Competition Tribunal Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Canada Pipe Company*, 2003 Comp. Trib. 15
File no.: CT2002006
Registry document no.: 0030a

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

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to sections 79 and 77 of the *Competition Act;*

AND IN THE MATTER OF certain practices by Canada Pipe Company Ltd. through its Bibby Ste-Croix Division.

BETWEEN:

The Commissioner of Competition
(applicant)
(respondent on the motion)

and

Canada Pipe Company Ltd.
(respondent)
(applicant on the motion)

Dates of hearing: 20030428-30, 20030501
Member: Blanchard J. (presiding)
Date of Reasons: 20030808
Reasons signed by: Blanchard J.

REASONS AND ORDER RESPECTING CERTAIN PROVISIONS OF THE *COMPETITION TRIBUNAL RULES*

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I. INTRODUCTION

[1] Canada Pipe Company Ltd. ("Canada Pipe") brings a motion seeking relief that includes a declaration that certain provisions of the *Competition Tribunal Rules,* SOR/94-290, as amended (the "Rules"), are inoperative on the ground that they violate Canada Pipe's right to a fair hearing guaranteed by paragraph *2(e)* of the *Canadian Bill of Rights,* S.C. 1960 c. 44, reprinted in R.S.C. 1985, App. III, (the "Bill of Rights").

[2] The motion is brought in the context of an application by the Commissioner of Competition (the "Commissioner") under subsections 77(2), 79(1) and 79(2) of the *Competition Act,* R.S.C. 1985, c. C-34 (the "Act"), concerning alleged exclusive dealing and abuse of dominant position by Canada Pipe.

[3] Canada Pipe argues that its right to a fair hearing, protected by the Bill of Rights, is violated by the Commissioner's application of the Rules and/or by the content of the Rules. Canada Pipe alleges that the Commissioner has provided inadequate disclosure of documents and witness will-say statements and has improperly asserted public interest privilege over documents and information. Canada Pipe also seeks relief limiting the Commissioner's further use of section 11 of the Act, which gives him the power to apply for *ex parte* orders to examine under oath any person who has information relevant to his inquiry.

[4] In a preliminary motion, the Commissioner seeks to strike two affidavits filed by Canada Pipe in support of its motion: one by Mr. James M. Proctor II, an officer of MeWane, Inc., Canada Pipe's parent corporation, sworn on January 31, 2003, and the other by Mr. J. William Rowley, Q.C., a senior competition lawyer, also sworn on January 31, 2003, (the "Proctor and Rowley Affidavits"). The Commissioner argues that these affidavits should be struck because they contain argument, opinion and hearsay evidence, and because their contents are irrelevant to the matters at issue in Canada Pipe's motion. Alternatively, the Commissioner seeks to strike certain offending portions of the Proctor and Rowley Affidavits. The Commissioner also requests that Canada Pipe be made to comply with sections 5 and 5.1 of the Rules, which require that a respondent who intends to oppose an application must file a response and disclosure statement.

II. BACKGROUND

[5] On October 31, 2002, the Commissioner filed a notice of application (the "Application") alleging that Canada Pipe had abused its dominant position and engaged in a practice of exclusive dealing in the market for cast iron pipe, fittings and mechanical joint couplings for use in drain, waste and vent ("DWV") applications. Canada Pipe is an Ontario corporation that sells cast iron DWV pipe, fittings and mechanical joint couplings in Canada and is a subsidiary of the American company MeWane, Inc.

[6] In his Application, the Commissioner states that Canada Pipe substantially controls the supply of the three products in six geographic markets, and in addition controls the national market. The Commissioner alleges that Canada Pipe has engaged in a practice of exclusive dealing through its "stocking distributor program", which provides discounts to distributors and contractors who deal exclusively in Canada Pipe's line of products.

[7] The Commissioner served his disclosure statement on November 14, 2002, pursuant to subsection 4.1(1) of the Rules. The disclosure statement includes: (i) a list of records to be relied on at the hearing, divided into two groups: 526 documents obtained from Canada Pipe and 92 documents or categories of documents in respect of which public interest privilege is claimed; (ii) five statements summarizing the will-say statements of 42 non-expert witnesses from the industry, identified by category of witness, and (iii) a statement of economic theory in support of the Application. A letter dated December 2, 2002 from counsel for the Commissioner stated that one of the 92 documents would be disclosed, but that privilege would continue to be asserted over 91 privileged documents unless and until it was waived prior to the hearing or otherwise ordered by the Competition Tribunal (the "Tribunal").

[8] On November 19, 2002, counsel for Canada Pipe sent a letter to counsel for the Commissioner indicating that it intended to contest the Application. However, Canada Pipe served neither the response to the Application, nor the disclosure statement, as required by paragraph 5(1)(a) and section 5.1 of the Rules.

[9] On December 24, 2002, Canada Pipe filed a notice of motion setting out its Bill of Rights challenge. An affidavit sworn on December 17, 2002, by Mr. Milos Barutciski, counsel for Canada Pipe (the "Barutciski Affidavit"), was filed in support of the motion. After a case management conference held on January 14, 2003, the Barutciski Affidavit was withdrawn. The Proctor and Rowley Affidavits filed on January 31, 2003 in support of Canada Pipe's motion, purport to set out the impact of the Rules on Canada Pipe's right to a fair hearing. The Commissioner continued his motion to strike with respect to the Proctor and Rowley Affidavits, or parts thereof.

[10] The two motions were heard on April 28 to 30 and May 1, 2003. At the close of the hearing, I reserved judgment on both motions.

III. ISSUES

[11] The following issues are raised by the two motions:

(a) Should the Proctor and/or Rowley Affidavits, or portions thereof, be struck?

(b) Does paragraph 2(e) of the Bill of Rights apply to the conduct of the abuse of dominant position proceeding and, if so, what is the content of the duty of fairness?

(c) Do the Rules, as interpreted and applied by the Commissioner in this proceeding, violate Canada Pipe's right to a fair hearing with respect to:

(i) documentary discovery?

(ii) oral discovery?

(iii) identification of witnesses?

(iv) the use of section 11 orders?

(v) the obligation to produce section 11 transcripts?

IV. LEGISLATIVE AND REGULATORY FRAMEWORK

A. THE *COMPETITION TRIBUNAL RULES*

[12] Subsection 16(1) of the *Competition Tribunal Act,* R.S.C. 1985, c.19 (2d Supp.) (the "CTA"), as amended, provides that the Tribunal may make general rules regarding its practice and procedure, subject to the approval of the Governor in Council. The Rules subject to challenge in Canada Pipe's motion were brought into force on February 13, 2002, the date of publication in the *Canada Gazette Part II* (Vol. 136, No. 4). As noted in the Regulatory Impact Analysis Statement ("RIAS"), also published in the *Canada Gazette Part II,* the amendments to the Rules relate only to contested reviewable matters other than mergers. The amendments were designed to ensure that such proceedings would "be dealt with as informally and expeditiously as possible while preserving fairness" *(Canada Gazette* at 432).

[13] The amendments to the Rules were designed to streamline the proceedings of the Tribunal. The regulatory objectives included: (i) ensuring that the Commissioner's investigation is completed and that the case is in final form at the time an application is filed with the Tribunal; (ii) ensuring that the issues are clearly defined at the outset of the case by having them set out in disclosure statements; (iii) streamlining the Tribunal's pre-hearing procedure by eliminating examinations for discovery as of right; and (iv) providing a more effective presentation of expert witness evidence. These objectives were set out by Simpson J. in "Objectives of the Amendments to the Competition Tribunal's Rules Relating to Reviewable Matters Other Than Mergers" (Speaking notes presented at the National Conference of the Insight Information Co., "Canada's Changing Competition Regime", February 26-27, 2003).

