Federal Court of Appeal | Cour d'appel fédérale

Date: 20261014

Docket: A-147-26

Citation: 2026 FCA 173

2026 FCA 173 (CanLII)

CORAM: **STRATAS J.A.**
LASKIN J.A.
WALKER J.A.

BETWEEN:

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Appellants

and

COMMISSIONER OF COMPETITION

Respondent

Heard at Toronto, Ontario, on September 1, 2026.

Judgment delivered at Ottawa, Ontario, on October 14, 2026.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: LASKIN J.A.
WALKER J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The Commissioner of Competition brought proceedings in the Competition Tribunal concerning some of the appellants' online advertising services. The Commissioner says they are anti-competitive, contrary to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34.

[2] Discoveries have taken place. During the discoveries, certain questions were refused on the basis of relevance and litigation privilege, among other things. The Tribunal (*per* Andrew D. Little, Chairperson) ruled on the refusals: 2026 Comp. Trib. 17. The appellants now appeal from that ruling.

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[3] Discoveries in competition proceedings under the Act are governed by the same principles that apply to civil proceedings in the Federal Court: see the Tribunal's decision at para. 6; see also *Competition Tribunal Rules*, S.O.R./2008-141, Rule 34, which incorporates Rules 3, 240 and 242 of the *Federal Courts Rules*, S.O.R./98-106. This Court has seldom discussed those principles. For a rare example, see the brief discussion in *Canada v. Lehigh Cement Limited*, 2011 FCA 120 at paras. 33-37. To resolve the issues in this appeal, a little more needs to be said.

[4] Discoveries are not an end in themselves; they are a means to an end. That end is the fair, efficient and informed determination of a dispute.

[5] When done well, discoveries separate the wheat from the chaff. Evidence supporting allegations with possible merit comes to light; allegations without support are cast aside. Real issues stay on the table; the rest go in the bin. Adjournments, delays and costly unproductive trial days become less likely. Procedural fairness, especially knowledge of the case to meet, is enhanced. Settlement can become more likely because the parties have better information about the dispute. And if the trial runs its full course, the judge's fact-finding is more likely to be accurate.

[6] But here, too much of a good thing can be bad. If relevance—whether the evidence sought has any tendency to make an allegation more or less probable—alone governed every question and production request during discoveries, parties would have to rummage through files scattered across many offices. They would have to scrounge for anything logically related to an issue, no matter how tangential or minor, and produce it. Re-examinations, further searches and still more productions would follow. In many cases, the insights gained would be too slight to justify the time and expense.

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[7] Thus, relevance alone cannot govern whether a discovery question or a production request is proper. Materiality and proportionality must also be brought to bear.

[8] Materiality asks whether the evidence sought is aimed at something the law cares about in the case. Given the pleadings, the elements of the claim or defence, and the governing substantive law, does anyone really need to prove or disprove a particular fact?

[9] Proportionality asks whether the evidence sought is worth the cost and burden it imposes. Information may be logically relevant and material to a pleaded claim or defence and still be off-limits if the expense, delay, or intrusion is out of line with what the case actually needs.

[10] Discovery questions that go too far often fall into three categories:

- The question is only logically relevant to a fact that is not material, a fact of no real consequence under the pleadings.

- The fact is material, but the particular question is so remote that it will not significantly help determine the issue, or it is not proportional to the needs of the case.

- The cumulative burden of the whole line of inquiry—searching for, collecting, reviewing, and producing megabytes or even terabytes of electronically stored information, along with other relevant considerations such as privacy—outweighs its likely benefit, even if individual questions, taken alone, could be defended.

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No doubt there are other categories too.

[11] Sometimes questions seeking a party's legal positions are proper. They can further the purposes of discovery, many of which are set out in paragraphs 4 and 5 above.

[12] Though an overbroad discovery has its pitfalls, so does an overly restrictive approach. Undue restrictions on the scope of discovery can lead to serious problems, delays or even injustice at trial. See *Canada v. CHR Investment Corporation*, 2021 FCA 68 at para. 20, citing *Montana Band v. Canada*, [2000] 1 F.C. 267 at para. 5. Thus, in cases of real doubt, it is often best for a regulator or court to allow a discovery question to be asked.

