

**Atomic Energy of Canada
Limited** *Appellant*

v.

Sierra Club of Canada *Respondent*

and

**The Minister of Finance of Canada, the
Minister of Foreign Affairs of Canada,
the Minister of International Trade of
Canada and the Attorney General of
Canada** *Respondents*

**INDEXED AS: SIERRA CLUB OF CANADA v. CANADA
(MINISTER OF FINANCE)**

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

Present: McLachlin C.J. and Gonthier, Iacobucci,
Bastarache, Binnie, Arbour and LeBel JJ.

**ON APPEAL FROM THE FEDERAL COURT OF
APPEAL**

*Practice — Federal Court of Canada — Filing of
confidential material — Environmental organization
seeking judicial review of federal government's decision
to provide financial assistance to Crown corporation
for construction and sale of nuclear reactors — Crown
corporation requesting confidentiality order in respect of
certain documents — Proper analytical approach to be
applied to exercise of judicial discretion where litigant
seeks confidentiality order — Whether confidentiality
order should be granted — Federal Court Rules, 1998,
SOR/98-106, r. 151.*

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance

**Énergie atomique du Canada
Limitée** *Appelante*

c.

Sierra Club du Canada *Intimé*

et

**Le ministre des Finances du Canada, le
ministre des Affaires étrangères du Canada,
le ministre du Commerce international
du Canada et le procureur général du
Canada** *Intimés*

**RÉPERTORIÉ : SIERRA CLUB DU CANADA c. CANADA
(MINISTRE DES FINANCES)**

Référence neutre : 2002 CSC 41.

N° du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

Présents : Le juge en chef McLachlin et les juges
Gonthier, Iacobucci, Bastarache, Binnie, Arbour et
LeBel.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

*Pratique — Cour fédérale du Canada — Production
de documents confidentiels — Contrôle judiciaire
demandé par un organisme environnemental de la
décision du gouvernement fédéral de donner une aide
financière à une société d'État pour la construction
et la vente de réacteurs nucléaires — Ordonnance de
confidentialité demandée par la société d'État pour
certains documents — Analyse applicable à l'exercice
du pouvoir discrétionnaire judiciaire sur une demande
d'ordonnance de confidentialité — Faut-il accorder
l'ordonnance? — Règles de la Cour fédérale (1998),
DORS/98-106, règle 151.*

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée (« ÉACL »), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que

by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act* (“CEAA”), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL filed an affidavit in the proceedings which summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club’s application for production of the confidential documents on the ground, *inter alia*, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court, but with no restriction on public access to the judicial proceedings. AECL’s application for a confidentiality order was rejected by the Federal Court, Trial Division. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed and the confidentiality order granted on the terms requested by AECL.

In light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. The court must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles because a confidentiality order will have a negative effect on the s. 2(b) right to freedom of expression. A confidentiality order should only be granted when (1) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

l’autorisation d’aide financière du gouvernement déclenche l’application de l’al. 5(1)b) de la *Loi canadienne sur l’évaluation environnementale* (« LCÉE ») exigeant une évaluation environnementale comme condition de l’aide financière, et que le défaut d’évaluation entraîne l’annulation des ententes financières. ÉACL dépose un affidavit qui résume des documents confidentiels contenant des milliers de pages d’information technique concernant l’évaluation environnementale du site de construction qui est faite par les autorités chinoises. ÉACL s’oppose à la communication des documents demandée par Sierra Club pour la raison notamment qu’ils sont la propriété des autorités chinoises et qu’elle n’est pas autorisée à les divulguer. Les autorités chinoises donnent l’autorisation de les communiquer à la condition qu’ils soient protégés par une ordonnance de confidentialité n’y donnant accès qu’aux parties et à la cour, mais n’imposant aucune restriction à l’accès du public aux débats. La demande d’ordonnance de confidentialité est rejetée par la Section de première instance de la Cour fédérale. La Cour d’appel fédérale confirme cette décision.

Arrêt : L’appel est accueilli et l’ordonnance demandée par ÉACL est accordée.

Vu le lien existant entre la publicité des débats judiciaires et la liberté d’expression, la question fondamentale pour la cour saisie d’une demande d’ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d’expression. La cour doit s’assurer que l’exercice du pouvoir discrétionnaire de l’accorder est conforme aux principes de la *Charte* parce qu’une ordonnance de confidentialité a des effets préjudiciables sur la liberté d’expression garantie à l’al. 2b). On ne doit l’accorder que (1) lorsqu’elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d’un litige, en l’absence d’autres options raisonnables pour écarter ce risque, et (2) lorsque ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l’emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d’expression qui, dans ce contexte, comprend l’intérêt du public dans la publicité des débats judiciaires. Trois éléments importants sont subsumés sous le premier volet de l’analyse. Premièrement, le risque en cause doit être réel et important, être bien étayé par la preuve et menacer gravement l’intérêt commercial en question. Deuxièmement, l’intérêt doit pouvoir se définir en termes d’intérêt public à la confidentialité, mettant en jeu un principe général. Enfin le juge doit non seulement déterminer s’il existe d’autres options raisonnables, il doit aussi restreindre l’ordonnance autant qu’il est raisonnablement possible de le faire tout en préservant l’intérêt commercial en question.

Applying the test to the present circumstances, the commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality, which is sufficiently important to pass the first branch of the test as long as certain criteria relating to the information are met. The information must have been treated as confidential at all relevant times; on a balance of probabilities, proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information; and the information must have been accumulated with a reasonable expectation of it being kept confidential. These requirements have been met in this case. Disclosure of the confidential documents would impose a serious risk on an important commercial interest of AECL, and there are no reasonably alternative measures to granting the order.

Under the second branch of the test, the confidentiality order would have significant salutary effects on AECL's right to a fair trial. Disclosure of the confidential documents would cause AECL to breach its contractual obligations and suffer a risk of harm to its competitive position. If a confidentiality order is denied, AECL will be forced to withhold the documents in order to protect its commercial interests, and since that information is relevant to defences available under the *CEAA*, the inability to present this information hinders AECL's capacity to make full answer and defence. Although in the context of a civil proceeding, this does not engage a *Charter* right, the right to a fair trial is a fundamental principle of justice. Further, the confidentiality order would allow all parties and the court access to the confidential documents, and permit cross-examination based on their contents, assisting in the search for truth, a core value underlying freedom of expression. Finally, given the technical nature of the information, there may be a substantial public security interest in maintaining the confidentiality of such information.

The deleterious effects of granting a confidentiality order include a negative effect on the open court principle, and therefore on the right to freedom of expression. The more detrimental the confidentiality order would be to the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons, the harder it will be to justify the confidentiality order. In the hands of the parties and their experts, the confidential documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would assist the court in reaching accurate factual conclusions. Given the highly technical nature of the documents, the important value of the search for the truth which underlies

En l'espèce, l'intérêt commercial en jeu, la préservation d'obligations contractuelles de confidentialité, est suffisamment important pour satisfaire au premier volet de l'analyse, pourvu que certaines conditions soient remplies : les renseignements ont toujours été traités comme des renseignements confidentiels; il est raisonnable de penser que, selon la prépondérance des probabilités, leur divulgation compromettrait des droits exclusifs, commerciaux et scientifiques; et les renseignements ont été recueillis dans l'expectative raisonnable qu'ils resteraient confidentiels. Ces conditions sont réunies en l'espèce. La divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de ÉACL et il n'existe pas d'options raisonnables autres que l'ordonnance de confidentialité.

À la deuxième étape de l'analyse, l'ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de ÉACL à un procès équitable. Si ÉACL divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Le refus de l'ordonnance obligerait ÉACL à retenir les documents pour protéger ses intérêts commerciaux et comme ils sont pertinents pour l'exercice des moyens de défense prévus par la *LCÉE*, l'impossibilité de les produire empêcherait ÉACL de présenter une défense pleine et entière. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable est un principe de justice fondamentale. L'ordonnance permettrait aux parties et au tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu, favorisant ainsi la recherche de la vérité, une valeur fondamentale sous-tendant la liberté d'expression. Il peut enfin y avoir un important intérêt de sécurité publique à préserver la confidentialité de ce type de renseignements techniques.

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires et donc sur la liberté d'expression. Plus l'ordonnance porte atteinte aux valeurs fondamentales que sont (1) la recherche de la vérité et du bien commun, (2) l'épanouissement personnel par le libre développement des pensées et des idées et (3) la participation de tous au processus politique, plus il est difficile de justifier l'ordonnance. Dans les mains des parties et de leurs experts, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, et donc pour aider la cour à parvenir à des conclusions de fait exactes. Compte tenu de leur nature hautement technique, la production des documents confidentiels en vertu de l'ordonnance demandée favoriserait mieux l'importante valeur de la recherche de la vérité, qui

both freedom of expression and open justice would be promoted to a greater extent by submitting the confidential documents under the order sought than it would by denying the order.

Under the terms of the order sought, the only restrictions relate to the public distribution of the documents, which is a fairly minimal intrusion into the open court rule. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, the second core value of promoting individual self-fulfilment would not be significantly affected by the confidentiality order. The third core value figures prominently in this appeal as open justice is a fundamental aspect of a democratic society. By their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection, so that the public interest is engaged here more than if this were an action between private parties involving private interests. However, the narrow scope of the order coupled with the highly technical nature of the confidential documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts. The core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

Cases Cited

Applied: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; **referred to:** *AB Hassle v. Canada (Minister of National Health and*

sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le refus de l'ordonnance.

Aux termes de l'ordonnance demandée, les seules restrictions ont trait à la distribution publique des documents, une atteinte relativement minime à la règle de la publicité des débats judiciaires. Même si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, la deuxième valeur fondamentale, l'épanouissement personnel, ne serait pas touchée de manière significative. La troisième valeur joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection, de sorte que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés. Toutefois la portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires. Les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. Ses effets bénéfiques l'emportent sur ses effets préjudiciables, et il y a lieu de l'accorder. Selon la pondération des divers droits et intérêts en jeu, l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de ÉACL à un procès équitable et à la liberté d'expression, et ses effets préjudiciables sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes.

Jurisprudence

Arrêts appliqués : *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76; *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *R. c. Keegstra*, [1990] 3 R.C.S. 697; **arrêts mentionnés :** *AB Hassle c.*

Welfare), [2000] 3 F.C. 360, aff'g (1998), 83 C.P.R. (3d) 428; *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77; *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35; *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b).
Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 5(1)(b), 8, 54, 54(2)(b).
Federal Court Rules, 1998, SOR/98-106, rr. 151, 312.

APPEAL from a judgment of the Federal Court of Appeal, [2000] 4 F.C. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] F.C.J. No. 732 (QL), affirming a decision of the Trial Division, [2000] 2 F.C. 400, 178 F.T.R. 283, [1999] F.C.J. No. 1633 (QL). Appeal allowed.

J. Brett Ledger and Peter Chapin, for the appellant.

Timothy J. Howard and Franklin S. Gertler, for the respondent Sierra Club of Canada.

Graham Garton, Q.C., and *J. Sanderson Graham*, for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important

Canada (Ministre de la Santé nationale et du Bien-être social), [2000] 3 C.F. 360, conf. [1998] A.C.F. n° 1850 (QL); *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77; *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35; *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2b).
Loi canadienne sur l'évaluation environnementale, L.C. 1992, ch. 37, art. 5(1)b), 8, 54, 54(2) [abr. & rempl. 1993, ch. 34, art. 37].
Règles de la Cour fédérale (1998), DORS/98-106, règles 151, 312.

POURVOI contre un arrêt de la Cour d'appel fédérale, [2000] 4 C.F. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] A.C.F. n° 732 (QL), qui a confirmé une décision de la Section de première instance, [2000] 2 C.F. 400, 178 F.T.R. 283, [1999] A.C.F. n° 1633 (QL). Pourvoi accueilli.

J. Brett Ledger et Peter Chapin, pour l'appelante.

Timothy J. Howard et Franklin S. Gertler, pour l'intimé Sierra Club du Canada.

Graham Garton, c.r., et *J. Sanderson Graham*, pour les intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

I. Introduction

Dans notre pays, les tribunaux sont les institutions généralement choisies pour résoudre au mieux les différends juridiques par l'application de principes juridiques aux faits de chaque espèce. Un des principes sous-jacents au processus judiciaire est la transparence, tant dans la procédure suivie que dans les éléments pertinents à la solution du litige. Certains de ces éléments peuvent toutefois faire l'objet d'une ordonnance de confidentialité. Le

issues of when, and under what circumstances, a confidentiality order should be granted.

For the following reasons, I would issue the confidentiality order sought and accordingly would allow the appeal.

II. Facts

The appellant, Atomic Energy of Canada Limited (“AECL”) is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervenor with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada (“Sierra Club”). Sierra Club is an environmental organization seeking judicial review of the federal government’s decision to provide financial assistance in the form of a \$1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (“CEAA”), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

In the course of the application by Sierra Club to set aside the funding arrangements, the appellant

pourvoi soulève les importantes questions de savoir à quel moment et dans quelles circonstances il y a lieu de rendre une ordonnance de confidentialité.

Pour les motifs qui suivent, je suis d’avis de rendre l’ordonnance de confidentialité demandée et par conséquent d’accueillir le pourvoi.

II. Les faits

L’appelante, Énergie atomique du Canada Limitée (« ÉACL »), société d’État propriétaire et vendeuse de la technologie nucléaire CANDU, est une intervenante ayant reçu les droits de partie dans la demande de contrôle judiciaire présentée par l’intimé, Sierra Club du Canada (« Sierra Club »), un organisme environnemental. Sierra Club demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière, sous forme de garantie d’emprunt de 1,5 milliard de dollars, pour la construction et la vente à la Chine de deux réacteurs nucléaires CANDU par l’appelante. Les réacteurs sont actuellement en construction en Chine, où l’appelante est entrepreneur principal et gestionnaire de projet.

L’intimé soutient que l’autorisation d’aide financière du gouvernement déclenche l’application de l’al. 5(1)(b) de la *Loi canadienne sur l’évaluation environnementale*, L.C. 1992, ch. 37 (« LCÉE »), qui exige une évaluation environnementale avant qu’une autorité fédérale puisse fournir une aide financière à un projet. Le défaut d’évaluation entraîne l’annulation des ententes financières.

Selon l’appelante et les ministres intimés, la LCÉE ne s’applique pas à la convention de prêt et si elle s’y applique, ils peuvent invoquer les défenses prévues aux art. 8 et 54 de cette loi. L’article 8 prévoit les circonstances dans lesquelles les sociétés d’État sont tenues de procéder à des évaluations environnementales. Le paragraphe 54(2) reconnaît la validité des évaluations environnementales effectuées par des autorités étrangères pourvu qu’elles soient compatibles avec les dispositions de la LCÉE.

Dans le cadre de la requête de Sierra Club en annulation des ententes financières, l’appelante a

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filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the “Confidential Documents”). The Confidential Documents are also referred to in an affidavit prepared by Mr. Feng, one of AECL’s experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang’s evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under Rule 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the “EIRs”), a Preliminary Safety Analysis Report (the “PSAR”), and the supplementary affidavit of Dr. Pang which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

déposé un affidavit de M. Simon Pang, un de ses cadres supérieurs. Dans l’affidavit, M. Pang mentionne et résume certains documents (les « documents confidentiels ») qui sont également mentionnés dans un affidavit de M. Feng, un expert d’ÉACL. Avant de contre-interroger M. Pang sur son affidavit, Sierra Club a demandé par requête la production des documents confidentiels, au motif qu’il ne pouvait vérifier la validité de sa déposition sans consulter les documents de base. L’appelante s’oppose pour plusieurs raisons à la production des documents, dont le fait qu’ils sont la propriété des autorités chinoises et qu’elle n’est pas autorisée à les divulguer. Après avoir obtenu des autorités chinoises l’autorisation de communiquer les documents à la condition qu’ils soient protégés par une ordonnance de confidentialité, l’appelante a cherché à les produire en invoquant la règle 312 des *Règles de la Cour fédérale (1998)*, DORS/98-106, et a demandé une ordonnance de confidentialité à leur égard.

Aux termes de l’ordonnance demandée, seules les parties et la cour auraient accès aux documents confidentiels. Aucune restriction ne serait imposée à l’accès du public aux débats. On demande essentiellement d’empêcher la diffusion des documents confidentiels au public.

Les documents confidentiels comprennent deux Rapports d’impact environnemental (« RIE ») sur le site et la construction, un Rapport préliminaire d’analyse sur la sécurité (« RPAS ») ainsi que l’affidavit supplémentaire de M. Pang qui résume le contenu des RIE et du RPAS. S’ils étaient admis, les rapports seraient joints en annexe de l’affidavit supplémentaire de M. Pang. Les RIE ont été préparés en chinois par les autorités chinoises, et le RPAS a été préparé par l’appelante en collaboration avec les responsables chinois du projet. Les documents contiennent une quantité considérable de renseignements techniques et comprennent des milliers de pages. Ils décrivent l’évaluation environnementale du site de construction qui est faite par les autorités chinoises en vertu des lois chinoises.

As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order, otherwise it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Mr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

The Federal Court of Canada, Trial Division refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

Federal Court Rules, 1998, SOR/98-106

151. (1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments Below

A. *Federal Court, Trial Division, [2000] 2 F.C. 400*

Pelletier J. first considered whether leave should be granted pursuant to Rule 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondent would be prejudiced by delay, but since both parties had brought

Comme je le note plus haut, l'appelante prétend ne pas pouvoir produire les documents confidentiels en preuve sans qu'ils soient protégés par une ordonnance de confidentialité, parce que ce serait un manquement à ses obligations envers les autorités chinoises. L'intimé soutient pour sa part que son droit de contre-interroger M. Pang et M. Feng sur leurs affidavits serait pratiquement futile en l'absence des documents auxquels ils se réfèrent. Sierra Club entend soutenir que le juge saisi de la demande de contrôle judiciaire devrait donc leur accorder peu de poids.

La Section de première instance de la Cour fédérale du Canada a rejeté la demande d'ordonnance de confidentialité et la Cour d'appel fédérale, à la majorité, a rejeté l'appel. Le juge Robertson, dissident, était d'avis d'accorder l'ordonnance.

III. Dispositions législatives

Règles de la Cour fédérale (1998), DORS/98-106

151. (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.

(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

IV. Les décisions antérieures

A. *Cour fédérale, Section de première instance, [2000] 2 C.F. 400*

Le juge Pelletier examine d'abord s'il y a lieu, en vertu de la règle 312, d'autoriser la production de l'affidavit supplémentaire de M. Pang auquel sont annexés les documents confidentiels. À son avis, il s'agit d'une question de pertinence et il conclut que les documents se rapportent à la question de la réparation. En l'absence de préjudice pour l'intimé, il y a donc lieu d'autoriser la signification et le dépôt de l'affidavit. Il note que des retards seraient préjudiciables à l'intimé mais que, puisque les deux parties ont présenté des requêtes

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interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the

interlocutoires qui ont entraîné les délais, les avantages de soumettre le dossier au complet à la cour compensent l'inconvénient du retard causé par la présentation de ces documents.

Sur la confidentialité, le juge Pelletier conclut qu'il doit être convaincu que la nécessité de protéger la confidentialité l'emporte sur l'intérêt du public à la publicité des débats judiciaires. Il note que les arguments en faveur de la publicité des débats judiciaires en l'espèce sont importants vu l'intérêt du public envers le rôle du Canada comme vendeur de technologie nucléaire. Il fait aussi remarquer que les ordonnances de confidentialité sont une exception au principe de la publicité des débats judiciaires et ne devraient être accordées que dans des cas de nécessité absolue.

Le juge Pelletier applique le même critère que pour une ordonnance conservatoire en matière de brevets, qui est essentiellement une ordonnance de confidentialité. Pour obtenir l'ordonnance, le requérant doit démontrer qu'il croit subjectivement que les renseignements sont confidentiels et que leur divulgation nuirait à ses intérêts. De plus, si l'ordonnance est contestée, le requérant doit démontrer objectivement qu'elle est nécessaire. Cet élément objectif l'oblige à démontrer que les renseignements ont toujours été traités comme étant confidentiels et qu'il est raisonnable de croire que leur divulgation risque de compromettre ses droits exclusifs, commerciaux et scientifiques.

Ayant conclu qu'il est satisfait à l'élément subjectif et aux deux volets de l'élément objectif du critère, il ajoute : « J'estime toutefois aussi que, dans les affaires de droit public, le critère objectif comporte, ou devrait comporter, un troisième volet, en l'occurrence la question de savoir si l'intérêt du public à l'égard de la divulgation l'emporte sur le préjudice que la divulgation risque de causer à une personne » (par. 23).

Il estime très important le fait qu'il ne s'agit pas en l'espèce de production obligatoire de documents. Le fait que la demande vise le dépôt volontaire de documents en vue d'étayer la thèse de l'appelante,

appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

par opposition à une production obligatoire, joue contre l'ordonnance de confidentialité.

En soupesant l'intérêt du public dans la divulgation et le préjudice que la divulgation risque de causer à ÉACL, le juge Pelletier note que les documents que l'appelante veut soumettre à la cour ont été rédigés par d'autres personnes à d'autres fins, et il reconnaît que l'appelante est tenue de protéger la confidentialité des renseignements. À cette étape, il examine de nouveau la question de la pertinence. Si on réussit à démontrer que les documents sont très importants sur une question cruciale, « les exigences de la justice militent en faveur du prononcé d'une ordonnance de confidentialité. Si les documents ne sont pertinents que d'une façon accessoire, le caractère facultatif de la production milite contre le prononcé de l'ordonnance de confidentialité » (par. 29). Il conclut alors que les documents sont importants pour résoudre la question de la réparation à accorder, elle-même un point important si l'appelante échoue sur la question principale.

Le juge Pelletier considère aussi le contexte de l'affaire et conclut que, puisque la question du rôle du Canada comme vendeur de technologies nucléaires est une importante question d'intérêt public, la charge de justifier une ordonnance de confidentialité est très onéreuse. Il conclut qu'ÉACL pourrait retrancher les éléments délicats des documents ou soumettre à la cour la même preuve sous une autre forme, et maintenir ainsi son droit à une défense complète tout en préservant la publicité des débats judiciaires.

Le juge Pelletier signale qu'il prononce l'ordonnance sans avoir examiné les documents confidentiels puisqu'ils n'ont pas été portés à sa connaissance. Bien qu'il mentionne la jurisprudence indiquant qu'un juge ne devrait pas se prononcer sur une demande d'ordonnance de confidentialité sans avoir examiné les documents eux-mêmes, il estime qu'il n'aurait pas été utile d'examiner les documents, vu leur volume et leur caractère technique, et sans savoir quelle part d'information était déjà dans le domaine public.

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20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. *Federal Court of Appeal*, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under Rule 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under Rule 312.

22 With respect to Rule 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b) which the appellant proposed to raise if s. 5(1)(b) of the *CEAA* was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the *CEAA*. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under Rule 312.

23 On the issue of the confidentiality order, Evans J.A. considered Rule 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in

Dans son ordonnance, le juge Pelletier autorise l'appelante à déposer les documents sous leur forme actuelle ou sous une version révisée, à son gré. Il autorise aussi l'appelante à déposer des documents concernant le processus réglementaire chinois en général et son application au projet, à condition qu'elle le fasse sous 60 jours.

B. *Cour d'appel fédérale*, [2000] 4 C.F. 426

(1) Le juge Evans (avec l'appui du juge Sharlow)

ÉACL fait appel en Cour d'appel fédérale, en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*, et Sierra Club forme un appel incident en vertu de la règle 312.

Sur la règle 312, le juge Evans conclut que les documents en cause sont clairement pertinents dans une défense que l'appelante a l'intention d'invoquer en vertu du par. 54(2) si la cour conclut que l'al. 5(1)(b) de la *LCÉE* doit s'appliquer, et pourraient l'être aussi pour l'exercice du pouvoir discrétionnaire de la cour de refuser d'accorder une réparation dans le cas où les ministres auraient enfreint la *LCÉE*. Comme le juge Pelletier, le juge Evans est d'avis que l'avantage pour l'appelante et pour la cour d'une autorisation de déposer les documents l'emporte sur tout préjudice que le retard pourrait causer à l'intimé, et conclut par conséquent que le juge des requêtes a eu raison d'accorder l'autorisation en vertu de la règle 312.

Sur l'ordonnance de confidentialité, le juge Evans examine la règle 151 et tous les facteurs que le juge des requêtes a appréciés, y compris le secret commercial attaché aux documents, le fait que l'appelante les a reçus à titre confidentiel des autorités chinoises, et l'argument de l'appelante selon lequel, sans les documents, elle ne pourrait assurer effectivement sa défense. Ces facteurs doivent être pondérés avec le principe de la publicité des documents soumis aux tribunaux. Le juge Evans convient avec le juge Pelletier que le poids à accorder à l'intérêt du public à la publicité des débats varie selon le contexte, et il conclut que lorsqu'une affaire soulève des questions de grande importance pour le public, le principe de la publicité des débats a plus de poids

the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health and Welfare)*, [2000] 3 F.C. 360 (C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Ct. (Gen. Div.)), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the *CEAA*, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without

comme facteur à prendre en compte dans le processus de pondération. Le juge Evans note l'intérêt du public à l'égard de la question en litige ainsi que la couverture médiatique considérable qu'elle a suscitée.

À l'appui de sa conclusion que le poids accordé au principe de la publicité des débats peut varier selon le contexte, le juge Evans invoque les décisions *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [2000] 3 C.F. 360 (C.A.), où la cour a tenu compte du peu d'intérêt du public, et *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (C. Ont. (Div. gén.)), p. 283, où la cour a ordonné la divulgation après avoir déterminé qu'il s'agissait d'une affaire constitutionnelle importante et qu'il importait que le public comprenne ce qui était en cause. Le juge Evans fait remarquer que la transparence du processus d'évaluation et la participation du public ont une importance fondamentale pour la *LCÉE*, et il conclut qu'on ne peut prétendre que le juge des requêtes a accordé trop de poids au principe de la publicité des débats, même si la confidentialité n'est demandée que pour un nombre relativement restreint de documents hautement techniques.

Le juge Evans conclut que le juge des requêtes a donné trop de poids au fait que la production des documents était volontaire mais qu'il ne s'ensuit pas que sa décision au sujet de la confidentialité doive être écartée. Le juge Evans est d'avis que l'erreur n'entache pas sa conclusion finale, pour trois motifs. Premièrement, comme le juge des requêtes, il attache une grande importance à la publicité du débat judiciaire. Deuxièmement, il conclut que l'inclusion dans les affidavits d'un résumé des rapports peut, dans une large mesure, compenser l'absence des rapports, si l'appelante décide de ne pas les déposer sans ordonnance de confidentialité. Enfin, si ÉACL déposait une version modifiée des documents, la demande de confidentialité reposerait sur un facteur relativement peu important, savoir l'argument que l'appelante perdrait des occasions d'affaires si elle violait son engagement envers les autorités chinoises.

Le juge Evans rejette l'argument selon lequel le juge des requêtes a commis une erreur en statuant

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reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence, or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

sans avoir examiné les documents réels, affirmant que cela n'était pas nécessaire puisqu'il y avait des précis et que la documentation était hautement technique et partiellement traduite. L'appel et l'appel incident sont donc rejetés.

(2) Le juge Robertson (dissident)

Le juge Robertson se dissocie de la majorité pour trois raisons. En premier lieu, il estime que le degré d'intérêt du public dans une affaire, l'importance de la couverture médiatique et l'identité des parties ne devraient pas être pris en considération pour statuer sur une demande d'ordonnance de confidentialité. Selon lui, il faut plutôt examiner la nature de la preuve que protégerait l'ordonnance de confidentialité.

Il estime aussi qu'à défaut d'ordonnance de confidentialité, l'appelante doit choisir entre deux options inacceptables : subir un préjudice financier irréparable si les renseignements confidentiels sont produits en preuve, ou être privée de son droit à un procès équitable parce qu'elle ne peut se défendre pleinement si la preuve n'est pas produite.

Finalement, il dit que le cadre analytique utilisé par les juges majoritaires pour arriver à leur décision est fondamentalement défectueux en ce qu'il est fondé en grande partie sur le point de vue subjectif du juge des requêtes. Il rejette l'approche contextuelle sur la question de l'ordonnance de confidentialité, soulignant la nécessité d'un cadre d'analyse objectif pour combattre la perception que la justice est un concept relatif et pour promouvoir la cohérence et la certitude en droit.

Pour établir ce cadre plus objectif appelé à régir la délivrance d'ordonnances de confidentialité en matière de renseignements commerciaux et scientifiques, il examine le fondement juridique du principe de la publicité du processus judiciaire, en citant l'arrêt de notre Cour, *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, qui conclut que la publicité des débats favorise la recherche de la vérité et témoigne de l'importance de soumettre le travail des tribunaux à l'examen public.

Robertson J.A. stated that although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

He observed that, in the area of commercial law, when the information sought to be protected concerns “trade secrets”, this information will not be disclosed during a trial if to do so would destroy the owner’s proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

(1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is “necessary” to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

Selon le juge Robertson, même si le principe de la publicité du processus judiciaire reflète la valeur fondamentale que constitue dans une démocratie l’imputabilité dans l’exercice du pouvoir judiciaire, le principe selon lequel il faut que justice soit faite doit, à son avis, l’emporter. Il conclut que la justice vue comme principe universel signifie que les règles ou les principes doivent parfois souffrir des exceptions.