[14] Prior to instituting a proceeding under the Act, the Commissioner is aided in the conduct of his investigation by subsection **11(1)** of the Act, which provides:

Where, on the *ex parte* application of the Commissioner or the authorized representative of the Commissioner, a judge of a superior or county court or of the Federal Court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that <u>any person has or is likely to have information that is relevant to the inquiry</u>, the judge may order that person to	Sur demande *ex parte* du commissaire ou de son représentant autorise, un juge d'une cour supérieure, d'une cour de comte ou de la Cour fédérale peut, lorsqu'il est convaincu d'après une dénonciation faite sous serment ou affirmation solennelle qu'une enquête est menée en application de l'article 10 et qu'une personne détient ou <u>détient vraisemblablement des</u>

(a) attend as specified in the order and be examined on oath or solemn affirmation by the Commissioner or the authorized representative of the Commissioner on any matter that is relevant to the inquiry before a person, in this section and sections 12 to 14 referred to as a "presiding officer", designated in the order;
(b) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or
(c) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required. [emphasis added]

renseignements pertinents à l'enquête en question, ordonner à cette personne :
a) de comparaitre, selon ce que prévoit l'ordonnance de sorte que, sous serment ou affirmation so1ennelle, elle puisse, concernant toute question pertinente à l'enquête, être interrogée par le commissaire ou son représentant autorise devant une personne désignée dans l'ordonnance et qui, pour l'application du présent article et des articles 12 à 14, est appelée « fonctionnaire d`instruction »
b) de produire auprès du commissaire ou de son représentant autorise, dans le délai et au lieu que prévoit l'ordonnance, les documents – originaux ou copies certifiées conformes par affidavit – ou les autres choses dont l'ordonnance fait mention;
c) de préparer et de donner au commissaire ou à son représentant autorise, dans le délai que prévoit "ordonnance, une déclaration écrite faite sous serment ou affirmation solennelle et énonçant en détail les renseignements exigés par l'ordonnance. [Je souligne]

[15] I will briefly summarize the Rules applicable to non-merger cases which apply to the exclusive dealing and abuse of dominant position proceeding instituted against Canada Pipe.

[16] An application under the Act is commenced by the filing of a notice of application by the Commissioner. According to subsection 3(2) of the Rules, the notice is to contain:

(a) the sections of the Act under which the application is made;
(b) the name and address of each person against whom an order is sought;
(c) a concise statement of the grounds for the application and of the material facts on which the Commissioner relies;
(d) the particulars of the order sought; and *(e)* the official language that the Commissioner wishes to use in the proceedings.

a) les articles de la Loi en application desquels la demande est présentée;
b) les nom et adresse de chacune des personnes contre lesquelles une ordonnance est demandée;
c) le résumé des motifs de la demande et des faits substantiels sur lesquels se fonde le commissaire;
d) les détails de l'ordonnance demandée;
e) la langue officielle que le commissaire désire utiliser dans l'instance.

[17] Subsection 2.1(2) provides that the new regime applies only to applications other than section 92 or non-merger applications. Subsection 4.1(2) sets out the discovery process and requires that the Commissioner serve a "disclosure statement" within 14 days of filing the notice of application. The disclosure statement shall set out:

. . . *(a)* a list of the records on which the Commissioner intends to rely; *(b)* the will-say statements of non-expert witnesses; and (c) a concise statement of the economic theory in support of the application ...	*(. . .)* *a)* la liste des documents sur lesquels le commissaire entend se fonder; *b)* un sommaire de la déposition des témoins non experts; *c)* un expose concis de la théorie économique à l'appui de la demande ...

[18] Subsection 4.1(3) of the Rules provides that the Commissioner may by motion request authorization from the Tribunal to amend the disclosure statement "[i]f new information that is relevant to the issues raised in the application arises before the hearing ..."

[19] Subsection 4.1(4) provides for the inspection of records listed in the disclosure statement and reads as follows:

The Commissioner shall allow a person who wishes to oppose the application to inspect and make copies of the records listed in the disclosure statement referred to in subsection (2) and the transcript of information for which the authorization referred to in section 22.1 has been obtained.	Le commissaire doit permettre a la personne qui entend contester la demande d'examiner et de reproduire les documents mentionnés dans la déclaration visée au paragraphe (2) ainsi que la transcription des renseignements pour lesquels l'autorisation visée à l'article 22.1 a été obtenue.

(Section 22.1 of the Rules permits transcripts obtained pursuant to section 11 of the Act to be read into evidence at the hearing with the authorization of the Tribunal.)

[20] Concerning the identification of witnesses prior to the hearing, section 4.2 of the Rules provides:

Unless the Tribunal orders otherwise, the Commissioner shall serve on each person against whom an order ... is sought a notice identifying each witness referred to in paragraph 4.1(2)(b) by name and address, at least two days before the date that the witness is called to testify.	Sauf ordonnance contraire du Tribunal, le commissaire signifie a chacune des personnes contre lesquelles une ordonnance ... est demandée, un avis indiquant les nom et adresse de chacun des témoins vises a l'alinéa 4.1(2)b) au moins deux jours avant la date de leur témoignage.

[21] As per subsection 5(2) and section 5.1 of the Rules, a person who is served with a notice of application and who wishes to contest the application must file and serve a response on the Commissioner within 45 days and serve a disclosure statement within 14 further days.

[22] In section 21, the Rules provide for pre-hearing management conferences that may allow for the consideration of examination for discovery of particular persons or documents, witnesses to be called, and other matters. Subsections 21(1) and (2) read as follows:

(1) The Tribunal may, at the request of a party or if the Chairman deems it advisable, conduct one or more pre-hearing conferences	(1) Le Tribunal peut, si une partie le demande ou si le président le juge indique, tenir une ou plusieurs conférences préparatoires dans 1'un ou l'autre des délais suivants:

(a) at any time after the expiration of the period for filing a response to a notice of application; or

(b) at any time after the expiration of the period for filing a statement pursuant to subsection 9(3).

(2) The Tribunal may consider the following matters at a pre-hearing conference:

(a) any pending motions or requests for leave to intervene;

(b) the clarification and simplification of the issues;

(c) the possibility of obtaining admissions of particular facts or documents;

(d) the desirability of examination for discovery of particular persons or documents and the desirability of preparing a plan for the completion of such discovery;

(d.1) in the case of applications referred to in subsection 2.1(2) and if warranted by the circumstances, the matters referred to in paragraph (d); (e) any witnesses to be called at the hearing and the official language in which each witness will testify;

(j) a timetable for the exchange of summaries of the testimony that will be presented at the hearing;

(g) the procedure to be followed at the hearing and its expected duration; and

(h) such other matters as may aid in the disposition of the application. [emphasis added]

a) en tout temps après l'expiration du délai prévu pour le dépôt de la réponse a l'avis de demande:

b) en tout temps après l'expiration du délai prévu pour le dépôt du résumé vise au paragraphe 9(3).

