issue. The applicant's allegations in this regard are sufficiently detailed in his memorandum and in his affidavit for the allegations to be well understood by the respondent. In such a context, I find that the respondent ought to have included in the CTR all documentation that was available to the officer that could shed some light on the manner in which the applicant's file was handled by the officer and that is relevant for the purposes of making a determination on the allegations of breach of procedural fairness and bias, even where the documentation did not affect her decision.

96 In her affidavit of September 19, 2014, Ms. Terrier affirmed having supervised the preparation of the CTR. If the CTR, as it was constituted, was put together based on the respondent's view of what was relevant, I find that it is highly likely that it is not complete.

97 The respondent argues that Justice Martineau's order definitively resolved the issue as to the completeness of the CTR. With respect, I do not agree.

98 In my view, Justice Martineau's order accepted the premise that the tribunal record contained all of the documents that officer Terrier considered to be relevant, but it did not definitively resolve the question as to how complete the CTR was. However, I also agree that in that motion, the applicant had waived his right to cross-examine Ms. Terrier about her affidavit of September 19, 2014, which was clearly about the contents of the CTR. By choosing not to cross-examine Ms. Terrier, the applicant accepted the premise set out in the affidavit that the CTR contained documents that Ms. Terrier had reviewed *that she considered relevant to making her decision*. The subsequent unfolding of events leads me to believe that it would have been preferable for the applicant to have examined Ms. Terrier about her affidavit of September 19, 2014, before the

Court ruled on the motion, given that such an examination would have in all likelihood provided some idea as to the parameters that guided Ms. Terrier when she supervised the preparation of the CTR. In addition, such an examination would have possibly helped identify the documents that were not included in the CTR because Ms. Terrier had not deemed them relevant for the purposes of her decision but which may nonetheless be relevant with respect to the allegations of breach of procedural fairness and bias. In any event, the applicant decided not to cross-examine Ms. Terrier about her affidavit and the Court had to dispose of the motion in light of the record as it was constituted. Thus, Justice Martineau did not have to determine the fairness of the notion of relevance that guided officer Terrier when she stated in her affidavit that all of the relevant documentation had been included in the CTR. I find that Justice Martineau was called upon to determine whether the CTR was complete in the specific context of the categories of documents listed in the motion. Having listened to a recording of the hearing, I can confirm that the relevance of each category of documents was debated by the parties. Given this context, I am of the view that the order issued by Justice Martineau definitively settled the issue of the relevance of the documents reviewed in the order but did not definitively settle all of the issues that could be raised with regard to the contents of the CTR and that might have arisen based on the way the matter had proceeded.

99 I will come back to the specific documents the applicant is seeking to have included in the CTR.

*(2) Scope of the cross-examination on an affidavit*

100 I shall now turn to general principles that, in my opinion, must frame the right to cross-examine the deponent of an affidavit in an application for judicial review and that will guide my assessment of the objections raised during the cross-examination of Ms. Terrier and of the other requests of the applicant.

101 It is well-settled that cross-examination on an affidavit is more limited than an examination for discovery in an action. One must bear in mind the summary and expeditious nature of an application for judicial review.

102 Like the parties, I find that in *Merck Frosst*, Justice Huguessen effectively laid out the basic parameters that frame the right to cross-examine the deponent of an affidavit in a judicial review proceeding. As a starting point, it is helpful to cite the relevant excerpt from that judgment:

4 It is well to start with some elementary principles. Cross-examination is not examination for discovery and differs from examination for discovery in several important respects. In particular:

- a) the person examined is a witness not a party;

- b) answers given are evidence not admissions;
- c) absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself;
- d) production of documents can only be required on the same basis as for any other witness i.e. if the witness has the custody or control of the document;
- e) the rules of relevance are more limited.

**5** Since the objections which have given rise to the motions before me are virtually all based upon relevance, I turn, at once, to that subject.

**6** For present purposes, I think it is useful to look at relevance as being of two sorts: formal relevance and legal relevance.

**7** Formal relevance is determined by reference to the issues of fact which separate the parties. In an action those issues are defined by the pleadings, but in an application for judicial review, where there are no pleadings (the notice of motion itself being required to set out only the legal as opposed to the factual grounds for seeking review), the issues are defined by the affidavits which are filed by the parties. Thus, cross-examination of the deponents of an affidavit is limited to those facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding.

**8** Over and above formal relevance, however, questions on cross-examination must also meet the requirement of legal relevance. Even when a fact has been sworn to in the proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted. (I leave aside questions aimed at attacking the witness's personal credibility which are in a class by themselves). Thus, to take a simple example, where a deponent sets out his or her name and address, as many do, it would be a very rare case where questions on those matters would have legal relevance, that is to say, have any possible bearing on the outcome of the litigation.

103 It is clear from the start that subjects raised in a cross-examination on an affidavit must be connected to the grounds argued in the application for judicial review. Clearly, questions may be in regard to facts stated by the deponent.

104 However, since *Merck Frosst*, certain judgments have widened the parameters of cross-examination to allow questions that fall outside of the strict framework of facts stated by the deponent as long as those questions relate to subjects addressed in the affidavit and are relevant to the purposes for which the affidavit was sworn. Incidental questions that arise from answers given by the deponent are also permitted.

105 In this regard, I agree with the views expressed by Justice Kelen in *AgustaWestland International Ltd*, at para 12, who, when commenting on the musings of the Federal Court of Appeal in *Stella Jones*, wrote as follows:

12 Different treatments have been given in the reported cases to the scope of cross-examination and breadth of production of documents on cross-examination of affidavits in applications for judicial review. However, I am satisfied that the Federal Court of Appeal has broadened cross-examination on such affidavits so that it may extend to relevant matters beyond the four corners of the affidavit and require production of documents outside the affidavit material itself. The cross-examination and the production of documents are limited by what is relevant. See *Stanfield v. Canada (Minister of National Revenue - MNR)*, (2004) 255 F.T.R. 240, 2004 FC 584, per Hargrave P. at paragraphs 24 to 29 where Prothonotary Hargrave thoroughly reviews the jurisprudence. Hargrave P. stated at paragraph 28:

... In essence what the Court of Appeal has done in *Stella Jones* is not only to broaden cross-examination on an affidavit so that it may extend to relevant matters well beyond the four corners of the affidavit, but also to broaden production of documents by requiring production of material related to previous dealings, being relevant documents clearly outside of the affidavit material itself. The Court of Appeal was of the view that it was not open to the motions judge to exclude the possibility that previous dealings might shed relevant light. Of course, cross-examination and document production arising out of cross-examination are bounded by what is relevant, including relevance as discussed by Mr. Justice Hugessen in *Merck Frosst* (supra) and by the Court of Appeal in *Stella Jones Inc.* (supra).

106 Similarly, I agree with the words of Justice Mosley in *Almrei (Re)*, 2009 FC 3 at para 71, [2009] FCJ No 1, when he wrote:

The jurisprudence is to the effect that cross-examination is not restricted to the "four corners" of the affidavit so long as it is relevant, fair and directed to an issue in the proceeding or to the credibility of the applicant.

107 I also concur with the views expressed by Justice Russell in *Ottawa Athletic Club Inc (D.B.A. The Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672 at para 132, [2014] FCJ No 743:

132 Justice Hugessen's description of "factual" relevance as "facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding" is broader than some earlier articulations (see *Joel Wayne Goodwin v Canada (Attorney General)*, T-486-04 (October 6, 2004) [*Goodwin*] and *Merck (1994)*, above: matters arising from the affidavit itself as well as questions going to the credibility of the affiant), and narrower than others (see *Almrei (Re)*,

2009 FC 3 at para 71: "cross-examination is not restricted to the "four corners" of the affidavit so long as it is relevant, fair and directed to an issue in the proceeding or to the credibility of the applicant"). However, there seems to be a consensus that "[a]n affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit," and "should submit to cross-examination not only on matters set forth in his affidavit, but also to those collateral questions which arise from his answers": *Merck Frosst Canada Inc v Canada (Minister of National Health and Welfare)*, [1996] FCJ No 1038 at para 9, 69 CPR (3d) 49 [*Merck (1996)*], quoting *Wyeth Ayerst Canada Inc v Canada (Minister of National Health and Welfare)* (1995), 60 CPR (3d) 225 (FCTD).

133 However the proper scope of cross-examination on an affidavit is defined, the affiant is required to answer fair and legally relevant questions that come within that scope (*Merck (1996)*, above).

[See also *Maheu*, para 5]

108 I therefore conclude that the questions that may be posed on cross-examination of affidavits may, depending on the context, exceed the scope of facts strictly set out in the affidavit. However, cross-examination must be limited to questions of fact, and not questions of law, that arise from stated facts and subjects addressed in the affidavit and from the reasons for which the affidavit was sworn and filed. As I stated earlier, it goes without saying that the relevance of questions must also be determined based on the grounds asserted in the application for judicial review.

109 In this case, Ms. Terrier's affidavit was sworn to support the respondent's position in response to the allegations of breach of procedural fairness and bias raised by the applicant in his judicial review application. The affidavit of September 24, 2014, describes the stages in the processing of the permanent residence application. In my view, questions about facts which were not necessarily set out directly in the affidavit, but that concern the steps followed by Ms. Terrier in the handling of the applicant's file and the manner in which the application was treated are relevant and arise from facts alleged in her affidavit.

110 It is also recognized, and the respondent acknowledged this, that the examination may exceed the scope of the facts alleged in the affidavit if the questions relate to the credibility of the deponent.