Il fait observer qu’en droit commercial, lorsque les renseignements qu’on cherche à protéger ont trait à des « secrets industriels », ils ne sont pas divulgués au procès lorsque cela aurait pour effet d’annihiler les droits du propriétaire et l’exposerait à un préjudice financier irréparable. Il conclut que, même si l’espèce ne porte pas sur des secrets industriels, on peut traiter de la même façon des renseignements commerciaux et scientifiques acquis sur une base confidentielle, et il établit les critères suivants comme conditions à la délivrance d’une ordonnance de confidentialité (au par. 13) :

1) les renseignements sont de nature confidentielle et non seulement des faits qu’une personne désire ne pas divulguer; 2) les renseignements qu’on veut protéger ne sont pas du domaine public; 3) selon la prépondérance des probabilités, la partie qui veut obtenir une ordonnance de confidentialité subirait un préjudice irréparable si les renseignements étaient rendus publics; 4) les renseignements sont pertinents dans le cadre de la résolution des questions juridiques soulevées dans le litige; 5) en même temps, les renseignements sont « nécessaires » à la résolution de ces questions; 6) l’octroi d’une ordonnance de confidentialité ne cause pas un préjudice grave à la partie adverse; 7) l’intérêt du public à la publicité des débats judiciaires ne prime pas les intérêts privés de la partie qui sollicite l’ordonnance de confidentialité. Le fardeau de démontrer que les critères un à six sont respectés incombe à la partie qui cherche à obtenir l’ordonnance de confidentialité. Pour le septième critère, c’est la partie adverse qui doit démontrer que le droit *prima facie* à une ordonnance de non-divulgaration doit céder le pas au besoin de maintenir la publicité des débats judiciaires. En utilisant ces critères, il y a lieu de tenir compte de deux des fils conducteurs qui sous-tendent le principe de la publicité des débats judiciaires : la recherche de la vérité et la sauvegarde de la primauté du droit. Comme je l’ai dit au tout début, je ne crois pas que le degré d’importance qu’on croit que le public accorde à une affaire soit une considération pertinente.

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33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site plans for nuclear installations were not, for example, posted on a Web site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

- 35 A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under Rule 151 of the *Federal Court Rules, 1998*?
- B. Should the confidentiality order be granted in this case?

VI. Analysis

A. *The Analytical Approach to the Granting of a Confidentiality Order*

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23, La Forest J. expressed the relationship as follows:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the

Appliquant ces critères aux circonstances de l'espèce, le juge Robertson conclut qu'il y a lieu de rendre l'ordonnance de confidentialité. Selon lui, l'intérêt du public dans la publicité des débats judiciaires ne prime pas l'intérêt de ÉACL à préserver le caractère confidentiel de ces documents hautement techniques.

Le juge Robertson traite aussi de l'intérêt du public à ce qu'il soit garanti que les plans de site d'installations nucléaires ne seront pas, par exemple, affichés sur un site Web. Il conclut qu'une ordonnance de confidentialité n'aurait aucun impact négatif sur les deux objectifs primordiaux du principe de la publicité des débats judiciaires, savoir la vérité et la primauté du droit. Il aurait par conséquent accueilli l'appel et rejeté l'appel incident.

V. Questions en litige

- A. Quelle méthode d'analyse faut-il appliquer à l'exercice du pouvoir judiciaire discrétionnaire lorsqu'une partie demande une ordonnance de confidentialité en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*?
- B. Y a-t-il lieu d'accorder l'ordonnance de confidentialité en l'espèce?

VI. Analyse

A. *Méthode d'analyse applicable aux ordonnances de confidentialité*

(1) Le cadre général : les principes de l'arrêt Dagenais

Le lien entre la publicité des procédures judiciaires et la liberté d'expression est solidement établi dans *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480. Le juge La Forest l'exprime en ces termes au par. 23 :

Le principe de la publicité des débats en justice est inextricablement lié aux droits garantis à l'al. 2b). Grâce à ce principe, le public a accès à l'information concernant les tribunaux, ce qui lui permet ensuite de discuter des pratiques des tribunaux et des procédures qui s'y déroulent, et d'émettre des opinions et des critiques à cet égard. La liberté d'exprimer des idées et des opinions sur

freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under Rule 151 should echo the underlying principles laid out in *Dagenais*, although it must be tailored to the specific rights and interests engaged in this case.

Dagenais dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at

le fonctionnement des tribunaux relève clairement de la liberté garantie à l'al. 2b), mais en relève également le droit du public d'obtenir au préalable de l'information sur les tribunaux.

L'ordonnance sollicitée aurait pour effet de limiter l'accès du public aux documents confidentiels et leur examen public; cela porterait clairement atteinte à la garantie de la liberté d'expression du public.

L'examen de la méthode générale à suivre dans l'exercice du pouvoir discrétionnaire d'accorder une ordonnance de confidentialité devrait commencer par les principes établis par la Cour dans *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Cette affaire portait sur le pouvoir discrétionnaire judiciaire, issu de la common law, de rendre des ordonnances de non-publication dans le cadre de procédures criminelles, mais il y a de fortes ressemblances entre les interdictions de publication et les ordonnances de confidentialité dans le contexte des procédures judiciaires. Dans les deux cas, on cherche à restreindre la liberté d'expression afin de préserver ou de promouvoir un intérêt en jeu dans les procédures. En ce sens, la question fondamentale que doit résoudre le tribunal auquel on demande une interdiction de publication ou une ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression.

Même si, dans chaque cas, la liberté d'expression entre en jeu dans un contexte différent, le cadre établi dans *Dagenais* fait appel aux principes déterminants de la *Charte canadienne des droits et libertés* afin de pondérer la liberté d'expression avec d'autres droits et intérêts, et peut donc être adapté et appliqué à diverses circonstances. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la règle 151 devrait par conséquent refléter les principes sous-jacents établis par *Dagenais*, même s'il faut pour cela l'ajuster aux droits et intérêts précis qui sont en jeu en l'espèce.

L'affaire *Dagenais* porte sur une requête par laquelle quatre accusés demandaient à la cour de rendre, en vertu de sa compétence de common law, une ordonnance interdisant la diffusion d'une émission de télévision décrivant des abus physiques et

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religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accused's right to a fair trial.

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Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103. At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

A publication ban should only be ordered when:

(a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

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In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

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La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, at para. 33;

sexuels infligés à de jeunes garçons dans des établissements religieux. Les requérants soutenaient que l'interdiction était nécessaire pour préserver leur droit à un procès équitable, parce que les faits racontés dans l'émission ressemblaient beaucoup aux faits en cause dans leurs procès.

Le juge en chef Lamer conclut que le pouvoir discrétionnaire de common law d'ordonner l'interdiction de publication doit être exercé dans les limites prescrites par les principes de la *Charte*. Puisque les ordonnances de non-publication restreignent nécessairement la liberté d'expression de tiers, il adapte la règle de common law qui s'appliquait avant l'entrée en vigueur de la *Charte* de façon à établir un juste équilibre entre le droit à la liberté d'expression et le droit de l'accusé à un procès équitable, d'une façon qui reflète l'essence du critère énoncé dans *R. c. Oakes*, [1986] 1 R.C.S. 103. À la page 878 de *Dagenais*, le juge en chef Lamer énonce le critère reformulé :

Une ordonnance de non-publication ne doit être rendue que si :

a) elle est nécessaire pour écarter le risque réel et important que le procès soit inéquitable, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;

b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur la libre expression de ceux qui sont touchés par l'ordonnance. [Souligné dans l'original.]

Dans *Nouveau-Brunswick*, précité, la Cour modifie le critère de l'arrêt *Dagenais* dans le contexte de la question voisine de l'exercice du pouvoir discrétionnaire d'ordonner l'exclusion du public d'un procès en vertu du par. 486(1) du *Code criminel*, L.R.C. 1985, ch. C-46. Il s'agissait d'un appel d'une décision du juge du procès d'ordonner l'exclusion du public de la partie des procédures de détermination de la peine pour agression sexuelle et contacts sexuels portant sur les actes précis commis par l'accusé, au motif que cela éviterait un « préjudice indu » aux victimes et à l'accusé.

Le juge La Forest conclut que le par. 486(1) limite la liberté d'expression garantie à l'al. 2b) en créant un « pouvoir discrétionnaire permettant d'interdire au public et aux médias l'accès aux

however he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

- (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
- (b) the judge must consider whether the order is limited as much as possible; and
- (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76, and its companion case *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77. In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the

tribunaux » (*Nouveau-Brunswick*, par. 33). Il considère toutefois que l'atteinte peut être justifiée en vertu de l'article premier pourvu que le pouvoir discrétionnaire soit exercé conformément à la *Charte*. Donc l'analyse de l'exercice du pouvoir discrétionnaire en vertu du par. 486(1) du *Code criminel*, décrite par le juge La Forest au par. 69, concorde étroitement avec le critère de common law établi par *Dagenais* :

- a) le juge doit envisager les solutions disponibles et se demander s'il existe d'autres mesures de rechange raisonnables et efficaces;
- b) il doit se demander si l'ordonnance a une portée aussi limitée que possible; et
- c) il doit comparer l'importance des objectifs de l'ordonnance et de ses effets probables avec l'importance de la publicité des procédures et l'activité d'expression qui sera restreinte, afin de veiller à ce que les effets positifs et négatifs de l'ordonnance soient proportionnels.

Appliquant cette analyse aux faits de l'espèce, le juge La Forest conclut que la preuve du risque de préjudice indu consiste principalement en la prétention de l'avocat du ministère public quant à la « nature délicate » des faits relatifs aux infractions et que cela ne suffit pas pour justifier l'atteinte à la liberté d'expression.

La Cour a récemment réexaminé la question des interdictions de publication prononcées par un tribunal en vertu de sa compétence de common law dans *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76, et l'arrêt connexe *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77. Dans *Mentuck*, le ministère public demandait l'interdiction de publication en vue de protéger l'identité de policiers banalisés et leurs méthodes d'enquête. L'accusé s'opposait à la demande en soutenant que l'interdiction porterait atteinte à son droit à un procès public et équitable protégé par l'al. 11d) de la *Charte*. Deux journaux intervenants s'opposaient aussi à la requête, en faisant valoir qu'elle porterait atteinte à leur droit à la liberté d'expression.

La Cour fait remarquer que *Dagenais* traite de la pondération de la liberté d'expression, d'une part, et du droit de l'accusé à un procès équitable, d'autre part, tandis que dans l'affaire dont elle est saisie, le

accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve any important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

A publication ban should only be ordered when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the “necessity” branch. First, the risk in question must be a serious risk well grounded in the evidence. Second, the phrase “proper administration of justice” must be carefully interpreted so as not to

droit de l’accusé à un procès public et équitable tout autant que la liberté d’expression militent en faveur du rejet de la requête en interdiction de publication. Ces droits ont été soupesés avec l’intérêt de la bonne administration de la justice, en particulier la protection de la sécurité des policiers et le maintien de l’efficacité des opérations policières secrètes.

Malgré cette distinction, la Cour note que la méthode retenue dans *Dagenais* et *Nouveau-Brunswick* a pour objectif de garantir que le pouvoir discrétionnaire des tribunaux d’ordonner des interdictions de publication n’est pas assujéti à une norme de conformité à la *Charte* moins exigeante que la norme applicable aux dispositions législatives. Elle vise cet objectif en incorporant l’essence de l’article premier de la *Charte* et le critère *Oakes* dans l’analyse applicable aux interdictions de publication. Comme le même objectif s’applique à l’affaire dont elle est saisie, la Cour adopte une méthode semblable à celle de *Dagenais*, mais en élargissant le critère énoncé dans cet arrêt (qui portait spécifiquement sur le droit de l’accusé à un procès équitable) de manière à fournir un guide à l’exercice du pouvoir discrétionnaire des tribunaux dans les requêtes en interdiction de publication, afin de protéger tout aspect important de la bonne administration de la justice. La Cour reformule le critère en ces termes (au par. 32) :

Une ordonnance de non-publication ne doit être rendue que si :

a) elle est nécessaire pour écarter le risque sérieux pour la bonne administration de la justice, vu l’absence d’autres mesures raisonnables pouvant écarter ce risque;

b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur les droits et les intérêts des parties et du public, notamment ses effets sur le droit à la libre expression, sur le droit de l’accusé à un procès public et équitable, et sur l’efficacité de l’administration de la justice.

La Cour souligne que dans le premier volet de l’analyse, trois éléments importants sont subsumés sous la notion de « nécessité ». En premier lieu, le risque en question doit être sérieux et bien étayé par la preuve. En deuxième lieu, l’expression « bonne administration de la justice » doit être interprétée

allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to “reflec[t] the substance of the *Oakes* test”, we cannot require that *Charter* rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the *Charter* be justified exclusively by the pursuit of another *Charter* right. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

Mentuck is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles.

judicieusement de façon à ne pas empêcher la divulgation d'un nombre excessif de renseignements. En troisième lieu, le critère exige non seulement que le juge qui prononce l'ordonnance détermine s'il existe des mesures de rechange raisonnables, mais aussi qu'il limite l'ordonnance autant que possible sans pour autant sacrifier la prévention du risque.

Au paragraphe 31, la Cour fait aussi l'importante observation que la bonne administration de la justice n'implique pas nécessairement des droits protégés par la *Charte*, et que la possibilité d'invoquer la *Charte* n'est pas une condition nécessaire à l'obtention d'une interdiction de publication :

Elle [la règle de common law] peut s'appliquer aux ordonnances qui doivent parfois être rendues dans l'intérêt de l'administration de la justice, qui englobe davantage que le droit à un procès équitable. Comme on veut que le critère « reflète [. . .] l'essence du critère énoncé dans l'arrêt *Oakes* », nous ne pouvons pas exiger que ces ordonnances aient pour seul objectif légitime les droits garantis par la *Charte*, pas plus que nous exigeons que les actes gouvernementaux et les dispositions législatives contrevenant à la *Charte* soient justifiés exclusivement par la recherche d'un autre droit garanti par la *Charte*. [Je souligne.]

La Cour prévoit aussi que, dans les cas voulus, le critère de *Dagenais* pourrait être élargi encore davantage pour régir des requêtes en interdiction de publication mettant en jeu des questions autres que l'administration de la justice.

Mentuck illustre bien la souplesse de la méthode *Dagenais*. Comme elle a pour objet fondamental de garantir que le pouvoir discrétionnaire d'interdire l'accès du public aux tribunaux est exercé conformément aux principes de la *Charte*, à mon avis, le modèle *Dagenais* peut et devrait être adapté à la situation de la présente espèce, où la question centrale est l'exercice du pouvoir discrétionnaire du tribunal d'exclure des renseignements confidentiels au cours d'une procédure publique. Comme dans *Dagenais*, *Nouveau-Brunswick* et *Mentuck*, une ordonnance de confidentialité aura un effet négatif sur le droit à la liberté d'expression garanti par la *Charte*, de même que sur le principe de la publicité des débats judiciaires et, comme dans ces affaires, les tribunaux doivent veiller à ce que le

However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

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The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

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Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the *CEAA*, the inability to present this information hinders the appellant's capacity to make full answer and defence, or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone

pouvoir discrétionnaire d'accorder l'ordonnance soit exercé conformément aux principes de la *Charte*. Toutefois, pour adapter le critère au contexte de la présente espèce, il faut d'abord définir les droits et intérêts particuliers qui entrent en jeu.

(2) Les droits et les intérêts des parties

L'objet immédiat de la demande d'ordonnance de confidentialité d'ÉACL a trait à ses intérêts commerciaux. Les renseignements en question appartiennent aux autorités chinoises. Si l'appelante divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Il ressort clairement des conclusions de fait du juge des requêtes qu'ÉACL est tenue, par ses intérêts commerciaux et par les droits de propriété de son client, de ne pas divulguer ces renseignements (par. 27), et que leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23).

Indépendamment de cet intérêt commercial direct, en cas de refus de l'ordonnance de confidentialité, l'appelante devra, pour protéger ses intérêts commerciaux, s'abstenir de produire les documents. Cela soulève l'importante question du contexte de la présentation de la demande. Comme le juge des requêtes et la Cour d'appel fédérale concluent tous deux que l'information contenue dans les documents confidentiels est pertinente pour les moyens de défense prévus par la *LCÉE*, le fait de ne pouvoir la produire nuit à la capacité de l'appelante de présenter une défense pleine et entière ou, plus généralement, au droit de l'appelante, en sa qualité de justiciable civile, de défendre sa cause. En ce sens, empêcher l'appelante de divulguer ces documents pour des raisons de confidentialité porte atteinte à son droit à un procès équitable. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable peut généralement être considéré comme un principe de justice fondamentale : *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157, par. 84, le juge L'Heureux-Dubé (dissidente, mais non sur ce point). Le droit à un procès équitable intéresse directement l'appelante, mais le public a aussi un intérêt général à la protection du droit à un procès équitable. À vrai dire, le principe

demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick, supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as “the very soul of justice”, guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, at para. 22.

(3) Adapting the *Dagenais* Test to the Rights and Interests of the Parties

Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under Rule 151 should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

général est que tout litige porté devant les tribunaux doit être tranché selon la norme du procès équitable. La légitimité du processus judiciaire n'exige pas moins. De même, les tribunaux ont intérêt à ce que toutes les preuves pertinentes leur soient présentées pour veiller à ce que justice soit faite.

Ainsi, les intérêts que favoriserait l'ordonnance de confidentialité seraient le maintien de relations commerciales et contractuelles, de même que le droit des justiciables civils à un procès équitable. Est lié à ce dernier droit l'intérêt du public et du judiciaire dans la recherche de la vérité et la solution juste des litiges civils.

Milite contre l'ordonnance de confidentialité le principe fondamental de la publicité des débats judiciaires. Ce principe est inextricablement lié à la liberté d'expression constitutionnalisée à l'al. 2b) de la *Charte* : *Nouveau-Brunswick*, précité, par. 23. L'importance de l'accès du public et des médias aux tribunaux ne peut être sous-estimée puisque l'accès est le moyen grâce auquel le processus judiciaire est soumis à l'examen et à la critique. Comme il est essentiel à l'administration de la justice que justice soit faite et soit perçue comme l'étant, cet examen public est fondamental. Le principe de la publicité des procédures judiciaires a été décrit comme le « souffle même de la justice », la garantie de l'absence d'arbitraire dans l'administration de la justice : *Nouveau-Brunswick*, par. 22.

(3) Adaptation de l'analyse de *Dagenais* aux droits et intérêts des parties

Pour appliquer aux droits et intérêts en jeu en l'espèce l'analyse de *Dagenais* et des arrêts subséquents précités, il convient d'énoncer de la façon suivante les conditions applicables à une ordonnance de confidentialité dans un cas comme l'espèce :

Une ordonnance de confidentialité en vertu de la règle 151 ne doit être rendue que si :

- a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;

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(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

Comme dans *Mentuck*, j'ajouterais que trois éléments importants sont subsumés sous le premier volet de l'analyse. En premier lieu, le risque en cause doit être réel et important, en ce qu'il est bien étayé par la preuve et menace gravement l'intérêt commercial en question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).

De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgence, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit du public à la confidentialité l'emporte sur le droit du public à l'accessibilité » (je souligne).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second

Outre l'exigence susmentionnée, les tribunaux doivent déterminer avec prudence ce qui constitue un « intérêt commercial important ». Il faut rappeler qu'une ordonnance de confidentialité implique une atteinte à la liberté d'expression. Même si la pondération de l'intérêt commercial et de la liberté d'expression intervient à la deuxième étape

branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

Finally, the phrase “reasonably alternative measures” requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. *Application of the Test to this Appeal*

(1) Necessity

At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself, or to its terms.

The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the Confidential Documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed

de l’analyse, les tribunaux doivent avoir pleinement conscience de l’importance fondamentale de la règle de la publicité des débats judiciaires. Voir généralement *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (C.F. 1^{re} inst.), p. 439, le juge Muldoon.

Enfin, l’expression « autres options raisonnables » oblige le juge non seulement à se demander s’il existe des mesures raisonnables autres que l’ordonnance de confidentialité, mais aussi à restreindre l’ordonnance autant qu’il est raisonnablement possible de le faire tout en préservant l’intérêt commercial en question.

B. *Application de l’analyse en l’espèce*

(1) Nécessité

À cette étape, il faut déterminer si la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l’appelante, et s’il existe d’autres solutions raisonnables que l’ordonnance elle-même, ou ses modalités.

L’intérêt commercial en jeu en l’espèce a trait à la préservation d’obligations contractuelles de confidentialité. L’appelante fait valoir qu’un préjudice irréparable sera causé à ses intérêts commerciaux si les documents confidentiels sont divulgués. À mon avis, la préservation de renseignements confidentiels est un intérêt commercial suffisamment important pour satisfaire au premier volet de l’analyse dès lors que certaines conditions relatives aux renseignements sont réunies.

Le juge Pelletier souligne que l’ordonnance sollicitée en l’espèce s’apparente à une ordonnance conservatoire en matière de brevets. Pour l’obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. n° 1850 (QL) (C.F. 1^{re} inst.), par. 29-30. J’ajouterais à cela

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by Robertson J.A. that the information in question must be of a “confidential nature” in that it has been “accumulated with a reasonable expectation of it being kept confidential” as opposed to “facts which a litigant would like to keep confidential by having the courtroom doors closed” (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant’s commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL’s competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the *CEAA* and this finding was not appealed at this Court. Further, I agree with the Court of Appeal’s assertion (at para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant’s case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be

l’exigence proposée par le juge Robertson que les renseignements soient « de nature confidentielle » en ce qu’ils ont été « recueillis dans l’expectative raisonnable qu’ils resteront confidentiels », par opposition à « des faits qu’une partie à un litige voudrait garder confidentiels en obtenant le huis clos » (par. 14).

Le juge Pelletier constate que le critère établi dans *AB Hassle* est respecté puisque tant l’appelante que les autorités chinoises ont toujours considéré les renseignements comme confidentiels et que, selon la prépondérance des probabilités, leur divulgation risque de nuire aux intérêts commerciaux de l’appelante (par. 23). Le juge Robertson conclut lui aussi que les renseignements en question sont clairement confidentiels puisqu’il s’agit de renseignements commerciaux, uniformément reconnus comme étant confidentiels, qui présentent un intérêt pour les concurrents d’ÉACL (par. 16). Par conséquent, l’ordonnance est demandée afin de prévenir un risque sérieux de préjudice à un intérêt commercial important.

Le premier volet de l’analyse exige aussi l’examen d’options raisonnables autres que l’ordonnance de confidentialité, et de la portée de l’ordonnance pour s’assurer qu’elle n’est pas trop vaste. Les deux jugements antérieurs en l’espèce concluent que les renseignements figurant dans les documents confidentiels sont pertinents pour les moyens de défense offerts à l’appelante en vertu de la *LCÉE*, et cette conclusion n’est pas portée en appel devant notre Cour. De plus, je suis d’accord avec la Cour d’appel lorsqu’elle affirme (au par. 99) que vu l’importance des documents pour le droit de présenter une défense pleine et entière, l’appelante est pratiquement forcée de les produire. Comme les renseignements sont nécessaires à la cause de l’appelante, il ne reste qu’à déterminer s’il existe d’autres options raisonnables pour communiquer les renseignements nécessaires sans divulguer de renseignements confidentiels.

Deux options autres que l’ordonnance de confidentialité sont mentionnées dans les décisions antérieures. Le juge des requêtes suggère de retrancher des documents les passages commercialement délicats et de produire les versions ainsi modifiées.

filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

There are two possible options with respect to expungement, and in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal, in the sense that, at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese

La majorité en Cour d'appel estime que, outre cette possibilité d'épuration des documents, l'inclusion dans les affidavits d'un résumé des documents confidentiels pourrait, dans une large mesure, compenser l'absence des originaux. Si l'une ou l'autre de ces deux options peut raisonnablement se substituer au dépôt des documents confidentiels aux termes d'une ordonnance de confidentialité, alors l'ordonnance n'est pas nécessaire et la requête ne franchit pas la première étape de l'analyse.

Il existe deux possibilités pour l'épuration des documents et, selon moi, elles comportent toutes deux des problèmes. La première serait que ÉACL retranche les renseignements confidentiels sans divulguer les éléments retranchés ni aux parties ni au tribunal. Toutefois, dans cette situation, la documentation déposée serait encore différente de celle utilisée pour les affidavits. Il ne faut pas perdre de vue que la requête découle de l'argument de Sierra Club selon lequel le tribunal ne devrait accorder que peu ou pas de poids aux résumés sans la présence des documents de base. Même si on pouvait totalement séparer les renseignements pertinents et les renseignements confidentiels, ce qui permettrait la divulgation de tous les renseignements sur lesquels se fondent les affidavits, l'appréciation de leur pertinence ne pourrait pas être mise à l'épreuve en contre-interrogatoire puisque la documentation retranchée ne serait pas disponible. Par conséquent, même dans le meilleur cas de figure, où l'on n'aurait qu'à retrancher les renseignements non pertinents, les parties se retrouveraient essentiellement dans la même situation que celle qui a donné lieu au pourvoi, en ce sens qu'au moins une partie des documents ayant servi à la préparation des affidavits en question ne serait pas mise à la disposition de Sierra Club.

De plus, je partage l'opinion du juge Robertson que ce meilleur cas de figure, où les renseignements pertinents et les renseignements confidentiels ne se recoupent pas, est une hypothèse non confirmée (par. 28). Même si les documents eux-mêmes n'ont pas été produits devant les tribunaux dans le cadre de la présente requête, parce qu'ils comprennent des milliers de pages de renseignements détaillés, cette hypothèse est au mieux optimiste. L'option de

authorities require prior approval for any request by AECL to disclose information.

l'épuration serait en outre compliquée par le fait que les autorités chinoises exigent l'approbation préalable de toute demande de divulgation de renseignements de la part d'ÉACL.

66 The second option is that the expunged material be made available to the court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are reasonably alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

La deuxième possibilité serait de mettre les documents supprimés à la disposition du tribunal et des parties en vertu d'une ordonnance de confidentialité plus restreinte. Bien que cela permettrait un accès public un peu plus large que ne le ferait l'ordonnance de confidentialité sollicitée, selon moi, cette restriction mineure à la requête n'est pas une option viable étant donné les difficultés liées à l'épuration dans les circonstances. Il s'agit de savoir s'il y a d'autres options raisonnables et non d'adopter l'option qui soit absolument la moins restrictive. Avec égards, j'estime que l'épuration des documents confidentiels serait une solution virtuellement impraticable et inefficace qui n'est pas raisonnable dans les circonstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

Une deuxième option autre que l'ordonnance de confidentialité serait, selon le juge Evans, l'inclusion dans les affidavits d'un résumé des documents confidentiels pour « dans une large mesure, compenser [leur] absence » (par. 103). Il ne semble toutefois envisager ce fait qu'à titre de facteur à considérer dans la pondération des divers intérêts en cause. Je conviens qu'à cette étape liminaire, se fonder uniquement sur les résumés en connaissant l'intention de Sierra Club de plaider leur faiblesse ou l'absence de valeur probante, ne semble pas être une « autre option raisonnable » à la communication aux parties des documents de base.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

Vu les facteurs susmentionnés, je conclus que l'ordonnance de confidentialité est nécessaire en ce que la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et qu'il n'existe pas d'autres options raisonnables.

(2) The Proportionality Stage

(2) L'étape de la proportionnalité

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free

Comme on le mentionne plus haut, à cette étape, les effets bénéfiques de l'ordonnance de confidentialité, y compris ses effets sur le droit de l'appelante à un procès équitable, doivent être pondérés avec ses effets préjudiciables, y compris ses effets sur le droit

expression, which in turn is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) *Salutary Effects of the Confidentiality Order*

As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case, or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan, supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck, supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the *CEAA* is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and

à la liberté d'expression, qui à son tour est lié au principe de la publicité des débats judiciaires. Cette pondération déterminera finalement s'il y a lieu d'accorder l'ordonnance de confidentialité.

a) *Les effets bénéfiques de l'ordonnance de confidentialité*

Comme nous l'avons vu, le principal intérêt qui serait promu par l'ordonnance de confidentialité est l'intérêt du public à la protection du droit du justiciable civil de faire valoir sa cause ou, de façon plus générale, du droit à un procès équitable. Puisque l'appelante l'invoque en l'espèce pour protéger ses intérêts commerciaux et non son droit à la liberté, le droit à un procès équitable dans ce contexte n'est pas un droit visé par la *Charte*; toutefois, le droit à un procès équitable pour tous les justiciables a été reconnu comme un principe de justice fondamentale : *Ryan*, précité, par. 84. Il y a lieu de rappeler qu'il y a des circonstances où, en l'absence de violation d'un droit garanti par la *Charte*, la bonne administration de la justice exige une ordonnance de confidentialité : *Mentuck*, précité, par. 31. En l'espèce, les effets bénéfiques d'une telle ordonnance sur l'administration de la justice tiennent à la capacité de l'appelante de soutenir sa cause, dans le cadre du droit plus large à un procès équitable.

Les documents confidentiels ont été jugés pertinents en ce qui a trait aux moyens de défense que l'appelante pourrait invoquer s'il est jugé que la *LCÉE* s'applique à l'opération attaquée et, comme nous l'avons vu, l'appelante ne peut communiquer les documents sans risque sérieux pour ses intérêts commerciaux. De ce fait, il existe un risque bien réel que, sans l'ordonnance de confidentialité, la capacité de l'appelante à mener à bien sa défense soit gravement réduite. Je conclus par conséquent que l'ordonnance de confidentialité aurait d'importants effets bénéfiques pour le droit de l'appelante à un procès équitable.

