COURT OF APPEAL FOR ONTARIO

CITATION: Treat America Limited v. Leonidas, 2012 ONCA 748
DATE: 20121127
DOCKET: C55002

Goudge, Feldman and Blair JJ.A.

BETWEEN

Treat America Limited

Applicant (Respondent)

and

Robert G. Leonidas

Respondent (Appellant)

and

The Commissioner of Competition

Intervener

Jay L. Naster, for the appellant

Darryl T. Mann, for the respondent

James D. Sutton and Belinda Peres, for the intervener

Heard: March 26, 2012

On appeal from the order of Justice Colin L. Campbell of the Superior Court of Justice, dated December 9, 2011, with reasons reported at 2011 ONSC 7325.

Feldman J.A.:

A. INTRODUCTION

[1] The appellant, Robert Leonidas, is the former President and Chief Executive Officer of Nestlé Canada Inc. and is one of a number of targets of a criminal investigation being conducted in Canada by the Commissioner of Competition in respect of an alleged conspiracy by a number of chocolate manufacturers to unreasonably enhance the price of chocolate candy in Canada.

[2] The Commissioner initiated the investigation by obtaining search warrants, based on sworn information contained in affidavits (the Informations to Obtain (ITOs)). Following execution of the search warrants, the ITOs were filed in court and the information contained in them then became available to the public. As a result, various class actions were commenced in multiple jurisdictions in the United States against a number of chocolate manufacturers there and in Canada for damages suffered from the alleged conspiracy to inflate the price of chocolate candy in the U.S.

[3] Those lawsuits have been combined into Multidistrict Litigation (MDL) known as *In Re: Chocolate Confectionary Antitrust Litigation*, MDL Docket No. 1935, Civil Action No. 1:08-MDL-1935, which is under case management by Judge Christopher C. Conner of the United States District Court for the Middle District of Pennsylvania. Although Nestlé Canada was originally one of the defendants, the action was dismissed against it on jurisdictional grounds. There

is now only one Canadian defendant, Hershey Canada Inc. The appellant is not a defendant.

[4] The plaintiffs in the class action (represented by the respondent, Treat America Limited), wish to examine the appellant to obtain his information regarding the merits of their claim. Judge Conner issued a Letter of Request for International Judicial Assistance (LOR), seeking an order from the Ontario Superior Court, compelling the appellant to appear for a deposition and provide oral testimony under oath as a witness in the MDL. The Commissioner was granted intervener status in the MDL and sought and obtained from Judge Conner a number of conditions in respect of the LOR.

[5] The order enforcing the LOR was granted by the application judge, C. Campbell J. of the Ontario Superior Court of Justice, together with a number of further conditions, designed to protect the appellant's interests.

[6] The appellant appeals from that order on the basis that it is contrary to Canadian public policy in respect of his right to remain silent and that it is unduly burdensome on him.

B. BACKGROUND FACTS

(1) Investigation by the Commissioner and the MDL

[7] The application judge accepted the following findings regarding the historical and factual context underlying the LOR:

> - The [appellant] is a target of an ongoing criminal investigation in Canada being conducted by the Competition Bureau. As a consequence, the Competition Bureau is prohibited from conducting a compelled examination of the [appellant] for the purposes of advancing the criminal investigation.
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> - The Letter of Request was issued further to class actions in the United States (the "MDL") which were commenced as a direct result of the publication of two Informations to Obtain search warrants sworn by an officer of the Competition Bureau, wherein the [appellant] was identified as a target of the criminal investigation being conducted by the Competition Bureau.
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> - The [respondent] seek[s] to conduct a compelled examination of the [appellant] in respect of the very same matters which are the subject of the ongoing criminal investigation.
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> - Although not a party to the MDL, the Competition Bureau has intervened in the MDL, reached agreements with counsel for the plaintiffs to the MDL, and made submissions to the Court in the MDL intended to facilitate the taking of "Canadian Depositions" including the issuance of the Letter of Request herein seeking to compel the [appellant] to testify.
>
> - At least one, if not more, of the parties to the MDL has been granted immunity from prosecution by