(2) Le Tribunal peut considérer les questions suivantes lors de la conférence préparatoire :

a) toute requête ou demande d'autorisation d'intervenir qui est en cours;

b) la clarification et la simplification des questions en litige;

c) la possibilité d'obtenir des admissions quant à des faits ou des documents précis;

d) l'opportunité d'interroger au préalable certaines personnes ou d'obtenir la communication de certains documents, ainsi que l'opportunité d'établir un plan d'action aces fins;

d.1) dans le cas d'une demande visée au paragraphe 2.2(2) et lorsque les circonstances le justifient, les questions visées a l'alinéa d);

e) l'identification des témoins qui seront appelés a l'audience et la langue officielle dans laquelle ils vont témoigner;

f) les modalités de 1'echange des résumés des témoignages qui seront rendus a **l'**audience;

g) la procédure à suivre pendant l'audience et sa durée approximative;

h) toute autre question qui permettrait de faciliter le règlement de la demande. [je souligne]

[23] Finally, subsection 64(1) of the Rules provides that the Tribunal may declare a document confidential, this may include a document listed in a disclosure statement. Section 64 provides:

(1) The [T]ribunal may declare the following documents confidential:

(a) on the request of a party or intervenor, a document that is filed or received in evidence; and

(b) on the request of a party, a document listed in a disclosure statement referred to in subsection 4.1(2) or 5.1(2).

(2) A person who makes a request pursuant to subsection (1) shall advise the Tribunal of the reasons for the request, including details of the specific, direct harm that would

(1) Le Tribunal peut déclarer confidentiels les documents suivants :

a) sur demande d'une partie ou d'un intervenent, tout document déposé ou reçu en preuve;

b) sur demande d'une partie, tout document mentionne dans la déclaration relative a 1a communication de renseignements visée aux paragraphes 4.1(2) ou 5.1(2).

(2) la personne qui présente une demande visée au paragraphe (1) en soumet les motifs au Tribunal, y compris les détails sur la

allegedly result from public access to the document.
(3) The Tribunal may, if it is of the opinion that there are valid reasons for restricting access to a document, declare the document confidential and make such other order as it deems appropriate.
[emphasis added]

nature et l'ampleur du préjudice direct et précis qu'occasionnerait la divulgation du document.
(3) le Tribunal peut déclarer le document confidentiel et rendre toute autre ordonnance qu'il juge indiquée s'il croit qu'il existe des raisons valables de ne pas divulguer le document.
[je souligne]

B. THE *CANADIAN BILL OF RIGHTS*

[24] Paragraph 2(e) of the Bill of Rights provides:

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

. . .

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

. . .

[emphasis added]

2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclares aux présentes, ni a en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

(...)

e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

(...)

[je souligne

[25] Subsection 5(2) of the Bill of Rights defines a "law of Canada" as follows:

The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or
in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

L'expression « loi du Canada», à la Partie I, désigne une loi du Parlement du Canada, édictée avant ou après la mise en vigueur de la présente loi, ou toute ordonnance, régie
ou règlement établi sous son régime, et toute loi exécutoire au Canada ou dans une partie du Canada lors de l'entrée en application de la présente loi, qui est susceptible d'abrogation, d'abolition ou de modification par le Parlement du Canada.

V. ANALYSIS

A. SHOULD THE PROCTOR AND/OR ROWLEY AFFIDAVITS, OR PORTIONS THEREOF, BE STRUCK?

[26] Mr. Proctor is the vice-president of McWane, Inc. and a resident of Alabama. He is a former litigation lawyer responsible for the supervision and management of the legal affairs of McWane, Inc. and its subsidiaries. Mr. Proctor's affidavit provides background facts with respect to the Application. In addition, the affidavit provides opinion and legal argument concerning the impact the Rules now have on Canada Pipe's ability to present its defence during the Tribunal proceeding.

[27] Mr. Rowley is senior competition lawyer and a resident of Toronto. His affidavit provides a historical overview of the Rules and Tribunal practices in addition to an analysis of the various ways in which, in his view, the Rules now affect the ability of respondents to defend themselves in abuse of dominant position proceedings. The affidavit provides opinion evidence on the consequences and impact of the Rules on Canada Pipe and also contains legal argument concerning the merits of Canada Pipe's motion.

[28] The Commissioner makes three basic submissions on the admissibility of the Proctor and Rowley Affidavits: (i) the affidavits are improper; (ii) the affidavits do not meet the requirements of the test in *R. v. Mohan* ((1994), 114 D.L.R. (4th) 419) *[Mohan]* for the admissibility of expert evidence; and (iii) Canada Pipe has not complied with the requirements of sections 47 and 48 of the Rules concerning the introduction of expert evidence.

[29] The Commissioner submits that the affidavits are improper because they contain legal argument that ought not appear in an affidavit. He argues that the language of the affidavits is prone to hyperbole and, as a result, the content of the affidavits cannot be properly assessed. He also states that, because the content of the Proctor and Rowley Affidavits is similar to the Barutciski Affidavit, it is impossible to know the extent to which Messrs. Proctor and Rowley drew independent conclusions, or to what degree their affidavits were influenced by the advice given by Mr. Barutciski in his role as counsel to Canada Pipe.

[30] Secondly, the Commissioner argues that the affidavits do not conform to the case law principles on opinion evidence. He submits that the relevant test is that stated by the Supreme Court of Canada in *Mohan, ibid.* at 427, which provides that expert evidence should only be admitted where: (i) it is relevant; (ii) it is necessary to assist the trier of fact; (iii) it is not excluded by an exclusionary rule; and (iv) the expert is properly qualified. The Commissioner submits that the Proctor and Rowley Affidavits seek to answer the ultimate question and present evidence that is not necessary to the Tribunal, in violation of the second *Mohan* rule. The Commissioner also suggests that Messrs. Proctor and Rowley are not properly qualified and, as a result, the evidence should be excluded in accordance with the fourth rule in *Mohan.*

[31] Finally, the Commissioner submits that if Messrs. Proctor and Rowley are being presented as experts, Canada Pipe has not complied with sections 47 and 48 of the Rules

concerning the proper treatment of expert evidence. Subsection 47(1) provides that a party who intends to introduce evidence of an expert witness at the hearing must serve an affidavit of the expert witness on each party. I am of the view that this argument has no merit. I find that these Rules, as set out, apply to expert evidence introduced at a hearing, and are therefore not applicable to the within motion. Canada Pipe has complied with the provisions of subsection 38(4) and section 41, which are the evidentiary rules applicable to motions.

[32] Canada Pipe submits that the affidavits should not be struck, for two reasons: (i) the affidavits provide a broad evidentiary base that is permissible in constitutional or quasi- constitutional proceedings; and (ii) the Commissioner has not demonstrated that he would be "prejudiced" by the affidavits.

[33] Canada Pipe argues that constitutional cases allow for broadened evidentiary rules to encompass "legislative facts"- facts that are often beyond the personal knowledge of the parties or witnesses. Canada Pipe argues that the affidavits set out the impact of the Rules on Canada Pipe and other respondents, and are therefore appropriate and relevant to the Bill of Rights motion.

[34] Canada Pipe cites *Sawridge Band v. Canada,* [2000] F.C.J. No. 192 (QL) *[Sawridge]* for the proposition that affidavits will not be struck absent the demonstration of prejudice by the party seeking to strike. Canada Pipe argues that the approach of Hugessen J. in *Sawridge* is applicable in the context of Tribunal proceedings, which are to be dealt with "informally and expeditiously" pursuant to subsection 9(2) of the CTA.