En plus des effets bénéfiques pour le droit à un procès équitable, l'ordonnance de confidentialité aurait aussi des incidences favorables sur d'autres droits et intérêts importants. En premier lieu, comme je l'exposerai plus en détail ci-après, l'ordonnance de confidentialité permettrait aux parties ainsi qu'au

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permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) *Deleterious Effects of the Confidentiality Order*

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a general principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the particular deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R.

tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu. En facilitant l'accès aux documents pertinents dans une procédure judiciaire, l'ordonnance sollicitée favoriserait la recherche de la vérité, qui est une valeur fondamentale sous-tendant la liberté d'expression.

En deuxième lieu, je suis d'accord avec l'observation du juge Robertson selon laquelle puisque les documents confidentiels contiennent des renseignements techniques détaillés touchant la construction et la conception d'une installation nucléaire, il peut être nécessaire, dans l'intérêt public, d'empêcher que ces renseignements tombent dans le domaine public (par. 44). Même si le contenu exact des documents demeure un mystère, il est évident qu'ils comprennent des détails techniques d'une installation nucléaire et il peut bien y avoir un important intérêt de sécurité publique à préserver la confidentialité de ces renseignements.

b) *Les effets préjudiciables de l'ordonnance de confidentialité*

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires, puisqu'elle priverait le public de l'accès au contenu des documents confidentiels. Comme on le dit plus haut, le principe de la publicité des débats judiciaires est inextricablement lié au droit à la liberté d'expression protégé par l'al. 2b) de la *Charte*, et la vigilance du public envers les tribunaux est un aspect fondamental de l'administration de la justice : *Nouveau-Brunswick*, précité, par. 22-23. Même si, à titre de principe général, l'importance de la publicité des débats judiciaires ne peut être sous-estimée, il faut examiner, dans le contexte de l'espèce, les effets préjudiciables particuliers que l'ordonnance de confidentialité aurait sur la liberté d'expression.

Les valeurs fondamentales qui sous-tendent la liberté d'expression sont (1) la recherche de la vérité et du bien commun; (2) l'épanouissement personnel par le libre développement des pensées et des idées; et (3) la participation de tous au processus politique : *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 976; *R. c. Keegstra*, [1990]

927, at p. 976; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 762-64, *per* Dickson C.J. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, at pp. 760-61. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, at pp. 1357-58, *per* Wilson J. Clearly the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

However, as mentioned above, to some extent the search for truth may actually be promoted by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or

3 R.C.S. 697, p. 762-764, le juge en chef Dickson. La jurisprudence de la *Charte* établit que plus l'expression en cause est au cœur de ces valeurs fondamentales, plus il est difficile de justifier, en vertu de l'article premier de la *Charte*, une atteinte à l'al. 2b) à son égard : *Keegstra*, p. 760-761. Comme l'objectif principal en l'espèce est d'exercer un pouvoir discrétionnaire dans le respect des principes de la *Charte*, l'examen des effets préjudiciables de l'ordonnance de confidentialité sur la liberté d'expression devrait comprendre une appréciation des effets qu'elle aurait sur les trois valeurs fondamentales. Plus l'ordonnance de confidentialité porte préjudice à ces valeurs, plus il est difficile de la justifier. Inversement, des effets mineurs sur les valeurs fondamentales rendent l'ordonnance de confidentialité plus facile à justifier.

La recherche de la vérité est non seulement au cœur de la liberté d'expression, elle est aussi reconnue comme un objectif fondamental de la règle de la publicité des débats judiciaires, puisque l'examen public des témoins favorise l'efficacité du processus de présentation de la preuve : *Edmonton Journal*, précité, p. 1357-1358, le juge Wilson. À l'évidence, en enlevant au public et aux médias l'accès aux documents invoqués dans les procédures, l'ordonnance de confidentialité nuirait jusqu'à un certain point à la recherche de la vérité. L'ordonnance n'exclurait pas le public de la salle d'audience, mais le public et les médias n'auraient pas accès aux documents pertinents quant à la présentation de la preuve.

Toutefois, comme nous l'avons vu plus haut, la recherche de la vérité peut jusqu'à un certain point être favorisée par l'ordonnance de confidentialité. La présente requête résulte de l'argument de Sierra Club selon lequel il doit avoir accès aux documents confidentiels pour vérifier l'exactitude de la déposition de M. Pang. Si l'ordonnance est refusée, le scénario le plus probable est que l'appellante s'abstiendra de déposer les documents, avec la conséquence fâcheuse que des preuves qui peuvent être pertinentes ne seront pas portées à la connaissance de Sierra Club ou du tribunal. Par conséquent, Sierra Club ne sera pas en mesure de vérifier complètement l'exactitude de la preuve de M. Pang en contre-

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documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

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As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would in turn assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

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In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

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The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focusses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would

interrogatoire. De plus, le tribunal ne bénéficiera pas du contre-interrogatoire ou de cette preuve documentaire, et il lui faudra tirer des conclusions fondées sur un dossier de preuve incomplet. Cela nuira manifestement à la recherche de la vérité en l'espèce.

De plus, il importe de rappeler que l'ordonnance de confidentialité ne restreindrait l'accès qu'à un nombre relativement peu élevé de documents hautement techniques. La nature de ces documents est telle que le public en général est peu susceptible d'en comprendre le contenu, de sorte qu'ils contribueraient peu à l'intérêt du public à la recherche de la vérité en l'espèce. Toutefois, dans les mains des parties et de leurs experts respectifs, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, ce qui devrait aussi aider le tribunal à tirer des conclusions de fait exactes. À mon avis, compte tenu de leur nature, la production des documents confidentiels en vertu de l'ordonnance de confidentialité sollicitée favoriserait mieux l'importante valeur de la recherche de la vérité, qui sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le rejet de la demande qui aurait pour effet d'empêcher les parties et le tribunal de se fonder sur les documents au cours de l'instance.

De plus, aux termes de l'ordonnance demandée, les seules restrictions imposées à l'égard de ces documents ont trait à leur distribution publique. Les documents confidentiels seraient mis à la disposition du tribunal et des parties, et il n'y aurait pas d'entrave à l'accès du public aux procédures. À ce titre, l'ordonnance représente une atteinte relativement minime à la règle de la publicité des débats judiciaires et elle n'aurait donc pas d'effets préjudiciables importants sur ce principe.

La deuxième valeur fondamentale sous-jacente à la liberté d'expression, la promotion de l'épanouissement personnel par le libre développement de la pensée et des idées, est centrée sur l'expression individuelle et n'est donc pas étroitement liée au principe de la publicité des débats judiciaires qui concerne l'expression institutionnelle. Même

restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will always be engaged where the open court

si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, j'estime que cette valeur ne serait pas touchée de manière significative.

La troisième valeur fondamentale, la libre participation au processus politique, joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Ce lien est souligné par le juge Cory dans *Edmonton Journal*, précité, p. 1339 :

On voit que la liberté d'expression est d'une importance fondamentale dans une société démocratique. Il est également essentiel dans une démocratie et fondamental pour la primauté du droit que la transparence du fonctionnement des tribunaux soit perçue comme telle. La presse doit être libre de commenter les procédures judiciaires pour que, dans les faits, chacun puisse constater que les tribunaux fonctionnent publiquement sous les regards pénétrants du public.

Même si on ne peut douter de l'importance de la publicité des débats judiciaires dans une société démocratique, les décisions antérieures divergent sur la question de savoir si le poids à accorder au principe de la publicité des débats judiciaires devrait varier en fonction de la nature de la procédure.

Sur ce point, le juge Robertson estime que la nature de l'affaire et le degré d'intérêt des médias sont des considérations dénuées de pertinence. Le juge Evans estime quant à lui que le juge des requêtes a eu raison de tenir compte du fait que la demande de contrôle judiciaire suscite beaucoup d'intérêt de la part du public et des médias. À mon avis, même si la nature publique de l'affaire peut être un facteur susceptible de renforcer l'importance de la publicité des débats judiciaires dans une espèce particulière, le degré d'intérêt des médias ne devrait pas être considéré comme facteur indépendant.

Puisque les affaires concernant des institutions publiques ont généralement un lien plus étroit avec la valeur fondamentale de la participation du public au processus politique, la nature publique d'une instance devrait être prise en considération dans l'évaluation du bien-fondé d'une ordonnance de confidentialité. Il importe de noter que cette valeur

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principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the substance of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below where he stated, at para. 87:

While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

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This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the *CEAA*. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

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However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish public interest, from media interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public nature of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case.

fondamentale sera toujours engagée lorsque sera mis en cause le principe de la publicité des débats judiciaires, vu l'importance de la transparence judiciaire dans une société démocratique. Toutefois, le lien entre la publicité des débats judiciaires et la participation du public dans le processus politique s'accroît lorsque le processus politique est également engagé par la substance de la procédure. Sous ce rapport, je suis d'accord avec ce que dit le juge Evans (au par. 87) :

Bien que tous les litiges soient importants pour les parties, et qu'il en va de l'intérêt du public que les affaires soumises aux tribunaux soient traitées de façon équitable et appropriée, certaines affaires soulèvent des questions qui transcendent les intérêts immédiats des parties ainsi que l'intérêt du public en général dans la bonne administration de la justice, et qui ont une signification beaucoup plus grande pour le public.

La requête est liée à une demande de contrôle judiciaire d'une décision du gouvernement de financer un projet d'énergie nucléaire. La demande est clairement de nature publique, puisqu'elle a trait à la distribution de fonds publics en rapport avec une question dont l'intérêt public a été démontré. De plus, comme le souligne le juge Evans, la transparence du processus et la participation du public ont une importance fondamentale sous le régime de la *LCÉE*. En effet, par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection. À cet égard, je suis d'accord avec le juge Evans pour conclure que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés.

J'estime toutefois avec égards que, dans la mesure où il se fonde sur l'intérêt des médias comme indice de l'intérêt du public, le juge Evans fait erreur. À mon avis, il est important d'établir une distinction entre l'intérêt du public et l'intérêt des médias et, comme le juge Robertson, je note que la couverture médiatique ne peut être considérée comme une mesure impartiale de l'intérêt public. C'est la nature publique de l'instance qui accroît le besoin de transparence, et cette nature publique ne se reflète

I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values, “we must guard carefully against judging expression according to its popularity”.

Although the public interest in open access to the judicial review application as a whole is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-54:

One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

pas nécessairement dans le désir des médias d'examiner les faits de l'affaire. Je réitère l'avertissement donné par le juge en chef Dickson dans *Keegstra*, précité, p. 760, où il dit que même si l'expression en cause doit être examinée dans ses rapports avec les valeurs fondamentales, « nous devons veiller à ne pas juger l'expression en fonction de sa popularité ».

Même si l'intérêt du public à la publicité de la demande de contrôle judiciaire dans son ensemble est important, à mon avis, il importe tout autant de prendre en compte la nature et la portée des renseignements visés par l'ordonnance demandée, lorsqu'il s'agit d'apprécier le poids de l'intérêt public. Avec égards, le juge des requêtes a commis une erreur en ne tenant pas compte de la portée limitée de l'ordonnance dans son appréciation de l'intérêt du public à la communication et en accordant donc un poids excessif à ce facteur. Sous ce rapport, je ne partage pas la conclusion suivante du juge Evans (au par. 97) :

Par conséquent, on ne peut dire qu'après que le juge des requêtes eut examiné la nature de ce litige et évalué l'importance de l'intérêt du public à la publicité des procédures, il aurait dans les circonstances accordé trop d'importance à ce facteur, même si la confidentialité n'est demandée que pour trois documents parmi la montagne de documents déposés en l'instance et que leur contenu dépasse probablement les connaissances de ceux qui n'ont pas l'expertise technique nécessaire.

La publicité des débats judiciaires est un principe fondamentalement important, surtout lorsque la substance de la procédure est de nature publique. Cela ne libère toutefois aucunement de l'obligation d'apprécier le poids à accorder à ce principe en fonction des limites particulières qu'imposerait l'ordonnance de confidentialité à la publicité des débats. Comme le dit le juge Wilson dans *Edmonton Journal*, précité, p. 1353-1354 :

Une chose semble claire et c'est qu'il ne faut pas évaluer une valeur selon la méthode générale et l'autre valeur en conflit avec elle selon la méthode contextuelle. Agir ainsi pourrait fort bien revenir à préjuger de l'issue du litige en donnant à la valeur examinée de manière générale plus d'importance que ne l'exige le contexte de l'affaire.

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In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

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In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the *CEAA*, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations, or withholding the documents in the hopes that either it will not have to present a defence under the *CEAA*, or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the *CEAA* are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain, with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

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In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the *CEAA*, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on either the public interest in freedom of expression or the appellant's commercial interests or fair trial right. This neutral result is in contrast with the

À mon avis, il importe de reconnaître que, malgré l'intérêt significatif que porte le public à ces procédures, l'ordonnance demandée n'entraverait que légèrement la publicité de la demande de contrôle judiciaire. La portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires.

Pour traiter des effets qu'aurait l'ordonnance de confidentialité sur la liberté d'expression, il faut aussi se rappeler qu'il se peut que l'appelante n'ait pas à soulever de moyens de défense visés par la *LCÉE*, auquel cas les documents confidentiels perdraient leur pertinence et la liberté d'expression ne serait pas touchée par l'ordonnance. Toutefois, puisque l'utilité des documents confidentiels ne sera pas déterminée avant un certain temps, l'appelante n'aurait plus, en l'absence d'ordonnance de confidentialité, que le choix entre soit produire les documents en violation de ses obligations, soit les retenir dans l'espoir de ne pas avoir à présenter de défense en vertu de la *LCÉE* ou de pouvoir assurer effectivement sa défense sans les documents pertinents. Si elle opte pour le premier choix et que le tribunal conclut par la suite que les moyens de défense visés par la *LCÉE* ne sont pas applicables, l'appelante aura subi le préjudice de voir ses renseignements confidentiels et délicats tomber dans le domaine public sans que le public n'en tire d'avantage correspondant. Même si sa réalisation est loin d'être certaine, la possibilité d'un tel scénario milite également en faveur de l'ordonnance sollicitée.

En arrivant à cette conclusion, je note que si l'appelante n'a pas à invoquer les moyens de défense pertinents en vertu de la *LCÉE*, il est également vrai que son droit à un procès équitable ne sera pas entravé même en cas de refus de l'ordonnance de confidentialité. Je ne retiens toutefois pas cela comme facteur militant contre l'ordonnance parce que, si elle est accordée et que les documents confidentiels ne sont pas nécessaires, il n'y aura alors aucun effet préjudiciable ni sur l'intérêt du public à la liberté d'expression ni sur les droits commerciaux ou le droit de l'appelante à un procès

scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the *CEAA*, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under Rule 151 of the *Federal Court Rules, 1998*.

équitable. Cette issue neutre contraste avec le scénario susmentionné où il y a un refus de l'ordonnance et possibilité d'atteinte aux droits commerciaux de l'appelante sans avantage correspondant pour le public. Par conséquent, le fait que les documents confidentiels puissent ne pas être nécessaires est un facteur en faveur de l'ordonnance de confidentialité.

En résumé, les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, dans le contexte en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. À ce titre, l'ordonnance n'aurait pas d'effets préjudiciables importants sur la liberté d'expression.

VII. Conclusion

Dans la pondération des divers droits et intérêts en jeu, je note que l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de l'appelante à un procès équitable et sur la liberté d'expression. D'autre part, les effets préjudiciables de l'ordonnance de confidentialité sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes. En outre, si l'ordonnance est refusée et qu'au cours du contrôle judiciaire l'appelante n'est pas amenée à invoquer les moyens de défense prévus dans la *LCÉE*, il se peut qu'elle subisse le préjudice d'avoir communiqué des renseignements confidentiels en violation de ses obligations sans avantage correspondant pour le droit du public à la liberté d'expression. Je conclus donc que les effets bénéfiques de l'ordonnance l'emportent sur ses effets préjudiciables, et qu'il y a lieu d'accorder l'ordonnance.

Je suis donc d'avis d'accueillir le pourvoi avec dépens devant toutes les cours, d'annuler l'arrêt de la Cour d'appel fédérale, et d'accorder l'ordonnance de confidentialité selon les modalités demandées par l'appelante en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*.

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Appeal allowed with costs.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondent Sierra Club of Canada: Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.

Solicitor for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Osler, Hoskin & Harcourt, Toronto.

Procureurs de l'intimé Sierra Club du Canada : Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.

Procureur des intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada : Le sous-procureur général du Canada, Ottawa.



SUPREME COURT OF CANADA

CITATION: Sherman Estate v.
Donovan, 2021 SCC 25

APPEAL HEARD:
October 6, 2020
JUDGMENT RENDERED:
June 11, 2021
DOCKET: 38695

BETWEEN:

**Estate of Bernard Sherman and Trustees of the Estate and
Estate of Honey Sherman and Trustees of the Estate**
Appellants

and

**Kevin Donovan and
Toronto Star Newspapers Ltd.**
Respondents

- and -

**Attorney General of Ontario, Attorney General of British Columbia,
Canadian Civil Liberties Association, Income Security Advocacy Centre,
Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc.,
CTV, a Division of Bell Media Inc., Global News, a division of Corus
Television Limited Partnership, The Globe and Mail Inc.,
Citytv, a division of Rogers Media Inc.,
British Columbia Civil Liberties Association,
HIV & AIDS Legal Clinic Ontario, HIV Legal Network
and Mental Health Legal Committee**
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring)

JUDGMENT:
(paras. 1 to 108)

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SHERMAN ESTATE v. DONOVAN

**Estate of Bernard Sherman and Trustees of the Estate and
Estate of Honey Sherman and Trustees of the Estate**

Appellants

v.

**Kevin Donovan and
Toronto Star Newspapers Ltd.**

Respondents

and

**Attorney General of Ontario,
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Canadian Civil Liberties Association,
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Intervenors

Indexed as: Sherman Estate v. Donovan

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

Present: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public interest — Privacy — Dignity — Physical safety — Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files — Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files, concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them. Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only

where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be

likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a

final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

Cases Cited

By Kasirer J.

Applied: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; **referred to:** *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 11; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Otis v. Otis* (2004), 7 E.T.R. (3d) 221; *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321; *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880; *R. v. Dyment*, [1988] 2 S.C.R. 417; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial*

Workers, Local 401, 2013 SCC 62, [2013] 3 S.C.R. 733; *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 289 C.C.C. (3d) 549; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *R. v. Paterson* (1998), 102 B.C.A.C. 200; *S. v. Lamontagne*, 2020 QCCA 663; *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357; *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629; *R. v. Pickton*, 2010 BCSC 1198; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; 3834310 *Canada inc. v. Chamberland*, 2004 CanLII 4122; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561, aff'd [1997] 3 S.C.R. 844; *A. v. B.*, 1990 CanLII 3132; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100; *Fedeli v. Brown*, 2020 ONSC 994; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121; *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410; *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455.

Statutes and Regulations Cited

Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

Canadian Charter of Rights and Freedoms, ss. 2(b), 8.

Charter of Human Rights and Freedoms, CQLR, c. C-12, s. 5.

Civil Code of Québec, arts. 35 to 41.

Code of Civil Procedure, CQLR, c. C-25.01, art. 12.

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.

Privacy Act, R.S.C. 1985, c. P-21.

Authors Cited

Ardia, David S. “Privacy and Court Records: Online Access and the Loss of Practical Obscurity” (2017), 4 *U. Ill. L. Rev.* 1385.

Austin, Lisa M. “Re-reading Westin” (2019), 20 *Theor. Inq. L.* 53.

Bailey, Jane, and Jacquelyn Burkell. “Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties’ and Witnesses’ Personal Information” (2016), 48 *Ott. L. Rev.* 143.

Cockfield, Arthur J. “Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies” (2007), 40 *U.B.C. L. Rev.* 41.

Eltis, Karen. *Courts, Litigants and the Digital Age*, 2nd ed. Toronto: Irwin Law, 2016.

Eltis, Karen. “The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context” (2011), 56 *McGill L.J.* 289.

Ferland, Denis, et Benoît Emery. *Précis de procédure civile du Québec*, vol. 1, 6^e éd. Montréal: Yvon Blais, 2020.

Gewirtz, Paul. “Privacy and Speech”, [2001] *Sup. Ct. Rev.* 139.

Guillemard, Sylvette, et Séverine Menétrey. *Comprendre la procédure civile québécoise*, 2^e éd. Montréal: Yvon Blais, 2017.

Hughes, Kirsty. “A Behavioural Understanding of Privacy and its Implications for Privacy Law” (2012), 75 *Modern L. Rev.* 806.

- Matheson, David. “Dignity and Selective Self-Presentation”, in Ian Kerr, Valerie Steeves and Carole Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society*. New York: Oxford University Press, 2009, 319.
- McIsaac, Barbara, Kris Klein, and Shaun Brown. *The Law of Privacy in Canada*, vol. 1. Toronto: Thomson Reuters, 2000 (loose-leaf updated 2020, release 11).
- McLachlin, Beverley. “Courts, Transparency and Public Confidence: To the Better Administration of Justice” (2003), 8 *Deakin L. Rev.* 1.
- Paton-Simpson, Elizabeth. “Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000), 50 *U.T.L.J.* 305.
- Perell, Paul M., and John W. Morden. *The Law of Civil Procedure in Ontario*, 4th ed. Toronto: LexisNexis, 2020.
- Québec. Ministère de la Justice. *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01*. Montréal: SOQUIJ, 2015.
- Rochette, Sébastien, et Jean-François Côté. “Article 12”, dans Luc Chamberland, dir. *Le grand collectif: Code de procédure civile — Commentaires et annotations*, vol. 1, 5^e éd. Montréal: Yvon Blais, 2020.
- Rossiter, James. *Law of Publication Bans, Private Hearings and Sealing Orders*. Toronto: Thomson Reuters, 2006 (loose-leaf updated 2020, release 2).
- Solove, Daniel J. “Conceptualizing Privacy” (2002), 90 *Cal. L. Rev.* 1087.

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rouleau and Hourigan JJ.A.), 2019 ONCA 376, 47 E.T.R. (4th) 1, [2019] O.J. No. 2373 (QL), 2019 CarswellOnt 6867 (WL Can.), setting aside a decision of Dunphy J., 2018 ONSC 4706, 417 C.R.R. (2d) 321, 41 E.T.R. (4th) 126, 28 C.P.C. (8th) 102, [2018] O.J. No. 4121 (QL), 2018 CarswellOnt 13017 (WL Can.). Appeal dismissed.

Chantelle Cseh and Timothy Youdan, for the appellants.

Iris Fischer and Skye A. Sepp, for the respondents.

Peter Scrutton, for the intervener the Attorney General of Ontario.

Jacqueline Hughes, for the intervener the Attorney General of British Columbia.

Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Ewa Krajewska, for the intervener the Income Security Advocacy Centre.

Robert S. Anderson, Q.C., for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, for the intervener the British Columbia Civil Liberties Association.

Khalid Janmohamed, for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee.

The judgment of the Court was delivered by

I. Overview

[1] This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

[2] Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

[3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public

importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

[4] This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

[5] This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that,

on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

[6] This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

[7] For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

[8] In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

[9] Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

[10] The couple's estates and estate trustees (collectively the "Trustees")¹ sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

[11] When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy

¹ As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

[12] Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star").² The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. *Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)*

[13] In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club*. He noted that a confidentiality order should only be granted when: "(1) such an

² The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

order is necessary . . . to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings” (para. 13(d)).

[14] The application judge considered whether the Trustees’ interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: “protecting the privacy and dignity of victims of crime and their loved ones” and “a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased” (paras. 22-25). With respect to the first interest, the application judge found that “[t]he degree of intrusion on that privacy and dignity has already been extreme and . . . excruciating” (para. 23). For the second interest, although he noted that “it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation”, he concluded that “the lack of such evidence is not fatal” (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the “willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed” (*ibid.*). He concluded that the “current uncertainty” was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was “grave” (*ibid.*).

[15] The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

[16] Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

B. *Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)*

[17] The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

[18] The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have

a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that “[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle” (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

[19] While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone’s physical safety. The application judge had erred on this point: “the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order” (para. 16).

[20] The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

C. *Subsequent Proceedings*

[21] The Court of Appeal’s order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles.

This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

[22] The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

[23] First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club*. The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

[24] Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

[25] The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

[26] The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an “administrative” character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

[27] The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star’s view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees’ position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive.

On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

[28] In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

[29] The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club*.

[30] Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26).

Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. “In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so” (*Khuja v. Times Newspapers Limited*, [2017] UKSC 49, [2019] A.C. 161, at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1326-39, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*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 paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

[31] The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court’s jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a

fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

[32] For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing

orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

[33] Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

[34] This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise

than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

[35] I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at “serious risk”. For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[36] In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of

physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become ““one of the hallmarks of a democratic society”” (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that “acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and

understanding of the administration of justice” (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

[40] The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

[41] The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the “fairness of the trial” (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the “proper administration of justice” (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an “important interest, including a commercial interest, in the context of litigation” (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the “general commercial interest of preserving confidential information” was an important interest because of its public character (para. 55). This is consistent with the fact that this test

was developed in reference to the *Oakes* jurisprudence that focuses on the “pressing and substantial” objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term “important interest” therefore captures a broad array of public objectives.

[42] While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.’s sense, explained in *Sierra Club*, that courts must be “cautious” and “alive to the fundamental importance of the open court rule” even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at “serious risk” is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[43] The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of “important interest” transcends the interests of the parties to the dispute and provides significant

flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, “Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties’ and Witnesses’ Personal Information” (2016), 48 *Ottawa L. Rev.* 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

[44] Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court’s authority. The court’s decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example

by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

[45] It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. *The Public Importance of Privacy*

[46] As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

[47] I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to “[p]ersonal concerns” which cannot, “without more”, satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that “[p]urely personal interests cannot justify non-publication or sealing orders” (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that “personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test” (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the

necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

[48] Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the “sensibilities of the individuals involved” (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club*. But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions “personal concerns”. Certain personal concerns — even “without more” — can coincide with important public interests within the meaning of *Sierra Club*. To invoke the expression of Binnie J. in *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a “public interest in confidentiality” that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face “a substantial risk of serious debilitating emotional . . . harm”, an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a “public interest in confidentiality” is therefore not whether the interest reflects or is rooted in “personal concerns” for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club*. It is true that an individual’s privacy is

pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

[49] The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club*.

[50] In the context of s. 8 of the *Charter* and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in *Dagg*, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: “The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual’s unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one’s own thoughts, actions and decisions” (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in *Lavigne*, at para. 25.

[51] Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733

(“UFCW”), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as “intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values” (para. 24). The importance of privacy, its “quasi-constitutional status” and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that “the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person’s privacy interests” (para. 59).

[52] Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“PIPEDA”); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41).³ Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective

³ At the time of writing the House of Commons is considering a bill that would replace part one of PIPEDA: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

(*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which “the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process” was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, “Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies” (2007), 40 *U.B.C. L. Rev.* 41, at p. 41; K. Hughes, “A Behavioural Understanding of Privacy and its Implications for Privacy Law” (2012), 75 *Modern L. Rev.* 806, at p. 823; P. Gewirtz, “Privacy and Speech” (2001), *Sup. Ct. Rev.* 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

[53] The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person’s personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced,

alongside its personal interest to the parties, a “public interest in confidentiality” (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

[54] In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is “something more” to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one’s professional standing (see, e.g., *R. v. Paterson* (1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect

of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

[55] Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at para. 9 (CanLII)) and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at

p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that “[i]f we are serious about peoples’ private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way” (“Courts, Transparency and Public Confidence: To the Better Administration of Justice” (2003), 8 *Deakin L. Rev.* 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. *The Important Public Interest in Privacy Bears on the Protection of Individual Dignity*

[56] While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The *Toronto Star* has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong

presumption of openness if privacy is cast too broadly without a view to its public character.

[57] Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that “covertness is the exception and openness the rule”, he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, “that the ‘privacy’ of litigants requires that the public be excluded from court proceedings” (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that “[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings” (p. 185).

[58] Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d’Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that “a party who institutes a legal proceeding waives his or her right to privacy, at least in part” (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule

and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

[59] The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., 3834310 *Canada inc. v. Chamberland*, 2004 CanLII 4122 (Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

[60] Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, “Conceptualizing Privacy” (2002), 90 *Cal. L. Rev.* 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of “theoretical disarray” (*R. v. Spencer*,

2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

[61] While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

[62] Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of

openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

[63] Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club*. As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] “[t]he confidentiality of the proceedings may be justified, in

particular, in order to protect the parties' privacy However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

[64] How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

[65] In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial

proceedings addressed “a somewhat different aspect of privacy, one more closely related to the protection of one’s dignity . . . namely the personal anguish and loss of dignity that may result from having embarrassing details of one’s private life printed in the newspapers” (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person’s ability to control sensitive information was said to foster respect for “dignity, personal integrity and autonomy” (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

[66] Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the *Code of Civil Procedure*, CQLR, c. C-25.01 (“C.C.P.”), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), art. 12). Under art. 12 C.C.P., a discretionary exception to the open court principle can be made by the court if “public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests”, requires it.

[67] The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the “important public interest” that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as

fundamental to a given society (see *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 C.C.P., the interest must be understood as defined [TRANSLATION] “in terms of a public interest in confidentiality” (see 3834310 *Canada inc.*, at para. 24, per Gendreau J.A. for the court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 C.C.P. alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 C.C.P. — [TRANSLATION] “what is part of one’s personal life, in short, what constitutes a minimum personal sphere” (*Godbout*, at p. 2569, per Baudouin J.A.; see also *A. v. B.*, 1990 CanLII 3132 (Que. C.A.), at para. 20, per Rothman J.A.).

[68] The “preservation of the dignity of the persons involved” is now consecrated as the archetypal public order interest in art. 12 C.C.P. It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, “Article 12”, in L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its

preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club*'s notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

[69] Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 *McGill L.J.* 289, at p. 314).