111 The applicant submits that his right to cross-examine includes the right to compel Ms. Terrier to inform herself in order to be able to respond to questions to which she does not know the answer. I do not share this view. Ms. Terrier was the immigration officer tasked with handling the applicant's permanent residence application. I do not find that, acting in that capacity, she could be considered as the respondent's corporate agent or representative within the meaning understood by the case law that would impose on a deponent of an affidavit an obligation to inform him or herself. Accordingly, I find that she was under no obligation to inform herself about factual elements above

and beyond those facts she had first-hand knowledge of and that were relevant to her handling of the applicant's permanent residence application. The grounds cited in support of the application for judicial review criticize the manner in which Ms. Terrier handled the applicant's permanent residence application, and what is relevant must be connected to the manner in which Ms. Terrier handled the applicant's permanent residence application and to the documents and information she had been apprised of.

112 I will now address the various requests made by the applicant.

*(3) Examination of Ms. Terrier about her affidavit of September 19, 2014*

113 The arguments raised by the applicant in his motion on October 29, 2014, to justify cross-examining Ms. Terrier about her affidavit of September 19, 2014, do not sway me.

114 First, I do not find that Justice Mosley's order applies to the affidavit dated September 19, 2014. In his order, Justice Mosley allowed the application for leave and established a timetable. This order concerned examinations that are normally conducted with regard to affidavits that have been filed by the parties in support of their arguments on the merits of the application for judicial review. The affidavit of September 19, 2014, was sworn and filed in the specific context of the motion for full disclosure of the CTR filed by the applicant. Its purpose was not to support the respondent's position on the merits of the grounds raised by the applicant in his judicial review application. I find that it does not fall under Justice Mosley's order.

115 Second, I reject the applicant's contention that the right to cross-examine the deponent of an affidavit includes the right to cross-examine that person about every other affidavit filed in the proceeding. I find that the authorities relied upon by the applicant in support of his position, in particular *Merck Frosst*, *Sam Levy* and *Eli Lilly*, are of no help to him in this case, and contrary to the context of those cases, the applicant expressly waived cross-examination Ms. Terrier about her affidavit of September 19, 2014.

116 I also find that during the examination that took place on October 7 and 8, 2014, the respondent was quite right to object to the applicant cross-examining Ms. Terrier about her affidavit of September 19, 2014. The applicant had expressly waived cross-examination of Ms. Terrier about her affidavit of September 19, 2014, at the hearing for his initial motion for disclosure. Ms. Terrier's affidavit had been sworn specifically for his motion for disclosure in which the applicant argued that the CTR was incomplete. I find that, barring any special circumstances, the applicant remains bound by his decision not to cross-examine Ms. Terrier. There is nothing in the record that would lead me to conclude that during the motion on October 29, 2014, there were any special circumstances would warrant allowing the applicant to change his mind.

117 In *Imperial Oil*, which was relied on by the respondent, Justice Nadon indicated that, in principle, a party was bound by its decision to waive cross-examination of the deponent of an



affidavit. He did, however, acknowledge that certain circumstances would dictate that the Court allow a party to change its position:

9 I can only conclude that counsel for the defendants did not cross-examine Ms. Ethier because they were not concerned by her affidavit. It is not now open to the defendants to change their position. I am also not convinced that because a different judge is now presiding that the parties should be allowed to rethink past strategy. There may be cases where circumstances would dictate that a party be allowed to change its position, but the circumstances of the case before me are not in that category.

[Emphasis added.]

118 Despite my position on the arguments relied on by the applicant in his motion dated October 29, 2014, I find that the situation evolved between the time Ms. Terrier was cross-examined (October 7 and 8, 2014) and the time the November 20, 2014, motion was filed. In my view, the facts relied on by the applicant in support of his motion dated November 20, 2014, shed light on special circumstances justifying revisiting the completeness of the CTR and allowing the applicant to cross-examine Ms. Terrier on her affidavit of September 19, 2014.

119 Indeed, I find that some of the documents received by the applicant through his access requests under the *Access to Information Act* raise doubts about the documents that were or were not included in the CTR.

120 For example, in her affidavit of September 19, 2014, Ms. Terrier stated that the CTR contained all the relevant documents that she consulted to make her decision and, more specifically, all her exchanges with CBSA. Ms. Terrier also indicated that the CTR contained all exchanges between her colleagues and CBSA and/or CIC that had been communicated to her. However, the e-mails between Ms. Terrier and Michelle Sinuita that were filed in support of the November 20, 2014, motion, as well as the e-mails that Ms. Terrier exchanged with Marc Gauthier, clearly constitute documents that record [TRANSLATION] "exchanges" between Ms. Terrier and CBSA representatives. Does that mean that when Ms. Terrier stated that the CTR included all her exchanges with CBSA, those [TRANSLATION] "exchanges" were limited to those that she deemed relevant? Or, were the documents listed in the motion inadvertently omitted? I cannot answer any of these questions, but I find that it is relevant that these ambiguities be clarified.

121 I wish to make clear that I make no determination that calls into question Ms. Terrier's good faith. However, I find that some of the documents received by the applicant as part of his access to information requests, which are not included in the CTR, raise doubts about the parameters that guided Ms. Terrier in overseeing the preparation of the CTR.

122 As I mentioned, I find that the documents that were at Ms. Terrier's disposal during the processing of the application for permanent residence are presumed to be relevant. I believe it is

important that the applicant be able to base the grounds in support of his application for judicial review upon a CTR that is complete. I believe it is equally important, given the grounds of the application for judicial review, that the Court also be able to conduct its analysis based on a CTR that is complete.

123 I therefore find that the circumstances underlying the November 20, 2014, motion are not the same as those that existed when the parties appeared before Justice Martineau, or the circumstances relied on in support of the October 29, 2014, motion. In such a context, and for the reasons already stated, I find that it is in the best interest of justice that the applicant be allowed to cross-examine Ms. Terrier on her affidavit of September 19, 2014, even though he waived cross-examination as part of his first motion for disclosure.

*(4) Objections raised during the cross-examination of Ms. Terrier*

124 I will now turn to the objections raised by the defendant during the cross-examination of Ms. Terrier, and I will rule on them in light of my decision to allow Ms. Terrier to be examined on her affidavit dated September 19, 2014.

<b>Objection number</b>	<b>Question</b>	<b>Decision</b>
1	<i>Examination on October 7, 2014</i> [TRANSLATION] "Tell us, madam, did you oversee or were you involved in putting together and preparing the tribunal record?"	Question allowed — the question deals with the contents of the CTR.
10	[TRANSLATION] "But were you involved in preparing the tribunal record?"	Question allowed — the question deals with the contents of the CTR.
13	[TRANSLATION] "You failed to deal with that question when there was a response?"	Question allowed — why the response to the complaint was not placed in the CTR is relevant.
14	[TRANSLATION] "So, you were unaware of the content of the complaint?"	Objection upheld — Ms. Terrier had already answered by stating that she had forwarded the complaint to Alain Théault.
15	[TRANSLATION] "Is there a particular reason why the response is not written here in your affidavit?"	Question allowed — why the response to the complaint was not placed in the CTR is relevant.
25	[TRANSLATION] "Can you undertake to check whether said analysis notes by persons other than yourself concerning the complaints exist, please?"	Objection upheld — Ms. Terrier is not required to inform herself of facts of which she has no personal knowledge.
27	[TRANSLATION] "Can you check whether Boyd and Prémont, who were in Section 'B' of CIC ..., on what date they came over to the Border Services Agency?"	Objection upheld — Ms. Terrier is not required to inform herself of facts of which she has no personal knowledge.
32	[TRANSLATION] "I will ask you to undertake to provide us with ... the notes or the interventions of	Question allowed, but only with regard to the documents of which Ms. Terrier had knowledge and

this section [Section B] and the responses provided by the Border Services Agency further to their emails, which are in the tribunal record at pages 208 to 210, during the period relevant to the processing of the file."

which were possibly not included in the CTR, and only if such documents exist.

33 [TRANSLATION] "I would just like to know whether she was aware of the mandate that was given to the person at the Border Services Agency who was responsible for the file before her — was she aware of the nature of the mandate that was in all likelihood given to the Agency in February 2008?"

Question allowed — the question is relevant with regard to alleged breaches of procedural fairness and bias, and with regard to the preparation of the CTR.

34 [TRANSLATION] "When you took over the file, did Ms. Knox explain to you what action she had taken or had not taken regarding the processing of that file and an inadmissibility determination to be verified in that file?"

Question allowed — the question is relevant with regard to alleged breaches of procedural fairness and bias.

35 [TRANSLATION] "When you processed Mr. Nguesso's application, did you take into account all the requests and the responses from the Border Services Agency in processing his file?"

Question allowed — the question is relevant with regard to alleged breaches of procedural fairness and bias.

36 [TRANSLATION] "So, if I understand correctly, the immigration officer was not aware of the concerns of Section 'B', nor was the individual, by virtue of that letter dated May 13, 2008?"

Objection upheld — the letter is in the CTR, and Ms. Terrier cannot testify regarding its content.

37 [TRANSLATION] "Do you admit that this letter does not relate any concerns either?"

Objection upheld — the letter is in the CTR, and Ms. Terrier is not required to testify regarding its content.

38 [TRANSLATION] "But the letter physically exists in your file?"

The letter is in the CTR, in the GCMS notes. The specific format is not relevant.