[13] In this Court, the appellate standard of review applies: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 37, adopting *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The appellants must show that the Tribunal erred

on a stand-alone legal principle or on an extricable question of law arising from a question of mixed fact and law. They have not done so.

[14] Reading the Tribunal's reasons properly (see *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at paras. 69 and 153, *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at paras. 49-51, and *Halton (Regional Municipality) v. Canada (Transportation Agency)*, 2024 FCA 122 at paras. 23-25), we see that, in careful, complete and logical reasons concerning the refusals, the Tribunal was alive to accepted principles of discovery. Throughout its reasons, sometimes explicitly, sometimes implicitly, the Tribunal considered relevance, materiality and proportionality—principles baked into Rules 3, 240 and 242 of the *Federal Courts Rules*. It applied these principles without any palpable and overriding error.

[15] The appellants allege other legal errors on various points. We see none. The Tribunal set out the correct legal test for litigation privilege, guided by the controlling authorities. It followed well-established discovery law and did not encroach upon issues for the hearing on the merits, such as hearsay, admissibility, the use of Rule 288 and procedural fairness. We substantially agree with the respondent's submissions at paragraphs 67-77, 84-92 and 99-114 of its memorandum on these points and other discovery issues.

[16] Counsel for the appellants, with their usual skill, tried hard to wring extricable legal error out of factually suffused questions of mixed fact and law. But an extricable principle of law is not just a question that forms part of the overall mix. Instead, it must clearly, objectively and

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genuinely taint, infect or dominate the question: *Housen* at para. 35; *Mahjoub* at para. 74. Here, the Court must focus on the real substance of the matter: *Cineplex Inc. v. Commissioner of Competition*, 2026 FCA 10 at para. 26, citing *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140, [2021] 3 F.C.R. 206 at para. 51; *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 at para. 29; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50. We agree with the respondent that there are no extricable questions of law in this case.

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[17] Absent legal error or error on an extricable principle of law, we can interfere only for palpable and overriding error. That is a very difficult standard to satisfy: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; see the metaphorical description of the standard in *South Yukon* at para. 46 and the detailed discussion of the practicalities of the standard in *Mahjoub* at paras. 61-74; see also *Cineplex* at paras. 24-26.

[18] The Tribunal is an administrative decision-maker in a highly specialized regulatory field, with knowledge and experience handling large and complicated cases. It is master of its own procedure and can tailor things to ensure the administrative law requirements of procedural fairness are met, including the right of the appellants to make full answer and defence. It must apply its procedural rules “as informally and expeditiously as the circumstances and considerations of fairness permit”. See *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd

Supp.), s. 9(2); *Competition Tribunal Rules*, Rule 2(1) and Rule 34(1); *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 685.

[19] These things, and others discussed above such as relevance, materiality and proportionality, are qualitative, somewhat impressionistic, and fact-based. They entitle the Tribunal to an ample margin of appreciation, one expressed well by the standard of palpable and overriding error. The appellants have not shown any palpable and overriding error.

[20] More needs to be said about the Tribunal's decision on the issue of litigation privilege. Here, the main issue was whether the documents said to be covered by the privilege were created for the dominant purpose of litigation. The appellants submit that the Tribunal wrongly accepted scant evidence—just one paragraph in the affidavit of Ms. McLean—without sufficient attention or scrutiny. The paragraph in the McLean Affidavit is as follows:

> I have reviewed the documents listed in Schedule "B" of the Commissioner's [affidavit of documents] that [the appellants seek] disclosure of in its Refusals Motion. With three exceptions [where documents have already been produced], I confirm that those documents were prepared for the dominant purpose of litigation and can be categorized [footnote omitted] as follows:
>
> a. Communications with third parties requesting data or information for the purposes of litigation;
>
> b. Communications with prospective witnesses;
>
> c. Communications with third parties regarding their witness statement; and
>
> d. Witness statement exhibits.
>
> [footnotes concerning a, b, c and d identifying the documents by row number omitted]

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[21] Each of these categories is of the sort that can fall within litigation privilege: see the analysis in paras 112-118 of the Tribunal's reasons, correctly applying *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319 and *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521.