[70] It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy and dignity of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

[71] Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from*

the Identity Trail: Anonymity, Privacy and Identity in a Networked Society (2009), 319, at pp. 327-28; L. M. Austin, “Re-reading Westin” (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as “[a]n expression of an individual’s unique personality or personhood” (para. 65).

[72] Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to

other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

[73] I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

[74] Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

[75] If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this

Court has described in its jurisprudence on s. 8 of the *Charter* as the “biographical core” — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that “reasonable and informed Canadians” would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the “biographical core” or, “[p]ut another way, the more personal and confidential the information” (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is “personal” to the affected person.

[76] The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the

structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

[77] There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown*, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

[78] I pause here to note that I refer to cases on s. 8 of the *Charter* above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a

result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

[79] In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

[80] I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious

risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was “practically obscure” (D. S. Ardia, “Privacy and Court Records: Online Access and the Loss of Practical Obscurity” (2017), 4 *U. Ill. L. Rev.* 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

[81] It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude

further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, “Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000), 50 *U.T.L.J.* 305, at p. 346).

[82] Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

[83] That said, the likelihood that an individual’s highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

[84] Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with “privacy”, are generally insufficient to justify a

restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage “social values of superordinate importance” beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

[85] To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual’s biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court’s emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. *The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest*

[86] As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

[87] As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception

to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

[88] The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that “[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating” (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

[89] Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals’ privacy, as I have defined it above in reference to dignity, is not serious. The information the

Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

[90] There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

[91] With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might

well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club*.

[92] The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

[93] Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

[94] Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

[95] Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

[96] Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is

worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was “foreseeable” and “grave” (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the *Toronto Star* agrees that the application judge’s conclusion as to the existence of a serious risk to safety was mere speculation.

[97] At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

[98] As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious

risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

[99] This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

[100] Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the

Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

[101] The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated “cases involving gang violence and dangerous firearms” and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it “self-evident” that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans’ deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

[102] Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis.

Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

[103] Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. *There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy*

[104] While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

[105] Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the *Toronto Star* would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

[106] Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the

harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

[107] The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

[108] For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellants: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the respondents: Blake, Cassels & Graydon, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: DMG Advocates, Toronto.

Solicitors for the intervener the Income Security Advocacy Centre: Borden Ladner Gervais, Toronto.

Solicitors for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.: Farris, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: McCarthy Tétrault, Toronto.

Solicitors for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee: HIV & AIDS Legal Clinic Ontario, Toronto.

**Toronto Star Newspapers Ltd. v. Attorney General of Ontario; ARCH
Disability Law Centre et al., Intervenor**
[Indexed as: Toronto Star Newspapers Ltd. v. Ontario (Attorney General)]

Ontario Reports

Ontario Superior Court of Justice

E.M. Morgan J.

April 27, 2018

142 O.R. (3d) 266 | 2018 ONSC 2586

Case Summary

Charter of Rights and Freedoms — Freedom of expression — Open court principle — Freedom of information — Freedom of Information and Protection of Privacy Act violating s. 2(b) of Charter substantively by presuming non-disclosure of adjudicative records held by administrative tribunals under "personal information" exemption and procedurally by occasioning delay in accessing adjudicative records — Procedural infringement justified under s. 1 of Charter — Substantive infringement not justified under s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31.

The applicant brought an application challenging the constitutionality of certain provisions of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") insofar as those provisions apply to "adjudicative records" held by 13 administrative tribunals which hold adjudicative hearings. In particular, the applicant submitted that the presumption of non-disclosure of records under the "personal information" exemption in s. 21(1) of FIPPA violates the open court principle under s. 2(b) of the *Canadian Charter of Rights and Freedoms* when applied to adjudicative records held by those tribunals. "Adjudicative records", in the context of this application, meant records that are part of the actual record of the tribunal hearing, not documents that were part of the pre-hearing discovery but that did not get introduced at the hearing itself.

Held, the application should be allowed.

The applicant had public interest standing to bring this application, and was not required to mount its constitutional challenge by applying for judicial review of individual Information and Privacy Commission decisions.

Of the 13 tribunals identified by the applicant, eight did not use the FIPPA process at all. Unless and until the applicant's (or anyone else's) rights were infringed by those eight non-FIPPA applying tribunals, there was nothing further to analyze in respect of them.

The open court principle, which is inextricably tied to the rights guaranteed by s. 2(b) of the *Charter*, applies to administrative tribunals as well as to courts. FIPPA violates s. 2(b) of the

Charter in two respect -- substantively by imposing a reverse onus on a request for adjudicative records to which the "personal information" exemption is said to apply; and procedurally by occasioning delay in accessing adjudicative records. The multiple objectives of *FIPPA* are sufficiently important to warrant overriding a *Charter*-protected right. There is a rational connection between those objectives and the inclusion of adjudicative tribunals in the Schedule to *FIPPA*. The substantive violation of s. 2(b) is not justified under s. 1 of the *Charter*. The reverse onus on requests for personal information does not minimally impair s. 2(b). The deleterious effects of the presumption against disclosure are real and substantial, and outweigh the purely speculative advantage of encouraging access to justice by individuals who might stop using the relevant tribunals if their identities were exposed to the public. A declaration of invalidity [page267] was granted. As for *FIPPA*'s procedural limitations on s. 2(b), the notice requirements, timelines, etc. minimally impair s. 2(b). While those procedural factors may be subject to extension and abuse in individual cases, they are, in their own terms, justifiable as minimal intrusions on the open court principle. That conclusion effectively rendered the proportionality analysis redundant: a minimal impairment of a *Charter* right is already proportionate to that right.

Ontario (Public Safety and Security) v. Criminal Lawyers' Assn., [2010] 1 S.C.R. 815, [2010] S.C.J. No. 23, 2010 SCC 23, 212 C.R.R. (2d) 300, 84 C.P.R. (4th) 81, 255 C.C.C. (3d) 545, 76 C.R. (6th) 283, 402 N.R. 350, 319 D.L.R. (4th) 385, EYB 2010-175469, 2010EXP-1990, 262 O.A.C. 258, J.E. 2010-1089, 1 Admin. L.R. (5th) 235, 88 W.C.B. (2d) 628, 189 A.C.W.S. (3d) 675, **consd**

Other cases referred to

Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567, [2009] S.C.J. No. 37, 2009 SCC 37, 310 D.L.R. (4th) 193, [2009] 9 W.W.R. 189, J.E. 2009-1407, EYB 2009-161892, 390 N.R. 202, 9 Alta. L.R. (5th) 1, 81 M.V.R. (5th) 1, 460 A.R. 1, 179 A.C.W.S. (3d) 327; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 S.C.R. 733, [2013] S.C.J. No. 62, 2013 SCC 62, 451 N.R. 253, 2013EXP-3621, 2013EXPT-2096, J.E. 2013-1964, 239 L.A.C. (4th) 317, D.T.E. 2013T-775, EYB 2013-229254, 297 C.R.R. (2d) 71, 60 Admin. L.R. (5th) 173, 88 Alta. L.R. (5th) 1, [2014] CLLC Â210-003, 365 D.L.R. (4th) 257, [2014] 2 W.W.R. 1, 561 A.R. 359, 235 A.C.W.S. (3d) 375; *ARPA Canada v. Ontario* (2017), 138 O.R. (3d) 253, [2017] O.J. No. 2969, 2017 ONSC 3285, 383 C.R.R. (2d) 25 (S.C.J.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, 174 D.L.R. (4th) 193, 243 N.R. 22, J.E. 99-1412, REJB 1999-13279, 14 Admin. L.R. (3d) 173, 1 Imm. L.R. (3d) 1, 89 A.C.W.S. (3d) 777; *Batty v. Toronto (City)* (2011), 108 O.R. (3d) 571, [2011] O.J. No. 5158, 2011 ONSC 6862, 248 C.R.R. (2d) 175, 12 R.P.R. (5th) 26, 90 M.P.L.R. (4th) 250, 342 D.L.R. (4th) 129, 209 A.C.W.S. (3d) 542 (S.C.J.); *Bell Canada v. Canadian Telephone Employees Assn.*, [2003] 1 S.C.R. 884, [2003] S.C.J. No. 36, 2003 SCC 36, [2003] 1 S.C.R. 884, 227 D.L.R. (4th) 193, 306 N.R. 34, [2004] 1 W.W.R. 1, J.E. 2003-1227, 3 Admin. L.R. (4th) 163, [2003] CLLC Â230-021, 109 C.R.R. (2d) 65, 123 A.C.W.S. (3d) 531, 46 C.H.R.R. D/495; *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, [2013] S.C.J. No. 72, 2013 SCC 72, 366 D.L.R. (4th) 237, 452 N.R. 1, 312 O.A.C. 53, 2014EXP-30, J.E. 2014-21, 303 C.C.C. (3d) 146, 7 C.R. (7th) 1, 297 C.R.R. (2d) 334, 110 W.C.B. (2d) 753; *Canada*

(Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 S.C.R. 524, [2012] S.C.J. No. 45, 2012 SCC 45, 325 B.C.A.C. 1, 434 N.R. 257, 34 B.C.L.R. (5th) 1, 2012EXP-3353, J.E. 2012-1793, EYB 2012-211411, [2012] 10 W.W.R. 423, 95 C.R. (6th) 1, 267 C.R.R. (2d) 1, 290 C.C.C. (3d) 1, 352 D.L.R. (4th) 587, 220 A.C.W.S. (3d) 536, 103 W.C.B. (2d) 625; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, [2007] S.C.J. No. 30, 2007 SCC 30, 281 D.L.R. (4th) 589, 364 N.R. 89, J.E. 2007-1276, 158 C.R.R. (2d) 127, 158 A.C.W.S. (3d) 919, EYB 2007-121233; *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*, [2008] M.J. No. 286, 2008 MBCA 94, [2008] 10 W.W.R. 19, 58 C.P.C. (6th) 5, 296 D.L.R. (4th) 724, 228 Man. R. (2d) 312, 168 A.C.W.S. (3d) 94; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, [1996] S.C.J. No. 38, 139 D.L.R. (4th) 385, 203 N.R. 169, 182 N.B.R. (2d) 81, 110 C.C.C. (3d) 193, 2 C.R. (5th) 1, 39 C.R.R. (2d) 189, EYB 1996-67336, J.E. 96-2090, 66 A.C.W.S. (3d) 444, 32 W.C.B. (2d) 273; *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 S.C.R. 65, [2011] S.C.J. No. 3, 2011 SCC 3, 227 C.R.R. (2d) 121, 2011EXP-380, 411 N.R. 75, 264 C.C.C. (3d) 311, 328 D.L.R. (4th) 651, J.E. 2011-207, 199 A.C.W.S. (3d) 1161, 92 W.C.B. (2d) 791; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1, 122 [page268] D.L.R. (4th) 129, 177 N.R. 325, J.E. 95-232, 26 Admin. L.R. (2d) 1, [1995] 2 C.N.L.R. 92, 52 A.C.W.S. (3d) 1185; *C.B. Powell Ltd. v. Canada (Border Services Agency)*, [2010] F.C.J. No. 274, 2010 FCA 61, [2011] 2 F.C.R. 332, 400 N.R. 367, 2011EXP-3678, 185 A.C.W.S. (3d) 914; *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, [2005] S.C.J. No. 33, 2005 SCC 35, 254 D.L.R. (4th) 577, 335 N.R. 25, J.E. 2005-1144, 130 C.R.R. (2d) 99, 53 C.H.R.R. D/1, 139 A.C.W.S. (3d) 1080, EYB 2005-91328; *City of Toronto (Re)*, 2016 CanLII 31964 (Ont. IPC); *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115, 140 D.L.R. (4th) 193, 204 N.R. 1, J.E. 96-2213, 43 Admin. L.R. (2d) 155, 26 C.C.E.L. (2d) 1, 96 CLLC Â230-056, 40 C.R.R. (2d) 81, 27 C.H.R.R. D/173; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, [1991] S.C.J. No. 42, 81 D.L.R. (4th) 121, 122 N.R. 361, J.E. 91-935, 47 O.A.C. 271, 50 Admin. L.R. 44, [1991] OLRB Rep. June 790, 91 CLLC Â14,024 at 12217, 4 C.R.R. (2d) 1, 27 A.C.W.S. (3d) 35; *CUPE, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45, 97 D.L.R. (3d) 417, 26 N.R. 341, 25 N.B.R. (2d) 237, 79 CLLC Â14,209 at 111, [1979] 2 A.C.W.S. 108; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104, 120 D.L.R. (4th) 12, 175 N.R. 1, J.E. 95-30, 76 O.A.C. 81, 94 C.C.C. (3d) 289, 34 C.R. (4th) 269, 25 C.R.R. (2d) 1, 51 A.C.W.S. (3d) 1045, 25 W.C.B. (2d) 304, EYB 1994-67668; *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, [2012] S.C.J. No. 12, 2012 SCC 12, 428 N.R. 146, 2012EXP-1231, J.E. 2012-672, EYB 2012-203967, 255 C.R.R. (2d) 289, 34 Admin. L.R. (5th) 1, 343 D.L.R. (4th) 193, 211 A.C.W.S. (3d) 852; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63, 2003 SCC 62, 232 D.L.R. (4th) 577, 312 N.R. 1, J.E. 2003-2076, 218 N.S.R. (2d) 311, 45 C.P.C. (5th) 1, 112 C.R.R. (2d) 202; *Doyle v. Ontario (Ministry of Municipal Affairs)*, 2017 CanLII 52705 (Ont. PSGB); *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, 2008 SCC 9, 329 N.B.R. (2d) 1, 64 C.C.E.L. (3d) 1, EYB 2008-130674, J.E. 2008-547, [2008] CLLC Â220-020, 170 L.A.C. (4th) 1, 372 N.R. 1, 69 Imm. L.R. (3d) 1, 291 D.L.R. (4th) 577, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65, D.T.E. 2008T-223, 164 A.C.W.S. (3d) 727; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, [1989] S.C.J. No. 124, 64 D.L.R. (4th) 577, 102 N.R. 321, [1990] 1 W.W.R. 577, J.E. 90-47, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 18 A.C.W.S. (3d) 894, EYB 1989-66926; *Finlay v. Canada (Minister of*

Finance), [1986] 2 S.C.R. 607, [1986] S.C.J. No. 73, 33 D.L.R. (4th) 321, 71 N.R. 338, [1987] 1 W.W.R. 603, J.E. 87-100, 23 Admin. L.R. 197, 17 C.P.C. (2d) 289, 2 A.C.W.S. (3d) 277, 8 C.H.R.R. D/3789; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, [1988] S.C.J. No. 88, 10 C.H.R.R. D/5559, 36 C.R.R. 1, 54 D.L.R. (4th) 577, 90 N.R. 84, 13 A.C.W.S. (3d) 7, 6 W.C.B. (2d) 186; *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339, [1909] S.C.J. No. 7; *Guardian News v. Westminster Magistrates' Court*, [2012] EWCA Civ. 420; *H. (M.E.) v. Williams* (2012), 108 O.R. (3d) 321, [2012] O.J. No. 525, 2012 ONCA 35, 287 O.A.C. 133, 346 D.L.R. (4th) 668, 15 R.F.L. (7th) 37, 212 A.C.W.S. (3d) 735; *Hanif v. Ontario College of Pharmacists*, [2014] O.J. No. 2137, 2014 ONSC 2598 (Div. Ct.); *Hill v. Church of Scientology of Toronto* (1995), 24 O.R. (3d) 865, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, 126 D.L.R. (4th) 129, 184 N.R. 1, J.E. 95-1495, 84 O.A.C. 1, 25 C.C.L.T. (2d) 89, 30 C.R.R. (2d) 189, 56 A.C.W.S. (3d) 495, REJB 1995-68609; *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*, [1952] O.R. 366, [1952] O.J. No. 439, [1952] 3 D.L.R. 162 (C.A.); *Hunte v. Ontario (Superintendent of Financial Services)*, 2013 ONFST 3, 2013 LNOFST 3; *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, [1990] S.C.J. No. 20, 68 D.L.R. (4th) 524, 105 N.R. 161, J.E. 90-472, 38 O.A.C. 321, 42 Admin. L.R. 1, [1990] OLRB Rep. March 369, 90 CLLC Â14,007 at 12041, EYB 1990-67694, D.T.E. 90T-444; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36, 58 D.L.R. (4th) 577, 94 N.R. 167, J.E. 89-772, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, [page269] 15 A.C.W.S. (3d) 121; *John Doe v. Ontario (Information & Privacy Commissioner)* (1993), 13 O.R. (3d) 767, [1993] O.J. No. 1527, 106 D.L.R. (4th) 140, 64 O.A.C. 248, 19 Admin. L.R. (2d) 251, 41 A.C.W.S. (3d) 1089 (Div. Ct.); *Kadia v. Gonzales*, 501 F.3d 817 (7th Cir. 2007); *Law Society of Upper Canada v. Xynnis*, [2014] L.S.D.D. No. 38, 2014 ONLSAP 9; *Loutchansky v. Times Newspapers Ltd.*, [2002] 2 W.L.R. 640, [2002] 1 All E.R. 652 (C.A.); *Lukacs v. Canada (Canadian Transportation Agency)*, [2015] F.C.J. No. 707, 2015 FCA 140, 386 D.L.R. (4th) 163, 88 Admin. L.R. (5th) 24, 473 N.R. 263, 253 A.C.W.S. (3d) 751 (C.A.); *McPherson v. McPherson*, [1936] A.C. 177; *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, [2007] S.C.J. No. 43, 2007 SCC 43, 285 D.L.R. (4th) 193, 368 N.R. 112, [2008] 1 W.W.R. 223, J.E. 2007-1909, 247 B.C.A.C. 1, 73 B.C.L.R. (4th) 34, 224 C.C.C. (3d) 1, 51 C.R. (6th) 262, 162 C.R.R. (2d) 104, EYB 2007-124673, 75 W.C.B. (2d) 103; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21, 89 D.L.R. (4th) 289, 134 N.R. 241, J.E. 92-380, 95 Nfld. & P.E.I.R. 271, 4 Admin. L.R. (2d) 121, 31 A.C.W.S. (3d) 1124; *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, 132 D.L.R. (3d) 385, 40 N.R. 181, 49 N.S.R. (2d) 609, 65 C.C.C. (2d) 129, 26 C.R. (3d) 193, 7 W.C.B. 154, EYB 1982-149378; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54, 2003 SCC 54, 231 D.L.R. (4th) 385, 310 N.R. 22, J.E. 2003-1843, 217 N.S.R. (2d) 301, 4 Admin. L.R. (4th) 1, 28 C.C.E.L. (3d) 1, 110 C.R.R. (2d) 233, 125 A.C.W.S. (3d) 542; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, [2001] S.C.J. No. 17, 2001 SCC 52, 204 D.L.R. (4th) 33, 274 N.R. 116, [2001] 10 W.W.R. 1, 155 B.C.A.C. 193, 93 B.C.L.R. (3d) 1, 34 Admin. L.R. (3d) 1, J.E. 2001-1709, REJB

2001-25683, 108 A.C.W.S. (3d) 3; *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300, 166 O.A.C. 88, 22 C.P.R. (4th) 447, 118 A.C.W.S. (3d) 1 (C.A.); *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, [1991] S.C.J. No. 45, 82 D.L.R. (4th) 321, 125 N.R. 241, J.E. 91-

1000, 37 C.C.E.L. 135, 91 CLLC Â14,026 at 12231, 4 C.R.R. (2d) 30, 27 A.C.W.S. (3d) 601; *R. v. Brint*, [1979] A.J. No. 57, [1979] 2 W.W.R. 369, 14 A.R. 183, 45 C.C.C. (2d) 560, 6 C.R. (3d) 377, 3 W.C.B. 152 (C.A.); *R. v. Canadian Broadcasting Corp.* (2010), 102 O.R. (3d) 673, [2010] O.J. No. 4615, 2010 ONCA 726, 221 C.R.R. (2d) 242, 271 O.A.C. 7, 262 C.C.C. (3d) 455, 327 D.L.R. (4th) 470, 91 W.C.B. (2d) 175; *R. v. Conway*, [2010] 1 S.C.R. 765, [2010] S.C.J. No. 22, 2010 SCC 22, 75 C.R. (6th) 201, 320 D.L.R. (4th) 25, 255 C.C.C. (3d) 506, 402 N.R. 255, 263 O.A.C. 61, 211 C.R.R. (2d) 326, 2010EXP-1926, J.E. 2010-1051, EYB 2010-175167, 1 Admin. L.R. (5th) 163, 88 W.C.B. (2d) 441; *R. v. Domm* (1996), 31 O.R. (3d) 540, [1996] O.J. No. 4300, 95 O.A.C. 262, 111 C.C.C. (3d) 449, 4 C.R. (5th) 61, 40 C.R.R. (2d) 289, 33 W.C.B. (2d) 108 (C.A.); *R. v. Eurocopter Canada Ltd.*, [2001] O.J. No. 1591, [2001] O.T.C. 310, 49 W.C.B. (2d) 603 (S.C.J.); *R. v. Eurocopter Canada Ltd.* (2003), 67 O.R. (3d) 763, [2003] O.J. No. 4238, 233 D.L.R. (4th) 114, 180 C.C.C. (3d) 15, 112 C.R.R. (2d) 261, 59 W.C.B. (2d) 278 (S.C.J.); *R. v. Ferguson*, [2008] 1 S.C.R. 96, [2008] S.C.J. No. 6, 2008 SCC 6, 228 C.C.C. (3d) 385, EYB 2008-130228, [2008] 5 W.W.R. 387, J.E. 2008-514, 371 N.R. 231, 290 D.L.R. (4th) 17, 425 A.R. 79, 54 C.R. (6th) 197, 87 Alta. L.R. (4th) 203, 168 C.R.R. (2d) 34, 78 W.C.B. (2d) 303; *R. v. Jordan*, [2016] 1 S.C.R. 631, [2016] S.C.J. No. 27, 2016 SCC 27, 335 C.C.C. (3d) 403, 398 D.L.R. (4th) 381, 29 C.R. (7th) 235, 388 B.C.A.C. 111, 358 C.R.R. (2d) 97, 2016EXP-2173, J.E. 2016-1212, EYB 2016-267713, 130 W.C.B. (2d) 596; *R. v. Keegstra*, [1990] 3 S.C.R. 697, [1990] S.C.J. No. 131, 117 N.R. 1, [1991] 2 W.W.R. 1, J.E. 91-42, 77 Alta. L.R. (2d) 193, 114 A.R. 81, 61 C.C.C. (3d) 1, 1 C.R. (4th) 129, 3 C.R.R. (2d) 193, 11 W.C.B. (2d) 352; *R. v. Kossyrine*, [2011] O.J. No. 4495, 2011 ONSC 6081, 249 C.R.R. (2d) 17, 97 W.C.B. (2d) 476 (S.C.J.); *R. v. Laba*, [1994] 3 S.C.R. 965, [1994] S.C.J. No. 106, 120 D.L.R. (4th) 175, 174 N.R. 321, J.E. 95-27, 94 C.C.C. (3d) 385, 34 C.R. (4th) 360, 25 C.R.R. (2d) 92, 25 W.C.B. (2d) 300; *R. v. Leipert*, [1997] 1 S.C.R. 281, [1997] S.C.J. No. 14, 143 D.L.R. (4th) 38, 207 N.R. 145, [1997] [page270] 3 W.W.R. 457, J.E. 97-357, 112 C.C.C. (3d) 385, 4 C.R. (5th) 259, 41 C.R.R. (2d) 266, 85 B.C.A.C. 162, 33 W.C.B. (2d) 229; *R. v. Lefebvre*, [1984] J.Q. no 247, 17 C.C.C. (3d) 277, J.E. 84-633 (C.A.); *R. v. Mentuck*, [2001] 3 S.C.R. 442, [2001] S.C.J. No. 73, 2001 SCC 76, 205 D.L.R. (4th) 512, 277 N.R. 160, [2002] 2 W.W.R. 409, J.E. 2001-2142, 163 Man. R. (2d) 1, 158 C.C.C. (3d) 449, 47 C.R. (5th) 63, 51 W.C.B. (2d) 349; *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 16 W.C.B. 73; *R. v. Quesnel*, [1979] O.J. No. 116, 51 C.C.C. (2d) 270 (C.A.); *R. v. Vandeveld*, [1994] S.J. No. 156, [1994] 7 W.W.R. 370, 120 Sask. R. 51, 89 C.C.C. (3d) 161, 23 W.C.B. (2d) 297 (C.A.); *R. v. White*, [2005] A.J. No. 1727, 2005 ABCA 435, 56 Alta. L.R. (4th) 255, 376 A.R. 63, 68 W.C.B. (2d) 70; *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267, [1994] O.J. No. 200, 112 D.L.R. (4th) 683, 68 O.A.C. 284, 1 C.C.E.L. (2d) 161, 94 CLLC Â14,024 at 12110, 45 A.C.W.S. (3d) 666 (C.A.); *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467, [2013] S.C.J. No. 11, 2013 SCC 11, 276 C.R.R. (2d) 270, 441 N.R. 1, 2013EXP-629, J.E. 2013-335, [2013] 4 W.W.R. 429, EYB 2013-218564, 355 D.L.R. (4th) 383, 76 C.H.R.R. D/1, 409 Sask. R. 75, 223 A.C.W.S. (3d) 1004; *Schachter v. Canada*, [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68, 93 D.L.R. (4th) 1, 139 N.R. 1, J.E. 92-1054, 92 CLLC Â14,036 at 12221, 10 C.R.R. (2d) 1, 34 A.C.W.S. (3d) 1090; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 2002 SCC 41, 211 D.L.R. (4th) 193, 287 N.R. 203, J.E. 2002-803, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 18 C.P.R. (4th) 1, 93 C.R.R. (2d) 219, 113 A.C.W.S. (3d) 36; *Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987]

F.C.J. No. 658, [1987] 3 F.C. 329, 13 F.T.R. 138, 33 C.R.R. 376, 3 Imm. L.R. (2d) 226 (T.D.); *Stepanova v. Ontario (Human Rights Tribunal)*, [2017] O.J. No. 2689, 2017 ONSC 2386 (Div. Ct.); *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General)* (1998), 38 O.R. (3d) 735, [1998] 1 S.C.R. 877, [1998] S.C.J. No. 44, 159 D.L.R. (4th) 385, 226 N.R. 1, J.E. 98-1224, 109 O.A.C. 201, 51 C.R.R. (2d) 189, 79 A.C.W.S. (3d) 921; *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138, [1974] S.C.J. No. 45, 43 D.L.R. (3d) 1, 1 N.R. 225; *Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 S.C.R. 721, [2010] S.C.J. No. 21, 2010 SCC 21, 212 C.R.R. (2d) 30, [2010] 8 W.W.R. 193, 320 D.L.R. (4th) 64, 402 N.R. 206, 263 O.A.C. 4, EYB 2010-175067, 2010EXP-1937, J.E. 2010-1061, 75 C.R. (6th) 1, 23 Alta. L.R. (5th) 242, 482 A.R. 66, 255 C.C.C. (3d) 473; *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, [2005] S.C.J. No. 41, 2005 SCC 41, 253 D.L.R. (4th) 577, 335 N.R. 201, J.E. 2005-1234, 200 O.A.C. 348, 197 C.C.C. (3d) 1, 29 C.R. (6th) 251, 132 C.R.R. (2d) 178, 65 W.C.B. (2d) 621; *University of Ottawa (Re)*, 2017 CanLII 2024 (Ont. IPC); *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, [2004] S.C.J. No. 41, 2004 SCC 43, 240 D.L.R. (4th) 147, 322 N.R. 161, [2005] 2 W.W.R. 671, 199 B.C.A.C. 1, 33 B.C.L.R. (4th) 261, 184 C.C.C. (3d) 515, 21 C.R. (6th) 142, 120 C.R.R. (2d) 203, 61 W.C.B. (2d) 216, REJB 2004-66287, J.E. 2004-1332

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1)

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1)

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 2(1), (e), (g), Part II [as am.], ss. 10(1) [as am.], 21 [as am.], (1), (a), (b), (c), (d), (e), (f), (2)(a), (b), (c), (d), (e), (f), (g), (h), (i), (3), (a), (b), (c), (d), (e), (f), (g), (h), 23 [as am.], 24(1) [as am.], (1.1), (2), 25, 27, 28(1), (2)(c) [as am.], (4) [as am.], (b), (c) [as am.], (8.1), Part III [as am.], ss. 42(1) [as am.], 50(1), (3) [as am.], 51, 52 [as am.], (1) [as am.], (13) [as am.], 54(1), (4)

Health Insurance Act, C.Q.L.R., c. A-29 [page271]

Hospital Insurance Act, C.Q.L.R., c. A-28

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, ss. 9(1) [as am.], 20

Rules and regulations referred to

General, R.R.O. 1990, Reg. 460 [as am.], s. 1(1), Schedule [as am.]