*Examination on October 8, 2014*

1 [TRANSLATION] "[C]an you tell us if there were ... if there could have been any discussions between Section B and the partners during that period when you were waiting for the results, or you were unaware, but it is possible that there were discussions between Section B, Fintrac, Section B ...?"

Question allowed, but only with regard to the information and/or documents that were brought to the attention of Ms. Terrier.

3 [TRANSLATION] "Can you find the out-of-court settlement in the 65-page file? I would have hoped that the letter was still in the file to supplement your affidavit on the period between 2008 and 2012."

Question allowed.

6 [TRANSLATION] "If you look at the out-of-court settlement letter dated ... July 3, from Ms. Joubert, that you received from your counsel because I served it on him as being evidence missing from the record, does it not mention such concerns?"

10 The applicant introduced in evidence, under objection, a letter dated July 13, 2012, summoning him to an interview on September 19, 2012 (D-4).

12 [TRANSLATION] "But the letter physically exists in your file?"

17 [TRANSLATION] "When you say that it was agreed that he would provide the documents and that this was one way of proceeding — interview, documents — this is not true and is not reflected in that document, so is it accurate that this is not reflected?"

18 [TRANSLATION] "But how do you explain your testimony? The document contradicts your testimony."

26 [TRANSLATION] "Did you contact the examining judge in France yourself?"

28 [TRANSLATION] "Was this the first time you made such inquiries?"

30 [TRANSLATION] "Can you see how, to someone on the outside, your actions could straight out look like an attempt to inform the examining judge that the Canadian authorities had an interest in the case, and how your intervention was therefore intended more to give this information or to influence the examining judge than the opposite?"

36 [TRANSLATION] "But in the tribunal record, did you assume that Mr. Nguesso had no formal criminal charges pending against him?"

37 [TRANSLATION] "Did you consult the documents from CBSA or

Objection upheld — Ms. Terrier does not have to testify regarding the contents of this letter.

Filing of letter authorized.

Question allowed.

Question allowed — Ms. Terrier's understanding of the terms of the out-of-court settlement is relevant, but she cannot be questioned regarding the content of the out-of-court settlement letter itself.

Question allowed — Ms. Terrier's understanding of the terms of the out-of-court settlement is relevant, but she cannot be questioned regarding the content of the out-of-court settlement letter itself.

Objection upheld — the answer is in the affidavit dated September 19, 2014.

Question allowed — in her affidavit dated September 19, 2014, Ms. Terrier mentions having contacted the examining judges twice, once on April 8, 2011, and once on May 15, 2013, while in the email dated June 1, 2012 (Exhibit C-3 in the motion of November 20, 2013), Ms. Terrier mentions having contacted the examining judges more than once.

Objection upheld — this is a question of opinion, not fact.

Question allowed — the question is relevant with regard to alleged breaches of procedural fairness and bias.

Question allowed — the question is relevant with regard to alleged

- Section B regarding the status of the formal charges against Mr. Nguesso, the lack thereof?"
- 41 [TRANSLATION] "Do we have the notes that were sent to CBSA in the tribunal record?"
- 45 [TRANSLATION] "Do you have the notes sent to CBSA?"
- 46 [TRANSLATION] "Are they in the tribunal record?"
- 47 [TRANSLATION] "Is there any evidence that you sent them to CBSA?"
- 48 [TRANSLATION] "Did you send it to Section B?"
- 51 [TRANSLATION] "And why [were they destroyed]?"
- 52 [TRANSLATION] "That is the reason, because they were unintelligible, that is your reason?"
- 54 [TRANSLATION] "Do you agree with me that the applicant could have commented on this document somehow to argue that he was not inadmissible? In other words, do you agree with me that the disclosure of this report could have been rooted in the fairness of this case?"
- 55 [TRANSLATION] "Do you think that the candidate, had he been informed of CBSA's comments, could have offered some clarifications ...?"
- 58 [TRANSLATION] "[D]o you not think that Mr. Nguesso could in fact have used it to contradict the information and to clarify with regard to that aspect?"
- 59 [TRANSLATION] "[D]o you not think that your communications with the examining judge or the convergent and open documentation that was identified, the long undisclosed list, that Mr Nguesso could have contradicted the reliability of the sources, the credibility, the motivations, the author, any other aspect, he could have, do you not agree, that he could have perhaps provided evidence that showed that your documentation was biased?"
- breaches of procedural fairness and bias.
- Questions 41 to 48 allowed.
- Objections 51 and 52 upheld — Ms. Terrier already answered the question.
- Objections 54 to 59 upheld — questions of opinion.

(5) *The re-examination of Ms. Terrier on her affidavit dated September 24, 2014*

125 Subject to the following exception, in my view, there is no need to re-examine Ms. Terrier on her affidavit dated September 24, 2014, with regard to subjects other than those related to the objections that I have ruled on, as I already allowed a cross-examination on her affidavit dated September 19, 2014, regarding the contents of the CTR. Moreover, the applicant has already asked the questions relating to procedural fairness and bias that he wanted to put to Ms. Terrier, and I find that the questions that I have allowed in deciding the respondent's objections are sufficient to adequately supplement the cross-examination of Ms. Terrier on her affidavit dated September 24, 2014. However, I will allow the applicant to question Ms. Terrier regarding whether she was aware of the November 2011 FINTRAC/CANAFE report because this aspect is relevant to the alleged breach of procedural fairness. Whether Ms. Terrier had that document in her possession is also a relevant question with regard to her affidavit dated September 19, 2014.

*(6) Examination of Ms. Bradley*

126 I see no relevance in the applicant examining Ms. Bradley since he is authorized to examine Ms. Terrier on her affidavit of September 19, 2014, with respect to the content of the CTR.

*(7) Documents listed in the motion of October 29, 2014, that the applicant wants to see added to the CTR*

127 The documents at issue are the following:

- the first letter inviting the applicant to an interview at the Embassy dated July 13, 2012;
- the disclosure request sent to the Embassy by Ms. Doyon on February 1, 2013;
- the letter sent by the Embassy to Ms. Doyon on February 27, 2013, in response to her disclosure request;
- the fairness letter sent by the Embassy to the applicant, dated February 27, 2013;
- a letter of July 3, 2012, from Michèle Joubert to the applicant's former counsel regarding the out of court settlement that occurred in the mandamus application (Docket IMM-4924-12);
- photocopies from Julie Resetarits, the applicant's former counsel, dated September 4 and 26, 2008, and October 31, 2008, requesting information on the status of the applicant's application and on the grounds justifying the request of documents and additional information requested from the applicant;
- the updated assignment before the judge of the Exécution du Tribunal de Grande Instance de Paris-SCP Bourgoing-Dumonteil & Associés Connecticut Bank of Commerce, which had been filed by Ms. Doyon in support of the complaint of April 30, 2013;

- the last three pages of the conclusions from SCP Bourgoing-Dumonteil & Associés to the enforcement-hearing judge, which had been filed by Ms. Doyon in support of the complaint of April 30, 2013;
- the excerpt of the Commerce et des Sociétés du Luxembourg registry, CANAAN CANADA S.A. dated April 15, 2013, which was filed by Ms. Doyon in support of the complaint of April 30, 2013;
- the handwritten notes from the interview of September 25, 2012;
- the beginning of the form "Renseignements supplémentaires Paris" found at pages 58-59 of the CTR;
- two e-mails exchanged between the Embassy and the office of the applicant's former counsel on October 28, 2011, regarding the follow-up of the processing of the applicant's file;
- the letter sent to the Embassy on November 14, 2013, regarding the follow-up of the complaint of April 30, 2013.

128 As I expressed, I consider that all the documents that were in Ms. Terrier's possession when she processed the applicant's file are presumed to be relevant. Therefore, the respondent should add the documents listed in the CTR insofar as Ms. Terrier had them in her possession.

*(8) Documents listed in the motion of November 20, 2014, which the applicant wants to see added to the CTR*

129 In his motion of November 20, 2014, the applicant requested that the Court direct the respondent to add to the CTR the following documents that were sent to it by the CBSA and the CIC following his access to information requests:

***Documents disclosed by the CBSA***

- A2-A3 Constance Terrier's e-mail to Michelle Sinuita (CBSA), August 30, 2012
- A4 E-mail from Michelle Sinuita (CBSA) to Constance Terrier, August 10, 2012
- A5 E-mail from Michelle Sinuita (CBSA) to Constance Terrier, July 16, 2012
- A9 E-mails between Constance Terrier and Michelle Sinuita (CBSA), July 16, 2012
- A6 Constance Terrier's e-mail to Marie-Claude Beaumier, Ms. Joubert and Sean McNair (CBSA), July 13, 2012
- A7-A8 Constance Terrier's e-mail to Marc Gauthier (CBSA)
- A10 E-mails between Constance Terrier and Marc Gauthier (CBSA), June 22, 2012
- A11 E-mail from Marc Gauthier (CBSA) to Constance Terrier, June 22, 2012
- A12 Mail sent from Kathleen Knox-Dauthuille of the Embassy of Canada — Paris to the CBSA, February 7, 2008
- A13- A14 E-mails between Connie Reynolds (CBSA) and Luc Piché (Embassy), June 5, 2012
- A15- A17 E-mails between CBSA employees, August 2010, April 2011
- A18- A26 Computerized notes from the CBSA

- A27- Report from FINTRAC of April 5, 2011, regarding the applicant  
 A35  
 A36 "Case Log Sheet — OCS" signed by Michelle Sinuita (CBSA) on November 1, 2012  
 A37- Hand-written notes  
 A38  
 A39 E-mail from Sean Curran (CBSA) to Marie-Eve Proulx (War Crimes Section), April 6, 2009  
 Documents disclosed by the CIC  
 C3-C9 Constance Terrier's e-mail to Vladislav Mijic (Embassy), June 1, 2012  
 C10- Complaint of April 30, 2013 with handwritten annotations  
 C67

130 For the reasons already described, the respondent must add to the CTR all the documents among the documents listed above, which come from Ms. Terrier or which were in her possession while processing the applicant's file. The applicant is authorized to file the documents that were not included in the CTR and to file a supplementary affidavit if he considers that these documents are relevant to his allegations of breach of the rules of procedural fairness and bias.