> the Competition Bureau, or leniency, in return for, *inter alia*, the provision of ongoing assistance to the Competition Bureau. Those parties are entitled to participate in the compelled examination of the [appellant].
>
> - Further to its intervention in the MDL, the Competition Bureau has sought and obtained an order from the requesting court (CMO No. 7A) that requires the Competition Bureau to be given notice if, and when, any compelled testimony from a Canadian Deposition, including any deposition that may be taken of the [appellant], is to be used at any hearing or trial.
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> - Further to its intervention in the MDL, the Competition Bureau has sought and obtained an order from the requesting court (CMO No. 7A) the effect of which is to prohibit the [appellant] and his counsel from reviewing information that is necessary to properly prepare for questions that may be asked during the course of any compelled examination that may be ordered pursuant to the Letter of Request, thereby further prejudicing the [appellant]'s rights.
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> - The [appellant], a non-party to the MDL, is being compelled to give testimony relevant solely to the merits of the [respondent's] claim, in the context of U.S. class proceedings which have not been certified; were the action being tried in Ontario, such pre-certification discovery, particularly of a non-party, would not be permitted.

[8] The pre-certification discovery in the MDL is proceeding at the same time both on class certification issues, as well as on the merits of the claim. The appellant refused to be examined voluntarily in the MDL. In oral argument in this court, counsel for the Commissioner confirmed that the appellant was shortly

going to be charged personally with criminal offences under the *Competition Act*, R.S.C. 1985, c. C-34, in respect of alleged price fixing of chocolate confectionary in Canada by a number of chocolate manufacturers.

(2) Proceedings before the Application Judge

[9] In light of this background, the application judge asked for the participation of the Commissioner on the application and received written submissions. On the resumption of the hearing, it became clear that the appellant's concern was the possible prejudice to him if the Commissioner were to obtain access to his deposition while he is under investigation or indictment. The Commissioner has the potential to obtain access to his deposition directly, and as well, indirectly, through at least one of the parties to the MDL who is a co-operating party with the Commissioner, and who has been granted immunity by the Commissioner. That party will have direct access to the appellant's deposition evidence.

[10] The application judge reviewed the history of the Commissioner's involvement in the MDL proceeding in the U.S. In that proceeding, the Commissioner had sought and was accorded intervener status by Judge Conner. In that capacity, the Commissioner obtained amendments to the original protective order, CMO No. 7, dated December 19, 2008.

[11] CMO No. 7 provided restrictions on disclosure of discovery material designated as confidential or highly confidential. However, regardless of the

designation, discovery material could be disclosed to anyone identified in the material or to a witness at a deposition in the litigation if necessary for the purposes of the deposition.

[12] The Commissioner intervened in the MDL for the purpose of seeking further disclosure restrictions on the Canadian depositions, including that of the appellant, in order to protect the integrity of its ongoing investigation. Judge Conner amended CMO No. 7 by CMO No. 7A on Feb 1, 2011. According to that order, transcripts of Canadian depositions are not to be shown to witnesses in other Canadian depositions, and the Commissioner is to be provided with notice before any Canadian deposition is used.

[13] The appellant argued before the application judge, as he does on this appeal, that: 1) the enforcement of the LOR is both contrary to the public policy of Canada in respect of his right against self-incrimination, as well as unduly burdensome on the appellant; 2) if the LOR is enforced, then CMO No. 7A should not be given effect to the extent that it prohibits the appellant from learning the testimony of other witnesses to prepare for his examination, it gives notice of the use of his testimony in the litigation to the Commissioner, and it binds his counsel.

[14] The application judge concluded that an order could be crafted that would adequately protect the appellant's immunity rights in respect of his compelled testimony, while also honouring Canada's comity obligations to the U.S. court.

[15] On the issue of whether it was unduly burdensome on the appellant to be denied access to other depositions in order to prepare for his, the application judge analogized to r. 39.03 of Ontario's *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, saying that if the appellant's evidence were taken under that rule, he would similarly not be entitled to review the transcripts of other witnesses in preparation.

[16] On the issue of the appellant's immunity rights, the application judge referred to the protection afforded by the *Canada Evidence Act*, R.S.C. 1985, c. C-5 and s. 13 of the *Charter* to limit the use that could be made of his compelled testimony. However, in order to minimize the Commissioner's ability to obtain and use the transcript of the appellant's examination for any purpose, the application judge did two things: 1) he accepted an undertaking from counsel for the Commissioner to provide notice to the appellant of any move by the Commissioner to seek access to the appellant's transcript or of any move by another party to make the appellant's evidence public prior to trial; and 2) he added a condition to the LOR that the requesting court allow for notice to be given to the appellant of any motion to vary either CMO No. 7 or CMO No. 7A,

and further that the appellant would be entitled to make submissions without attorning to the jurisdiction of the MDL court.