Authorities referred to

Akhavan, Payam, "Justice delayed is better than justice denied", *The Globe and Mail*, March 30, 2016

Barak, Aharon, *Proportionality, Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012)

Blackstone, William, *Commentaries on the Laws of England*

Dyzenhaus, David, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997)

Hale, Matthew, *The History of the Common Law of England*, Charles M. Gray, ed. (University of Chicago Press, 1971)

Hogg, Peter W., *Constitutional Law of Canada*, 5th ed. (Supp.) (Toronto: Carswell, 2007), vol. 2

Hurwitz, Mark S., "Ideology and Deference in U.S. Courts of Appeals Decision Making on Administrative Law", Buffalo Legal Studies Research Paper (2006, No. 2006-003, University at Buffalo Law School, 2005)

McKechnie, William Sharp, *Magna Carta: A Commentary on the Great Charter of King John*, 2nd ed. (Glasgow: James Maclehose and Sons, 1914)

Oliver, Peter, Patrick Macklem and Natalie Des Rosiers, "Introduction", in *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017)

Ontario Commission on Freedom of Information and Individual Privacy, Public Government for Private People — The Report of the Ontario Commission on Freedom of Information and Individual Privacy (Toronto: Ministry of Government Services, 1980), Vol. 2

Reidinger, Paul, "Will Roe v. Wade Be Overruled?", ABA Journal Vol. 74, No. 7 (July 1, 1988)

Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "Administrative Tribunals and the Courts: An Evolutionary Relationship", <[https:// www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx](https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx)>

Roach, Kent, and David Schneiderman, "Freedom of Expression in Canada" (2013), 61 S.C.L.R. (2d) 429

Stern, Simon, "Legal Fictions and Exclusionary Rules" in Maksymilian Del Mar and William Twining, eds., *Legal Fictions in Theory and Practice* (New York: Springer International Publishing, 2015)

Wasserman, Herman, "Reflecting on Journalism Research: A quarter century of *Ecquid Novi*" (2004), 25(1) South African Journal for Journalism Research 179

Weinrib, Ernest J., "Private Law and Public Right" (2011), 61 UTLJ 191

Weinrib, Lorraine E., "Canada's Charter of Rights: Paradigm Lost?" (2002), 6 Review of Constitutional Studies 119

APPLICATION for a declaration of invalidity.

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Daniel Guttman, Yashoda Ranganathan and Audra Ranalli, for respondent. [page272]

Niiti Simmonds, Mariam Shanouda and Marie Chen, for HIV and AIDS Legal Clinic Ontario, ARCH Disability Law Centre and Income Security Advocacy Centre.

Paul Cavalluzzo, Adrienne Telford and Tyler Boggs, for Laborers' International Union of North America and LIUNA Local 183.

William Challis, for Information and Privacy Commissioner of Ontario.

Julia Lefebvre and Abbas Kassam, for Canadian Journalists for Free Expression.

Linda Rothstein and Andrew Lokan, for Ontario Judicial Council.

Mary Birdsell and Jesse Mark, for Justice for Children and Youth.

E.M. MORGAN J.: —

I. *The Constitutional Challenge*

[1] This case challenges the application of the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*")¹ to 13 administrative tribunals,² all of which are designated as "institutions" in the Schedule to the *FIPPA* General Regulation.³ The claim originally included the Workplace Safety and Insurance Appeals Tribunal ("*WSIAT*") as a named respondent, but the Toronto Star has abandoned its claim against *WSIAT* and the application against it is accordingly dismissed.

[2] Among other things, *FIPPA* sets out terms on which access is granted to documents held by government and wider public sector institutions. The Toronto Star contends that by applying to tribunals that preside over adversarial processes, adjudicate disputes and act judicially or quasi-judicially, *FIPPA* violates the open courts [page273] principle embedded in s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").⁴

[3] The venerability of the open courts, or openness principle is not in doubt. In the 13th century, *Magna Carta* confirmed the prohibition against selling writs, or admission tickets to trials, in favour of open public access to court proceedings.⁵ The openness principle was reiterated by Sir Matthew Hale in the 17th century, who noted that witnesses must be examined

"in the open court, and in the presence of the parties, their attorneys, counsel and all bystanders".⁶ In the 18th century, William Blackstone understatedly observed that "the open examination of witnesses . . . is much more conducive to the clearing up of the truth".⁷

[4] The concept of open justice easily made the crossing from England; accordingly, Canadian courts have historically recognized that, "it is of vast importance to the public that the proceedings of courts of justice should be universally known".⁸ This has been reinforced in the post-*Charter* era, with the Supreme Court of Canada emphasizing that public access to legal proceedings includes access by the press:

Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.⁹

[5] The question in this application is whether and how this judicial principle applies to contemporary administrative law proceedings. In many ways the 13 tribunals at issue here are stand-ins for a large number of adjudicative tribunals across the province.¹⁰ As former Chief Justice McLachlin describes it, "vast and [page274] unlimited stretches of law and conduct that formerly fell under the jurisdiction of common law courts were swallowed up by these new schemes. . . . More and more, administrative tribunals regulated the problems created by modern society."¹¹

[6] All parties acknowledge that administrative hearings governed by the *Statutory Powers Procedure Act* ("SPPA") are required to be open to the public.¹² In principle, therefore, it is uncontroversial that "[t]he 'open court' principle" -- at least in *some* version -- "is a cornerstone of accountability for decision-making tribunals and courts".¹³

[7] The present controversy arises with respect to documents filed with administrative tribunals that hold adjudicative hearings. More specifically, the issue posed in this Application challenges the means by which such documents are accessed by the press outside of the adjudicative hearing itself.

[8] The application is restricted even further to those documents that qualify as records of tribunal proceedings. The SPPA contains a list of "records" for the purposes of hearings by tribunals covered by that Act. This list provides a ready definition of the documents to which the present application applies ("Adjudicative Records"). These include:

- (a) any application, complaint, reference or other document, if any, by which the proceeding was commenced;
- (b) the notice of any hearing;
- (c) any interlocutory orders made by the tribunal;
- (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;
- (e) the transcript, if any, of the oral evidence given at the hearing; and

(f) the decision of the tribunal and the reasons therefor,

where reasons have been given.¹⁴

[9] To this definition I would add tribunal dockets or schedules of hearings and registers of actions or proceedings kept by the [page275] adjudicative tribunals. These are included in a similar list of Adjudicative Records published by the Canadian Judicial Council. That list is accompanied by an advisory, which is equally applicable here, as to a number of items that are not included as Adjudicative Records, as follows:

This definition does not include other records that might be maintained by court staff, but that are not connected with court proceedings, such as license and public land records. It does not include any information that merely pertains to management and administration of the court, such as judicial training programs, scheduling of judges and trials and statistics of judicial activity. Neither does it include any personal note, memorandum, draft and similar document or information that is prepared and used by judges, court officials and other court personnel.¹⁵

[10] I would also clarify that Adjudicative Records do not include documents exchanged between the parties to a hearing and filed with the tribunal in the pre-hearing stage of proceedings. Counsel for the Attorney General and a number of the intervenors advise that some adjudicative tribunals require parties to file with the tribunal all relevant documents in their possession prior to the hearing. In those situations, the tribunal's file in the given matter may resemble the full pre-trial documentary discovery in civil litigation.

[11] Counsel for the Toronto Star states that the challenge posed here is for access to Adjudicative Records that are part of the actual record of the tribunal hearing. It does not include documents that were part of pre-hearing discovery but that did not get introduced at the hearing itself. The open court principle includes access to "anything that has been made part of the record",¹⁶ but it does not cover documents that did not make it to open court.

[12] While most of the tribunals in issue hold open hearings and make their Adjudicative Records available for inspection during the hearing itself, the Toronto Star has documented the difficulties in obtaining access to tribunal schedules before the hearing has taken place and inspecting or copying Adjudicative Records after the hearing has ended. Many, although not all, of the tribunals in issue take the position that access to those documents is governed by *FIPPA*.

[13] The Toronto Star submits that *FIPPA*, which sets out statutory terms on which members of the press or public can obtain copies of all documents held by government, burdens the [page276] right of access and is thereby contrary to the requirement of open hearings. In response, the Attorney General submits that *FIPPA* is itself a tool to promote access to information held by public and administrative bodies, including tribunals, and in doing so thereby fosters openness.

[14] The Supreme Court of Canada has stated that "[a]ll law and law-makers that touch the people must conform to [the *Charter*]. Tribunals and commissions charged with deciding legal issues are no exception."¹⁷ What needs to be determined is the effect of *FIPPA* in this regard. Do its substantive terms that weigh access to documents against privacy protection, and its

procedural regime by which documents are requested, vetted and withheld or produced, conform with or undermine the requirement of openness? As the English Court of Appeal has said in its inimitable way, "The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed?"¹⁸

II. *The FIPPA Process*

[15] In raising its constitutional challenge, the Toronto Star identifies a series of issues that are occasioned by the terms of *FIPPA* as applied to administrative tribunals. These include procedural issues which are alleged to lead to undue delay in obtaining Adjudicative Records, and substantive issues which are alleged to exempt many Adjudicative Records (or much of the information contained in Adjudicative Records) from production at all.

a) *Procedural issues in FIPPA*

[16] The *FIPPA* process is, as counsel for the Toronto Star describes it, a bureaucratic one. To make a relatively long piece of legislation short, under s. 24(1) a person seeking access to a record -- *i.e.*, a document or information, including an Adjudicative Record -- from an applicable institution must make a formal request, pay a minimal prescribed fee and provide sufficient information for the record to be identified.

[17] The head of the institution has authority to determine whether the request is frivolous (s. 24(1.1)), whether there is sufficient detail (s. 24(2)), forward the request to the relevant agency [page277] holding the record and give written notice thereof (s. 25). Further, the head of the institution is mandated to within 30 days advise the applicant whether or not the request will be granted, or to extend the 30-day time period if necessary (s. 27). Before making a decision, an institution head must give written notice to any person effected by the record requested (s. 28(1)) and give a copy of that notice to the requester (s. 28(4)), then allow representations to be made by each (s. 28(2)(c), 28(4) (b)), and within ten days make a decision about disclosing the record in issue (s. 28(4)(c)). Like all of the timelines under *FIPPA*, this period can also be extended as the head of the institution deems necessary (s. 28(8.1)).

[18] A person requesting the record or a person affected by the disclosure has a right of appeal to the Information and Privacy Commission ("IPC") (s. 50(1)). The IPC then provides notice of the appeal to the head of the institution from which the record was requested (s. 50(3)). There are time periods set aside for potential mediation of the dispute (s. 51) and the IPC may conduct a review of the head of institution's initial decision (s. 52). After that, the "person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal" has an opportunity to make submissions to the IPC (s. 52(13)). Finally, after receiving all applicable submissions, the IPC is authorized to make a decision disposing of the issues on appeal (s. 54(1)) and provide notice of the decision to all relevant parties (s. 54(4)).

[19] The *FIPPA* process is a potentially lengthy one when played out in full. Although the above is a capsulized summary, counsel for the Toronto Star points out that in all there are some six different notice periods that can become relevant in a given record request, all of which add to the time that it takes for a request to be processed and answered. The evidence in the record of the Toronto Star's specific access requests to different administrative institutions varies

from a few days to many months or even years, depending on the nature of the tribunal and the records being sought.

[20] Since the timelines vary greatly from request to request, it is possible to overstate both the expediency and the delay of the process. The Toronto Star understandably stresses the journalistic imperative of timely disclosure and the newsworthiness of the documents sought. It recounts the experiences of one of its reporters, who sought Adjudicative Records from the OLRB but who gave up his appeal to the IPC after eight months without a final decision on what would be produced. It also recounts experiences of its reporters with the CICB, in which one request for Adjudicative Records took 12 weeks to be answered. [page278]

[21] The Attorney General stresses the need to accurately balance the competing imperatives of privacy rights and public access under *FIPPA*. It emphasizes the experience related by a Toronto Star reporter in which the HRTO responded to a disclosure request within 45 days of its submission. Other incidents narrated in the affidavit material filed before the court reveal a seven-week process for a reporter to obtain Adjudicative Records from the CICB, 32 days from the PEHT and ten days for a reporter to be provided with Adjudicative Records from the LTB. Counsel for the Attorney General concedes that many disclosure packages come with notable redactions and withheld material, but contends that the time lines are generally significantly shorter than the more egregious delays cited by counsel for the Toronto Star.

[22] It is noteworthy that both sides agree that there are a number of tribunals included in this application whose process entails no delay at all. As discussed further below, these tend to be the institutions that have fashioned their own method of handling document requests outside of the *FIPPA* process. Thus, for example, the OSC posts its docket lists and its unredacted decisions on its website, and allows public access to Adjudicative Records without requiring any *FIPPA* request at all. The ERT and the OMB do the same, as do the FST and the OCPC except that the names of individuals are typically anonymized (with the exception of police officers, whose names are disclosed by the OCPC).

b) *Substantive issues in FIPPA*

[23] Separate from the cumbersome procedures, the other aspect of *FIPPA* emphasized by counsel for the Toronto Star is that it contains a presumption of non-disclosure of many records. That is, it protects privacy by placing the onus on the party seeking disclosure of records, including Adjudicative Records, to justify why they should be disclosed.

[24] The *FIPPA* regime commences on a premise that simultaneously embraces openness and closure. Section 10(1) provides that "every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless, (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22 . . .". Although the provision is phrased in terms of transparency, the exemptions are anything but minor. Counsel for the Toronto Star identifies one exemption in particular that is so broad as to swallow up the initial mandate to disclose records upon request -- the personal privacy exemption: "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates" (s. 21(1)). [page279]

[25] This prohibition on disclosure of personal information is repeated in Part III of the *FIPPA*, entitled "Protection of Individual Privacy". Under that general heading, s. 42(1) provides that "[a]n institution shall not disclose personal information in its custody or under its control", except in accordance with a number of listed exceptions. It is fair to say that none of the exceptions to the non-disclosure of personal information exemption in s. 21(1) or s. 42(1), or any of their follow-up sections, pertain to access to Adjudicative Records as a general category.

[26] The trigger phrase "personal information" is described very broadly in s. 2(1) of *FIPPA*:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[27] As indicated above, there are exceptions to the exemption from disclosure of any record containing "personal information"; and, again, an institution's head at first appears to maintain wide discretion to decide whether the sought-for document falls within the exceptions to the exemption. Section 21(1)(c) provides that the record can be disclosed where it contains "personal information collected and maintained specifically for the purpose of creating a record available to the general public", while s. 21(1) (f) provides more generally that the record may be disclosed "if the disclosure does not constitute an unjustified invasion of personal privacy". This discretion, however, is circumscribed by a further [page280] list of statutory presumptions that narrow the exceptions to the personal information exemption:

21(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

(d) relates to employment or educational history;

(e) was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[28] The evidence collected by the Toronto Star and, indeed, the reported decisions by the IPC regarding production of records, suggests that the personal information exemption is so widely invoked that it has become the rule rather than an exemption to the rule. In effect, decisions about production of records under *FIPPA* start from the s. 21(1) premise of non-production rather than from the s. 10(1) premise of production.

[29] Adjudicative Records, in particular, are likely to fall within the definition of "personal information", since they almost inevitably contain personal information identifying the parties, were most often compiled in respect of an investigation into a regulatory breach or other violation of the law, and frequently relate to either welfare benefits, employment, education finances, race or sexuality, etc. Moreover, complaints to regulators, pleadings and other primary documents filed with tribunals invariably contain opinions by one person about the issue at hand or the opinion of one person about another, making them "personal information" under s. 2(1) (e) and (g). Differences of opinion are what adjudicated disputes are virtually always about, but their effect is to bring the Adjudicative Records into the s. 21 exemption.

[30] It is worth noting that one potentially important exception to the personal information exemption, s. 23 of *FIPPA*, appears to [page281] be rarely invoked. A typical comment in IPC decisions is to the effect that "[t]he appellant has not claimed that section 23 [the public interest override] applies in this case, and in my view, it would not apply in any event".¹⁹ That section provides that "[a]n exemption from disclosure of a record . . . does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

[31] Despite its seeming importance to the issues here, the IPC does not consider it to override the s. 21(1) exemption of personal information from disclosure. The reason for this, and presumably for the paucity of cases invoking it, is that s. 23 has been given a very strict reading and narrow ambit of operation. The Divisional Court has interpreted s. 23 as applying where the "public interest" is not only more important than the personal information found in the specific Adjudicative Record, but more important than the protection of personal information at all:

The two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a *compelling* public interest in disclosure; and this compelling interest must *clearly* outweigh the *purpose* of the exemption, as distinct from the value of disclosure of the particular record in question. (Emphasis in the original)²⁰

[32] As the IPC generally puts it, in order to fall within the s. 23 exception to the non-disclosure rule, the requester must establish that there is a "rousing strong interest and attention"²¹ in the record sought -- again, an interest that goes beyond an interest in reporting on a case before the administrative body but that "add[s] in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices".²² In other words, a requester must demonstrate to the IPC's satisfaction that there is a public interest in the Adjudicative Record not simply to inform the public about the particular case, but for the larger societal purpose of aiding the public in making political choices. [page282]

[33] Even in theory this would eliminate all but the largest and most politically prominent of cases from media access to Adjudicative Records and the details contained therein; in practice, it seems to have reduced the section to negligible use. The minimization of s. 23 is, of course, part and parcel of the expansion of s. 21 and its accompanying sections. Much like an expansive use of exclusionary rules in the law of evidence or deeming provisions in defining "constructive liability", the "personal information" exemption stands as an adaptable device -- a "legal artifice" that "brand[s] as legally irrelevant, information that might otherwise figure significantly in determining a person's [right of access]".²³ With the contraction of s. 23, many decisions under *FIPPA* embody the idea that the public almost never has a compelling interest in the records, and all that is not already public is kept private.

[34] As a result of *FIPPA*'s aversion to allowing any "personal information" to be disclosed, the LTB (and its predecessor, the Ontario Rental Housing Tribunal),²⁴ the HRT²⁵ and other similar institutions either refuse to produce Adjudicative Records or heavily redact them. This includes dockets and other types of agendas that would help identify the cases in advance of their being heard.²⁶ Furthermore, the IPC has stated that the requester does not satisfied its onus of proving that the request falls within the s. 21(1)(c) exception for documents collected for the purpose of making them available to the public where "the personal information . . . is collected . . . from the [parties] filing the form for the purpose of adjudicating disputes".²⁷ Thus, Adjudicative Records do not fit within any exception to the personal information exemption by virtue of having been filed in a public hearing.

[35] In other words, the presumption of non-disclosure, or the reverse onus in respect of the production of the broadly framed definition of "personal information", presents a serious obstacle to disclosure of Adjudicative Records. As counsel for the IPC acknowledged at the hearing of this application, this statutory [page283] approach has led the HRT and certain other of the 13 tribunals in issue here to refuse most if not all requests for production of records filed with it, including Adjudicative Records, where those records have identifying information. All that is required for a requested record to fall into the non-disclosable category is that the decision maker -- either the head of the institution in the first instance or the IPC on appeal -- be satisfied that the record passes a test set at a rather low bar: "If there is a reasonable expectation that the

individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information."²⁸

III. Application of FIPPA

[36] *FIPPA* applies to all branches of provincial government and to all of the 182 public institutions listed in the Schedule thereto.²⁹ This includes, but is obviously not limited to, a great many adjudicative tribunals. Indeed, a cursory glance at the governing legislation and General Regulation thereunder reveals that *FIPPA* applies to an exceptionally diverse range of institutions. These span all government ministries, government service providers, universities, hospitals, agencies, boards, commissions, corporations and tribunals. Given the variety of functions carried out by these institutions, it is little wonder that the process established under *FIPPA* functions well with some and seems dysfunctional with others.

[37] As already discussed, it is important to note that the Toronto Star challenges access to Adjudicative Records only, and not to all documents held by the institutions to which *FIPPA* applies. This distinction, of course, eliminates Ontario's many non-adjudicative bodies from the ambit of the present analysis. In this application, the Toronto Star does not seek or challenge any records (or the process by which records can be obtained) from public institutions such as government ministries, hospitals, universities, etc. Its focus is strictly on those institutions that act in an adjudicative capacity.

[38] The very fact that on its face *FIPPA* does not distinguish between Adjudicative Records and non-adjudicative records is indicative of the difficulties inherent in fashioning an all-embracing disclosure regime. As suggested by the Canadian Judicial Council's qualification on the definition of Adjudicative Records set out earlier, there is a significant difference between [page284] granting access to documents introduced by parties to hearings and entered into the evidentiary record and granting access to a given institution's management records.

[39] To take a simple illustration, a media request for access to educational records filed by the parties in a professional negligence case must be analyzed one way, while a media request for access to the educational records of the judge presiding over that trial must be analyzed in an entirely different way. Both types of records may well be in the hands of the court or tribunal *qua* public institution, but one set of records are Adjudicative Records that form part of an open court record while the other are administrative or personnel records that ordinarily would play no role in the specific judicial process to which the request relates.

[40] This debate -- *i.e.*, whether administrative bodies are part and parcel of government and the information and documents they hold must be treated as part of government business, or are independent decision-makers and the information and documents they hold must be treated as Adjudicative Records -- highlights a dichotomy that lies at the core of the issues in the application. As the House of Lords put it some eight decades ago, openness to the public is the "authentic hallmark of judicial as distinct from administrative procedure".³⁰ A government personnel committee contemplating hiring a lawyer is not required by the open courts concept to meet in public; a Law Society discipline committee contemplating sanctions against a lawyer is.³¹ The former is a public institution conducting its business or administration, while the latter is a public institution conducting an adjudication.

[41] The duality of being an administrative arm of the executive and an independent adjudicative body characterizes many of the institutions at issue here and poses an interpretive problem in applying *FIPPA*. Counsel for the IPC, which, as noted above, is the body to which *FIPPA* disclosure decisions can be appealed, concedes that while *FIPPA* on its face does not address the different character traits of administrative institutions, there is an open question of interpretation as to how and where its privacy mandate applies. Thus, the IPC itself has yet to determine whether the privacy protections contained in Part III of *FIPPA* apply to Adjudicative Records. That said, institution heads and the IPC routinely apply the s. 21 exemption in response to specific applications for access. [page285]

[42] The Supreme Court of Canada has observed that "[administrative institutions] may be seen as spanning the constitutional divide between the executive and judicial branches of government".³² Thus, on one hand, it has been said that "[i]t is unrealistic to expect an administrative tribunal such as the [Ontario Labour Relations] Board to abide strictly by the rules applicable to courts of law."³³ On the other hand, it has been observed that the very same board -- the OLRB -- "does not carry on any business", but has the power to "exercise certain functions of a judicial nature".³⁴ Former Chief Justice Lamer has pointed out that characterizing administrative bodies depends on their function in the circumstances: "the principles for judicial independence . . . are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties".³⁵

[43] As indicated, the express terms of *FIPPA* draw no distinction between the administrative or "business" functions of governmental bodies and the adjudicative functions of administrative tribunals. Some institutions covered by *FIPPA* conceive of themselves as part of government and thus "lack [a] constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy".³⁶ Others conceive of themselves as adjudicators rather than administrators and adhere to the notion that they are "expressly created as independent bodies for the purpose of being an alternative to the judicial process".³⁷

[44] This distinction, then, translates into the varying approach to openness and other aspects of procedure that is discernable among the large array of institutions named in the schedule to *FIPPA*. The Supreme Court has indicated that this variety of procedures is an inevitable incident of administrative law: [page286]

Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence.³⁸

[45] Of the 13 institutions specifically put in issue by the Toronto Star, eight do not appear to use the *FIPPA* process at all.³⁹ That is, post-hearing requests for access to and copies of Adjudicative Records are handled directly by the tribunal itself without the mechanism of a *FIPPA* application. Those tribunals have devised their own methodology for assessing the requests. Counsel for the Attorney General and counsel for the IPC support this diversity of

approaches. It is their view that *FIPPA* applies where a person has made an application thereunder, but it does not require any given institution to embrace it as the sole mechanism for access to documents.

[46] This view is similar to that taken by the Federal Court of Appeal, where the decision as to whether to apply the federal equivalent to *FIPPA*, the *Privacy Act*, has been left to the institution itself. As the court put it: ". . . once the Agency placed the documents . . . on its Public Record . . . those documents became Publicly Available. As such, the limitation on their disclosure, contained in subsection 8(1) of the *Privacy Act* was no longer applicable".⁴⁰ *FIPPA*, like the *Privacy Act*, does not explicitly state under what circumstances it applies to any given institution; the reason for this may well be that the answer eludes any overarching definition.

[47] Simply put, it is inherent to administrative law that procedures -- including the procedures for accessing documents -- invariably "depend upon the nature and the function of the particular tribunal".⁴¹ It is the administrative institution itself that is left to assess not only its own overall character, but the circumstances in which the request arises. [page287]

[48] Leaving it to the institutions to determine whether a *FIPPA* application for Adjudicative Records is necessary is viewed by the Attorney General and the IPC to be in compliance with *FIPPA*. Since many agencies "act[page288] in an administrative capacity, when carrying out its . . . regulatory mandate, and in a quasi-judicial, or court-like capacity, when carrying out its adjudicative dispute resolution mandate",⁴² the procedures for documentary access may vary not only between institutions but within them, depending on the function at play. As former Chief Justice McLachlin stated in a speech to the Council of Canadian Administrative Tribunals: "We understand . . . that the rule of law does not always call for one right answer in every case."⁴³

[49] Accordingly, to the extent that some of the institutions named in the Toronto Star's notice of application bypass the *FIPPA* regime, there is little more to be said about them here. It is certainly the case that their ability to fashion their own mechanism for public access to Adjudicative Records, and to make their own fine-tuned determinations of the correct balance between openness and privacy, fall within the power of those adjudicative institutions to control their own processes.⁴⁴ Like other requirements of natural justice implemented by administrative tribunals, these document access procedures attract deference. This deference arises not just as an acknowledgment of legislative authority,⁴⁵ but as an acknowledgment of the constitutionally different roles assigned to courts and administrative bodies.⁴⁶

[50] Of course, any tribunal implementing its own mechanism for access to Adjudicative Records may deny access in response to a request. In the event of a challenge, there would have to be a case-specific analysis of whether the openness principle and s. 2(b) of the *Charter* was breached and whether a remedy, whether under s. 24(1) of the *Charter* or otherwise, was applicable under the circumstances. However, the fact that a given tribunal ignores *FIPPA* in making such a decision on its own raises no larger issue.

[51] I note that counsel for the Attorney General makes the point that the Toronto Star's challenge is, in effect, moot with [page289] respect to the eight tribunals that require no formal application under *FIPPA* for a request for Adjudicative Records. It is the Attorney General's position that since no *FIPPA* application was made and denied, there is no evidentiary basis for the present application and the constitutional analysis it demands. Counsel for the Toronto Star,

on the other hand, makes the point that the voluntary compliance of the eight tribunals in the face of *FIPPA*'s apparent applicability to those tribunals is not good enough to end the case against them. It is the Toronto Star's position that its constitutional rights, and the constitutional requirement of openness, cannot turn on the discretionary choice of those who administer the specific tribunals from time to time.

[52] Neither side has got it exactly right. The Attorney General states in its factum that with respect to the eight tribunals that bypass *FIPPA*, "the evidence demonstrates that access to the Adjudicative Records of these tribunals was readily granted to the applicant without a formal FOI [freedom of information] request". The record before me accordingly establishes not that the controversy with respect to those tribunals is moot in the sense that there are insufficient adjudicative facts to consider the issue, and not that the conduct of those tribunals is discretionary and subject to unprompted change; rather, it shows that those tribunals are in compliance with the openness principle.

[53] The Supreme Court of Canada has left little doubt that administrative tribunals are competent to interpret and implement constitutional norms -- "We do not have one *Charter* for courts and another for administrative tribunals".⁴⁷ Unless and until the Toronto Star's (or anyone else's) rights are infringed by the eight non-*FIPPA* applying tribunals, there is nothing further to analyze in respect of them. One can assume that they have taken it on themselves to implement procedures which comply with their view of what the *Charter* requires. While it remains to be determined below whether the other tribunals that do apply the *FIPPA* procedure for post-hearing access to Adjudicative Records are in compliance with their constitutional obligations, there is no evidence (and no real argument) that the ready access to documents that the eight tribunals offer amounts to a breach.

IV. Freedom of Expression

[54] "The open court principle is one of the hallmarks of a democratic society . . . [and] is inextricably tied to the rights [page290] guaranteed by s. 2(b) of the *Charter*."⁴⁸ The Supreme Court has declared that this principle includes "guaranteed access to the courts in order to gather information", and that "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press".⁴⁹ Counsel for the Toronto Star correctly indicates that this includes the presumptive right to Adjudicative Records,⁵⁰ including exhibits entered into evidence,⁵¹ photocopies of all such records⁵² and the ability to disseminate those records by means of broadcast or other publication.⁵³

[55] As discussed earlier in these reasons, these principles apply to administrative tribunals as well as to courts. While the source of administrative tribunals' authority is their enabling statute, "[t]he legitimacy of such tribunals' authority . . . can be effected only if their proceedings are open to the public".⁵⁴ This open access, and concomitant protection of freedom of the press, is in keeping with those tribunals' obligation "in exercising their statutory functions . . . [to] act consistently with the *Charter* and its values".⁵⁵ This is not optional or discretionary on the part of administrative tribunals. As the Supreme Court has stated, "the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it".⁵⁶

[56] The evidence in the record, and even a perusal of the terms of the statute itself, establishes that *FIPPA* burdens freedom of the press. In coming to this conclusion, it is

important to keep in mind that freedom of expression "protects listeners as well as speakers".⁵⁷ By extension, the Supreme Court has specifically held that [page291] "[a]ccess to exhibits is a corollary to the open court principle."⁵⁸ By further logical extension, the Supreme Court has also observed that "the open court principle gains importance from its clear association with free expression . . . [and that] s. 2(b) [of the *Charter*] provides that the state must not interfere with an individual's ability to 'inspect and copy public records and documents'".⁵⁹ And finally, in case it wasn't already obvious, the Court of Appeal has emphasized that "the right to access exhibits includes the right to make copies".⁶⁰

a) *The reverse onus on "personal information"*

[57] The very structure of the process that *FIPPA* puts in place for obtaining records from its designated institutions impinges on the openness principle and s. 2(b) of the *Charter*, as elaborated by the courts. As reviewed earlier in these reasons, s. 2(1) of *FIPPA* defines "personal information" in the broadest possible terms, while s. 21(1) (which is reiterated in s. 42(1)) sets out a presumption of non-disclosure of personal information and imposes an onus on the requesting party to justify the disclosure of the record. The IPC in its rulings on disclosure has emphasized that, "In the case of information that qualifies as "personal information" under [*FIPPA*], there is a strong assumption against disclosure".⁶¹

[58] As also explained above, these provisions apply not only to records held by the listed institutions as a matter of the business or administration of the institutions but to Adjudicative Records as well -- including evidence filed before tribunals, complaints and other pleadings that form the originating processes before tribunals, dockets and schedules for hearings, transcripts of proceedings, etc. The upshot of these statutory provisions is that the openness principle does not apply as of right to the tribunals governed by the *FIPPA* process; rather, a person or the press that seeks access to Adjudicative Records bears the onus of establishing that an exception to the non-disclosure of personal information rule applies. Again, this is not an insubstantial onus.