*(9) Declaration that the CTR is incomplete and the respondent's failure to include documents of critical importance*

131 I have already indicated that, in my view, the CTR is not complete and I intend to order the production of certain documents. Therefore, I do not find it necessary to include in the order's conclusions a statement that the CTR is incomplete. Neither do I intend to decide whether the documents that were not included in the CTR are of critical importance. It will be up to the judge who will hear the merits of the application for judicial review to determine this issue if he or she considers it relevant and appropriate. It will also be up to him or her to determine probative value and allow the cross-examination of Ms. Terrier and the documents contained in the CTR.

## **Order**

### *THE COURT ORDERS AND ADJUDGES that*

1. *The parties are authorized to file supplementary memoranda of more than 60 pages, which will replace the memoranda that they filed at the authorization stage;*
2. *The applicant is authorized to cross-examine Ms. Terrier on her affidavit of September 19, 2014;*
3. *The applicant is authorized to cross-examine Ms. Terrier on her affidavit of September 24, 2014, to respond to the questions that were the subject of the respondent's objections during the examinations of October 7 and 8, 2014, which I authorized and examined regarding whether he is familiar with the FINTRAC report of November 2011;*



4. The respondent add to the CTR, *among* the documents listed at paragraphs 127 and 129 of the reasons, those of which Ms. Terrier is the author and those that she had in her possession while processing the applicant's file;
5. The applicant is authorized to file an additional affidavit to introduce into evidence the documents listed at paragraphs 127 and 129 of the grounds that were not included in the CTR and that he considers relevant to support the grounds raised in his application for judicial review, and specifically the allegations regarding apprehension of bias and breaches of procedural fairness;
6. *Without costs.*

*Application granted.*

#### Footnotes

- 1 In an order issued on November 4, 2014, Justice Noël ordered the case to proceed via case management and further to an order dated December 4, 2014, I was appointed as case management judge in this proceeding by the Chief Justice.

2004 FC 584, 2004 CF 584  
Federal Court

Stanfield v. Minister of National Revenue

2004 CarswellNat 1132, 2004 CarswellNat 2600, 2004 FC 584, 2004 CF 584, [2004] 3 C.T.C. 125, [2004] F.C.J. No. 719, 130 A.C.W.S. (3d) 917, 2004 D.T.C. 6419, 255 F.T.R. 240

**Hugh Stanfield, Greta Anderson, Robert Anderson, Donald Apolczer, Carol L. Apolczer, James C. Ayearst, Elizabeth Joan Ayearst, Christine Banville, Brent Beyak, David G. Blissett, James L. Brady, Keith Brooke, George Burden, Donald Carey, Patricia Carpenter, Alan Carpenter, Maria Clarke, Kenneth Clarke, Julia S. Cundliffe, Kate A Davis, Larry Davis, Allan De Haan, Herb Demars, Terrance Dunford, Irvine J. Dyck, Norma Farenick, Stephan Fralick, Renee Gallant, Roy Gallant, Mary Gelpke, Paul Gelpke, Dianne Germain, Ben Goertzen, Martha Goertzen, Peter Graboski, Frank Graf, Gary H. Grueter, David R. Hackett, Eric R. Harrison, Kenneth Allan Hay, John A. Higgins, Geoffrey Hilliard, William Johnson, Peter Leger, Edna L. Lindal, Robert Lindal, Wayne Garry Martin, Ed Macintosh, Robert Mcginn, Terence Meadows, Robert Naber, Edith Nelson, Garth L. Nelson, Glenn Parker, John L. Parsons, Helen Parsons, Danny Pawlachuk, Joseph Pennimpede, Irene Pennimpede, Brenda Quattrin, Garry Reimer, Neil Reinhart, Glen Robbins, Luc Roberge, Joan Ellen Sabourin, Paul Wyatt Sabourin, Mark Sampson, Susan Scott, Philip Scott, Michael Slade, Kazik Smilowski, Frances Smilowski, Candice Stanfield, Seona Stephen, John G. Stephen, Gregory Stevens, Jennifer Stevens, Roger G. Stogre, Brian E. Stoutenburg, Lesley Suggitt, James H. Suggitt, Scott Thomson, Allan Tolsma, Tom Tolsma, Agnes Dorothy Tolsma, Andrew Trojner, Mary Trojner, Jim R. Trojner, George H. Wadsworth, Sharon Wadsworth, Glenys Whelan, Earl Wilkes, David J. Williams, Mildred Williamson, Kerry Wilson, Harvey Yarn, David Zevick, Preben Andersen, Daniel M. Arrigo, Robert P. Blair, Stephen P. Burke, Brent Carlson, Fiona Douglas-Crampton, Helen Fadden, Reid Frederick, Edgar Giesbrecht, John Gordon, Gary Hammer, John F. Heathe, Judith A. Kostuk, Ron A. Krowchuk, Larry Ledoux, Penny Ledoux, Ernest Reimer, Laurie Reimer and Maxwell Thompson, Applicants and The Minister of National Revenue, Respondent**

Hargrave Prothonotary

Heard: February 3, 2003

Judgment: April 20, 2004

Docket: T-1554-02

Counsel: Mr. Edwin G. Kroft, Mr. Elizabeth Junkin for Applicants  
Mr. Robert H. Carvalho for Respondent

***Hargrave Prothonotary:***

1 On 17 August 2002 the Minister of National Revenue (the "MNR"), had become concerned about what are characterized as "tax loss arrangements", being in the nature of currency and commodity transactions, spanning a year end, upon which various taxpayers had claimed losses. The MNR therefore sent to the Applicant, Hugh Stanfield, demand in the form of a questionnaire under cover of a letter dated 27 August 2002, the letter containing the statement:

Please be advised that a criminal investigation regarding the promotion of transactions of the type claimed on your income tax return has been undertaken. You are not under investigation at the present time but we wish to advise you that any information submitted may be provided to our Investigations Division for review.

The letter did not say that the recipient would never be under investigation. This uncertainty concerned Mr. Stanfield, who wondered why he should hand over information to the Minister if he was in fact under investigation. He was concerned enough that he sought review of the Minister's demand.

2 Mr. Stanfield, in due course, was joined by other concerned taxpayers who now make up the Applicants in this judicial review proceeding. The proceeding is for a declaration that the letter requesting information is invalid or unlawful and that the Minister be prohibited or restrained from taking any action or proceedings against the Applicants for failure to respond to the 27 August 2002 letter.

3 The Applicants' position is based upon *R. v. Jarvis*, [2002] 3 S.C.R. 757 (S.C.C.), the effect of which is summed up by Justices Iacobucci and Major, at pages 765-766:

Ultimately, we conclude that compliance audits and tax evasion investigations must be treated differently. While taxpayers are statutorily bound to co-operate with CCRA auditors for tax assessment purposes (which may result in the application of regulatory penalties), there is an adversarial relationship that crystallizes between the taxpayer and the tax officials when the predominant purpose of an official's inquiry is the determination of penal liability. When the officials exercise this authority, constitutional protections against self-incrimination prohibit CCRA officials who are investigating ITA offences from having recourse to the powerful inspection and requirement tools in ss. 231.1(1) and 231.2(1). Rather, CCRA officials who

exercise the authority to conduct such investigations must seek search warrants in furtherance of their investigation.

In essence, taxpayers must cooperate with Canada Customs and Revenue Agency (the "CCRA") audits for tax assessment purposes, even though the result may be a regulatory penalty, but an adversarial relationship crystallizes when the predominant purpose of the inquiry is the determination of a penal liability: when this line is crossed the CCRA no longer has recourse to inspection and requirement procedures under the *Income Tax Act*, but must obtain search warrants in order to further their investigation.

4 On the present motion the Applicants seek additional documents on which to cross-examine further on an affidavit sworn on behalf of the Crown and that the Crown's deponent re-attend for further cross-examination to answer questions already asked and to answer proper questions arising out of any additional documents which are ordered produced.

5 The result of this motion, based upon the *Jarvis* case and the law is mixed success. In order to demonstrate the route to rulings for and against the Applicants I begin with background commencing in the spring of 1999, for there are many events, well before a formal delivery of a file by the Audit branch of the CCRA to the Investigations Division, which might bear on a crystallization of an adversarial situation and preclude information gathering under sections 231.1(1) and 231.2(1) of the *Income Tax Act*, forcing the CCRA Investigations to proceed by way of search warrant in order to gather information for prosecution purposes.

## **Background**

6 The submissions of the Applicants are based on events going back to tax loss arrangements in 1998. The involvement of the Respondent's witness, Ms. Deanna Pumple, the deponent of a 31 October 2002 affidavit which is relied upon by the Minister in opposing the judicial review application, is as an auditor. Ms. Pumple worked with the Tax Avoidance Division of the Verification and Enforcement Division of CCRA, which is apparently an audit section. The initial audit related to a 1998 tax loss arrangement referred to the Union Cal Trading Joint Ventures which were, as I have already indicated, currency and commodity transactions straddling a year end, are described by Ms. Pumple as vehicles to realize losses and defer recognition of income. She audited about three quarters of the Applicants.