[35] The decision in *Sawridge* suggests that there may be circumstances in which it is desirable that an inappropriate affidavit not be struck, but be left for the judge hearing the underlying application or main motion. In my view, however, *Sawridge* does not stand for the proposition that in all cases prejudice must be shown before an improper affidavit be struck. This interpretation would encourage the filing of inappropriate affidavits and discount the applicable rules of evidence.

[36] The Proctor affidavit consists essentially of legal argument designed to bolster Canada Pipe's submissions on its motion. These arguments were made in oral argument by counsel for Canada Pipe. Consequently, I find that the affidavit is not necessary and contributes nothing to the determination of the issues. The affidavit is therefore not properly before the Tribunal and will be struck.

[37] Although the Rowley affidavit has, to a significant extent, strayed into legal argument, I nevertheless find the affidavit to be helpful to the Tribunal. Mr. Rowley provides appropriate opinion evidence on the consequences and impact of the Rules on the applicant (Canada Pipe). Moreover, the Commissioner has failed to demonstrate that he would be "prejudiced" by those portions of the affidavit which inappropriately stray into legal argument. In the circumstances of this motion, where the applicant (Canada Pipe) attacks the Rules on the ground that they violate its right to a fair hearing guaranteed by paragraph *2(e)* of the Bill of Rights, a broader evidentiary base setting out the historic underpinnings of the current and former regimes is permissible. In

the end, the weight to be accorded to the evidence attested to in the Rowley affidavit is matter for me to assess. Accordingly, I decline to strike the Rowley affidavit.

B. DO THE RULES VIOLATE CANADA PIPE'S RIGHT TO A FAIR HEARING?

(1) Does paragraph 2(*e*) of the Bill of Rights apply to the conduct of the abuse of dominant position proceeding?

[38] Canada Pipe submits that definition of "law of Canada" in subsection 5(2) of the Bill of Rights- an Act of the Parliament of Canada and any order, rule or regulation thereunder- includes the Act, the CTA, and the Rules. Counsel emphasizes that the Supreme Court of Canada has confirmed the continued relevance of the Bill of Rights despite the promulgation of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "Charter"),: see *Singh v. Canada (Minister of Employment and Immigration),* (1985] 1 S.C.R. 177 *[Singh]*. In addition, counsel argues that section 26 of the Charter provides that the guarantee of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada. This section has been interpreted in *Singh, inter alia,* to mean that rights in the Bill of Rights maintain their currency, particularly where such rights are not articulated in the Charter, as in the case of paragraph 2(e). As stated in *Singh, ibid* at 228: **"...** s. 2(e) does protect a right which is fundamental, namely "the right to a fair hearing in accordance with the principles of fundamental justice" for the determination of one's rights and obligations, fundamental or not **..."**

[39] I am in substantial agreement with the argument advanced by counsel for Canada Pipe on this point. I accept that paragraph 2(e) of the Bill of Rights applies to Canada Pipe in the context of the Tribunal proceedings when procedural fairness is at issue.

(2) What is the content of the duty of fairness?

[40] It is common ground that the criteria for determining the content of the duty of fairness are set out in *Baker v. Canada (Minister of Citizenship and Immigration),* (1999] 2 S.C.R. 817, at 819 *[Baker]* as: (i) the nature of the decision being made; (ii) the statutory scheme within which the body/agency operates; (iii) the importance of the decision to the person affected; (iv) the legitimate expectations of the parties; and (v) the procedural choices of the agency.

(a) Canada Pipe's Arguments

[41] Canada Pipe submits that the first three factors, namely, the nature of the decision; the statutory scheme within which the Tribunal operates; and the importance of the decision to the person affected, all support giving substantial content to procedural fairness in this case. Canada Pipe places no particular importance on the last two factors.

[42] Concerning the first factor, the nature of the decision, Canada Pipe makes the following points to support its argument that the Tribunal's decisions are made on a "judicial basis": (i) the Tribunal is empowered to determine questions of law; (ii) questions of law are decided by judges

of the Federal Court; (iii) appeal lies directly to the Federal Court of Appeal; (iv) there is no privative clause in the CTA; and (v) the Tribunal has all powers accorded to a superior court of record and has the power to award costs and grant broad-based orders. Canada Pipe argues that these factors suggest a high degree of procedural fairness.

[43] Concerning the second factor, the statutory scheme within which the Tribunal operates, Canada Pipe argues that *Baker* requires greater procedural protections where the Tribunal's decision is final or determinative of an issue. It is argued that the Tribunal's decisions are final and that it determines issues based on arguments and evidence presented in an adversarial process. As such, the applicant (Canada Pipe) argues that the maximum content of procedural fairness is required.

[44] Concerning the third factor, the importance of the decision to the person affected, the applicant (Canada Pipe) argues that, where personal or property rights are directly affected, courts have required greater procedural protections. Canada Pipe states that the far-reaching relief requested by the Commissioner would have a "profound and lasting impact" on the business and argues that Canada Pipe should be entitled to the highest level of procedural protection. While Canada Pipe submits that it is not seeking *"Stinchcombe-type* procedures" *(R. v. Stinchcombe* [1991] 3 S.C.R. 326) *[Stinchcombe],* counsel nevertheless argues that an order under the Act may have certain and severe effects on a party's commercial operations and such effects must be treated as demanding a high content of procedural fairness.

[45] In summary, Canada Pipe submits that paragraph *2(e)* of the Bill of Rights requires, in the present context, that it is entitled to a high degree of procedural fairness and to a number of the procedural protections normally available to a litigant in a court proceeding. Canada Pipe's position is that the Rules as currently formulated violate its right to a fair hearing. Counsel states that Canada Pipe's right to procedural fairness would be fulfilled by a hearing that provides:
(i) the right to know the case against it, including access to all relevant documents whether or not the Commissioner intends to rely on such evidence; (ii) the right to dispute, correct or contradict anything prejudicial to its position; and (iii) the right to present arguments and evidence supporting its own case.

(b) Commissioner's Arguments

[46] Counsel for the Commissioner submits that procedural fairness requires adjudication before an independent and impartial tribunal, reasonable notice of the case to be met, and an opportunity to respond to that case. Counsel argues that the Rules and their application in this case satisfy these requirements.

[47] The Commissioner emphasizes that Canada Pipe's motion is brought prematurely. He quotes from *Baker* at 837 where L'Heureux-Dubé J. comments that the content of procedural fairness is determined with reference to "a given set of circumstances". Counsel suggests that Canada Pipe has mounted a philosophical attack on the Rules and that decisions concerning the Bill of Rights cannot be made absent a factual foundation. The Commissioner submits that the

Baker analysis may apply at some point in order to clarify the procedural entitlements of Canada Pipe, but not at the present time.

[48] Concerning the *Baker* factors, the Commissioner acknowledges that an abuse of dominant position proceeding before the Tribunal has some attributes of a judicial proceeding. However, the Commissioner states that the Tribunal is in fact an administrative tribunal and not a court, and should therefore not be directed to institute court-like procedures. Further, the Commissioner points out that subsection 9(2) of the CTA provides that "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.", which the Commissioner submits indicates the intention of Parliament to not confer court-like procedures.

[49] Concerning the statutory scheme within which the Tribunal operates, the Commissioner argues that it is important to note the overarching objective articulated in section 1.1 of the Act, which indicates in part that the purpose of the Act is to"... maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets ..." Therefore, the Commissioner states that the Act does not deprive persons or enterprises of their rights except to the extent that such "rights" are being exercised unfairly and in a way that adversely affects competition.