[17] Finally, at the settlement of the order following release of his reasons, the application judge added that the protections against self-incrimination provided both by Ontario's *Evidence Act,* R.S.O. 1990, c. E.23 and the *Canada Evidence Act* would apply to the evidence to be given by the appellant pursuant to the LOR.

C. ISSUES ON THE APPEAL

[18] The appellant raises the following issues on the appeal: 1) Did the application judge err by concluding that enforcement of the LOR would not breach the appellant's *Charter* rights, and in that way be contrary to Canadian public policy and sovereignty concerns? 2) Did the application judge err by: (a) concluding that enforcement of the LOR would not be unduly burdensome for the appellant; and (b) trying to minimize prejudice to the appellant by adding a condition to the LOR that would allow or effectively force him to make submissions in the U.S. court to oppose release of his deposition?

D. ANALYSIS

The Test for Enforcement of an LOR

[19] The six-part test for enforcement of an LOR was set out in *Re Friction Division Products, Inc. and E. I. Du Pont de Nemours & Co. Inc. (No.2)* (1986), 56 O.R. (2d) 722 (H.C.), at p. 732. It has been affirmed by this court on a number of occasions, most recently in *Treat America Ltd. v. Nestlé Canada Inc.*, 2011 ONCA 560, 340 D.L.R. (4th) 707, at para. 12. Before an order giving effect to letters rogatory will be made, the evidence, including the letters rogatory, must establish that:

> (1) the evidence sought is relevant;
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> (2) the evidence sought is necessary for trial and will be adduced at trial, if admissible;
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> (3) the evidence is not otherwise obtainable;
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> (4) the order sought is not contrary to public policy;
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> (5) the documents sought are identified with reasonable specificity;
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> (6) the order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do, and produce, were the action to be tried here.

[20] In *R. v. Zingre*, [1981] 2 S.C.R. 392, at p. 401, the Supreme Court described how the two principles of sovereignty and comity co-relate in the context of enforcement of a letter of request for examination:

> [T]he courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect. A foreign request is given full force and effect unless it be contrary to the public policy of the jurisdiction to which the request is directed (see *Gulf Oil Corporation v. Gulf Canada Limited et al.*, [1980] 2 S.C.R. 39) or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction.

[21] The court in *Zingre*, at p. 401, then gave a number of examples in which the public policy or sovereignty principle overrode the comity principle and the order was refused: a) where the request for documents was vague and would not have been enforced in the Canadian context; b) where discovery of the person would not have been allowed under local laws; c) where the main purpose of the examination was a "fishing expedition"; d) where the person examined would be committing an offence in order to comply with the order; and e) where the purpose of the request was to use the person's testimony in proceedings against him in the requesting country.

[22] The appellant does not dispute the "*Friction* test" criteria. He relies on numbers four and six, submitting that enforcement of the LOR would be contrary to Canadian public policy and unduly burdensome.

Issue 1: Would enforcement of the LOR breach the appellant's *Charter* rights and in that way be contrary to Canadian public policy and sovereignty?

[23] The appellant submits that the application judge failed to consider how enforcement of the LOR in its factual and historical context would infringe his right to silence under s. 7 of the *Charter* as a right that encompasses more than use immunity for his compelled testimony. He further submits that the application judge failed to take into account the role that the Commissioner's actions played in bringing about the MDL and the effect on the appellant's rights of the Commissioner's subsequent intervention in that litigation.

[24] The appellant's concern is that by forcing him to testify in the MDL, the Commissioner or other persons working with the Commissioner who have been granted immunity will have access to the deposition with the following consequences: 1) it will provide a roadmap to the appellant's defence to the Commissioner's allegations; 2) it may cause the Commissioner or others to adjust their strategies or positions in proceedings against him; 3) it will provide the Commissioner the ability to access (including with a warrant) "information not otherwise permitted in the Canadian criminal process or pursuant to Canadian constitutional law;" and 4) it will deny the appellant all the protections included in the right of a target to remain silent, beyond testimonial immunity.

[25] These concerns arise in the context of the following issues raised by the appellant: (a) the role of the Commissioner and its impact, (b) the scope of the *Charter* protection against self-incrimination in the context of enforcing an LOR as Canadian public policy, and (c) the terms of the approval of the LOR which are discussed under Issue 2.