[22] The appellants say that the Tribunal simply adopted the evidence in the McLean Affidavit without giving it enough scrutiny. This is incorrect. The Tribunal stated (at para. 125) that "each document for which litigation privilege is claimed must be shown to fall within the class of documents covered by the litigation privilege that is demonstrated by the evidence". It found as a fact (at para. 128) that the deponent, Ms. McLean, "did review all of the documents that are the subject of [the appellants'] motion and that she found them to be prepared for the dominant purpose of reasonably contemplated litigation". The Tribunal added (at para. 129) that "each of the four categories described above is a kind of document for which litigation privilege may be properly claimed". Also it considered the grouping of the documents into these four categories to be appropriate. Finally, it relied on a previous authority that noted that Ms. McLean is the sort of person with sufficient knowledge of the circumstances and, thus, is an appropriate deponent: *Commissioner of Competition v. Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp. Trib. 16, at paras. 68-69, adopted by the Tribunal at para. 129.

[23] The Tribunal paid very close attention to the witness statements, item "d" in the quoted paragraph above. It noted that the parties did not dispute that each of the witness statements is not producible, at least not at this time. It found that the exhibits to the witness statements are

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also not producible, at least not at this time, saying in effect (at paras. 132-133 and 137) that since they are part and parcel of the witness statements, their production might shed light on their contents and reveal the Commissioner's litigation strategy. On this, we see no reviewable error.

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[24] True, the one-paragraph treatment of this issue by the deponent is brief. But brevity does not necessarily undercut quality. Here, given the circumstances of this case, enough was said. It is hard to imagine what else the deponent could have added without revealing the contents of the documents and lifting the protection afforded by the privilege.

[25] During oral submissions, the appellants made much of the unfairness of the Tribunal's ruling on litigation privilege. But the ruling must be seen in its proper context. The Tribunal has made a very narrow ruling on litigation privilege, aimed at allowing a zone of privacy for the Commissioner to prepare its case. The documents appended to the affidavit are not to be produced, at least at this time. If they were produced at this time, the Commissioner's evolving litigation strategies, preparations and evaluations might be disclosed to its prejudice.

[26] But the Tribunal's ruling does not prevent necessary and appropriate disclosure later, perhaps even some of the documents appended to the McLean Affidavit. In substance, the Tribunal recognized (in paras. 134-136) that withholding documents due to litigation privilege is one thing but proper disclosure before and during the hearing is another thing. The Tribunal observed that under Rule 74 of the *Competition Tribunal Rules*, the Commissioner will soon have to disclose witness statements with supporting documents, no doubt including some that are appended to the McLean Affidavit. At the hearing, the appellants will be able to cross-examine

witnesses. As part of that, they may seek production orders to ensure procedural fairness and accurate decision-making: *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 8(2); and see also the authorities in para. 18, above.

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[27] This Court has acted before to ensure that regulators, even those acting in good faith, do not withhold documents and information under dubious claims of privilege: *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24, [2018] 3 F.C.R. 633. Regulators' assurances such as "trust us, we'll do the right thing" have never gotten much traction in our Court: see, *e.g.*, *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 at paras. 23-24; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 73-79; *Jewish National Fund of Canada Inc. v. Canada (National Revenue)*, 2026 FCA 63 at paras. 12-13 (and note the consequences of disobeying production orders at paras. 40-43). We are confident that at the hearing the Tribunal will have procedural fairness and full answer and defence front of mind.

[28] Quite aside from the issues concerning the documents covered by litigation privilege, further disclosure or other accommodation might have to be given at the hearing. The result of this appeal and these reasons do not affect that in any way.

[29] Therefore, I would dismiss the appeal with costs.

"David Stratas"
J.A.

"I agree.
J.B. Laskin J.A."

"I agree.
Elizabeth Walker J.A."

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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