[50] Concerning the third *Baker* factor, counsel for the Commissioner and for Canada Pipe disagree about the level of importance that should be attached to a decision that affects the economic activities of a party. As noted above at paragraph 44, Canada Pipe submits that the importance of a decision concerning economic regulation is high. The Commissioner submits that a decision that results in economic regulation is not necessarily as important as a decision that impacts on personal liberties. Further, the Commissioner argues that there is no right to carry on economic activities free of any regulation. Consequently, the Commissioner argues that a consideration of the importance of the decision to Canada Pipe in the present case should not be compared to cases in which liberty interests are affected, since the interest here is merely economic.

[51] The Commissioner submits that the statutory scheme makes it clear that the Tribunal is intended to develop Rules that will further its mandate and notes also that the Tribunal has expertise in matters of competition and economic regulation in addition to a body of experience regarding the practical operation of the Rules it promulgated in 1994. The Commissioner argues that, in view of the language of subsection 9(2) of the CTA (mandating informal and expeditious proceedings), deference should be accorded to the Tribunal's choice of procedures.

[52] In conclusion the Commissioner submits that, if the *Baker* analysis is applied to an abuse of dominant position proceeding, the procedural fairness accorded to Canada Pipe should not be "the highest" available.

(c) Analysis

[53] I find that proceedings before the Tribunal are conducted in a judicial, adversarial manner, and the impact of a Tribunal decision on Canada Pipe could potentially be important to its economic functioning. I also find that the Tribunal has expertise in matters of competition law and economic regulation and that the CTA provides that the Tribunal is to determine its own procedures, subject to the approval of the Governor in Council. Accordingly, considerable deference should be shown to the Tribunal in its choice of procedure. However, section 13 of the CTA provides for appeals of any decision or order of the Tribunal, although appeals of factual findings require leave. The Tribunal's decisions therefore are not final to the extent that the statutory scheme provides for an appeal. This suggests a lesser level of procedural protection. I am satisfied, upon application of the five *Baker* factors, that Canada Pipe's right to a fair hearing would be fulfilled by a process that provides a respondent the right to know the case against it and the right to have a meaningful opportunity to present evidence supporting its own case. I am therefore of the opinion that the content of the duty of fairness is significant. It serves no useful purpose to further define the "content of the duty of fairness". It is rather more useful to apply the "right to a fair process" as expressed above to the various issues raised by the parties to determine whether Canada Pipe's right to procedural fairness has been violated. I will now proceed to do so to the extent that I can, based on the factual circumstances present on this motion.

(3) Do the Rules, as interpreted and applied by the Commissioner in this proceeding, violate Canada Pipe's right to a fair hearing with respect to:

(a) Documentary Discovery?

[54] As noted earlier, section 4.1 of the Rules provides that the Commissioner's disclosure statement must set out

> *(a)* a list of the records on which the Commissioner intends to rely;
> *(b)* the will-say statements of non-expert witnesses; and
> (c) a concise statement of the economic theory in support of the application ...

Canada Pipe's submissions concerning the disclosure of documents under section 4.1 challenge both the content of section 4.1 and the Commissioner's interpretation and application of that section.

[55] Canada Pipe makes four submissions concerning inadequate disclosure: (i) section 4.1 requires that the Commissioner's disclosure statement set out only documents on which he intends to rely, as opposed to all relevant documents, and this denies it the right to know the case to meet; (ii) there is no obligation of continuous disclosure required by the Rules; (iii) the Commissioner has not complied with section 4.1 in claiming privilege over some documents in
the disclosure statement; and (iv) the Commissioner has not complied with paragraph 4.1(2)(b) in providing only amalgamated non-expert witness will-say statements.

(i) Inadequate Disclosure

[56] Canada Pipe submits that the Rules prior to the February 13, 2002 amendments required the Commissioner to deliver an affidavit of documents describing all non-privileged documents in his possession, power or control "that are relevant to any matter in issue", whereas the Rules now applicable to proceedings of this nature only require the Commissioner to produce "a list of the records on which the Commissioner intends to rely" (paragraph 4.1(2)(a)). Canada Pipe argues that if the Commissioner is in possession of a "bad document" (a document that undermines his case and/or helps Canada Pipe's case) he may eliminate it by merely failing to list it in his disclosure statement and thereby undertake not to rely on it during the hearing. Canada Pipe submits that the Rules, as now framed, violate the *audi alteram partem* rule that protects the right to know the case one has to meet.

[57] The Commissioner submits that the Rules provide for a process that ensures Canada Pipe a fair hearing. The Application sets out the "grounds for the application and ... the material facts on which the Commissioner relies" and the "particulars of the order sought" (subsection 3(2) of the Rules). The Commissioner's disclosure statement lists the documents and provides the will-say statements and the economic theory on which he intends to rely. The Commissioner argues that the Application and the Commissioner's disclosure statement adequately inform a respondent of the case to be met.

[58] I am of the view that the framers of the Rules clearly intended to amend the standard of "relevance" and replace it with one that requires only the disclosure of documents to be relied on. Canada Pipe argues that the Commissioner's failure to disclose any or all "bad documents", even if he does not intend to rely on such documents, has the effect of impairing its ability to know the case to meet. I disagree. The case that Canada Pipe must meet is set out in the Application and
is supported by the documents listed in the disclosure statement. Canada Pipe is asking for additional documents that may serve to bolster its own case, which has little to do with the case it must meet. The Commissioner's case must be based on documents included in the disclosure statement, and no others.

[59] I am of the view that the change to a standard of reliance in the Rules is not inherently unfair in the context of procedures before an administrative tribunal. Nor am I convinced on the evidence before me that the new standard of reliance, which is at the heart of the rule changes, in any way violates a respondent's right to know the case it must meet. Canada Pipe has not satisfied me that the standard of "reliance" now imposed by the Rules violates its right to a fair hearing.

(ii) No Duty of Continuous Disclosure

[60] Canada Pipe argues that the Rules impose no duty of continuous disclosure requiring the parties to make disclosure of relevant information or documents obtained after delivery of their disclosure statements. Subsection 4.1(3) of the Rules provides:

If new information that is relevant to the issues raised in the application arises before	Le commissaire peut, par voie de requête, demander au Tribunal l'autorisation de

the hearing, the Commissioner may by motion request authorization from the Tribunal to amend the disclosure statement referred to in subsection (2). [emphasis added]

modifier la déclaration visée au paragraphe (2) en cas de découverte, avant l'audition, de nouveaux renseignements se rapportant aux questions soulevées dans la demande. [je souligne]

[61] Prior to the February 13, 2002 amendments, the rules applicable to an abuse of dominant position proceeding provided for mandatory continuous discovery, as found in section 15:

A party who has filed an affidavit of documents and who comes into possession or control of or obtains power over a relevant document, or who becomes aware that the affidavit of documents is inaccurate or deficient, shall serve and file a supplementary affidavit of documents listing the document or correcting the inaccuracy or deficiency.

La partie qui a déposé un affidavit vise a l'article 13 et qui soit prend possession d'un document pertinent ou en devient responsable, soit constaté que l'affidavit contient des renseignements inexacts ou incomplets, signifie et dépose un affidavit supplémentaire qui fait état du document ou qui complète ou corrige l'affidavit original.