[59] I pause here to note that it is the Attorney General's view that there is nothing inherently wrong with *FIPPA*'s stringent [page292] privacy protection and the reverse onus that ensures this protection. Counsel for the Attorney General submits that s. 2(b) of the *Charter* does not guarantee a general right of access to information; he observes that in *CLA*,⁶² which he posits as the leading case on point, the Supreme Court held that "s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded".⁶³ The Attorney General cites a number of cases decided either in Superior Court⁶⁴ or by the IPC⁶⁵ that rely on *CLA* as demonstrating that the *CLA* test is now the accepted basis on which to measure government disclosure obligations.

[60] The cases cited by the Attorney General as following *CLA*, as well as *CLA* itself, illustrate that the Attorney General's position misses the mark here. In *CLA*, the records in question were not produced by the government due to a concern for, *inter alia*, personal privacy.⁶⁶ On the other hand, nothing in *CLA* contradicts the "general principle that the open court principle trumps desires for anonymity".⁶⁷ The key to unravelling this apparent contradiction is in the type of information being requested. As McLachlin C.J.C. described it in *CLA*, the Criminal Lawyers

Association applied to obtain "a 318-page report looking into alleged police misconduct"⁶⁸ which contained "records prepared in the course of law enforcement investigations". The request was denied by the Minister of Public Safety and Security partly because the content of the document contained solicitor-client privileged material and partly because it was a law enforcement investigatory record.

[61] The *CLA* case, in other words, did not deal with Adjudicative Records such as those in issue here; and since the documents were investigative and were not part of a record before an adjudicative tribunal, the open court principle did not apply. The same is true of the other cases referred to by counsel for the Attorney [page293] General in this regard. One of those cases entails a request by a university employee for a psychological report contained in his personnel records held by the university;⁶⁹ another entails a request by a reporter for an Auditor General forensic report "directed at the detection of fraud, waste and wrongdoing involving city resources";⁷⁰ while a third entails a request for hospital records pertaining to the provision of abortion services.⁷¹ None of them entails a request for Adjudicative Records.

[62] As already indicated, *FIPPA* does not distinguish between Adjudicative Records and non-adjudicative records. But the open court principle in s. 2(b) of the *Charter* only applies to Adjudicative Records. This very point lies at the core of the Supreme Court's reasoning in *CLA*: "Access to documents in government hands is constitutionally protected only where it is . . . compatible with the function of the institution concerned."⁷² Government agencies and public administrative bodies that hold investigative reports, personnel records, business and accounting records, and the like other than in an Adjudicative Record, are not subject to the open court principle.⁷³ They are obliged under *CLA* to implement transparency only where disclosure of their records is necessary for democratic process.

[63] Adjudicative Records, on the other hand, like court records, are not only entirely compatible with transparency but require it for the sake of the integrity of the administration of justice.⁷⁴ The rationale for maintaining confidentiality over records accumulated by law enforcement and forensic examiners at the investigation stage of a complaint or dispute does not, absent some special circumstance, continue into the open hearing or post-hearing stage of proceedings.⁷⁵ Thus, while access to government business records, including the content of personnel and investigative audits, is granted or withheld subject to the *CLA* test of "meaningful public discussion", the question of access to [page294] documents filed in the Adjudicative Record before administrative tribunals must be answered in accordance with the *Charter*,⁷⁶ including s. 2(b) and the open court principle.

[64] Like most reverse onus provisions, one purpose and effect of s. 21(1) of *FIPPA* and the operation of the exceptions thereto is, simply put, to facilitate the government's case against the party arguing against it.⁷⁷ This obviously makes it more difficult for the press and other document requesters to exercise the rights which they otherwise have under the *Charter*.

[65] This statutory imposition of an onus on the requester to justify the disclosure of Adjudicative Records may or may not be justifiable, but it certainly amounts in the first instance to an infringement on the s. 2(b) *Charter* right of access to those documents. The Supreme Court has stated emphatically that when it comes to access of the press to Adjudicative Records, "covertness is the exception and openness the rule".⁷⁸ In fashioning a regime that prohibits the disclosure of "personal information" unless the press can establish its justification,

FIPPA has it the wrong way around.

b) *Delay in accessing Adjudicative Records*

[66] Counsel for the Toronto Star submits that newsgathering inherently requires timeliness. Any newspaper reader would find it difficult to refute this observation. In fact, it takes only the most cursory understanding of the media to comprehend the adage that "old news is no news".⁷⁹ Since time is of the essence to effective journalism, the publication of "stale news . . . cannot rank in importance with the dissemination of contemporary material".⁸⁰

[67] The Alberta Court of Appeal has observed that it is only "contemporaneous access" to relevant materials that "allows the media to fulfill their legitimate role as the eyes and ears of the public".⁸¹ Generally speaking, it is essential in a system that [page295] protects free expression and the press that "the media . . . should not have their right to report on proceedings . . . delayed for any greater period of time than a court believes is absolutely necessary".⁸² Just as justice delayed can be justice denied,⁸³ so reportage delayed can be reportage denied.

[68] The evidence adduced by the Toronto Star demonstrates varying amounts of delay in responding to requests for documents. As detailed earlier in these reasons, those tribunals who utilize the *FIPPA* process take from ten days to eight months and beyond to provide a requester with a final decision. The most typical time frame for the requests contained in the present evidentiary record are somewhere in the 30- to 45-day range. This is roughly in keeping with what one might expect from a review of the legislation itself, which allows for 30 days (with possible extensions) for a first decision by an institution head, with more time needed for an appeal to the IPC.

[69] Counsel for the Attorney General submits that there is no evidence that any of the delays (or redactions) actually impeded the writing of any stories or reporting on any of the cases mentioned in the record. However, it is the Toronto Star's evidence that for many of these incidents the newsworthiness of the reporter's story has faded by the time the documentary production was made by the given tribunal. In the more frequently litigated area of libel law, it is notoriously difficult to prove a negative such as libel chill or the number of articles *not* written,⁸⁴ and it stands to reason that the same applies with respect to delay. It may be difficult to calculate how many article ideas faded away as the days and weeks passed and the writer waited for a decision on whether an Adjudicative Record would be forthcoming.

[70] As Doherty J.A. has elsewhere put it, "The values promoted by s. 2(b) [of the *Charter*] are not served by publication when the speaker has lost his audience and the message to be conveyed has lost its purpose."⁸⁵ It must be the rare story that is still timely months after the event. Canadian readers, like Canadian voters, [page296] expect that "the most accurate and timely polls [and news reports] will be available".⁸⁶ Thus, even if a reporter were "ultimately successful in his challenge . . . the full exercise of his rights would have been compromised by the delay in publication while the challenge was being made".⁸⁷

[71] As with the presumption of non-disclosure in s. 21(1), the delay occasioned by *FIPPA* procedures may or may not be justifiable -- "[a]n unreasonable delay denies justice",⁸⁸ but not all delay is unreasonable. That said, it certainly burdens freedom of the press and amounts in the first instance to an infringement on the s. 2(b) *Charter* right of free expression.

V. Reasonable Limits on Openness and Expression

[72] When it comes to fundamental *Charter* guarantees such as the openness principle, freedom of the press and freedom of expression, "any encroachment upon the guarantees demand[s] justification by the state on a stringent basis".⁸⁹ Having found that *FIPPA* violates s. 2(b) of the *Charter* in two respects -- substantively by imposing a reverse onus on a request for Adjudicative Records, and procedurally by occasioning delay in accessing Adjudicative Records -- it is necessary to turn to s. 1 of the *Charter*. It is here that the analysis of *Charter* rights takes on "a more contextual approach and indicate[s] the harms that might be caused to other rights and interests".⁹⁰ These include, most notably, the privacy rights of litigants and the administration of justice in administrative tribunals.

[73] In considering whether *FIPPA*'s limits on freedom of expression are reasonable and justifiable in a free and democratic society, the analysis follows the *Oakes* test.⁹¹ It will therefore consider whether the legislative objective is pressing and substantial, whether the means chosen by the legislature is rationally connected to the objective, whether the legislation minimally impairs [page297] the right of free expression, and whether it is proportional considering the deleterious and salutary effects on the right.

a) Pressing and substantial objective

[74] Counsel for the Toronto Star submits that the Attorney General has difficulty in articulating any objective for *FIPPA*, let alone a pressing and substantial one. To put it another way, the Toronto Star contends that if there is an identifiable objective to this legislation it is an illegitimate one in that it aims at overriding the openness principle. That is, it is specifically designed to place obstacles in the way of disclosing Adjudicative Records.

[75] In response, counsel for the Attorney General stresses the *FIPPA* objectives as they apply to administrative tribunals: "to provide a right of access to information while at the same time protecting the privacy of individuals". It is the Attorney General's position that the objective of providing individuals a measure of control over information that is personal to them is itself pressing and substantial. To put it another way, "[t]he ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy."⁹²

[76] Courts in other contexts have indicated that contemporary legislation and other state action often exhibits multiple objectives. These objectives, in turn, often take the form of a policy balance between the particular *Charter* rights of the individual and the rights and interests of others with whom the individual may interact.

[77] As an example, counsel for Justice for Children and Youth makes the forceful point that criminal justice legislation aimed at young persons has long reflected multiple objectives: ensuring privacy and other accommodation measures for youths while fostering fair sentencing and other criminal process measures for the community at large. As a further example, in the context of s. 2(b) of the *Charter*, a demonstration in a public park may be curtailed with the objective of preserving some use of the public resource for other residents;⁹³ likewise, hate speech may attract criminal sanctions with the objective of preventing distress to [page298]

other individuals and discord in society.⁹⁴ All of these combine a rights-oriented objective with a community-oriented objective.

[78] This thinking has been applied by the Supreme Court of Canada to *FIPPA* itself. In *CLA*, the court identified the dual objectives of *FIPPA* by identifying its purpose and effect: "Both openness and confidentiality are protected by Ontario's freedom of information legislation."⁹⁵ The Williams Commission Report, on which *FIPPA* was originally based, endorsed the application of a freedom of information regime, with its built-in balance of the openness principle with privacy concerns, to administrative tribunals, with specific reference to the latitude to be given each tribunal to fashion its own access policy.⁹⁶

[79] I have little hesitation in concluding that the multiple objectives of *FIPPA* are of sufficient importance, even considering that the law has the effect of infringing s. 2(b) of the *Charter*. The effort to prevent harm to some people is a pressing and substantial objective for a law that otherwise limits freedom of expression.⁹⁷

b) *Rational connection*

[80] Neither the Toronto Star nor the Attorney General make much of an argument with respect to the question of whether means chosen by the legislature -- the application of *FIPPA* to adjudicative tribunals -- is rationally connected to its objectives. Counsel for the Toronto Star is somewhat dismissive of this question, given that he has concluded that there is no valid objective to the legislation. He tacitly concedes that there might be a rational connection between the means and the objective, but since the objective is seen to contradict authoritative case law identifying the openness principle as a constitutional imperative he contends that the rational connection question is of no import.

[81] Counsel for the Attorney General gives the question equally short shrift. He maintains that the inclusion of adjudicative tribunals in the *FIPPA* regime is rationally connected to the purpose of balancing a right of access against a concern for privacy. Since the Attorney General has submitted that this balancing is [page299] itself a pressing and substantial objective, he submits that all that needs to be demonstrated at this stage is that that objective is logically furthered by the legislation.

[82] I tend to agree with counsel for the Attorney General on this point. Since I have found there to be a valid objective to *FIPPA*, the only question for the next stage of the *Oakes* test is to ask a question not of policy but of logic. As it was put originally in *Oakes*: is there a "rational connection between the fact proved and the ultimate fact presumed"?⁹⁸ The question here manifests as an inquiry into whether one can logically perceive a connection between the inclusion of adjudicative tribunals in the Schedule to *FIPPA* and the balancing that the statute aims to engage. The question virtually answers itself; the rational connection test is met.

c) *Minimal impairment*

[83] Counsel for the Attorney General observes that the minimal impairment requirement is the heart of a s. 1 analysis; it is here that challenged legislation most often rises and falls. The test is a rather stringent one in the sense that the legislative measure that has already been determined to impair *Charter* rights must now be seen to impair them minimally. When it comes

to legislative measures with multiple, competing objectives that are balanced against each other, the minimal impairment test becomes a difficult one to meet. "[A] particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal."⁹⁹

[84] As discussed earlier, the problem with *FIPPA* is twofold: it substantively infringes s. 2(b) by presuming non-disclosure of a broadly defined version of "personal information, and it procedurally infringes s. 2(b) by causing delay in accessing those Adjudicative Records that it does allow to be disclosed. Given the goal of balancing openness and access with privacy protection, the minimal impairment question must be asked in respect of both forms of rights violation. Does the reverse onus on producing personal information minimally impair the right, and do the timelines and wait periods built into the statute's access to information process minimally impair the right? [page300]

i) *Is there minimal impairment in substance?*

[85] Counsel for the Toronto Star submits that "[t]he exemptions in *FIPPA* and the broad definition of 'personal information' are often used to resist, and even prevent, disclosure of Tribunal Adjudicative Records." While this description may be accurate, it suggests that there is something improper about the way in which heads of institutions or the IPC are applying *FIPPA*. That, however, is not the case. The officials tasked with applying *FIPPA* are, on my reading of the statute, genuinely applying its terms as enacted. If there is a problem with the way records are disclosed by institutions to which *FIPPA* applies, the problem is with the statutory terms themselves and not with anyone's manipulation of them.

[86] By way of illustration, in 2005 the IPC had to consider a double request to the predecessor to the LTB for a schedule of "Cases in a Hearing Block". One of the pair of requests sought a pre-hearing schedule of upcoming cases, while the other sought a post-hearing list of cases that had been considered. For the pre-hearing schedule, the IPC cited privacy grounds in authorizing production of a list of cases with all identifying features -- names, addresses and unit numbers -- redacted. This, of course, made the disclosure meaningless in terms of knowing the actual hearings on the upcoming schedule, although the IPC indicated that the identifying information would be available at the hearings themselves since they were required under s. 9(1) of the *SPPA* to be open to the public.¹⁰⁰

[87] The IPC then turned its attention to the request for post-hearing information, and again declined to make meaningful production of the tribunal's records. In a key passage of its ruling, the IPC found there to be no distinction between pre-hearing and post-hearing records, despite the fact that the post-hearing records had already been made public during the course of the hearing itself:

The appellant also argues that the record is not personal information because it is "public information". The fact that information may be contained in a document that is or was available to the public does not mean that it is not personal information. Rather, the issue of public availability arises in the analysis of whether any personal information the record may contain is exempt under section 21(1) of [*FIPPA*] ¹⁰¹ [page301]

[88] In other words, while the exemption for personal information was indeed invoked as a basis on which to refuse production of Adjudicative Records, the basis for the refusal was the operation of the statute itself. The presumption of non-disclosure, and the reverse onus on the requester to show that the request falls within an exception to the s. 21(1) personal information exemption, is a feature of *FIPPA* that must be confronted directly.

[89] In other, non-*FIPPA*-related contexts, the grounds for issuing a publication ban -- *i.e.*, for overriding the open court principle on a case by case basis -- are contained in what has become known as the *Dagenais/ Mentuck* test.¹⁰² As the Supreme Court has explained, the openness principle is contained within s. 2(b) of the *Charter*, and so can only be limited in accordance with s. 1 of the *Charter*. Any test that seeks to limit a constitutionally entrenched principle must, therefore, incorporate the essential elements of the reasonable limits analysis within it.¹⁰³ The *Dagenais/Mentuck* test does this in a way that "mirror[s] the minimal impairment and proportionality steps in the s. 1 analysis set out in *R. v. Oakes*".¹⁰⁴ Under *Dagenais/Mentuck*, a publication ban may be issued if the following conditions are met:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.¹⁰⁵

[90] As the test states, the reasons for overriding the openness principle must pose a serious risk, and not just an inconvenience to the parties or the adjudicative body. That said, although the *Dagenais/Mentuck* analysis has been characterized as a "stringent test", it has also been observed that it should not be "applied mechanistically".¹⁰⁶ As it applies to judicial proceedings, the test has been [page302] "tailored . . . to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings and Crown-initiated applications for publication bans".¹⁰⁷ Thus, the names of police informants can be expunged from public accessibility,¹⁰⁸ and information contained in search warrants and other investigative instruments can be withheld from publication,¹⁰⁹ but only where the specific circumstances show that "the public interest in effective law enforcement and privacy" outweighs the principle of "accountability and the transparency of the legal system".¹¹⁰

[91] What is clear from the case law is that it is the openness of the system, and not the privacy or other concerns of law enforcement, regulators, or innocent parties, that takes primacy in this balance. This, then, impacts directly on the onus of proof. In order for an adjudicative system to comply with s. 2(b) of the *Charter*, "The burden of displacing the general rule of openness lies on the party making the application."¹¹¹ As other courts across the country have stated, publicity is the order of things and "any exceptions" -- including those specifically provided by statute -- "must be substantiated on a case by case basis".¹¹² This onus is necessary "in light of the . . . *Charter* principles which inform the [*Dagenais/Mentuck*] test".¹¹³

[92] I acknowledge, as any court must, that the openness principle and the analysis that accompanies a request to override it, must "tak[e] into account the particular characteristics and

circumstances of the . . . proceedings".¹¹⁴ The judicial considerations of the *Dagenais/Mentuck* test have tended to arise in the course of criminal prosecutions, which raise unique factors that may not apply to the regulatory contexts of most administrative tribunals. [page303]

[93] A decision about a revealing a police informant's identity in a record supporting a search warrant will obviously entail very different considerations than a decision about revealing a tenant's identity in a record filed in evidence in LTB hearing. The decision-maker contemplating a limitation on the openness principle must take the differing contexts and the statutory objectives of the particular administrative body into account.¹¹⁵ The particular institution and circumstances of the particular case may require the most stringent application of the *Dagenais/Mentuck* test or a modified and more relaxed version of the test. There is no "one size fits all" application of the openness principle.

[94] Varied though the contexts and considerations may be, however, the decision must always be a constitutionally justifiable one. That is, it "must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban . . . ; is authorized by statute . . . ; or under [civil] rules of court, for example, a confidentiality order".¹¹⁶ This *Charter* requirement applies equally to "statutory tribunals exercising judicial or quasi-judicial functions involving adversarial type processes",¹¹⁷ since "it is a basic principle that proceedings of . . . [such] administrative tribunals should be open to the public, with the ability to be . . . reported on".¹¹⁸ It is therefore applicable to each of the adjudicative tribunals at issue in this application.

[95] An across-the-board presumption such as that embodied in s. 21 of *FIPPA*, in which privacy and non-disclosure rather than openness and disclosure is the presumptive rule, cannot qualify as a minimum impairment of s. 2(b) of the *Charter*. The open court principle is the fundamental one and the personal information and privacy concerns are secondary to it.¹¹⁹ That principle directs administrative tribunals to protect confidentiality only where a party seeking it establishes that it is necessary to protect important interests.¹²⁰ Although the decision-maker may be exercising a statutory discretion taking into account the context on [page304] a case-by-case basis, the onus must remain on the party seeking to keep the information from the public rather than the other way around.

ii) *Is there minimal impairment in procedure?*

[96] As discussed earlier, the delay and bureaucracy inherent in the *FIPPA* regime also burdens the exercise of s. 2(b) *Charter* rights. As noted, freedom of the press is only operational when the press has timely enough access to information to publish to an audience. Untimely disclosure that loses the audience is akin to no disclosure at all.

[97] The question of whether *FIPPA* minimally impairs the right in this respect is a more difficult one. The Toronto Star contends that the statutory notice and other time periods, and the arrangement in which it is administrative personnel and the IPC rather than tribunal members make the disclosure decisions, violate the right to openness in an unjustifiable way. Counsel for the Toronto Star submits that the tribunals themselves can and often do make disclosure decisions, and that this alternative is a more workable and minimally impairing one than the decision-making regime established by *FIPPA*.

[98] The Attorney General, on the other hand, views *FIPPA* as establishing a system that allows administrative tribunals to achieve the appropriate balance between openness and privacy in a manner that fully takes into account each tribunal's mandate and function. Counsel for the Attorney General indicates that administrative tribunals work differently from courts and operate in diverse socio-economic contexts -- specifically, they are less formal in their procedures, often collect large amounts of personal material from litigants in the pre-hearing stage of proceedings, tend to be sparsely staffed and under-resourced, and frequently deal with unrepresented and highly vulnerable litigants. It is the Attorney General's submission that *FIPPA*'s delegation of disclosure decisions to the head of each institution and to the IPC allows this reality to be taken into account.

[99] Moreover, counsel for the Attorney General argues that the result of the Toronto Star's proposal of unregulated access to tribunal records (except directly by each adjudicator) would result in an unwieldy burden on adjudicators. Since the Toronto Star's position closely analogizes adjudicative tribunals to courts, adjudicators in the tribunal system would have to add each disclosure application to their case load. *FIPPA*'s delegation of the task to institution heads and the IPC effectively relieves this pressure. It is the Attorney General's view that *FIPPA*'s structure is workable and sound, and that it establishes a decision-making expertise [page305] that deserves deference as a result of the accumulated knowledge about the privacy considerations at stake and the logistical support it provides to administrative tribunals.

[100] In terms of the expertise of the institution heads and, in particular, the IPC, it is fair to say that the jury is still out. Reading IPC decisions makes one keenly aware that *FIPPA* does not mandate the IPC to take s. 2(b) of the *Charter* into account in making disclosure decisions. Thus, one finds decisions made in review of the HRTO that opine: "While the Tribunal makes the argument that there is a compelling public interest in disclosure of the records, it goes on to recognize that this office has not accepted the 'open court principle' as a basis for overriding the exemption in section 21".¹²¹ Similarly, IPC decisions in review of LTB rulings on disclosure tend to circle back onto the statutory requirements rather than to weigh them against a principle of openness:

Although the appellant's analogy between open court processes and the transparent conduct of hearings by tribunals covered by the *SPPA* has some merit, they are not identical. For example, section 65(4) of the Act excludes documents prepared and filed for the purposes of proceedings before the Courts from coverage under Ontario's freedom of Information regime; while administrative tribunals, including the Tribunal, are subject to the Act and bound by its access and privacy requirements. Accordingly, while the Tribunal's hearings and procedures must comply with the *SPPA*, decisions regarding disclosure of personal information contained in records outside of the actual hearings process must be determined in accordance with the requirements of the Act.¹²²

[101] I do agree, of course, that institution heads and the IPC have developed a sensitivity to the privacy concerns of litigants before adjudicative tribunals. They have certainly been adept at applying the existing statutory presumption against disclosure of any personal information to the end of protecting their privacy. Indeed, I would say that they have been fully committed to *FIPPA*'s policy of ensuring total privacy, holding back not only pleadings and evidentiary

documents from public access, but even schedules of cases making those tribunals inscrutable by the press.

[102] It remains to be seen how this will be tempered once institution heads and the IPC turn their minds more fully to the paramount consideration of openness that the *Charter* requires. The legislature has delegated the decision-making task to them, but their decisions now must start taking the applicable *Charter* principles into account. "Deference as respect" may be a formula [page306] embraced by the courts,¹²³ but this posture must not be driven by ideology.¹²⁴ Properly understood, the point is to pay "respectful attention to the reasons offered or which could be offered in support of a decision".¹²⁵ Thus, it is equally accurate to say that "[d]eference is earned; it is not a birthright."¹²⁶

[103] With all of that, I am mindful of the submission made at the hearing of this application by counsel for the Ontario Judicial Council. That institution is, of course, well versed in both the open court principle and the privacy interests that can be vested in sensitive adjudicative tribunal proceedings. Counsel admonished the court to be cognizant of the complex task of fashioning a disclosure system for a very diverse body of administrative institutions. Some of these institutions have full-time members that sit in formal hearings dealing with substantial commercial matters (e.g., OSC, FST, OMLC, OMB), others sit in more informal proceedings dealing with highly sensitive matters going to personal autonomy of the participating individuals (e.g., HRTO, CICB, OCPC), while still others hold hearings on social justice and welfare issues for unrepresented and often unsophisticated litigants (e.g., LTB, WSIAT).

[104] In view of this complex and diverse picture, counsel for the Ontario Judicial Council warned me to pay heed to "the law of unintended consequences". That, I must say, is sage advice. Under the circumstances, the Toronto Star's proposal -- that the court strike down *FIPPA* insofar as it pertains to Adjudicative Records held by the listed quasi-judicial tribunals and replace it with direct access to the tribunals themselves -- might minimally impair the right of openness enshrined in s. 2(b) of the *Charter*. But I do not know how much collateral damage will be done to the tribunal system in the process. An under-resourced tribunal staffed with part-time adjudicators and little in the way of administrative assistance may find itself overwhelmed in a suddenly *FIPPA*-free procedural environment. [page307]

[105] Moreover, there is a sense that the Toronto Star is perhaps frustrated by having to deal with a cumbersome, bureaucratic system which can sometimes seem neither user-friendly nor prone to make document requests easy. I sympathize with the desire of journalists and others who make *FIPPA* applications on a regular basis to cut through the "red tape", as it were. But bureaucracy in and of itself is not a *Charter* violation. It's just annoying. Legal commentators in the United States have pointed out that, "We have to accept that there's a difference between laws that embody bad policy and laws that a state legislature lacks the power to enact. A law can be bad . . . without being unconstitutional."¹²⁷ That message is an apt one under Canada's constitutional system as well.

[106] In any case, the various timelines built into the *FIPPA* system appear designed to make the system operate fairly. One cannot act judicially in making an access determination without giving notice to affected parties and providing some amount of time for a response. The specific notice and other time periods provided for in *FIPPA* may or may not be ideal, but there is little evidence that the problems are with *FIPPA*'s terms on their face. Where the evidence in the

record shows that there have been inordinate delays, the source of the problems may lie more with the particular administrators or decision makers who extend the *FIPPA* timelines than with the statutory system itself. Once the reverse onus on personal information is removed, those human delay factors will hopefully be reduced.

[107] The *Charter* requires public access to Adjudicative Records, which may be tempered on a case-by-case basis by other considerations -- integrity of the administration of justice, safety and security of informants and other third parties, privacy for complainants and other litigants, etc. For an unconstitutional law, "the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*. . . .Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts".¹²⁸

[108] To the extent that an applicant for Adjudicative Records has its rights undermined by an institution head or the IPC excessively extending the *FIPPA* timelines, the appropriate course of action is not to declare the statute (or any of its provisions) of no [page308] force and effect under s. 52(1). Rather, the Superior Court retains jurisdiction to fashion an "appropriate and just" remedy for the aggrieved rights holder under s. 24(1) of the *Charter*,¹²⁹ or to impose an administrative law remedy.

[109] All of this is to say that much as *FIPPA*'s various notice periods, times for submissions, and potential extensions of those times burden the exercise of s. 2(b) rights when it comes to access to Adjudicative Records, on a systemic basis the impairment is minimal. While there may be individual cases of unjustifiable delay and impairment of rights which could lead to an individual remedy, those cases are left for another day.

d) *Proportionality*

[110] The final step in the *Oakes* analysis is to determine whether there is proportionality between the deleterious and the salutary effects of *FIPPA*'s infringing measures.

[111] The deleterious effects of the presumption against disclosure in s. 21(1) and related provisions of *FIPPA* are real and substantial. As counsel for the Toronto Star points out, emphasizing privacy over openness not only has a negative impact on the press but also affects other stakeholders. Regulators have no way of identifying chronic offenders, reference checks on tenants and others who come before the various tribunals are impossible to carry out. Problematic landlords, police and other actors, including repeat human rights offenders, vexatious litigants and the like cannot be discovered by members of the public who have to engage with them. The public cannot know about upcoming hearings for a number of the tribunals, and the media are unable to engage public debate about cases which they do not know are forthcoming and so do not attend or cover.

[112] In the seminal press freedom case under the *Charter*, Wilson J. noted that "we cannot ignore the fact that for every litigant concerned about the adverse impact of publicity upon his or her image in the community, there may be another equally concerned about public vindication and community support."¹³⁰ As indicated, eight of the tribunals in issue bypass the *FIPPA* process altogether, and make their documents presumptively available to the public. Other

tribunals invoke *FIPPA* and make documents presumptively unavailable even in the face of parties who may not object to publication. [page309]

[113] Counsel for the Attorney General identifies a number of salutary effects of the reverse onus on disclosing personal information. These include the strong protection of privacy, the support for informality and efficiency by dispensing with the need for lawyers, and the encouragement of use of the administrative tribunal system by vulnerable individuals. While one can certainly appreciate the pragmatic advantages of the system as identified by the Attorney General, these must be seen as outweighed by a process that embodies substantial rather than minimal impairment.