(a) The legal effect of the Commissioner's role in bringing about the MDL

[26] The appellant alleges that the Commissioner effectively instigated the MDL by not seeking a sealing order for the ITOs once the warrants had been exercised and the ITOs were filed with the court. In this way, he says, the Commissioner has caused his s. 7 *Charter* right to silence to be abrogated by these proceedings. The appellant submits that the application judge erred by failing to refer to this aspect of his submissions. I do not agree.

[27] The application judge asked the Commissioner to take part in the proceedings and to answer these allegations. The Commissioner's material explains that the Commissioner acted in accordance with ordinary practice in not seeking to obtain an order to seal the material filed with the court following the execution of the search warrants.

[28] The Supreme Court has repeatedly stressed the importance of the open court principle, requiring a serious risk of danger to the administration of justice to

justify the imposition of publication bans and sealing orders: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at para. 39; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 30-34. As Dickson J. stated for the majority of the Supreme Court in *A.G. (Nova Scotia) v. McIntyre*, [1982] 1 S.C.R. 175, at pp. 189-90, "once the warrant has been executed, exclusion thereafter of members of the public cannot normally be countenanced." In *Canada (Commissioner of Competition) v. Falconbridge Ltd.* (2003), 225 D.L.R. (4th) 1 at paras. 44, 95-100, this court refused a sealing order because the targets were not innocent third parties entitled to an exception to the principle of openness and public accessibility, but instead they were alleged to be involved in the conspiracy.

[29] In the present case, the targets of the Commissioner's investigation did not seek a sealing order over the ITOs, and it is unlikely one would have been granted. The fact that American litigants then viewed and acted on the ITOs in commencing their action and ultimately seeking to examine the appellant does not, in itself, make the Commissioner responsible for the appellant "losing his right to remain silent".

[30] In that context, the next issue for this court is whether the U.S. MDL that arose from the ITOs gives the Commissioner an advantage in its proposed proceedings against the appellant that is in breach of his constitutional rights.

(b) The scope of the *Charter* protections against self-incrimination

[31] The focus of the appellant's submission on the scope of his s. 7 *Charter* rights is that the target of an investigation has a right to remain silent and is not required to provide any information to authorities. He argues that this LOR process effectively circumvents that right and that if that testimony becomes available to the Commissioner either directly or indirectly, the Commissioner gets the benefits referred to above at para. 24 from having advance knowledge of the appellant's position. Those benefits, he says, undermine his right to silence, and by inference, his right to protection from self-incrimination.

[32] This court is very concerned, as was the application judge, that the appellant's *Charter* rights and protections, especially as an anticipated accused person in Canada, be scrupulously protected and preserved. That is the heart of the Canadian public policy component of the "*Friction* test", as it applies in this case.

[33] In *United States of America v. Pressey* (1988), 65 O.R. (2d) 141, leave to appeal to S.C.C. refused, [1988] S.C.C.A. No. 282, this court discussed the predecessor of s. 60(3) of Ontario's *Evidence Act*, which finds its equivalent in s.

50(1) of the *Canada Evidence Act*. Though the wording of these subsections provides a witness giving evidence requested by a foreign tribunal the right to refuse to answer questions tending to criminate himself, this court interpreted the section to mean that a person ordered to give evidence pursuant to an LOR does not have the ability to refuse to answer under the Fifth Amendment to the U.S. Constitution. Rather, the witness benefits from the protections of the Canadian forum, which consist primarily of the use immunity offered by s. 5(2) of the *Canada Evidence Act* and s. 9(2) of Ontario's *Evidence Act*, together with the protection provided by s. 13 of the *Charter*.

[34] Section 13 provides:

> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[35] The purpose of the use immunity protection accorded by s. 13 of the *Charter* was discussed and explained by the Supreme Court of Canada in *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, and most recently in *R. v. Nedelcu*, 2012 SCC 59. It protects a person who is compelled to give evidence in a prior proceeding and exposed to the risk of self-incrimination. The use immunity is the *quid pro quo*, offering protection from the subsequent use of that compelled

evidence against the witness, in exchange for full and frank testimony: *Henry*, at para. 22.