[62] Canada Pipe argues that subsection 4.1(3) of the Rules is unfair because the Commissioner's obligation to provide continuous disclosure is permissive. **It** states that if the Commissioner obtains new documentation or information prior to the commencement of the hearing that is directly relevant to and undermines important allegations that he has made, he is not required to disclose that documentation or information to Canada Pipe or to the Tribunal. Canada Pipe argues that it is important that it be made aware of important inculpatory and exculpatory evidence the Commissioner has gathered. Counsel consequently argues that subsection 4.1(3) of the Rules impairs its ability to make full answer and defence and to know the case it has to meet. The Commissioner did not respond to this submission.

[63] Subsection 4.1(3) of the Rules requires that if the Commissioner acquires new information that is relevant to the issues raised in the application, he may request authorization to amend his disclosure statement. The Commissioner then has the duty to provide such records to the respondent. As stated in paragraphs 58 and 59 of these reasons, the Rules clearly amended the former standard of "relevance" to require the disclosure of all records to be relied on at the hearing. The language of subsection 4.1(3) is permissive because the Commissioner is not, in any event, required to disclose all *relevant* information, but only the records on which he intends to *rely.* Therefore, the concept of" continuous disclosure" found in the rules of civil procedure is not relevant to the regime now set out in the Rules. Given my earlier finding that the change to a standard of reliance from the standard of relevance is not unfair, it follows that the "permissive" nature of subsection 4.1(3) does not deprive Canada Pipe of its right to procedural fairness. Additionally, I am satisfied that the Tribunal has the necessary discretion, by virtue of the pre- hearing management conference, to ensure a fair process by considering issues concerning the timing of the amendment of the disclosure statement and the adequacy of the disclosure of additional records (paragraph 21(2)(h) of the Rules).

(iii) Commissioner's Disclosure Statement Inadequate

[64] Canada Pipe notes that, pursuant to subsection 4.1(4) of the Rules, the Commissioner is required to allow persons who wish to oppose an application to "... inspect and make copies of ..." the records listed in his disclosure statement. However, counsel states that the Commissioner has purported to claim public interest privilege over 91 records listed in the disclosure statement and has refused requests for inspection. As such, Canada Pipe argues that the Commissioner is in violation of subsection 4.1(4).

[65] On this point, the Commissioner submits that the Application sets out the case and provides enough information for Canada Pipe to respond to the allegations raised by the Commissioner. Further, the Commissioner argues that the right (or duty) to claim public interest privilege over documents is not affected by the introduction of section 4.1 of the Rules because it is part of the substantive common law and not a procedural right. The Commissioner submits that he is entitled to list documents on which he intends to rely, claim privilege in respect of certain ones, and then gradually waive or "rebalance" the public interest privilege and thereby reveal to Canada Pipe some of the privileged documents in advance of the hearing. The Commissioner submits that his ability to claim privilege is crucial to protect the investigation process and the identity of informants, who may be customers, employees or associates of a respondent.

[66] I am of the view that, in the present case, the Commissioner has not met his obligations under paragraph 4.1(2)(a) and subsection 4.1(4) of the Rules in claiming privilege over documents listed in the disclosure statement. These provisions require that the Commissioner list in his disclosure statement the "... records on which [he] intend to rely" and then allow the respondent to "... inspect and make copies of the records listed in the disclosure statement ..." In the present case, this was not done. The Commissioner has listed 92 documents or categories of documents and has claimed privilege over 91 of these. This treatment flies in the face of the requirement of subsection 4.1(4).

[67] Much of the oral argument was directed toward the nature, scope, and waiver of public interest privilege (or public interest immunity). The Rules applicable to non-merger proceedings do not make reference to grounds for claiming privilege, nor is there a mechanism for the Tribunal to review such claims. By contrast, an affidavit of documents as required by
paragraph 13(2)(e) of the Rules (applicable in merger applications) must include a "statement of the grounds for each claim for privilege" and subsection 16(1) provides that documents listed in the affidavit over which privilege is claimed need not be produced for inspection and copying by the other side.

[68] I am of the view that the Rules provide a complete answer to questions concerning the disclosure obligations of the parties, which, in non-merger proceedings, is to list and produce for inspection all documents intended to be relied upon by the Commissioner during the hearing (paragraph 4.1(2)(a) and subsection 4.1(4) of the Rules). If the Commissioner wishes to exercise public interest privilege in relation to a document, he must do so prior to filing his disclosure statement and thus forego reliance on the document at the hearing. This interpretation is

consistent with the objectives of the Rules as outlined earlier in these reasons, and in particular, the objective of having the investigatory process completed by the time the disclosure statement is filed and served. Consequently, the Commissioner's argument that his ability to claim privilege is crucial to protect the investigation process is without merit.

[69] A party with concerns about the confidentiality of any document contained in a disclosure statement referred to in subsection 4.1(2) or 5.1(2) of the Rules, may ask the Tribunal for an order that such document be kept confidential pursuant to paragraph 64(1)(b) of the Rules. I am of the view that this provision is sufficient to address any confidentiality concerns that the Commissioner, or a respondent in a proceeding, may have with respect to documents, and in particular, any concerns that the Commissioner may have with respect to protecting the identity of an informant.

(iv) Will-Say Statements Inadequate

[70] Canada Pipe submits that the Commissioner's disclosure statement does not comply with the Rules and that he should be ordered to deliver one that does. Counsel for Canada Pipe states that the Commissioner has delivered only five amalgamated will-say statements for 42 non- expert witnesses. Further, there is no identification of the names and addresses of the witnesses. Canada Pipe argues that an amalgamated will-say statement does not serve its purpose, which is to give the recipient fair notice of the case he will be required to meet. Canada Pipe submits that the Commissioner should be ordered to comply with paragraph 4.1(2)(b) of the Rules, which provides that the disclosure statement must contain "the will-say statements of non-expert witnesses", i.e. one statement for each witness.

[71] The Commissioner submits that service of individual will-say statements for each non- expert witness would potentially reveal the identity of the witnesses. The Commissioner argues that a respondent's admissions may result in certain intended witnesses not being called, rendering their earlier identification unnecessary. Consequently, the requirement in the Rules to deliver will-say statements of non-expert witnesses cannot have been meant to override the protection historically given to the identity of witnesses until they are actually called to give evidence. The Commissioner submits the "global or collective" will-say statements strike an appropriate balance between providing sufficient detail to allow the respondent to know the case it has to meet for purposes of pleading, and maintaining the privilege protecting the identity of the witnesses until such time as it is necessary to call them as witnesses. The Commissioner also notes that sections 4.2 and 5.2 of the Rules provide that there is no obligation to reveal the identities of witnesses until at least two days before they are called to testify.

[72] I am of the view that the Commissioner has not complied with paragraph 4.1(2)(b) of the Rules by serving Canada Pipe with a disclosure statement that contains amalgamated will-say statements. The Commissioner has provided five will-say statements for 42 witnesses. This presentation does not allow Canada Pipe to know with reasonable certainty what a particular

non-expert witness will say and consequently does not comply with the disclosure requirement of knowing the case to meet. I read the Rules to require that a will-say statement be provided for each non-expert witness. The issue of the timeliness of the identification of witnesses will be dealt with below at paragraphs 77 to 80.

(b) Oral Discovery?

[73] Canada Pipe submits that the unfairness caused by the fact that the Commissioner is not required to produce all relevant documents is compounded by the fact that the Rules now limit Canada Pipe's right to conduct an oral examination for discovery of the Commissioner's representatives without fettering the Commissioner's unbridled right to conduct oral examinations of Canada Pipe's representatives or third parties pursuant to section 11 of the Act. The applicant (Canada Pipe) argues that the one-sided discovery and disclosure regime violates its right to a fair hearing.