7 Apparently because of the connection between 1998 tax loss arrangements and 1999 tax returns, Ms. Pumple decided, sometime in the first part of 2000, to review the tax returns of those Applicants whom she was auditing, for the 1999 taxation year. This subsequently became a national project, rather than merely one done by Ms. Pumple in the Vancouver Island taxation services office. Thus other CCRA auditors also became involved in reviewing the 1999 tax returns of the Applicants.

8 In April 2001 members of the CCRA Investigations Division met with the auditors from the Tax Avoidance Division, who included Ms. Pumple, to share information. As a result of a request by the Investigations Division Ms. Pumple referred various of her files to them and created a chronology for their assistance. At about this point the Investigations Division instructed the Tax Avoidance Division to cease auditing the 1998 and 1999 returns.

9 The Investigations Division was involved for the purpose of evaluating whether the Applicants were involved in criminal activities. From time to time Ms. Pumple received requests for and forwarded additional information to the Investigations Division. This seems to have been an ongoing process, with Ms. Pumple from time to time taking or seeking directions from the Investigations Division.

10 Some time after April of 2001 a Mr. Kuhn, of Tax Avoidance in Vancouver, was seconded to work for the Investigations Division in Vancouver. He was a member of what was called the Global Prosperity Group Team in the Investigations Division, working directly with its members, although he held himself out as belonging to Tax Avoidance. From the transcript of the examination of Ms. Pumple it is clear that he at least acted as the liaison person between the Tax Avoidance and the Investigations groups.

11 About a year after the Investigations group became involved, March 2002, the Investigations Division told the Tax Avoidance Division to recommence the audit for 1998, the result being a Notice of Reassessment for 1998.

12 In July 2002 Investigations told Tax Avoidance to recommence auditing the Applicants for their 1999 and 2000 taxation years. This resulted in Ms. Pumple and various other Tax Avoidance officers sending out letters and attached questionnaires, the subject of the present judicial review application.

13 Between June 2002 and September 2002 there was a regular exchange of information between Investigations and Tax Avoidance. Examples of the exchange of information show up in a series of emails from Mr. Kuhn, the liaison person between Investigations and Tax Avoidance, instructing CCRA officers as to the audit approach to be taken upon resumption of audit activities. As an example of the interrelationship of the two groups, at the time of the cross-examination of Ms. Pumple, in January of 2003, the tax returns of many of the Applicants were still in the possession of Investigations.

14 The Applicants set out in the material that Ms. Pumple did not always have personal knowledge and this is reasonable enough given the magnitude of the project. To inform herself Ms. Pumple communicated with other Tax Avoidance officers. She determined where various of the tax returns were located. However she did not make any inquiries of the head office of the CCRA or speak with anyone at Investigations. Counsel for the Applicants goes on to

make a case that Ms. Pumple had really only limited knowledge, for she knew nothing about internal communication within the CCRA, the communications path between head office and Investigations, the concept of a tax shelter, and the role of Investigations. She was unable to speak for Investigations. Further, Ms. Pumple did not prepare the letter or questionnaire at issue, although she did sign the letter. The discovery does indicate that Investigations had some input in drafting the letter, specifically I think the advice of the criminal investigation and that the recipient was not at that point under investigation. From the point of view of the Applicants, the evidence of Ms. Pumple and the documents that she brought with her to the cross-examination do not, in their view, make clear the predominant purpose of the investigation itself, the concept of predominant purpose demonstrating, in some instances, in the crystallization of an adversarial relationship. Thus the Applicants submit they are unable to determine both whether an adversarial situation has crystalized and the clear line between provision of information in an audit setting and the right to refuse information, except as against a search warrant, in an investigation setting.

15 Ms. Pumple also refused to answer a number of questions put to her on cross-examination as irrelevant.

16 The result of the refusals as to documents and questions is the present motion. I will turn first to the general request for documents contained in the Direction, to Ms. Pumple, to Attend.

## **Consideration**

### ***Production of Documents by way of Direction to Attend***

17 The Applicants refer to a Direction to Attend pursuant to Rule 91, served on Ms. Pumple, which requests that she bring with her an exceedingly broad range of documents, including:

all documents and records, including but not limited to electronic documents, in the possession of the Respondent with respect to or mentioning any Applicant for the taxation years affected by this Application, including, but not limited to:...

18 The particular documents which are then outlined, but in very general terms, extend to virtually all documents related to this matter held by Canada Customs and Revenue Agency, including those held by the Investigations Division. Certainly, on its face, the Rule 91 Direction to Attend (as elaborated upon in Rule 94) is broad in that on cross-examination the witness must bring "... all documents and other material in that person's possession, power or control that are relevant...". However, Rule 91 may not be used to expand production of documents on judicial review so that the process becomes similar to discovery of documents in an action. Certainly a court must have before it sufficient documents to provide an adequate factual record. It is in the interest of justice that production not be limited so as to handicap an applicant. However production of documents in a judicial review setting ought not to be such as to expand the intent of judicial review

as a relatively speedy remedy. Rather, production is limited to what is required by relevancy, in the context of judicial review and as set out in the case law.

19 By way of example, even in the case of an action, where there is full discovery of all relevant and produceable documents, such a broad request for documents, say that contain in a *subpoena duces tecum*, may come close to abusing the process of the Court.

20 Examining further this concept of too broad a production of documents being abuse of process, I would refer to the views of Mr. Justice MacKay in *Merck & Co. v. Apotex Inc.* (1998), 80 C.P.R. (3d) 103 (Fed. T.D.), at 107-108. There it concerned Mr. Justice MacKay that by describing and seeking documents too generally and too broadly in the *subpoena duces tecum*, a party was in effect on a fishing expedition. This use of a *subpoena duces tecum* was inappropriate. In *Merck* Mr. Justice MacKay quashed two subpoenas which sought a range of documents similar to the range sought this instance. He required the documents be both discreetly described and significant to the issues before the Court in order "... to avoid further 'sweeps' of the records" (page 108).

21 Mr. Justice Pelletier, as he then was, in *Bristol-Myers Squibb Co. v. Canada (Attorney General)* (2002), 18 C.P.R. (4th) 353 (Fed. T.D.), a judicial review matter, was not about to allow the use of a Rule 91 Direction to Attend to expand production of documents beyond what was allowed pursuant to Rule 317, that is the documents from the tribunal.

22 Just as in *Merck & Co. v. Apotex Inc.* a broadly worded *subpoena duces tecum* cannot be used to expand production of documents beyond all reason so may a Rule 91 Direction to Attend not be used in order to obtain documents beyond what is required on judicial review and all the more so given the reasoning and conclusion in *Bristol-Myers Squibb (supra)*. In short, a Rule 91 Direction to Attend cannot be used to obtain full discovery of documents as is the clear intent in this instance. Of course, as Mr. Justice MacKay went on to point out in *Merck & Co. v. Apotex Inc.* (supra) that his denial of a general production of documents did not prevent the Plaintiff from making a further subpoena seeking documents described with greater particularity. Keeping in mind, as I have said, that production is limited to what is required by relevancy, determined in the context of judicial review and by the case law, the present denial of wholesale production of documents, by way of a Direction to Attend, does not bar the Applicants from making more limited and specific requests for documents.

### ***Relevance and the Scope of Cross-Examination***

23 The concept of relevancy is more limited in judicial review than it is in an action. For this proposition and as a basic survey of the principles of cross-examination, I would refer to *Merck Frosst Canada Inc. v. Canada (Minister of Health)* (1997), 80 C.P.R. (3d) 550 (Fed. T.D.). In that case, at page 555, Mr. Justice Hugessen began with the proposition that cross-examination is not examination for discovery: it differs from examination for discovery in various particular aspects which he sets out as:

- a) the person examined is a witness not a party;
- b) answers given are evidence not admissions;
- c) absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself;
- d) production of documents can only be required on the same basis as for any other witness, i.e. if the witness has the custody or control of the document;
- e) the rules of relevance are more limited.

At issue in *Merck Frosst* was relevance, an important aspect in the present instance. Therefore it is useful to consider what Mr. Justice Hugessen went on to say:

Since the objections which have given rise to the motions before me are virtually all based upon relevance, I turn, at once, to that subject.

For present purposes, I think it is useful to look at relevance as being of two sorts: formal relevance and legal relevance.

Formal relevance is determined by reference to the issues of fact which separate the parties. In an action those issues are defined by the pleadings, but in an application for judicial review, where there are no pleadings (the notice of motion itself being required to set out only the legal as opposed to the factual grounds for seeking review), the issues are defined by the affidavits which are filed by the parties. Thus, cross-examination of the deponents of an affidavit is limited to those facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding.

Over and above formal relevance, however, questions on cross-examination must also meet the requirement of legal relevance. Even when a fact has been sworn to in the proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted.

Important principles arise out of these passages. First, formal relevance is based on issues of fact, defined by pleadings in an action and by affidavits in judicial review; second, Mr. Justice Hugessen pointed out that in his view, cross-examination on an affidavit "... is limited to those facts sworn to be the deponent and the deponent of any other affidavits filed in the proceeding.", in essence requiring a factual basis for cross-examination, obtainable from any filed affidavit; and third, legal relevance governs in determining whether the remedy sought is available.