[114] This is especially the case given that speech rights can be characterized as non-instrumental. McLachlin J. (as she then was) has made this point in reviewing the philosophical underpinnings of s. 2(b) of the *Charter*, to the effect that "freedom of expression may be viewed as more than a means to other ends. Many assert that free expression is an end in itself, a value essential to the sort of society we wish to preserve."¹³¹ Where the *Charter* right "respect[s] each and every person as an end", it cannot be contested or measured by a law that "merely manipulate[es] them, or some of them, as means".¹³² If there is no sociological goal or end to weigh against the salutary features of the impugned legislation, the contest between the deleterious effects and those salutary benefits is really no contest at all.

[115] Moreover, there is no real evidence to support the Attorney General's most strenuous point -- that tenants, human rights plaintiffs, complainants against medical professionals, etc. will likely cease using the relevant tribunals if their identities are exposed to the public. While there is affidavit evidence demonstrating that tribunal litigants are concerned about protecting their privacy, there is little to establish that a change in the s. 21(1) presumption against disclosure would have a chilling effect on tribunal applications.

[116] As already indicated, in matters touching on free expression chilling effects are notoriously difficult to prove. Even taking this difficulty into account, however, it is not possible for me to conclude that the statute's infringement of the openness principle is somehow more than counterbalanced by its potential, if speculative support for access to justice. On the record before me, the salutary effects of the presumption of non-disclosure of personal information in s. 21 of *FIPPA* do not outweigh the deleterious effects of that measure on the *Charter* right to openness. [page310]

[117] As for *FIPPA*'s procedural limitations on s. 2(b), I have already found that the notice requirements, timelines and designation of institution heads and the IPC as decision-makers minimally impair the right. While these procedural factors may be subject to extension and abuse in individual cases, they are in their own terms justifiable as minimal intrusions on the openness principle.

[118] Professor Hogg states in his textbook, and the Supreme Court has confirmed, that this effectively renders the proportionality analysis redundant.¹³³ That is not to deny the overall importance of proportionality, which embodies an analytic approach that has made Canadian law "a global constitutional reference point".¹³⁴ But as a general matter, proportionality determines the conditions which make a limitation on a constitutional right justified and therefore

permissible.¹³⁵ A minimal impairment of a *Charter* right is already proportionate to that right and is justifiable on those terms.

VI. *Standing and Factual Basis for the Application*

[119] As a final matter (or, perhaps, as a preliminary, threshold matter), counsel for the Attorney General submits that the Toronto Star has no standing to bring this application and that, in any case, the application should have proceeded by way of judicial review of an IPC decision. Both of these arguments mischaracterize the proceeding; they treat it as a challenge to a particular administrative decision rather than a challenge to a statutory regime authorizing all document access decisions in respect of 13 named tribunals. In my view, this approach has no merit.

[120] As it turns out, this application was really a challenge to the constitutionality of certain provisions of *FIPPA*. It was not a challenge to the constitutionality of any particular decision or set of decisions by administrative decision-makers implementing *FIPPA*. Accordingly, no applicant would be in a better position than the Toronto Star -- a newspaper with vast and ongoing [page311] experience in making access to information applications -- to bring the challenge. "[I]t would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."¹³⁶

[121] Under current standing rules, the Toronto Star has public interest standing to bring this constitutional application. In considering this question, "the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts".¹³⁷ The Toronto Star easily passes all three steps in the analysis. It raises serious *Charter* issues, it has a real stake in that it is a constant user of the *FIPPA* process for the tribunals in issue and, for that matter, any number of other tribunals across Ontario. The present application is a convenient way to bring issues before the court that pertain to multiple administrative tribunals all authorized by the same piece of legislation.

[122] The Attorney General takes the position that the challenge to the 13 tribunals should be treated like 13 distinct applications, and the Toronto Star must prove that it has standing to challenge each one. Thus, counsel for the Attorney General argues that the case against several of the tribunals be dismissed, since there is no evidence in the record that a Toronto Star reporter submitted a request to them under *FIPPA*. Counsel for the Toronto Star responds with the observation that requiring 13 different applications, with 13 records of evidence, would be "wasteful, unnecessary, and unproductive and not in the interests of justice to these litigants or the public".¹³⁸ It is hard to disagree with that common-sense proposition.

[123] Furthermore, the Toronto Star is a representative applicant for the entire public -- it is the public's right of access to Adjudicative Records that is in issue. In addition, the 13 named tribunals are, in effect, representatives for a large number of tribunals listed in the Schedule to *FIPPA* that act judicially. Whether at this moment the Toronto Star is seeking documents [page312] from the HRTIO, the OLRB, the FST, or the HPARB (the last two of which the Attorney General argues should not be here due to a paucity of evidence) is immaterial. *FIPPA*

applies to many tribunals that act judicially, and they all will be impacted by the present ruling with respect to the s. 21(1) reverse onus on personal information.

[124] By way of brief illustration of the type of standing that the Toronto Star enjoys, a doctor and his patient challenged the prohibition in Quebec's *Health Insurance Act*, C.Q.L.R., c. A-29 and *Hospital Insurance Act*, C.Q.L.R., c. A-28 on doctors billing their patients for private services. The Supreme Court of Canada described the standing of the two of them to bring the constitutional challenge, as follows:

The validity of the prohibition is contested by the appellants, George Zeliotis and Jacques Chaoulli. Over the years, Mr. Zeliotis has experienced a number of health problems and has used medical services that were available in the public system, including heart surgery and a number of operations on his hip . . . Mr. Chaoulli is a physician who has tried unsuccessfully to have his home-delivered medical activities recognized and to obtain a licence to operate an independent private hospital. Mr. Zeliotis and Mr. Chaoulli joined forces to apply to the court by way of motion for a declaration that s. 15 *HEIA* and s. 11 *HOIA* are unconstitutional and invalid.¹³⁹

[125] Neither the doctor nor the patient had a current request for private service pending, although both had a history of making such requests. Likewise, the remedy sought by them did not pertain just to them; it pertained to all doctors and all patients seeking payment for private medical services. The Toronto Star and the 13 named tribunals are in parallel positions. The newspaper has a history of doing what it seeks to do with a number of the listed tribunals, and in any case the tribunals are representatives of all of the other similarly situated tribunals. Additionally, the Toronto Star itself is a representative applicant in the sense that its remedy will be every other similarly situated party's remedy.

[126] The Toronto Star may not, right at this moment, have a direct personal interest in obtaining specific Adjudicative Records from all 13 of the tribunals listed in its application (or, for that matter, from all 185 administrative agencies listed in the Schedule to *FIPPA*). But as a major news outlet, it is certainly not a "mere busybody" that needs to be screened out for the sake of judicial efficiency.¹⁴⁰ It has standing to bring this application. [page313]

[127] Along similar lines, counsel for the Attorney General also contends that the present constitutional challenge should have proceeded as a judicial review application. He submits that in failing to do so, the Toronto Star seeks to bypass the IPC. It is the Attorney General's submission that proceeding in this way violates the rule that parties must exhaust all administrative remedies before moving for a remedy in court.¹⁴¹ Counsel argues that "only when the administrative process [*i.e.*, the IPC appeal process] has finished or when the administrative process affords no effective remedy can they proceed to court".¹⁴²

[128] There is, in fact, no administrative process that is relevant here. The Toronto Star commenced its application in the way that it did because its challenge goes well beyond any one request for documents. Moreover, no administrative remedy could be forthcoming in this type of constitutional challenge. The Toronto Star seeks to invoke under s. 52(1) of the *Constitution Act, 1982* to strike down *FIPPA* as the enabling legislation under which the institutional heads and the IPC operate. Administrative decision-makers generally have power to apply the *Charter* and to implement *Charter* remedies under s. 24(1), depending upon whether they are expressly or

impliedly authorized to do so by their governing legislation.¹⁴³ But striking down their own enabling statute, or part thereof, is another matter.

[129] There is no reason for the Toronto Star to have proceeded by way of judicial review. That would have been appropriate had the Toronto Star wished to challenge a decision with respect to any one tribunal's Adjudicative Records. A Superior Court application like the present one is the appropriate way to bring a challenge to the provisions of *FIPPA* itself.

VII. Remedy

[130] *FIPPA* infringes s. 2(b) of the *Charter* in two respects: (a) substantively in terms of s. 21 and related sections that contain the presumption of non-disclosure for producing Adjudicative Records containing "personal information" as defined in s. 2(1); and (b) procedurally in terms of the notice provisions, timelines, and authorization for institution heads and the IPC to make [page314] decisions about access to Adjudicative Records. The Attorney General bears the onus under s. 1 of the *Charter* to justify these infringements.¹⁴⁴ It has met this onus with respect to the procedural infringements, but has failed to meet the onus of justification with respect to the substantive breach.

[131] As the Supreme Court has long pointed out, the key to a *Charter* remedy is for the court to address the constitutional violation but to "refrain from intruding into the legislative sphere beyond what is necessary".¹⁴⁵ Given my finding that the presumption of non-disclosure, or reverse onus in s. 21 of *FIPPA* is unconstitutional insofar as it applies to requests for production of Adjudicative Records, *FIPPA*'s application to such requests from adjudicative tribunals is rendered inoperative under s. 52(1) of the *Constitution Act, 1982*. This raises several follow-on questions, as set out by the Supreme Court:

Section 52 is engaged when a law is itself held to be unconstitutional, as opposed to simply a particular action taken under it. Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked to it? Third, should the declaration of invalidity be temporarily suspended?¹⁴⁶

[132] As indicated, the extent of the inconsistency is limited within the overall scheme of *FIPPA*. The legislation, with its stringent protections of privacy built into s. 21 and other related sections, applies to government records of all sorts and to institutions that serve the public other than in an adjudicative function. This ruling does not apply to non-adjudicative institutions or to records held by adjudicative tribunals that are not within the definition of Adjudicative Records used throughout these reasons for judgment. The present ruling applies only to requests for Adjudicative Records from the 13 institutions named in this application and, by extension, any other analogous institution listed in the Schedule to *FIPPA* that operates in an adjudicative capacity and that holds Adjudicative Records.

[133] Since eight of the listed tribunals apparently answer requests for Adjudicative Records directly and do not require requesters to engage the *FIPPA* process, little or no change is needed for them. Each must examine its procedures to ensure [page315] that the presumption of openness and disclosure required by s. 2(b) of the *Charter* is adhered to in responding to requests to inspect or copy Adjudicative Records, but nothing about their procedures is

otherwise impugned by this ruling. Other tribunals may follow this model and bypass the *FIPPA* process altogether by dealing with requests for Adjudicative Records directly and in conformity with the openness that the *Charter* requires.

[134] Counsel for the Toronto Star has argued throughout that the *Dagenais/Mentuck* test is the appropriate one for any tribunal to apply when a request for Adjudicative Records is submitted to it. Counsel for the Attorney General has responded throughout that *Dagenais/Mentuck* is too high a test and that while it is appropriate for court records it does not take the varying contexts of administrative tribunals sufficiently into account. The case law demonstrates, however, that there is not just one level of analysis applied under that test, and that *Dagenais/Mentuck* is indeed flexible enough to be adapted by the various adjudicative tribunals to their own particular contexts and needs. In the *Mentuck* case itself, Iacobucci J. acknowledged this flexibility. He specifically admonished that in applying the test "the purposes and effects invoked by the parties must be taken into account in a case-specific manner", and went on to comment that, "This test exists to ground the exercise of discretion in a constitutionally sound manner, not to command the same result in every case."¹⁴⁷

[135] As an example, the Manitoba Court of Appeal has held that the *Dagenais/Mentuck* test is flexible enough to protect certain Adjudicative Records in a coroner's inquest whose confidentiality was made necessary due to the child protection imperatives of the inquest.¹⁴⁸ The test likewise does not require production of Adjudicative Records submitted at any stage of a proceeding that fall under a category of privilege,¹⁴⁹ and can be applied in modification to "ensure certainty and timeliness, to conserve resources, and to avert the disclosure of untested prejudicial information" that may impact on further proceedings.¹⁵⁰ These concerns to protect the vulnerable, conserve scarce resources, make efficient and timely decisions, enforce privilege and ensure the fairness of [page316] all adjudicative hearings, are all relevant to adjudicative tribunals. Each can adapt the *Dagenais/ Mentuck* test to its own particular needs in respect of these concerns.

[136] For those tribunals that adhere to the *FIPPA* regime, the ruling here leaves intact the procedural system established under that legislation. That is, the decision-making authority of the institution heads and, on appeal, the IPC, is not rendered inoperative. Likewise, the various notice provisions and timelines contained in the legislation are upheld, provided they are not unduly extended for any given decision (which, as indicated earlier, would have to be challenged on a case-by-case basis). Once the legislature has the opportunity to re-work *FIPPA*'s substantive grounds for making disclosure decisions so that there is a presumption of openness rather than a presumption of confidentiality, the *FIPPA* procedures can be utilized.

[137] I would emphasize here what must be obvious to anyone perusing *FIPPA*: the statute is not a paragon of clarity. I say this not to disparage the drafters, but to point out that it contains numerous interrelated provisions scattered across its several parts, and that the privacy concerns that touch on the production of Adjudicative Records are not conveniently gathered in one provision. They can be found up front in the definition section, in Part II dealing with access to information applications, exemptions from access, and exceptions to the exemptions, and in Part III dealing with the protection of individual privacy. Reversing the s. 21(1) onus with respect to the disclosure of personal information in Adjudicative Records may require some revisiting of large portions of the entire statute.

[138] Again, as a brief example, s. 21(1) contains the basic reverse onus that exempts personal information from the information that an institution head is authorized to disclose. It is followed by a list of specific exceptions to the general exemption in s. 21(1)(a) to (f), which is in turn followed by a list of "criteria re invasion of privacy" in s. 21(2)(a) to (i), which is in turn followed by a list of specific instances in s. 21(3)(a) to (h) where disclosure of personal information is "presumed to constitute an unjustifiable invasion of privacy". Some of these would doubtless survive a s. 2(b) *Charter* analysis and others would not. Thus, the concern for protecting the very vulnerable and for ensuring less formal and more efficient hearing processes where health matters -- and especially mental health matters -- are at stake would arguably justify the non-publication rule contained in s. 21(3) (a) (information that "relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation"); similarly, the concern to safeguard pre-hearing investigative procedures would [page317] likely justify the non-publication rule contained in s. 21(3) (b) (information that "was compiled and is identifiable as part of an investigation into a possible violation of law").

[139] Other factors listed in s. 21(3) -- including the presumption against disclosing anything containing education and employment history (s. 21(3)(d)), personal finances (s. 21(3)(f)), personal recommendations and evaluations (s. 21(3)(g)), etc. -- appear more geared toward saving a person from embarrassment than furthering the objectives of the particular legal process. These would not survive a *Charter* analysis.¹⁵¹ It is up to the legislature to re-work any statutory prohibitions on publication in a way that complies with the Supreme Court's analysis of the criteria for statutory publication bans. This will likely have to be done in a way which allows for tribunal-specific determinations of how the openness principle is balanced against privacy concerns. After all, "[t]he analysis under s. 1 of the *Charter* . . . can only be accomplished by canvassing the nature of the social problem which [a given measure] addresses".¹⁵² In the Supreme Court's words, "Context is the key to understanding the scope and impact of a limit on a *Charter* right."¹⁵³

[140] For those adjudicative tribunals that rely on the *FIPPA* process to determine access to Adjudicative Records, the need to revamp a relatively complex piece of legislation in order to make it *Charter* compliant presents practical difficulties. In effect, it leaves a procedural system intact but with a substantive void to be filled in on the fly by institution heads and the IPC. Requests for Adjudicative Records can continue to be dealt with procedurally in the way they have been until now, except that each institution head in the first instance, and the IPC on appeal, must make their decisions by applying the *Dagenais/ Mentuck* test in whatever modification the particular tribunal in the particular context of a given request requires.

[141] The concern is that this may put a difficult burden on decision makers to adapt overnight to a new task without substantive statutory guidance. As has been described in other legislative contexts, "moving abruptly from a situation where [the disclosure [page318] process] is regulated to a situation where it is entirely unregulated would be a matter of great concern".¹⁵⁴ The courts should be reluctant to place administrative decision-makers in that situation.

[142] This case therefore calls for some time period in which the invalidity of *FIPPA*'s application to Adjudicative Records is suspended. During oral submissions, counsel for the Attorney General suggested one year. That seems to me to be an appropriate length of time for the relevant portions of *FIPPA* to be re-worked should the legislature choose to do so.

Alternatively, it will provide time for institution heads and the IPC to establish a principled, tribunal-specific and context-specific basis for adapting and implementing the *Dagenais/Mentuck* test in response to requests under *FIPPA* for access to Adjudicative Records.

VIII. *Disposition*

[143] There shall be a declaration that the application of s. 21(1) to (3) and related sections of *FIPPA* pertaining to the presumption of non-disclosure of "personal information" to Adjudicative Records held by the remaining institutions named in the notice of application infringes s. 2(b) of the *Charter* and is not justified under s. 1. It is therefore of no force or effect.

[144] The declaration of invalidity of this aspect of *FIPPA* is suspended for 12 months from the date of this judgment.

Application allowed.

Notes

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- 1 R.S.O. 1990, c. F.31.
 - 2 The tribunals named in the notice of application are Ontario Securities Commission ("OSC"), Environmental Review Tribunal ("ERT"), Ontario Civilian Police Commission ("OCPC"), Human Rights Tribunal of Ontario ("HRTO"), Ontario Municipal Board ("OMB"), Financial Services Tribunal ("FST"), Health Professions Appeal and Review Board ("HPARB"), Landlord and Tenant Board ("LTB"), Criminal Injuries Compensation Board ("CICB"), License Appeal Tribunal ("LAT"), Ontario Energy Board ("OEB"), Workplace Safety and Insurance Appeals Tribunal ("WSIAT"), Ontario Mining and Lands Commissioner ("OMLC"), Ontario Labour Relations Board ("OLRB") and Pay Equity Hearings Tribunal ("PEHT").
 - 3 R.R.O. 1990, Reg. 460.
 - 4 Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
 - 5 William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John*, 2nd ed. (Glasgow: James Maclehose and Sons, 1914), 395 (citing *Magna Carta*, 1215, ch. 40).
 - 6 Matthew Hale, *The History of the Common Law of England* (Charles M. Gray, ed., Univ. Chicago Press 1971) (1670), ch. 12.
 - 7 William Blackstone, *Commentaries on the Laws of England* 396.
 - 8 *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339, [1909] S.C.J. No. 7, at p. 359 S.C.R.
 - 9 *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, [1989] S.C.J. No. 124, para. 10.
 - 10 Ministry of the Attorney General, "Guidelines for Administrative Tribunals" (October 29, 2015), online: [https://www.attorneygeneral.jus.gov.on.ca/english](https://www.attorneygeneral.jus.gov.on.ca/english/services/services/administrative_tribunals.php) /justice-ont/ french language

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- 11 Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "Administrative Tribunals and the Courts: An Evolutionary Relationship", available at <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>.
- 12 R.S.O. 1990, c. S.22, s. 9(1).
- 13 Stepanova v. Ontario (Human Rights Tribunal), [2017] O.J. No. 2689, 2017 ONSC 2386 (Div. Ct.), para. 36.
- 14 SPPA, s. 20.
- 15 Model Policy for Access to Court Records in Canada, Judges Technology Advisory Committee, Canadian Judicial Council, September 2005.
- 16 R. v. Canadian Broadcast Corp. (2010), 102 O.R. (3d) 673, [2010] O.J. No. 4615, 2010 ONCA 726, para. 44.
- 17 Cooper v. Canada (Canadian Human Rights Commission), [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115, para. 70 (McLachlin J., dissenting), adopted by majority in Nova Scotia (Workers' Compensation Board) v. Martin, [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54, para. 29.
- 18 Guardian News v. Westminster Magistrates' Court, [2012] EWCA Civ. 420, para. 1.
- 19 Human Rights Tribunal of Ontario, Information and Privacy Commission of Ontario, Order PO-2359, Appeal PA40163-109-451 (January 6, 2005).
- 20 John Doe v. Ontario (Information & Privacy Commissioner) (1993), 13 O.R. (3d) 767, [1993] O.J. No. 1527 (Div. Ct.).
- 21 Ministry of the Attorney General, Information and Privacy Commission of Ontario, Order P-984, Appeal P-9400823, August 28, 1995, p. 4.
- 22 Ibid.
- 23 Simon Stern, "Legal Fictions and Exclusionary Rules" in Maksymilian Del Mar and William Twining, eds., Legal Fictions in Theory and Practice (New York: Springer International Publishing, 2015), 157-73.
- 24 See Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2544, Appeal PA-040312-1 (January 24, 2007).
- 25 See Human Rights Tribunal of Ontario, Information and Privacy Commission of Ontario, Order PO-2923, Appeal PA09-451 (October 21, 2010).
- 26 See Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2019, PA-020194-1 (February 7, 2003).
- 27 Ibid.
- 28 Ontario (Attorney General) v. Pascoe, [2002] O.J. No 4300, 166 O.A.C. 88 (C.A.), paras. 2, 6.
- 29 FIPPA, General Regulation, R.R.O. 1990, Reg. 460, s. 1(1) and Schedule.
- 30 McPherson v. McPherson, [1936] A.C. 177.
- 31 Law Society of Upper Canada v. Xynnis, [2014] L.S.D.D. No. 38, 2014 ONLSAP 9.
- 32 Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing), [2001] 2 S.C.R. 781, [2001] S.C.J. No. 17, para. 24.
- 33 International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282, [1990] S.C.J. No. 20, para. 69.
- 34 Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board, [1952] O.R. 366, [1952] O.J. No. 439, [1952] 3 D.L.R. 162 (C.A.), paras. 15-16.
- 35 Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1, para. 80.
- 36 Ocean Port, supra, para. 24.
- 37 Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267, [1994] O.J. No. 200 (C.A.), para. 35.
- 38 Bell Canada v. Canadian Telephone Employees Assn., [2003] 1 S.C.R. 884, [2003] S.C.J. No. 36, para. 21.

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- 39** The eight tribunals that bypass the FIPPA process for post-hearing access to Adjudicative Records are OEB, ERT, OMB, OMLC, OCPC, LAT, FST and OSC. See, *supra*, note 2.
- 40** *Lukacs v. Canada (Canadian Transportation Agency)*, [2015] F.C.J. No. 707, 2015 FCA 140, para. 80.
- 41** *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21, at p. 636 S.C.R.
- 42** *Lukacs*, *supra*, para. 49.
- 43** Remarks of the Right Honourable Beverley McLachlin, *supra*.
- 44** *Doyle v. Ontario (Ministry of Municipal Affairs)*, 2017 CanLII 52705 (Ont. PSGB), para. 71.
- 45** *CUPE, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45, at p. 236 S.C.R.
- 46** *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, para. 49.
- 47** *R. v. Conway*, [2010] 1 S.C.R. 765, [2010] S.C.J. No. 22, para. 20.
- 48** *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, [1996] S.C.J. No. 38, headnote.
- 49** *Ibid.*, at para. 26.
- 50** *R. v. Canadian Broadcasting Corp.*, *supra*, para. 44.
- 51** *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 S.C.R. 65, [2011] S.C.J. No. 3, para. 12.
- 52** *Edmonton Journal v. Alberta (Attorney General)*, *supra*, at p. 1338 S.C.R.
- 53** *R. v. Canadian Broadcasting Corp.*, 2010, *supra*, para. 50.
- 54** *Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] F.C.J. No. 658, [1987] 3 F.C. 329 (T.D.), para. 9.
- 55** *Conway*, *supra*, at headnote and para. 20.
- 56** *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, [2012] S.C.J. No. 12, para. 4.
- 57** *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, [1988] S.C.J. No. 88, para. 59.
- 58** *Canadian Broadcasting Corp.*, 2011, *supra*, para. 12.
- 59** *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, [2007] S.C.J. No. 43, para. 33, citing *Edmonton Journal*, *supra*, at p. 1338 S.C.R.
- 60** *Canadian Broadcasting Corp.*, 2010, *supra*, para. 33.
- 61** *Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario*, Order PO-2265, Appeal PA-030192-1, April 28, 2004.
- 62** *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] 1 S.C.R. 815, [2010] S.C.J. No. 23 ("CLA").
- 63** *Ibid.*, para. 37.
- 64** *ARPA Canada v. Ontario* (2017), 138 O.R. (3d) 253, [2017] O.J. No. 2969, 2017 ONSC 3285 (S.C.J.).
- 65** *University of Ottawa (Re)*, 2017 CanLII 2024 (Ont. IPC); *City of Toronto (Re)*, 2016 CanLII 31964 (Ont. IPC).
- 66** *CLA*, *supra*, para. 13.
- 67** *Stepanova*, *supra*, para. 36.
- 68** *CLA*, *supra*, paras. 3-4.
- 69** *University of Ottawa (Re)*, *supra*, paras. 1-2, 4.
- 70** *City of Toronto (Re)*, *supra*, para. 2.
- 71** *ARPA Canada v. Ontario*, *supra*, paras. 8-9.
- 72** *CLA*, *supra*, para. 5.

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- 73** In the Matter of an Application Brought by the Toronto Star and the Criminal Lawyers Association, Ontario Judicial Council, October 14, 2015, online: [http:// www.ontariocourts.ca/ocj/ojc/confidentiality/](http://www.ontariocourts.ca/ocj/ojc/confidentiality/).
- 74** Toronto Star Newspapers Ltd. v. Ontario, [2005] 2 S.C.R. 188, [2005] S.C.J. No. 41, paras. 1-3.
- 75** Ibid., para. 8.
- 76** Nova Scotia (Workers' Compensation Board) v. Martin, supra, paras. 29-31.
- 77** R. v. Laba, [1994] 3 S.C.R. 965, [1994] S.C.J. No. 106, para. 24; R. v. Keegstra, [1990] 3 S.C.R. 697, [1990] S.C.J. No. 131.
- 78** Nova Scotia (Attorney General) v. MacIntyre, [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, at p. 185 S.C.R.
- 79** Herman Wasserman, "Reflecting on Journalism Research: A quarter century of Ecquid Novi" (2004), 25(1) South African Journal for Journalism Research 179, at 199.
- 80** Loutchansky v. Times Newspapers Ltd., [2002] 2 W.L.R. 64, [2002] 1 All E.R. 652 (C.A.), para. 74.
- 81** R. v. White, [2005] A.J. No. 1727, 2005 ABCA 435, para. 6.
- 82** R. v. Kossyrine, [2011] O.J. No. 4495, 2011 ONSC 6081 (S.C.J.), para. 5.
- 83** R. v. Jordan, [2016] 1 S.C.R. 631, [2016] S.C.J. No. 27, para. 19; but see Payam Akhavan, "Justice delayed is better than justice denied", The Globe and Mail, March 30, 2016, online: <<https://www.theglobeandmail.com/opinion/karadzic-verdict-justice-delayed-better-than-justice-denied/article29425024/>>.
- 84** Hill v. Church of Scientology of Toronto (1995), 24 O.R. (3d) 865, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, para. 203.
- 85** R. v. Domm (1996), 31 O.R. (3d) 540, [1996] O.J. No. 4300 (C.A.), para. 40.
- 86** Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General) (1998), 38 O.R. (3d) 735, [1998] 1 S.C.R. 877, [1998] S.C.J. No. 44, para. 114.
- 87** R. v. Domm, supra, para. 40.
- 88** R. v. Jordan, supra, para. 19.
- 89** Lorraine E. Weinrib, "Canada's Charter of Rights: Paradigm Lost?" (2002), 6 Review of Constitutional Studies 119, at 151.
- 90** Kent Roach and David Schneiderman, "Freedom of Expression in Canada" (2013), 61 S.C.L.R. (2d) 429, at 485.
- 91** R. v. Oakes, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7.
- 92** Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, [2013] 3 S.C.R. 733, [2013] S.C.J. No. 62, para. 19.
- 93** Batty v. Toronto (City) (2011), 108 O.R. (3d) 571, [2011] O.J. No. 5158, 2011 ONSC 6862 (S.C.J.), para. 95.
- 94** Saskatchewan (Human Rights Commission) v. Whatcott, [2013] 1 S.C.R. 467, [2013] S.C.J. No. 11, paras. 73-74.
- 95** CLA, supra, para. 2.
- 96** Ontario Commission on Freedom of Information and Individual Privacy, Public Government for Private People - The Report of the Ontario Commission on Freedom of Information and Individual Privacy (Toronto: Ministry of Government Services, 1980), Vol. 2, at 195.
- 97** R. v. Keegstra, supra, pp. 746-47 S.C.R.
- 98** R. v. Oakes, supra, para. 51.
- 99** Canada (Attorney General) v. JTI-Macdonald Corp., [2007] 2 S.C.R. 610, [2007] S.C.J. No. 30, para. 43.
- 100** Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2265, Appeal PA-030192-1 (April 28, 2004).
- 101** Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2418, Appeal PA-040326-1 (September 27, 2005), at 4.