[74] The Commissioner submits that there is no presumptive right to oral discovery in administrative proceedings and that such a right is not encompassed by paragraph *2(e)* of the Bill of Rights. He cites the Tribunal's ruling in *Canada (Commissioner of Competition) v. Air Canada,* (2002, Comp. Trib. 18) [2002] C.C.T.D. No 16 (QL), wherein McKeown J. stated"... There is no automatic right to discovery by any party. Rather, the Tribunal may make orders respecting examination for discovery where the process is "desirable"... "

[75] The Commissioner states that, under the Rules that existed prior to February 13, 2002, examination for discovery was available by order of the Tribunal and that the test was "the desirability of examination for discovery of particular persons or documents..." (paragraph 21(2)(d)). The Rules now add the phrase"... and if warranted by the circumstances ... " (paragraph 21(2)(d.l)), and so this constitutes an additional criterion. However, the Commissioner suggests that the Rules still respect a party's right to procedural fairness, but oral discovery must be both desirable and warranted by the circumstances. He submits that this determination is to be made on a case-by-case basis. The Commissioner submits that Canada Pipe has not shown that oral discovery is warranted in the present case and consequently argues that the motion is premature and the discretionary discovery procedures provided in paragraphs 21(2)(d) and (d.l) are sufficient to provide procedural fairness.

[76] I agree with the Commissioner's submission. The possibility of oral discovery of particular persons is provided for in paragraphs 21(2)(*d)* and (d.1) of the Rules as part of pre-hearing management procedures. These provisions allow the Tribunal to consider the desirability of examination for discovery of particular persons and of preparing a plan for the completion of such discovery. There is nothing to indicate that Canada Pipe would be denied oral discovery of a witness if it were warranted. Consequently, I find that Canada Pipe's right to a fair hearing is not compromised in the circumstances. The amendments to the Rules were promulgated with the intention of simplifying the discovery process and introducing flexibility and efficiency to the Tribunal's proceedings. I cannot determine on the evidence that Canada Pipe's right to a fair hearing is violated, given that pre-hearing management procedures, which provide for flexibility, have not yet commenced. In any event, given that there is no automatic right to discovery in this

Tribunal's proceedings, I conclude that the discretionary discovery provisions of the Rules do not violate a party's right to a fair hearing.

(c) Identification of Non-expert Witnesses?

[77] Canada Pipe states that the Rules provide that, unless otherwise ordered, the parties are only required to identify their non-expert witnesses by name and address two days before a particular witness is called to testify. Section 4.2 of the Rules provides:

Unless the Tribunal orders otherwise, the Commissioner shall serve on each person against whom an order ... is sought a notice identifying each witness referred to in paragraph 4.1(2)(b) by name and address, at least two days before the date that the witness is called to testify.	Sauf ordonnance contraire du Tribunal, le commissaire signifie chacune des personnes contre lesquelles une ordonnance autre qu'une ordonnance provisoire est demandée, un avis indiquant les nom et adresse de chacun des témoins vises à l'alinéa 4.1(2)b) au moins deux jours avant la date de leur témoignage.

[78] Canada Pipe argues that the effect of this rule is that the Commissioner is entitled to refuse to disclose to Canada Pipe the names and addresses of virtually all non-expert witnesses until after the hearing has commenced. Counsel further states that the operation of section 4.2 will preclude Canada Pipe from speaking with or interviewing any of the non-expert witnesses
until they are called to testify at the hearing. Canada Pipe submits that this rule impairs its ability to defend itself and to exercise its right to cross-examine the Commissioner's witnesses. Canada Pipe states that the right to cross-examine is an essential element of the adversarial system *(Innisfil TWP. v. Vespra TWP.*, [1981] 2 S.C.R. 145 at 166-67).

[79] If the "two-day rule" referred to in section 4.2 of the Rules were not mitigated by the flexible case management procedures, I would agree with Canada Pipe that the provision could deprive a party of procedural fairness. Indeed, I have difficulty appreciating the rationale for such a rule. However, the case management procedures add flexibility that may allow for earlier disclosure of the identity of witnesses on a case-by-case basis, and thus vary the "two-day rule".
I note that paragraph 21(2)(h) of the Rules provides that at a pre-hearing conference the Tribunal may consider "such other matters as may aid in the disposition of the application."

[80] In addition, the introductory words of sections 4.2 and 5.2 of the Rules are "[u]nless the Tribunal orders otherwise ... ", which indicates that there is broad discretion concerning the timing and identification of witnesses. Any concerns that Canada Pipe has about being prejudiced by the "two-day rule" and requests concerning advance notice of the identity of witnesses may be addressed at the appropriate time during the case management process. The Commissioner will also have the opportunity to argue against varying the "two-day rule". Given the discretionary nature of these sections, I find that the Rules adequately protect Canada Pipe's right to a fair hearing on this point.

(d) Use of Section 11 Orders?

[81] Canada Pipe argues that the Rules abrogate its right to know about and have access to documents or facts that are contrary to the Commissioner's case, while simultaneously preserving the Commissioner's right to obtain such documents and facts from Canada Pipe via section 11 orders. Further, Canada Pipe submits that it has no right to receive documents that come to the Commissioner's attention after he has filed his disclosure statement, because the Rules do not require that the Commissioner amend his disclosure statement (subsection 4.1(3) of the Rules). Canada Pipe contends that, through the use of section 11 powers, the Commissioner may obtain Canada Pipe's documents and conduct oral discovery.

[82] The Commissioner submits that the Tribunal has not been granted jurisdiction over the Commissioner's powers conferred by section 11 of the Act and that any attack on such an order must be brought before the issuing court. The Commissioner states that section 11 places the control over the Commissioner's exercise of his inquiry in the hands of a" ... judge of the superior or county court or of the Federal Court ..."

[83] I find that the Tribunal does not have jurisdiction over the Commissioner's exercise of the powers granted by section 11 of the Act. In *Canada (Director of Investigation and Research) v. Canadian Pacific Ltd.* (1997), 74 C.P.R. (3d) 55 at 60 (Comp. Trib.), McKeown J. stated that the governing legislation did not empower the Tribunal to control the Commissioner's (formerly the Director) actions:

> ... It is obvious that the Tribunal does not have jurisdiction to ensure that, during the course of his investigation, the Director complies with the requirements of the Act. Indeed, the Tribunal has no involvement with the Director's inquiry whatsoever; instead, its role in the administration of the Act only begins once an application is brought before it...

[84] I find that subsection 4.1(3) of the Rules makes the use of information obtained through section 11 orders more difficult once the disclosure statement has been served on the respondent, since any amendment to the disclosure statement can only be made with the authorization of the Tribunal. As such, the Tribunal exercises control over the introduction of information obtained under section 11 that arises after the Commissioner has served his disclosure statement. Any unfairness that may arise from the Commissioner's attempt to amend the disclosure statement after it has been filed in accordance with section 4.1 of the Rules may be controlled by the Tribunal.

(e) Obligation to Produce Section 11 Transcripts?