24 Whether cross-examination is strictly limited to the facts sworn to in the total of the affidavits filed in a matter is of interest. Certainly, Mr. Justice Muldoon, in *Swing Paints Ltd. v.*



*Minwax Co.*, [1984] 2 F.C. 521 (Fed. T.D.), at 530-531, took a more expansive view, citing sound authority. He felt that the deponent of an affidavit ought not to be able to hide behind skilfully sculpted evidence, but the cross-examination should extend beyond the four corners of an affidavit to encompass "Matters pertinent to the documentation of the issue in respect of which the affidavit was filed." (*ibid* page 531), that it should extend to collateral questions arising from answers and also matters upon which the witness could fairly be expected to have knowledge, relating to the principal issue in the proceeding, touched upon by the affidavit:

The person making the affidavit must submit himself to cross-examination not only on matters specifically set forth in his affidavit, but also to those collateral questions which arise from his answers. Indeed he should answer all questions, upon which he can be fairly expected to have knowledge, without being evasive, which relate to the principal issue in the proceeding upon which his affidavit touches if it does.

Also on point is *Monsanto Canada Inc. v. Novopharm Ltd.* (1996), 118 F.T.R. 92 (Fed. T.D.) where, at pages 93 and 94, Mr. Justice MacKay adopted a passage from a decision of Madam Justice Reed, in *Castlemore Marketing Inc. v. Intercontinental Trade & Finance Corp.* [1996 CarswellNat 181 (Fed. T.D.)] an unreported 16 February 1996 decision in file T-2498-95:

The applicable tests to determine what questions should be answered on cross-examinations on affidavits are set out in *Upjohn Inter-American Corporation v. Canada (Minister of National Health and Welfare and Attorney General) et al.* (1987), 10 F.T.R. 37. See also *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (No. 2)* (1972), 6 C.P.R. (2d) 169 (F.C.T.D.). An affiant is required to answer questions on matters which have been set out in the affidavit as well as any collateral questions arising from his or her initial answers. In *Bally-Midway Mfg. v. M.J.Z. Electronics Ltd.* (1984), 75 C.P.R. (2d) 160, Mr. Justice Dubé stated that cross-examinations on affidavits are confined to 'the issues relevant to the interlocutory injunction and/or all allegations contained in the affidavit'. In **Weight Watchers** (*supra*), Mr. Justice Heald relied upon jurisprudence which held that a person cross-examining on an affidavit was not confined to the area within the four corners of the affidavit but could cover any matter relevant to the determination of the issue in respect of which the affidavit was filed. In addition to being relevant, the question of course must not be of such a general nature that it cannot be intelligently answered, and the Court will exercise its discretion and disallow any question which it considers in the nature of a 'fishing expedition'

This clearly extends cross-examination not only beyond the four corners of the affidavit, but also to questions collateral to answers and to matters "relevant to the issue in respect of which the affidavit was filed": it is also in line with *Swing Paint* (*supra*).

### ***Obligations of the Witness to Inform Herself or Himself***

25 A further point which I should touch upon is whether the deponent of an affidavit may be required to inform herself or himself for the purpose of cross-examination. Certainly Mr. Justice Hugessen, in *Merck Frosst (supra)* was of the view that the person examined, being a witness and a party, could not be required to inform himself or herself. Yet in *Bland v. Canada (National Capital Commission)* (1989), 29 F.T.R. 232 (Fed. T.D.) Mr. Justice Martin, after canvassing a large section of the case law, including contrary case law in *Laflamme Fourrures (Trois Rivières) Inc. v. Laflamme Fourrures Inc.* (1986), 3 F.T.R. 48 (Fed. T.D.), a decision of Mr. Justice Walsh, did send the witness in *Bland* out to inform himself. This approach is consistent with that of Mr. Justice Nadon, as he then was, in *Merck & Co. v. Apotex Inc.* (1996), 110 F.T.R. 155 (Fed. T.D.) that "... a deponent has a duty to inform himself on matters in issue which are within his knowledge or means of knowledge." (page 149).

26 Moreover, and this still deals with a witness obtaining further information, the deponent of an affidavit may be required to produce documents, for cross-examination, in addition to those referred to in an affidavit, but with a limitation that cross-examination upon an affidavit will not be as free ranging as examination for discovery, nor will production of documents be as broad as on examination for discovery:

In my view, the cross-examination upon an affidavit in support of a motion for an interlocutory injunction ought not to be as wide-ranging as an examination for discovery. In the latter proceeding the witness must inform himself, provide answers and produce documents relevant to all the issues raised in the pleadings. The cross-examination upon an affidavit, however, must be confined to the issues relevant to the interlocutory injunction and/or all the allegations contained in the affidavit. In other words, the affiant must answer questions and produce documents relating to all the issues relevant to the interlocutory motion, plus questions on all the other statements he may have volunteered within the four corners of his affidavit. The cross-examiner cannot use the affidavit as a vehicle to obtain all the information and all the documents that might be useful at trial. (*Bally-Midway Manufacturing Co. v. M.J.Z. Electronics Ltd.* (1983) 75 C.P.R. (2d) 160 (F.C.T.D.)) [Emphasis added]

Here I recognize that *Bally-Midway Manufacturing Co. v. M.J.Z. Electronics Ltd.* [(1983), 75 C.P.R. (2d) 160 (Fed. T.D.)] involved cross-examination on an affidavit in a proceeding in an action, however it demonstrates that cross-examination on an affidavit can go to documents beyond the affidavit, although it is narrower than an examination for discovery.

27 There are differences in the approach taken to cross-examination and the breadth of production of documents on cross-examination in many of the reported cases. It may well be that from time to time the nature of the proceeding will mandate slightly fuller production of documents and of answers: here I have in mind particularly where the witness is really an agent of a party. To elaborate, to allow a lower echelon witness, who has very little knowledge of concepts, of

what happened and of what is at stake, to hide behind a narrow affidavit, is improper. To allow such would encourage litigants, who in effect are relying upon the witness as agent, to produce a marginal witness. For example corporate and government litigants might be encouraged to produce as a deponent a witness with limited knowledge and involvement. To countenance such would not only foster injustice, but also waste the time and money of all concerned, including litigants, the public and the Court. However I shall now turn to a current decision which has expanded the scope of cross-examination on an affidavit.

28 The final case to which I shall refer, as to the scope of cross-examination and production of documents, is *Stella Jones Inc. v. Hawknet Ltd.* [2000 CarswellNat 3006 (Fed. C.A.)] an unreported 6 December 2000 decision of the Federal Court of Appeal, docket A-52-00. At trial the judge took a very limited approach to cross-examination on an affidavit and production of documents, essentially limiting such to cross-examination within the affidavit and to a consideration of only the documents which were attached to the affidavit. The Court of Appeal held that previous dealings were relevant and that the deponent might be cross-examined on information which he could have obtained from a co-defendant. The Court of Appeal also required the production of booking notes and bills of lading with respect to previous shipments which, on a reading of the trial decision, unreported 21 January 2000 in docket T-1942-98, were not mentioned in the affidavit material and production of which was denied by the Motions Judge. In essence what the Court of Appeal has done in *Stella Jones* is not only to broaden cross-examination on an affidavit so that it may extend to relevant matters well beyond the four corners of the affidavit, but also to broaden production of documents by requiring production of material related to previous dealings, being relevant documents clearly outside of the affidavit material itself. The Court of Appeal was of the view that it was not open to the motions judge to exclude the possibility that previous dealings might shed relevant light. Of course cross-examination and document production arising out of cross-examination are bounded by what is relevant, including relevance as discussed by Mr. Justice Hugessen in *Merck Frosst (supra)* and by the Court of Appeal in *Stella Jones Inc. (supra)*.

29 I put emphasis on the Court of Appeal decision in *Stella Jones Inc.* because I do not accept the argument of Crown that in requiring answers or documents I should not go back in time beyond the 27 August 2002 letter, or perhaps not earlier than 6 June 2002, when there was both some sort of decision apparently made, by the Investigations Division, that the audit process ought to be recommenced, for to take a more limited approach would deny the consideration of all relevant factors as mandated by the Supreme Court in *Jarvis (supra)*. I also note that in June of 2002 the CCRA contemplated a form of the 27 August 2002 letter. Further, the evidence on this motion indicates that at the time of the cross-examination of Ms. Pumple, in January of 2003, material related to some of the Applicants had not been returned to the Audit Division, but was still with the Investigations Division.

### ***Minister's Predominant Purpose***

30 Before turning to the requests for individual documents, answers to specific questions and the matter of re-attendance for further cross-examination, I should consider the nature of the predominant purpose test referred to in *Jarvis* (*supra*). The propriety of a requested document or answer may depend on their relevancy in the context of the predominant purpose test. More specifically, the Supreme Court of Canada has suggested an open-ended list of factors which may go to indicate whether the line, between a cooperative audit for tax assessment purposes and the crystallization of an adversarial relationship when the predominant purpose of an investigation is a determination of penal liability, has been crossed.

31 In *Jarvis* the Supreme Court of Canada speaks of the necessary balance required between the principle against self-crimination and the need to make all evidence available in order to do fundamental justice, in essence a tension between privacy and state interest (see pages 795 and 797). In *Jarvis*, just as in the present instance, a liberty issue is at stake, there being no presumption of confidentiality, for once an auditor has information or documents, that material may go to the Investigations Division.