[36] The court in *Henry* emphasized that the use immunity protection offered by s. 13 is reserved for prior compelled or compellable testimony only (at paras. 34, 50). However, if the prior testimony was not compelled but was given voluntarily, then although it still cannot be used as direct evidence against the person because of the s. 11(c) *Charter* right not to be compelled to be a witness in proceedings against oneself, if the person chooses to testify in the second proceeding, then the prior non-compelled testimony may be used to cross-examine the person: *Henry*, at para. 43.

[37] Three years after *Henry*, the Supreme Court in *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157, discussed the extent and effect of the implied undertaking rule in examinations for discovery, including in the context of use immunity. For the purposes of this discussion, the court held that the implied undertaking rule does not prevent the use of information obtained in examinations for discovery in one proceeding to impeach a witness in another proceeding (at para. 41). However, Binnie J., writing for the court, noted that *Charter* protection was not in issue in that case (at para. 54).

[38] Binnie J. also pointed out that the implied undertaking rule prevents parties from disclosing information obtained during civil discoveries to the authorities,

subject to either a court order or immediate and serious danger to public safety (at paras. 32, 40). However, he noted that a prosecutor can obtain the discovery transcript in other ways, either by a search warrant or, where a person is charged with an offence, by subpoenaing a witness to trial who has possession of the transcripts (at paras. 56-57).

[39] Recently, in *Nedelcu*, the Supreme Court revisited its decision in *Henry* on the question of the extent of the use immunity protection guaranteed by s. 13 of the *Charter*. For the purpose of these reasons, it is sufficient to say that the Supreme Court in *Nedelcu* held that s. 13 use immunity protection is limited to previously compelled, incriminating evidence.

(c) Aside from use immunity in court, can the prosecutor obtain compelled evidence for the purpose of an investigation of the deponent?

[40] The appellant's position, however, is that his right to remain silent is broader than use immunity at trial for his deposition evidence, and extends to a full right not to have to disclose his position to the investigating authority directly or indirectly. He says that in the circumstances of this case, with immunity parties co-operating with the Commissioner, there will be disclosure and strategic advantage to the Commissioner and to the co-operating parties adverse in interest to the appellant.

[41] It is well-established that because of the common law and s. 7 *Charter* right to remain silent, no one can be compelled to provide information to the authorities, absent statutory or other legal compulsion: *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, at para. 27.

[42] However, that right does not make a potential accused person immune from compulsion in a civil suit, either as a party or if ordered by a court, as a witness, or possibly to provide information to other authorities, such as to local police following a car accident: *Nedelcu*, at paras. 1, 103; *Juman*, at para. 20; *R. v. White*, [1999] 2 S.C.R. 417.

[43] All statutorily compelled speech engages liberty interests under s. 7 of the *Charter*. Once engaged, the issue is whether the deprivation of this interest is in accordance with the principles of fundamental justice: *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 67; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 33. There must be a balancing between the principle against self-incrimination and the principle that all relevant evidence should be available to the trier of fact in a search for the truth: *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757, at paras. 67-68; *R. v. S. (R.J.),* [1995] 1 S.C.R. 451, at pp. 517-18, Iacobucci J.

[44] As such, while a person may, for example, use s. 7 of the *Charter* to apply for a stay of civil proceedings pending a criminal trial or for a constitutional

exemption, the availability of these remedies is strictly circumscribed due to the existence of use immunity. In *Nash v. Ontario* (1995), 27 O.R. (3d) 1, at p. 7, this court held that a stay is only justified in "extraordinary or exceptional circumstances", stating:

> The mere fact that criminal proceedings are pending at the same time as civil proceedings is not sufficient ground for a stay of the latter… Even the potential disclosure through the civil proceedings of the nature of the accused's defence or of self-incriminating evidence is not necessarily exceptional.

[45] Likewise, a "constitutional exemption" provides immunity from testifying in a proceeding, but only where the predominant purpose for compelling the witness to testify is to obtain incriminating evidence against the witness, rather than to obtain evidence in furtherance of that proceeding: *Application under s. 83.28 of the Criminal Code (Re)*, at paras. 71-72; *British Columbia (Securities Commission),* at paras. 7-10; *États-Unis c. Ross* (1995), 100 C.C.C. (3d) 320, at p. 328, Fish J.A. This court, in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2005), 79 O.R. (3d) 70, at para. 7, refused to grant a constitutional exemption from testifying to targets of an investigation because the purpose of the inquiry was fact-finding and not prosecutorial. In the present case, the purpose of the inquiry in the MDL is fact-finding. It cannot be said that the predominant purpose of the MDL is to obtain incriminating evidence against the appellant.