[85] The applicant (Canada Pipe) states that the Rules appear to empower the Commissioner to conduct examinations under oath pursuant to section 11 of the Act without providing transcripts of the examinations to respondents in non-merger cases. Subsection 4.1(4) of the Rules provides:

The Commissioner shall allow a person who wishes to oppose the application to inspect and make copies of the records listed in the disclosure statement referred to in subsection (2) and the transcript of information for which the authorization referred to in section 22.1 has been obtained. [emphasis added]

Le commissaire doit permettre a la personne qui entend contester la demande d'examiner et de reproduire les documents mentionnés dans la déclaration visée au paragraphe (2) ainsi que la transcription des renseignements pour lesquels l'autorisation visée à l'article 22.1 a été obtenue. [je souligne]

[86] Section 22.1 of the Rules provides:

The Commissioner may by motion request authorization from the Tribunal to read into evidence information obtained pursuant to paragraph 11(1)(a) of the Act from an officer of the person filing the response, unless the person undertakes to call the officer as a witness. [emphasis added]

Le commissaire peut, par voie de requête, demander au Tribunal l'autorisation de consigner comrne éléments de preuve les renseignements obtenus, en vertu de l'alinéa 11(1)a) de la Loi, d'un dirigeant de la personne qui dépose la réponse, à moins que celle-ci ne s'engage a assigner ce dernier comrne témoin. [je souligne]

[87] Canada Pipe argues that the Rules do not require the Commissioner to provide to a respondent with transcripts of section 11 examinations of third party witnesses, nor the transcripts of examinations of witnesses who do not qualify as "officers". Canada Pipe submits that these transcripts may be withheld and then used to impeach a witness during a contested hearing. Canada Pipe states that it would be denied procedural fairness in these circumstances.

[88] Additionally, Canada Pipe submits that, even where the Commissioner has conducted section 11 examinations and intends to use them as evidence, he is not required to provide transcripts to the respondent until he has sought and obtained authorization from the Tribunal to "read into evidence" information contained in the transcripts. Canada Pipe suggests that the Commissioner can unfairly control the timing of the authorization and provision of transcripts to a respondent.

[89] Section 22.1 of the Rules provide that the Commissioner must request authorization to read into evidence information given pursuant to a section 11 order by an officer of the respondent company (providing that officer is not called as a witness during the hearing). If authorization is granted, the Commissioner must provide the respondent with a copy of the transcript prior to the hearing (subsection 4.1(4)). The Rules do not specifically address whether authorization must be granted in order for the Commissioner to read into evidence information obtained from third parties or employees of the respondent company. As well, the Rules do not address whether authorization and provision of a transcript to the respondent are required in the event that the Commissioner uses that transcript to impeach a respondent's witness during the course of the hearing.

[90] I am satisfied that any concerns Canada Pipe may have with regard to the Commissioner's unfair control of the timing of an authorization under section 22.1 of the Rules to read into evidence information obtained pursuant to a section **11** order may be adequately addressed by the Tribunal when it considers the request to grant such an authorization.

Consequently, I do not find that the Rules deprive Canada Pipe of procedural fairness on this point.

[91] With respect to the other issues raised by Canada Pipe concerning the use of section 11 transcripts in a proceeding before the Tribunal, the Rules do not specifically address these issues. Canada Pipe has not yet served and filed its response to the Application pursuant to subsection 5(1) of the Rules and the proceeding has not yet advanced to the pre-hearing conference stage. In such circumstances, it is difficult, if not impossible, to determine that the Rules are procedurally unfair without the benefit of a factual basis upon which to make such a determination. Making a finding on these issues would require that I stray into the realm of conjecture. This would serve no useful purpose.

VI. CONCLUSION

[92] Given the foregoing analysis, I summarize my conclusions on the motions, as follows.

[93] I conclude that the Proctor affidavit should be struck from the record and that the Rowley affidavit should remain.

[94] I find that the provisions concerning documentary discovery do not violate Canada Pipe's right to a fair hearing. However, in order to ensure a fair hearing, the Commissioner must comply with subsection 4.1(4) of the Rules by allowing Canada Pipe to inspect and make copies of the records listed in the Commissioner's disclosure statement. I find that section 4.1 of the Rules does not permit the Commissioner to make claims of public interest privilege over documents listed in his disclosure statement. If public interest privilege is asserted over a document, it must be done at the time the disclosure statement is prepared. In that event, the document will not be included in the disclosure statement and the Commissioner will not be permitted to rely on it during the proceeding. However, the Commissioner may have documents listed in the disclosure statement declared confidential by the Tribunal pursuant to paragraph 64(1)(b) of the Rules if public access to the document would result in direct harm. In my view, the Commissioner must list and provide for inspection all documents on which he intends to rely at the hearing. I am also of the view that the Commissioner has not complied with paragraph 4.1(2)(b) of the Rules in setting out only amalgamated non-expert witness will-say statements. This practice has hampered Canada Pipe's ability to know the case it has to meet. There must be a will-say statement filed for each non-expert witness.

[95] On the issue of sufficiency of the oral discovery, I do not find that Canada Pipe's right to a fair hearing is violated, given the discretionary case management provisions that envisage oral discovery where warranted.

[96] I find that any concerns that Canada Pipe has about being prejudiced by the "two-day rule" and requests concerning advance notice of the identity of witnesses may be addressed at the appropriate time through the pre-hearing conference process. Given the discretionary nature of these provisions, I find that section 4.2 of the Rules does not violate Canada Pipe's right to a fair hearing.

[97] I find that the Tribunal has no jurisdiction over the granting of section 11 orders. However, the Tribunal can control the use of information obtained under section 11 because the Commissioner is required to secure the authorization of the Tribunal to amend his disclosure statement. In that context, the Tribunal may deal with any potential unfairness that may arise from the use of information obtained pursuant to section 11 orders granted following the service of the Commissioner's disclosure statement on the respondent.

[98] I also find that, if the Commissioner seeks authorization pursuant to section 22.1 to read into evidence portions of the transcript of an officer of the respondent, the issue of fairness and timing of the authorization may be dealt with by the Tribunal when it considers the request.

FOR THE ABOVE REASONS THE TRIBUNAL ORDERS THAT:

[99] The Commissioner's motion to strike the affidavits of Messrs. Proctor and Rowley is partially granted in that the affidavit of Mr. Proctor is hereby struck from the record.

[100] With respect to Canada Pipe's motion:

(a) the Commissioner shall provide to Canada Pipe, within 14 days of the date of this order, a fresh disclosure statement containing a list of all the records on which he intends to rely as required by paragraph 4.1(2)(a) of the Rules and in accordance with these reasons;

(b) the Commissioner shall provide to Canada Pipe a separate witness will-say statement for each non-expert witnesses as required by paragraph 4.1(2)(b) of the Rules and in accordance with these reasons;

(c) Canada Pipe shall serve and file its response pursuant to subsection 5(1) of the Rules within 45 days after being served with the Commissioner's fresh disclosure statement;

(d) Canada Pipe shall serve its disclosure statement on the Commissioner within 14 days of serving its response; and

(e) the motion is otherwise dismissed.

[101] Failing agreement on costs, the parties shall submit written submissions on costs of these two motions within 30 days of the date of this order.

DATED at Ottawa, this 8th day of August, 2003.

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

(s) Edmond P. Blanchard

APPEARANCES:

For the applicant:

The Commissioner of Competition

John A. Campion
Linda J. Wall
Robin P. Roddey
Catherine Lawrence
Graham Law

For the respondent:

Canada Pipe Company

Ltd. Kent E. Thomson
James Doris
Patrick J. Monahan
Jason Wadden