32 The predominant purpose test is not satisfied by a mere suspicion raised by minor contact between auditor and investigator: that does not signify a cross of the Rubicon between the section 231 requirement that documents be produced to an auditor and a clear adversarial relationship between the taxpayer and the Minister.

33 *Jarvis* teaches that there is no crystallization until there has been a formal referral of a file to the Investigations Division, however in the present instance, there was such a referral followed by a return of the file to the Audit Division, where upon the Audit Division sent out the 27 July 2002 letter to which was attached the very pointed investigation type questionnaire, raising more than a mere suspicion relating to the predominant purpose.

34 Certainly, applying *Jarvis*, where a file has been sent to the Investigations Division, that is a factor going to define the relationship between the taxpayer and the CCRA, just as is the reason for the return of the file from the Investigations Division to the Audit Division. As the Supreme Court of Canada observed at page 806 in *Jarvis*, one must consider whether the return of the file is because the Investigations Division has declined to take part on the basis there should merely be an audit, or because there is another agenda, that of allowing the Audit Division to use their easy entry into the taxpayer's records to obtain evidence to support a later prosecution and penal liability. Included in the factors to examine which may bear on determination of the one dominant purpose of the CCRA are:

- (a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation *could have* been made?

- (b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
- (c) Had the auditor transferred his or her files and materials to the investigators?
- (d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
- (e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
- (f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?
- (g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation? [Jarvis at 806-807]

This list contains a broad range of factors and moreover is, as I have said, open-ended.

35 If a question or a document might be relevant and proper on cross-examination, using my earlier analysis, and might reasonably go to establishing the predominant purpose of the Minister's inquiry, such questions are answerable and such documents are produceable. Relevant and produceable questions and documents may, on the basis of the Federal Court of Appeal decision in *Stella Jones Inc. (supra)*, include those which bear on the earlier dealings or relationships between the Applicants and the Minister and also the relationship, from time to time, between the Investigations Division and the Audit Division.

36 Just as there may be no clear and absolute line between a CCRA investigation and a CCRA audit there is, in the present instance, no clear and absolute evidence indicating whether the predominant purpose has gone from an initial audit intent, to an investigative and penal intent and whether it reverted to an audit purpose when the file subsequently went from the Investigations Division to the Audit Division, for there is no clear indication that the audit process will be the final disposition. As I read the transcript of the cross-examination of Ms. Pumple, who signed the 27 August 2002 letter, it is, as set out in that letter, that the Applicants are not presently under investigation, although "... a criminal investigation regarding the promotion of transactions of the type claimed on your income tax return has been undertaken.". The 27 August 2002 letter is thus far from an assurance that the Applicants are not at risk of a very real criminal investigation. Moreover, the cross-examination of Ms. Pumple establishes that she had no direct personal knowledge that the Applicants were not under criminal investigation and that she had made no inquiries of the

Investigations Division personnel who might have personal or direct knowledge as to what the Investigations Division intended of the criminal investigation.

37 Here I accept various indicia, as submitted by counsel for the Applicants, that those individuals reasonably believed that they had been and perhaps continue to be under investigation by the Investigations Division for a number of reasons including:

1. The files of the Applicants went to the Investigations Division in April of 2001.
2. From that time until at least January of 2003 there was regular contact between the Audit Division and the Investigations Division as to the 1998 through 2001 taxation years.
3. An Audit Division's employee, Mr. Kuhn, worked with the Investigations Division for some time, although still maintaining, or holding himself out as a member of the Audit Division.
4. In March 2002 the Investigations Division instructed the Audit Division to recommence gathering information for the 1998 taxation year.
5. In July of 2002 the Investigations Division instructed the Audit Division to recommence gathering information in respect of the 1999 and 2000 taxation years and at that point the Audit Division sent out letters and questionnaires, the questionnaire being a point to which I will shortly return.
6. Between June of 2002 and September of 2002 there was a regular exchange of information and emails between the Investigations Division and the Audit Division as to the approach to be taken on resumption of audit activities.

All of this reasonably raises alarm, on the part of the Applicants, that they may still be under investigation, or at least that there may be a clearly contemplated investigation and that for practical purposes there has been a crystallization of an adversarial relationship between the applicant taxpayers and the tax officials, with the predominant purpose of the inquiry being the determination of penal liability, once documents have been gathered from the Applicants by the Audit Division through the so-called cooperative approach with the taxpayers.

38 Counsel for the Applicants urged a thoughtful reading of the questionnaire sent out by the CCRA with the 27 August 2002 letter. The letter itself calls upon the taxpayers to produce a very thorough and comprehensive package of documents and information. In effect it is a letter requesting books and records: the questionnaire clearly goes far beyond being a request for books and records, but seeks a good deal of information which either was clearly not covered in the extensive production request in the letter and indeed, looks for information which one might be hard pressed to justify merely on the basis of an audit. A thoughtful reading of the questionnaire

can easily lead one to the conclusion that the questionnaire was not something dictated by the needs of and drafted by the Audit Division, but rather is a far more pointed and searching request for information which could well have bearing on the criminal investigation. Finally, and this has direct bearing on the provision of answers and production of documents well before June of 2002, Ms. Pumple did agree, in cross-examination, that the review by the CCRA of the 1998 taxation year was connected to an ongoing review of the taxation years 1999 through 2001, and that investigations undertaken by the CCRA dealt not only with the 1998 taxation year, but also with the 1999 through 2001 taxation years. Indeed, it is fair to say that investigations as to the 1998 taxation year were relevant to the subsequent three taxation years, all being a part of one investigation over a number of years.

### *Applicants' Requests for Documents*

39 *Question 50* in the 13 January 2003 transcript of the cross-examination of Ms. Pumple refers to a so-called principal file sought by way of the Direction to Attend. As I have indicated, the request in the Direction to Attend is too broad. The result could, in itself, be both a fishing expedition and a part of a full discovery of documents. However the cross-examination then proceeded, with the marking of a document at question 53 called "Unioncal Trading Joint Venture Binder Index", a document prepared by Ms. Pumple which describes what is contained in the principal file. The Defendant has refused to produce the principal file, even though acknowledging that the principal file is relevant to the extent of the 1999 and 2000 taxation years, but denying its relevance with regard to the 27 July 2002 letter.

40 Either the document is relevant or it is not: one does not measure relevance in degrees along a scale. The file described by the index which has been produced may well provide background and a basis for the development of and the actual letter of 27 July 2002, information by which to test the predominant purpose of the actions of the Minister as carried out by the CCRA. Moreover, the file requested is apparently in Ms. Pumple's filing cabinet. Its production, as a relevant bundle of documents is justified, for while it may be outside of the four corners of Ms. Pumple's affidavit, it certainly would be indicative of a course of conduct on the part of the Minister and may well have bearing on the issue the Applicants bring to the Court, including the predominant purpose of the CCRA inquiries. The so-called principal file, referred to in question 50 and following, is to be produced.

41 *Question 58* of the 20 January 2003 transcript is the culmination of answer 52, a babbled and somewhat incomprehensible answer by a discombobulated witness unsure of both what she knew and whether she should tell what she knows. The answer at question 52 certainly establishes a meeting by Ms. Pumple with the Investigations Division in April of 2001. Counsel for the Respondent says the result was a cease and desist direction to the Audit Division by the Investigations Division, which continued until June 2002.

42 However, answer 52 also raises the likelihood that a taxpayer, involved in one of the tax loss arrangements had, with her lawyer, come to the Investigations Branch:

Q So Investigations asked you to refer to them. Do you know how Investigations became aware of this project?

A I have some - I have some knowledge.

Q Can you please tell us about that?

A I hope I'm allowed to say - I mean I don't know, it - as far as I understand it, two things probably precipitated their involvement. But the one thing that I actually have direct knowledge of is that an individual who was involved in one of the Unioncal Trading Joint Ventures came forward with her lawyer to - to Investigations. And so this woman was involved in - in one of the Unioncal Trading Joint Ventures, and that was the tie-in that - enough of a tie-in - I'm speculating on what - what Investigations did there, so I probably shouldn't say that. But that's - that precipitated them finding that, oh, right, Victoria has some Unioncal Trading Joint Ventures files, and - and so does Penticton. I think those were the two. And then - then Investigations said after they looked at what they got, I assume - I mean I'm assuming all sorts of things here. But it's logical to assume that they looked at the information that was provided to them, saw a connection and said, right, we had - we had a meeting and they said, write up what you know.

The reference to "Unioncal Trading Joint Ventures" is apparently what the CCRA called the present grouped tax loss arrangements.

43 There are minutes of the April 2001 meeting, Ms. Pumple having a copy but not producing it. While at this point there is nothing to indicate that there were grounds to lay charges, the action of transferring the files to the Investigations Division does fall within one of the factors to consider suggested by the Supreme Court of Canada in *Jarvis*.

44 Production of this material was initially denied on the grounds that Ms. Pumple was not required to produce anything or to inform herself of anything. However, on the case law, that is not the situation (*supra*, paragraphs 25 through 29) and all the more so in that Ms. Pumple has the minutes in her possession. On the basis of the case law which I have canvassed, including as to production of material relating to previous dealings, the minutes should be produced.

45 *Question 67* of the 20 January 2003 transcript involves a write up of what Ms. Pumple thought she knew when she transferred the audit files to the Investigations Division. I do not see that some sort of a covering memorandum, clearly given by a witness who, from her testimony, seems to have little or no idea what was going on, is anything more than a fishing expedition, for the Applicants have established that the files were, at that point, transferred from the Audit



Division to the Investigations Division. Moreover, Ms. Pumple's view of what might or might not be happening has no relevance as to the intent of the Minister evidenced by whatever Investigations Division decided to do. The referral document, question 67, need not be produced.