[46] Neither a stay nor a constitutional exemption have been requested, nor are the criteria met in the context of this case. As the appellant is compelled to testify, he is protected by the use immunity in s. 13 of the *Charter*, which ensures that his compelled testimony, to the extent that it may be self-incriminating, cannot be used in subsequent proceedings against him for any purpose.

[47] To the extent that the Commissioner may seek to cross-examine the appellant on his deposition following *Nedelcu*, the Commissioner will need to gain access to that compelled testimony. In *Juman*, the court explained that the implied undertaking rule prevents parties to the litigation in which the testimony is given from disclosing it to a prosecutor, but pointed out two ways a prosecutor could potentially obtain the transcript: 1) by obtaining a search warrant; or 2) after charges are laid, by subpoenaing a witness to trial.

[48] The appellant is concerned with the first way, by which the Commissioner could obtain the transcript before laying charges and use it as part of its investigation. Whether that may be a violation of his s. 7 right to silence is an open question.

[49] However, it is not necessary for the court to decide in this case whether the *Charter* protection against self-incrimination may extend to precluding a prosecutor from obtaining access to compelled testimony before charges are laid

and using it for investigative purposes, because the Commissioner has agreed not to do so.

[50] I agree with the approach of the application judge, who imposed further protections for the appellant against the Commissioner in the enforcement of the LOR. In my view, these were properly based on public policy and sovereignty considerations. They address the prejudice to the appellant that arises from the background that led to both the MDL and to the subsequent request by the MDL plaintiffs for the appellant's testimony: see *Zingre* (para. 20 above). Requiring the appellant to testify in response to the LOR if the Commissioner could subsequently access his testimony to assist in the preparation of the Commissioner's case against him, raises public policy concerns that reflect on the fairness of the Canadian criminal justice system.

[51] Addressing those concerns while seeking to protect the integrity of its investigation and potential future prosecution, and recognizing its role leading to the MDL, the Commissioner advised the court that it is prepared to consent to further conditions to provide the appellant with the further protection he seeks.

Issue 2: Are the terms of the LOR, of the two protective orders, and those added by the application judge sufficient to meet public policy and sovereignty concerns and to ensure that the LOR is not an undue burden?

[52] The remaining issue, therefore, is whether the appellant is adequately protected from prejudice by the provisions of the LOR and the two protective

orders, CMO No. 7 and CMO No. 7A, together with the extra protection added by the application judge.

[53] The appellant says that another potential target who has co-operated with the Commissioner and is a party to the MDL will have access to his testimony before its representative testifies, but he will not have the same right. He says that a co-operating party may be obliged to share what is learned with the Commissioner. He also objects to the new protections added by the application judge, saying they add to his burden and if they are necessary to protect him in accordance with public policy, then the proper response was to refuse the order. Further, the appellant adds that he was not before Judge Conner, who made it clear that his interests were not being considered by the U.S. court, and that the merits aspect of the examination pre-certification would not be allowed in an Ontario class action. The appellant refers to these latter two concerns as “undue burden”. I will deal with these last two issues first.

(a) Consideration of the appellant’s rights

[54] Although Judge Conner was not concerned with the appellant’s rights, the application judge and this court are. It is in the process for obtaining the order enforcing an LOR that the witnesses’ rights are considered.

(b) Pre-certification examination on the merits

[55] The second point was not addressed by the application judge specifically in his reasons, and it is unclear whether the issue was raised before him. However, in the LOR, Judge Conner identifies five specific areas for examination and states that the proposed examination is narrowly tailored. In a previous LOR application in the same MDL, *Treat America Ltd. v. Nestlé Canada Inc.*, 2011 ONCA 560, 340 D.L.R. (4th) 707, at para. 25, this court acknowledged Judge Connor's explanation that a rigorous examination of the record is required at the certification stage, requiring a more extensive record to be presented. There was no challenge on the "*Friction* test" criteria to the necessity and relevance of the evidence sought in this case. Finally, the respondent points out in its factum that the MDL is not only a class action. It also includes six individual cases that have no certification barrier and will continue regardless of the outcome of the certification proceedings. For these reasons, testifying on the merits aspect of the action is not an "undue burden" in this context.