46 *Questions 114, 128 and 136*, from the 20 January 2003 transcript, deal with so-called green light memoranda, being memoranda from the Investigations Division to the Audit Division, if I understand it correctly, to go ahead with an audit and the issuance of various letters. Some of that material apparently relates to the carrying forward of losses, however this line of questioning leads toward and culminates in question and answer 136, establishing that various audits and notices of reassessment being sent to Mr. Stanfield.

47 Here we have a situation specifically touched upon by the Supreme Court of Canada in *Jarvis*, the apparent return of the files from the Investigations Division to the Audit Division. The directives from the Investigations Division could conceivably show an intent by the investigators to use the auditors as their agents in the collection of material. This is a reasonable possibility given the pointed and searching request for information which, I have already noted, could well have bearing on the criminal investigation. It is material which should be examined in order to go toward the determination of the predominant purpose of the Minister. What I will refer to generally as the directives of the Investigations Division to the Audit Division to proceed, referred to in questions 114, 128 and 136, are to be produced.

48 *Question 595* of the 20 January 2003 transcript refers to chronologies prepared by various auditors of the Applicants, early in 2001, being information, judging from the lead up to question 595, which might relate to the investigation by the Investigations Division. This material is similar to that sought and which I have denied, in question 67. It need not be produced.

49 *At question 793* of the 20 January 2003 transcript at issue is discussion of a meeting of 16 January 2003 and the production of minutes or other documents relating to that meeting. The essence of the objection to production is that a 16 January 2003 meeting cannot possibly shed any light on the 27 August 2002 letter and that the meeting was to discuss an upcoming statutory bar. The second branch of the objection may have some validity. However the Supreme Court, in *Jarvis*, intends that one look at all of the surrounding factors and it may be that the meeting did deal with information being collected by the Audit Division and again I refer to the probing questionnaire sent out by the Audit Division, indeed a questionnaire which would seem to taint what has taken and is taking place. The question 793 material is to be produced.

### ***Applicants' Request for Answers***

50 All of the questions to which the Applicants seek answers arise out of the 20 January, 2003 transcript.

51 *Questions 53 to 55* deal with a meeting with the Investigations Division at their request, in April 2001. At issue is the date of the meeting. I have considered the submissions of counsel and have re-read the passages at issue and the questions leading there. I do not see either formal relevance or legal relevance, as discussed by Mr. Justice Hugessen in *Merck Frosst Canada (supra)*. The actual date of the April 2001 meeting is immaterial and need not be provided.

52 *Question 69* deals with a different aspect of the April 2001 meeting. From the questions and answers leading up to that question, which is whether anyone from head office was involved in the meeting, it is clear that counsel for the Applicants had become frustrated by the apparent lack of knowledge of Ms. Pumple and of her professed ignorance as to what her job was, and therefore finally asked whether there was anyone from head office present, someone who perhaps could give a more lucid account of what the meeting was about. Thus the request for the name of someone who was at the meeting who might actually know what happened.

53 There has certainly never been any property in witnesses and that is the tenor of Mr. Justice Berger's discussion as to naming witnesses in *Ansley v. Ansley*, [1973] 5 W.W.R. 181 (B.C. S.C.), the historic aspects of decision being interesting in that the decision predates the codification of the point in the *British Columbia Rules of Practice*. There is a similar codification in Federal Court Rule 240 requiring the provision of names and addresses of witnesses on examination for discovery. But of course Rule 240 applies only to examination for discovery in actions, not cross-examination on affidavits.

54 Somewhat more relevant is the decision of Mr. Justice Rothstein, as he then was, in *Merck Frosst Canada Inc. v. Canada (Minister of National Health & Welfare)* (1994), 75 F.T.R. 97 (Fed. T.D.), at 99, where he adopts the view that cross-examination on an affidavit must be relevant, must be fair and that "There must be a *bona fide* intention of directing the question to the issue in the proceeding or the credibility of the witness." (page 99). It may well be that counsel for the Applicants is, in this instance, trying to test the credibility of the witness who, while in attendance, seems to have no idea what happened at the meeting in April of 2001. To the contrary, counsel for the Respondent says that this is a fishing expedition. However the question goes beyond that. Counsel for the Applicants is merely trying to find out what happened at a meeting about which the witness can recall little. It is clear from the discussion of counsel, at question 69, that there is a testing of the witness going on, the witness having said that she made appropriate inquiries, but a reading of the transcript demonstrates it is increasingly less likely that she had done so. The witness does, in subsequent questions, set out who in fact was at the meeting. However, the simple, proper and relevant question is whether anyone from head office was involved and that should be answered.

55 *Questions 147 and 148* raises the issue of when the witness believed the 1999 audits had commenced. Counsel for the Applicants has the best answer he is going to obtain, from the witness,

as to when she believes the audit commenced, at questions 163 and 164. There the witness confirms that the audit was ongoing in the year 2000. The questions need not be further answered.

56 *At question 181* the issue is whether the department had made a decision to issue reassessments for the 1999 and 2000 taxation years. Counsel has an answer to that at question 182, being a negative answer.

57 *At questions 187 and 188* the issue is whether, there being an upcoming time bar, from the context I think for the 1999 taxation year, seeking waivers from the taxpayers has been considered. Here I question the relevance of the inquiry. However the witness does volunteer that no waiver has been requested. Thus the answer has already been provided.

58 *At question 199* at issue is whether the Tax Department has considered levying penalties for the 1999 year. Again, that has been answered, in the negative, at question 201.

59 *Question 207* is quite speculative, the issue being whether there was any reason why penalties would not be levied for the 1999 year. The answer by the witness is that no decision has been made. I do not see the relevance of exploring something that has not come about and seems not to be directly connected to the predominant intent, or any other aspect of this proceeding. The question need not be answered.

60 *Question 239* asks the date at which Mr. Kuhn, of the Audit Division, went over to Special Investigations. This deals with the secondment of Mr. Kuhn to the Investigations Division. Counsel for the Crown agrees, in the transcript, to provide a date for the secondment, or at least a date as close as possible. Thus an answer to the question is pending.

61 *At question 540* at issue are the names of 60 or 70 Applicants the cases of whom Mr. Kuhn might have been involved with. Here there is no relevance unless the taxpayers involved in those cases are also Applicants in the present proceeding. Counsel for the Crown goes on to agree to provide that information, to the extent that the Crown's witness is required to inform herself. All of this bears on the general conduct of the CCRA and whether it was consistent with a criminal investigation, whether an auditor was acting as an agent for the Investigations Division and bears on a conclusion as to whether the compliance audit has in reality become a criminal investigation. The question is to be answered.

62 *At question 792* counsel asks, whether at the meeting on 16 January 2003, there was any discussion as to the passage of information from the Audit Division to the Investigations Division, with the response being to the effect that whatever happened in January of 2003 is irrelevant. Yet if, for example, that topic had come up, it would certainly be relevant within the framework set out by the Supreme Court in *Jarvis*. Counsel for the Respondent suggests that this is a fishing expedition. However, it is clearly an element that would fall within *Jarvis* and is needed in order to determine the predominant purpose of the inquiry. The question is to be answered.

63 *At question 793* the issue is whether the subject of Ms. Pumple's cross-examination was discussed in the course of the 16 January 2003 meeting. Counsel for the Crown makes the point that he has not coached or discussed the cross-examination with Ms. Pumple and that I accept. I do not see the relevance of discussion by the witness, with others in her department, as to what is going on in the legal proceedings. There is a lack of relevance. The question need not be answered.

64 *At question 862* at issue is whether Ms. Pumple had any communication, as a member of a group of CCRA people dealing with the files of the Applicants, about any different path that might have been followed, as opposed to that set out in Exhibit 4, being material prepared by a Mr. Makeno. Here I see neither formal nor legal relevance. All the more so in that the question deals with a decision as to penalties which has not been made. The question need not be answered.

65 *The thrust of question 1142* is whether the names of the Applicants, all of whom are being audited for the 1999 and 2000 taxation years, came to the Audit Division by way of the Investigations Division: counsel objects to the question as irrelevant. However, counsel does get an answer at questions 1142 through 1145 to the effect that the Investigations Division, or as it is called in this instance, "Special Investigations", did not furnish any of the names of the Applicants to the Audit Division for auditing. There need be no further answer to question 1142.

### **Conclusion**

66 Success has been mixed. However it is appropriate in this instance that Ms. Pumple re-attend for further cross-examination, informing herself where that is required, for as I have pointed out a witness can neither hide behind an overly carefully drafted affidavit, nor be a proper witness, in the sense of being an agent for a large entity, without making reasonable inquiries so as to become informed. Ms. Pumple will therefore answer questions as required in these reasons and all proper questions arising both from those answers and from the documents produced.

67 In a complex cross-examination on an affidavit, just as in the case of a complex discovery, there is often need for a re-attendance, almost as a matter of course. That should not necessarily be equated with the situation involving a contrary witness, who often must re-attend at his or her own expense, although being an uninformed witness can approach that situation. All of the circumstances considered, the costs of re-attendance will be costs in the cause.

68 Success having been mixed, the costs of this motion will also be in the cause.

69 Time for the filing of the Applicants' Record is extended until 20 days after the further cross-examination has been completed.

*Motion granted in part.*