(c) The appellant's ability to prepare for his deposition

[56] The Commissioner addressed the appellant's concern that the protective orders limit his ability to properly prepare for his deposition by preventing him from reviewing his testimony beforehand. The Commissioner explained that the effect of the orders is that examining counsel can disclose information to the

appellant from other depositions if the appellant has authored some relevant material referred to, or if disclosure is necessary for him to answer any questions.

(d) Potential disclosure of the appellant's testimony to the Commissioner

[57] I now turn to the main issue that is of concern to the appellant, which is the potential direct or indirect disclosure of his testimony to the Commissioner and its potential use in the Commissioner's investigation of the appellant.

[58] The Commissioner addressed the appellant's concerns in two ways. First, the Commissioner advised that only counsel for Hershey Canada, the only Canadian party remaining in the MDL, will be able to attend the appellant's examination, and counsel will not be permitted to share the content with its client or with the Commissioner. Second, it is not contemplated that examination transcripts will be shared among Canadian deponents, so the appellant will not be disadvantaged in that way.

[59] Further, the Commissioner stated that it has "no present intention to seek the appellant's deposition transcript." The only time that could change is if the appellant is not charged but instead becomes a witness for the prosecution, or, if the appellant is charged, he testifies in a subsequent proceeding against him, and the Supreme Court has changed the use immunity law in its decision in *Nedelcu*, which it recently did.

[60] It is the Commissioner's understanding that under the terms of the protective orders, no one with knowledge of the examination's contents may share that information with the Commissioner. In that way, the protective orders are consistent with Canadian public policy found in the implied undertaking rule that was discussed and given full effect in *Juman*. The Commissioner will not have any access to the appellant's deposition through other parties, including parties co-operating with the Commission.

[61] As stated above, In order to protect its investigation and potential prosecution, and recognizing potential fairness concerns, the Commissioner is prepared to try to ensure that the appellant will have enhanced protection against any use of his compelled testimony. To that end, counsel for the Commissioner agreed in oral argument that this court could add the following conditions to the order enforcing the LOR: (1) the Commissioner will not seek or receive from anyone with knowledge of the contents of the appellant's examination, information regarding those contents; and (2) the Commissioner will not seek a court order for access to the appellant's testimony unless one of the two changes identified by the Commissioner above, at para. 59, should occur.

[62] With the addition of these conditions, the Commissioner will not be privy to the content of the appellant's examination unless and until his deposition is sought to be used in public in the MDL or until any trial of the appellant in

Canada. In the latter event, it will be up to the trial judge to determine what use, if any the Commissioner may make of the appellant's compelled testimony obtained under the LOR. Both the Commissioner and the appellant will have notice of any proposed use in the MDL, and may apply to the U.S. court for further direction or protection at that time.

[63] The appellant is in that way protected from the Commissioner having any advance access to his testimony unless it becomes public in the MDL. This addresses his desire for protections that reach beyond the immunity he will have from the use of his testimony: see *EchoStar Satellite Corp. v. Quinn*, 2007 BCSC 1225, 71 B.C.L.R. (4th) 172 for another example of a non-disclosure condition in an order to enforce an LOR.

E. CONCLUSION

[64] In my view, the application judge applied the correct test and made no error in his conclusion that the order to enforce the LOR could be made without being contrary to public policy or sovereignty or constituting an undue burden on the appellant by adding protective conditions. By this court's addition of three further protective provisions in relation to the potential for access to the deposition by the Commissioner, I am satisfied that any potential prejudice to the appellant has been significantly minimized.

[65] I would therefore dismiss the appeal, but add the following three conditions to the order:

1. The Commissioner will not seek or receive information regarding the contents of the appellant's examination from anyone with knowledge or possession of those contents.
2. The Commissioner will not seek a court order to access the appellant's testimony unless one of the following occurs: (a) the appellant is not charged, but instead becomes a witness for the prosecution; or (b) the appellant is charged and may testify in a subsequent proceeding against him.
3. In the event the Commissioner wishes to obtain an order under condition two above, the order must be sought and obtained from the Ontario Superior Court, on notice to the appellant.

[66] The respondent asked the court to fix a date for the examination. If the parties are unable to agree within one week of release of these reasons, the respondent may suggest three available dates and times, preferably in consultation with counsel for the appellant. There were no costs awarded by the

application judge. In my view, in light of the nature of these proceedings, that is also an appropriate order on the appeal.

Released: “STG” November 27, 2012

“K. Feldman J.A.”

“I agree S.T. Goudge J.A.”

“I agree R.A. Blair J.A.”