Toronto Star Newspapers Ltd. v. Attorney General of Ontario; ARCH Disability Law Centre et al.,
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- 102** Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104; R. v. Mentuck, [2001] 3 S.C.R. 442, [2001] S.C.J. No. 73.
- 103** R. v. Mentuck, *supra*, para. 27.
- 104** Named Person v. Vancouver Sun, *supra*, para. 34.
- 105** *Ibid.*, para. 32.
- 106** Toronto Star Newspapers Ltd. v. Ontario, *supra*, paras. 17, 31.
- 107** *Ibid.*, para. 31.
- 108** *Ibid.*
- 109** R. v. Leipert, [1997] 1 S.C.R. 281, [1997] S.C.J. No. 14.
- 110** R. v. Eurocopter Canada Ltd. (2003), 67 O.R. (3d) 763, [2003] O.J. No. 4238 (S.C.J.), para. 44.
- 111** Canadian Broadcasting Corp. v. New Brunswick, *supra*, para. 71.
- 112** R. v. Vandevelde, [1994] S.J. No. 156, 89 C.C.C. (3d) 161 (C.A.), at p. 171 C.C.C., citing R. v. Lefebvre, [1984] J.Q. no 247, 17 C.C.C. (3d) 277 (C.A.), at p. 282-83 C.C.C. See, also, R. v. Brint, [1979] A.J. No. 57, 45 C.C.C. (2d) 560 (C.A.); R. v. Quesnel, [1979] O.J. No. 116, 51 C.C.C. (2d) 270 (C.A.).
- 113** R. v. Eurocopter Canada Ltd., [2001] O.J. No. 1591, [2001] O.T.C. 310 (S.C.J.), para. 35.
- 114** Toronto Star Newspapers Ltd. v. Ontario, *supra*, para. 17.
- 115** Doré v. Barreau du Québec, *supra*, paras. 55-56.
- 116** Vancouver Sun (Re), [2004] 2 S.C.R. 332, [2004] S.C.J. No. 41, para. 31.
- 117** Southam Inc. v. Canada (Minister of Employment and Immigration), *supra*, para. 9.
- 118** Law Society v. Xynnis, *supra*, para. 10.
- 119** Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, para. 56.
- 120** Hunte v. Ontario (Superintendent of Financial Services), 2013 ONFST 3, 2013 LNOTSF 3, para. 19.
- 121** Order PO-2923, *supra*, 10.
- 122** Order PO-2265, *supra*.
- 123** Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, para. 65; Dunsmuir, *supra*, para. 48.
- 124** See Mark S. Hurwitz, "Ideology and Deference in U.S. Courts of Appeals Decision Making on Administrative Law", Buffalo Legal Studies Research Paper No. 2006-003 (Buffalo: University at Buffalo Law School, 2005).
- 125** David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997), at 286.
- 126** Kadia v. Gonzales, 501 F.3d 817 (7th Cir. 2007), at p. 821.
- 127** Paul Reidinger, "Will Roe v. Wade Be Overruled?", ABA Journal Vol. 74, No. 7 (July 1, 1988).
- 128** R. v. Ferguson, [2008] 1 S.C.R. 96, [2008] S.C.J. No. 6, paras. 59-60.
- 129** Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63, para. 51.
- 130** Edmonton Journal, *supra*, para. 62.
- 131** R. v. Keegstra, *supra*, at p. 804 S.C.R.
- 132** Ernest J. Weinrib, "Private Law and Public Right" (2011), 61 UTLJ 191, at 196.
- 133** Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567, [2009] S.C.J. No. 37, para. 75, citing Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Supp.) (Toronto: Carswell, 2007), Vol. 2, s. 38.12.

Toronto Star Newspapers Ltd. v. Attorney General of Ontario; ARCH Disability Law Centre et al.,
Intervenors[Index as: Toronto Star Newspapers Ltd. v. Ontario(A....

- 134** Peter Oliver, Patrick Macklem, Natalie Des Rosiers, "Introduction" in *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017), at 5.
- 135** Aharon Barak, *Proportionality, Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012), at 3.
- 136** *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138, [1974] S.C.J. No. 45, at p. 145 S.C.R.
- 137** *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524, [2012] S.C.J. No. 45, para. 37.
- 138** *Hanif v. Ontario College of Pharmacists*, [2014] O.J. No. 2137, 2014 ONSC 2598 (Div. Ct.), para. 30.
- 139** *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, [2005] S.C.J. No. 33, para. 5.
- 140** *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, [1986] S.C.J. No. 73, para. 36.
- 141** *C.B. Powell Ltd. v. Canada (Border Services Agency)*, [2010] F.C.J. No. 274, 2010 FCA 61, para. 30.
- 142** *Ibid.*, para. 31.
- 143** *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, [1991] S.C.J. No. 42, at pp. 14-15 S.C.R.
- 144** *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36, para. 69.
- 145** *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, [1991] S.C.J. No. 45, at p. 104 S.C.R.
- 146** *Schachter v. Canada*, [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68, at p. 717 S.C.R.
- 147** *R. v. Mentuck*, *supra*, para. 37.
- 148** *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*, [2008] M.J. No. 286, 228 Man. R. (2d) 312 (C.A.), para. 30.
- 149** *Named Person v. Vancouver Sun*, *supra*, para. 36.
- 150** *Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 S.C.R. 721, [2010] S.C.J. No. 21, para. 60.
- 151** *H. (M.E.) v. Williams* (2012), 108 O.R. (3d) 321, [2012] O.J. No. 525, 2012 ONCA 35, para. 28.
- 152** *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, para. 87.
- 153** *Toronto Star Newspapers Ltd. v. Canada*, *supra*, para. 3.
- 154** *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, [2013] S.C.J. No. 72, para. 167.

Federal Court



Cour fédérale

Date: 20210804

**Dockets: T-101-18
T-102-18
T-103-18
T-1358-12
T-465-20
T-1884-19**

Citation: 2021 FC 821

Ottawa, Ontario, August 4, 2021

PRESENT: Madam Justice McVeigh

**Dockets: T-101-18
T-102-18
T-103-18
T-1358-12**

BETWEEN:

**KAREN FRASER, JENNIFER SWEET,
NICOLE SWEET, KIM SWEET,
JOHN SWEET, J. ROBERT SWEET,
CHARLES SWEET, PATRICIA
CORCORAN, ANN PARKER AND
TORONTO POLICE ASSOCIATION**

Applicants

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS,
ATTORNEY GENERAL OF CANADA,
CORRECTIONAL SERVICE
CANADA, PAROLE BOARD OF CANADA
AND CRAIG MUNRO**

Respondents

Docket: T-465-20

AND BETWEEN:

**DOUG FRENCH, DONNA FRENCH AND
DEBORAH MAHAFFY**

Applicants

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS,
ATTORNEY GENERAL OF CANADA,
PAROLE BOARD OF CANADA,
AND PAUL BERNARDO**

Docket: T-1884-19

AND BETWEEN:

CANADIAN BROADCASTING CORPORATION

Applicant

and

PAROLE BOARD OF CANADA

Respondent

JUDGMENT AND REASONS

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I. Introduction

[1] This is regarding judicial review applications of six decisions—four by the Parole Board of Canada [“Parole Board”] and two by the Correctional Service of Canada [“CSC”]—denying requests for the further disclosure of personal information about two incarcerated individuals, Craig Munroe and Paul Bernardo [together the “Inmates”]. Of these requests, five were made pursuant to the *Access to Information Act*, RSC 1985, c A-1 [“ATIA ”] and one by way of letter, requesting disclosure based on the Open Court Principle [“OCP”].

[2] I will dismiss these applications for the reasons that follow.

II. Background

[3] In their submissions, Canada (the Respondents: Minister of Public Safety and Emergency Preparedness, Attorney General of Canada, Parole Board of Canada), indicates that the files on the Inmates include records relating to:

- admission and discharge records (i.e. personal effects, valuables);
- case management reports (i.e. police reports, offender applications);
- discipline and disassociation reports (i.e. disciplinary measures, segregation records);
- education and training (i.e. employment records);
- health care (i.e. medical and surgical, dental and psychiatric assessments);
- preventative security (i.e. incident reports, modus operandi);
- psychology (i.e. psychological assessments, treatment records);
- sentence administration (i.e. victim information, community contact information); and

- visits and correspondence (i.e. list of visitors, declarations of common law unions).

[See also paragraph 15 for what is sought to be disclosed]

[4] This judicial review comprises of six decisions grouped into three proceedings. The six judicial reviews were heard together in one hearing, and the reasons are consolidated. The Respondent, Inmates did not file materials or participate in the hearing.

A. *First Group*

[5] The first group involves —Court files T-1358-12; T-101-18; T-102-18 and T-103-18 [the “1358 Applications”]—consists of four applications pursuant to s. 41 of the *ATIA* [Annex A]. These Applications are for the judicial review of Parole Board and CSC decisions denying the disclosure, either in whole or in part, of the personal CSC and Parole Board files on Mr. Munro and the disclosure of recordings of Mr. Munro’s parole hearings.

[6] Mr. Munro was convicted of the brutal murder of Toronto Police Constable Michael Sweet in 1980, in a case that garnered considerable public and media attention due to Mr. Munro’s cruel and repugnant conduct. The 1358 Applications are made by relatives of the deceased Cst. Sweet, i.e. the Fraser and Sweet families, and by the Toronto Police Association.

[7] In file T-1358-12, the Applicants submitted a Notice of Constitutional Question in 2013.

They amended the question in 2020, asking the Court to determine:

the constitutional validity and/or applicability and effect of sections 3.1, 4(a), (b), (c) and (e), 26(1), 27(1) and (2), 100.1, 101(a) and (b), 102, 132, 140(4), 140(5), 140(13), 140(14), 140.2(1), (2) and (3), 142(1)(b), 143(1) and 144(4) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("CCRA"); sections 2(1), 4(1), (2.1), 19(1), (2)(b) and (c) and 20(6) of the *Access to Information Act*, R.S.C., 1985, c. A-1; sections 7, 8(1), 8(2)(a), 8(2)(m)(i), 12 and 26 of the *Privacy Act*, R.S.C., 1985, c. P-21

[8] Neither the original or amended constitutional question was filed with the Court. Rule 73.1 of the *Federal Courts Rules*, SOR/98-106, requires that a Notice of Constitutional Question must be filed with the Registry, with proof of service, after service to all the parties. This was not brought to the attention of the Court by the parties and was only recently discovered neither question had been filed with the Court. Given Canada did not object and the non-filing could have been because of COVID related issues with the Registry or the parties, I will answer the question regardless of the procedural misstep on the part of the Applicants in the 1358 Applications.

[9] The four files comprising the 1358 Applications are as follows.

[10] File T-1358-12 is an application for the judicial review of the decision of the Parole Board dated June 20, 2011 ["PBC-1"], and the decision of the CSC date-stamped May 6, 2011 ["CSC-1"]. The former was affirmed by the Office of the Information Commissioner ["OIC"] on June 4, 2012, and the latter was affirmed by the OIC on June 4, 2012. The decisions denied the request for full disclosure and production of Mr. Munro's complete Parole Board and CSC files,

and particularly what was before the Parole Board for his parole hearings held on March 30, 2011, March 16, 2010, and February 26, 2009. In PBC-1 and CSC-1, the request was declined pursuant to s. 19(1) of the *ATIA*.

[11] File T-102-18 is an application for the judicial review of the decision of the Parole Board dated June 27, 2018 [“PBC-2”] and affirmed by the OIC on September 25, 2018. The decision denied disclosure and production of Craig Munro’s complete Parole Board file regarding his parole hearings, and the audio/video recordings and transcripts of those parole hearings. Note that this decision was a redetermination pursuant to the Order of Prothonotary Aalto dated May 17, 2018. In PBC-2, the request was declined pursuant to s. 19(1) and 19(2)(c) of the *ATIA*.

[12] File T-103-18 is an application for judicial review of the decision of CSC dated July 3, 2018 [“CSC-2”], affirmed by the OIC on October 3, 2018. CSC-2 was a redetermination, pursuant to an Order of Prothonotary Aalto dated May 17, 2018, of the decision of the CSC dated May 17, 2017 declining disclosure pursuant to s. 19(1) of the *ATIA*. File T-101-18 consists of the judicial review of CSC’s May 17, 2017 decision. CSC-2 declined to disclose records pertaining to the cancellation of Mr. Munro’s unescorted temporary absences [“UTA”] and his transfer to the Matsqui Institution, and documents included from Exhibits “I” and “J” of the affidavit of Ginette Pilon, sworn on March 21, 2014 and filed in file T-1358-18. In CSC-2, the request was declined pursuant to s. 8(2)(m)(i) of the *Privacy Act*, RSC, 1985, c P-21 [*Privacy Act*] [See also para 16 re: intervener].

B. *Second Group*

[13] The second group consists of file T-465-20 [the “465 Application”] is an application pursuant to s. 41 of the *ATIA* for the judicial review of the decision of the Parole Board dated March 8, 2019 [“PBC-3”] and affirmed by the OIC, denying the release of Mr. Bernardo’s prison and parole hearing records. Mr. Bernardo was convicted of a series of offenses, most notably the horrific first-degree murders of Ms. Leslie Mahaffy and Ms. Kristen French, in the early 1990s. This case garnered considerable public and media attention due to Mr. Bernardo’s cruel and abhorrent conduct. The Applicants seek the release of all materials and information that were before and/or available to the Parole Board as well as complete copies of the audio/video recordings and transcript of the parole hearing held on October 17, 2018.

[14] The Applicants in the 1358 Applications and 465 Application made joint written and oral submissions. I refer to the Applicants in the first two applications collectively as the “Families” because they largely consist of family members of the victims of the Inmates [See also para 17 re: intervener].

[15] The records the Families’ seek (in their own words) are:

Their entire CSC files commencing from the first day they entered the Canada correctional system regarding any offence, including trial and sentencing transcripts;

Their entire PBC files commencing from the first time that they came under its jurisdiction regarding any offence including trial and sentencing transcripts;

In the case of Craig Munro, details of his 1979 Mandatory Supervision release and the conditions he was on at the time he murdered Police Constable Michael Sweet;

More specifically, after Munro's first ATIP request, all ATIP requests included the disclosure of the entire CSC/PBC files that were directly or indirectly before the PBC for each hearing or which they had access to, as well as the materials that were before and/or used by CSC and the Case Management Team ("CMT") for the purpose of presenting their position at each parole hearing;

In the case of Craig Munro, documentation regarding his institutional offences which resulted in his January 2016 transfer from the minimum security Kwikwexwelhp Institution to the medium security Matsqui Institution;

In the case of Craig Munro, documents explaining the breaches and offences leading to the cancellation of his UTAs [unescorted temporary absence] in 2012 and consequently, the cancellation of his 2012 parole hearing, including full details of his positive cocaine tests, his involvement with the sex trade workers and how he went about to hide this activity from his CMT contrary to the conditions of his UTAs;

In the case of Craig Munro, the circumstances and facts leading to his February 2016 withdrawal of his application for UTAs;

Production of the audio recording and transcript (if they exist) of all of Munro, Bernardo, and Gayle's parole hearings;

In the case of Paul Bernardo, the ATIP request included all documents relating to his application to be relieved from the full consequences of his dangerous offender designation, including all medical records/reports addressing findings supporting the dangerous offender designation and all evidence tendered at his dangerous offender hearing, i.e., Victim Impact Statements of the Scarborough rape victims, transcript of the hearing and reports filed

(T-1358 Applicant's Memorandum of Fact and Law ["AMFL"] at para 8

C. *Third Group*

[16] The third group consists of file T-1884-19 [the "CBC Application"]. T-1884-19 is an application for judicial review by the Canadian Broadcasting Corporation ["CBC"] of a decision

of the Parole Board denying CBC's request for withheld personal information about the Inmates similar to the Families requests. CBC did not request the information pursuant to any specific legislation, however, but rather on the basis of the OCP.

[17] In addition CBC was granted leave to intervene in the judicial review of the Families, and made written and oral submissions before me as regards the applicable standard of review and the legal framework for resolving the 1358 Applications. CBC took no position on the specific outcome of the applications in the proceedings of the Families.

D. *Summary of the Three Groups*

[18] The submissions of the parties overlap substantially, and some arguments are only advanced on some of the applications. When possible, I will address similar arguments together.

[19] I will refer to the Respondents from all proceedings as "Canada" and all of the convicted Respondents as "Inmates". As well as previously set above references will be made to the Families and CBC. The various requested records will be referred to as the "Withheld Information".

[20] As noted at the beginning, these reasons are in regards to all of the Applications.

III. Preliminary Matters

[21] Canada raises a set of preliminary issues in respect of the scope of the Families' submissions. Canada submits that the Families:

- improperly made submissions and filed evidence regarding matters not before the Parole Board /CSC when it made the decisions under judicial review;
- sought the review of decisions made pursuant to *CCRA* provisions that fall beyond the scope of s. 41 of the *ATIA* and that are therefore outside of the scope of this judicial review;
- erroneously introduced evidence and made arguments regarding a decision declining an *ATIP* request for information regarding Mr. Clinton Gayle that is not on judicial review before this Court; and
- improperly sought the disclosure of information in CSC's possession regarding Mr. Bernardo, given that the judicial review in PBC-3 only covers Parole Board records.

[22] During oral submissions, the Families argued that all evidence submitted was relevant to contextualize the judicial review, and that the Court may decide on the weight given to this evidence. The evidence at issue included a refusal of disclosure by the Parole Board of information from an inmate who is not a party to these proceedings (Mr. Gayle). I would note that the Parole Board's decision with respect to Mr. Gayle is not yet properly available for judicial review because the opinion of the OIC has not yet been released. The Families also reference the closed nature of Mr. Munroe's April 3, 2020 parole hearing due to COVID-19. There was no decision on an *ATIP* request before the Court in relation to this issue.

[23] This Court may only consider the evidence before it in the record, and may not accept evidence, or give weight to any evidence which was not before the decision-maker and goes to the merits of the matter, with three exceptions (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20). The exceptions are: general evidence of a background nature; evidence of a breach of procedural fairness; and evidence that demonstrates a lack of evidence before the decision-maker (*Henry v Canada (Attorney General)*, 2021 FC 31 at para 15). None of these exceptions are present in this case, and so only the information which was before the decision-maker will be considered in this judicial review.

[24] Likewise there is no basis on which the evidence or the submissions relating to Mr. Gayle may be considered as part of this judicial review. While I acknowledge that the families of the victims of Mr. Gayle [the “Baylis/Leone” parties] have agreed to be bound by the outcome of this decision, no s. 41 *ATIA* application for judicial review has been made regarding their *ATIP* request for the disclosure of information regarding Mr. Gayle. Any evidence and submissions relating to Mr. Gayle are therefore immaterial to the resolution of the judicial reviews before me. For those same reasons, I cannot bind the Baylis/Leone parties to any outcome resulting from these judicial reviews.

[25] I agree with Canada that s. 20(6) of the *ATIA* has no application to these proceedings. That provision applies only if a disclosure refusal was made under s. 20(1) of the *ATIA* because the sought-after records contained confidential commercial information supplied by a third party. That is manifestly not the case here.

[26] Finally on the point of admissible arguments and evidence, Canada argues that the submissions and evidence regarding the April 3, 2020 parole review hearing of Mr. Munro should be disregarded as they are not part of this judicial review. I agree.

[27] Canada further submits that several of the arguments on the constitutional invalidity of the *ATIP* decision-making framework raised by the Families do not reflect the position they took before the administrative decision-makers, and therefore are improperly raised on judicial review.

[28] While the Families did not dispute the constitutional validity of the presumption against disclosure in their *ATIP* request, they raise a host of constitutional questions in their Notice of Application [see para 7] for Judicial Review and their Notice of Constitutional Question. Generally speaking, a party may not raise a new issue in a judicial review that they could have raised before the decision-maker (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 23; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at para 37).

[29] However, in this case, the new issues arose because of the decision rendered. I therefore disagree with Canada that the Families cannot advance their arguments on constitutional invalidity on account of having not espoused those arguments in their *ATIP* request. The Families cannot be expected to bind themselves to their arguments about errors in the statutory delegates' decisions prior to having seen those decisions. Given that there is no dispute that the Notice of Constitutional Question was properly served and that it adequately reflects the

Families' constitutional arguments raised in their submissions, I am of the view that these questions are properly before me.

[30] As a closing observation, it is useful to restate that this decision is not a judicial review of the parole review decisions concerning the Inmates or their heinous crimes. The issues for determination by this Court are whether the Parole Board and CSC erred in law when they declined to disclose the requested personal information about the Inmates and the audio recordings of their Parole Board hearings while still allowing victims, their families and observers to attend the hearings and victim's families to have access to audio of hearings they did not attend.

IV. Issues

[31] The Families identify five points at issue related to the denial of the Withheld Information:

When an offender seeks to be released from prison on parole and reintegrated back into the community on the basis of the assertion that he/she no longer poses a risk to public safety, are they seeking a "public" remedy or a "private" remedy?

Having chosen to seek parole at a "public" hearing, are offenders like Craig Munro, Paul Bernardo and Clinton Gayle entitled to assert a "privacy" interest over documents that (a) they intend to rely upon at their hearing for the purpose of persuading their respective CSC CMT and/or the PBC, that they no longer pose a risk to public safety, and, therefore entitled to be released back into the community on parole and (b) are referred to and identified at the hearing and in the decision of PBC?

In the event that this Honourable Court determines that offenders can assert a "privacy" right over their institutional files and records, upon which they rely, including documents discussed publicly at their parole hearing and relied upon and referred to in

the decision of PBC (which are of public record), as well as assert a privacy interest over the audio recordings and transcripts of their parole hearings, did CSC/PBC (as the case may be) err in concluding under s. 8(2)(m)(i) of the *Privacy Act*, that the privacy interests of these types of offenders (that is offenders serving life sentences as distinct from offenders with fixed sentences), outweighed the public interest and the interests of their victims?

Does the *CCRA*, the *ATIA* and the *Privacy Act* collectively and/or individually (or as interpreted by PBC/CSC and affirmed by the OIC), create an unconstitutional reverse onus by impermissibly creating a presumption in favour of non-disclosure?

To the extent that the impugned legislative regime (the *CCRA*, the *ATIA* and the *Privacy Act*), prevent disclosure and production of the materials and information sought by the applicants in their respective ATIP requests, do they violate the open Court principles and free speech rights of the applicants and the general public embedded in s. 2(b) of the *Charter*?

(Families AMFL at para 56)

[32] CBC characterizes the issues as:

A. Does the constitutional openness principle apply to Parole Board hearings, or should the Recordings have been disclosed under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*]?

B) Did the Decision reflect a proportionate balancing of the *Charter* protections at play?

C) Does the *Privacy Act* bar disclosure?

[33] Addressing all relevant questions from the submissions of the Applicants, I have characterized the issues as follows:

A. Is there an s. 2(b) *Charter* right to the information requested?

B. Were the decisions of the Parole Board and CSC unreasonable?

V. Standard of Review

A. *The Families' and CBC's Submissions*

[34] The Families submit, both in their written submissions and at the hearing, that the applicable standard of review ["SOR"] is correctness, but provide no jurisprudential support for their claim. During the hearing, counsel for the Families stated that he was adopting CBC's submissions with respect to the SOR. Nevertheless, the Families asserted that the constitutional issue, the issue of statutory interpretation, and the balancing of public and private interest pursuant to *Privacy Act* s. 8(2)(m)(i) [Annex B] are reviewable on a standard of correctness. The Families' position is that only the Parole Board/CSC's discretionary decision is reviewable on a standard of reasonableness.

[35] Notwithstanding the Families' adoption of CBC's arguments on the SOR, it is useful to recall that the latter made submissions that specifically address the particularities of the 1884 Application. CBC's argument on SOR is tailored to its application, and does not transpose well to the decision on review in the Families' applications.

[36] Specifically, the difficulty arises because the Parole Board/CSC decisions in the Families' applications do not engage on the topic of the OCP. Unlike CBC application, which considered and then waived the matter, the Parole Board/CSC did not turn their attention to the matter in the Families' applications.

[37] During the hearing, CBC did not distinguish the applicable SOR as between the 1358 Applications and the 1884 Application. It likewise did not suggest that a different standard of review applies to CSC and Parole Board decisions.

[38] CBC argues that the questions at issue attract different SOR. As regards the first issue before me, CBC submits that the first question is reviewable on a standard of correctness. That is, whether the OCP and the *DM/Sierra* test, (see: paragraphs 54 & 56) apply to the disclosure of government records arising from a parole hearing pursuant to the *ATIA* is a constitutional question of the type identified in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], that attracts a correctness standard. In support of its argument, CBC relies on a recent decision of the Ontario Court of Appeal that held that a decision declining to apply the *DM/Sierra* test in restricting access to an administrative hearing was reviewable on a correctness standard (*Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025 at paras 33-37 [*Ferrier*]).

[39] On the second issue, CBC submits that the Parole Board/CSC's decision to not disclose the Withheld Information is reviewable on a reasonableness standard as formulated in *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].

B. *Canada's Submissions*

[40] Canada's submission on the SOR do not exactly track the issues as I have formulated them. Nevertheless, it can be said, regarding the first issue, that Canada's position seems to be that the "issues decided by the Board do not fall into any of the limited exceptions in *Vavilov*".

They also submit that a determination on whether the OCP applies in a particular administrative hearing is a matter of interpretation by an administrative body of its own statute and mandate, which calls for a reasonableness review under *Vavilov*.

[41] On the second issue, Canada submits that judicial reviews pursuant to s. 41 of the *ATIA* proceed in two stages: *Husky Oil Operations Limited v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2018 FCA 10 at paragraphs 15 & 17 [*Husky*]. First, correctness governs the decision on whether the Withheld Information falls within the statutory exemption to disclosure at s. 19(1) of the *ATIA*. Then, reasonableness governs the discretionary decision to refuse to release exempted information under s. 19(2). To the extent that *Charter* protections are engaged, the reasonableness review articulated out in *Doré* is applicable on the second step of the *Husky* analysis. Notwithstanding that *Husky* was decided prior to *Vavilov*, Canada submitted that it remains good law regarding the applicable SOR for judicial reviews pursuant to s. 41 of the *ATIA*.

C. Analysis

[42] The standard of review applicable to the first question is correctness. I agree with the Ontario Court of Appeal in *Ferrier* at paragraph 35 that an assessment of whether the OCP applies to Parole Board hearings is reviewable on a correctness SOR. The applicability of *Charter* rights, here the OCP under s. 2(b) of the *Charter* [Annex C], to Parole Board hearings is specifically the type of question that requires that a standard of correctness be applied. This is not a situation like the one envisioned under the *Doré* analysis where, a *Charter* right is infringed upon by an administrative decision. Rather, the question here is a threshold question regarding

the applicability of a *Charter* right — whether Parole Board hearings are subject to the OCP and therefore are decisions on disclosure subject to the test recently reformulated in *Sherman Estate v Donovan*, 2021 SCC 25 [*Sherman Estate*]—which requires consistency and a “final and determinate answer” (*Vavilov*, at para 53). The correctness standard is therefore applicable.

[43] Regarding the second question, I agree with Canada that the two-part analysis from *Husky*, (see above at para 41), sets out the applicable SOR for applications for disclosure under s. 41 of the *ATIA*. I agree with Canada that *Vavilov* has not altered the application of *Husky*. A correctness SOR applies to determining whether the Withheld Information falls within the statutory exemption at s. 19(1) of the *ATIA*. Conversely, a reasonableness SOR applies to the discretionary decision not to disclose information under s. 19(2) of the *ATIA* subject to a *Doré* framework.

VI. The Law

[44] The *CCRA* provides for the disclosure of information to victims. S. 140 through 140.2 of the *CCRA* [Annex D] set out the law for review hearings, including the information to which the families of victims have access and the circumstances under which the families and other observers can apply to attend review hearings:

140 (4) Subject to subsections (5) and (5.1), the Board or a person designated, by name or by position, by the Chairperson of the Board shall, subject to such conditions as the Board or person considers appropriate and after taking into account	140 (4) Sous réserve des paragraphes (5) et (5.1), la Commission, ou la personne que le président désigne nommément ou par indication de son poste, doit, aux conditions qu'elle estime indiquées et après avoir pris en compte les observations du

the offender's views, permit a person who applies in writing therefor to attend as an observer at a hearing relating to an offender, unless the Board or person is satisfied that

(a) the hearing is likely to be disrupted or the ability of the Board to consider the matter before it is likely to be adversely affected by the presence of that person or of that person in conjunction with other persons who have applied to attend the hearing;

(b) the person's presence is likely to adversely affect those who have provided information to the Board, including victims, members of a victim's family or members of the offender's family;

(c) the person's presence is likely to adversely affect an appropriate balance between that person's or the public's interest in knowing and the public's interest in the effective reintegration of the offender into society; or

(d) the security and good order of the institution in which the hearing is to be held is likely to be adversely affected by the person's presence.

(5.1) In determining whether to permit a victim or a member of the victim's family to attend as an observer at a hearing, the Board or its designate shall make every effort to fully understand the need of the victim and of the members of his or her family

délinquant, autoriser la personne qui en fait la demande écrite à être présente, à titre d'observateur, lors d'une audience, sauf si elle est convaincue que, selon le cas :

a) la présence de cette personne, seule ou en compagnie d'autres personnes qui ont demandé d'assister à la même audience, nuira au déroulement de l'audience ou l'empêchera de bien évaluer la question dont elle est saisie;

b) sa présence incommodera ceux qui ont fourni des renseignements à la Commission, notamment la victime, la famille de la victime ou celle du délinquant;

c) sa présence compromettra vraisemblablement l'équilibre souhaitable entre l'intérêt de l'observateur ou du public à la communication de l'information et l'intérêt du public à la réinsertion sociale du délinquant;

d) sa présence nuira à la sécurité ou au maintien de l'ordre de l'établissement où l'audience doit se tenir.

(5.1) Lorsqu'elle détermine si une victime ou un membre de sa famille peut être présent, à titre d'observateur, lors d'une audience, la Commission ou la personne qu'elle désigne s'efforce de comprendre le besoin de la victime ou des membres de sa famille d'être

to attend the hearing and witness its proceedings. The Board or its designate shall permit a victim or a member of his or her family to attend as an observer unless satisfied that the presence of the victim or family member would result in a situation described in paragraph (4)(a), (b), (c) or (d).

(5.2) If the Board or its designate decides under subsection (5.1) to not permit a victim or a member of his or her family to attend a hearing, the Board shall provide for the victim or family member to observe the hearing by any means that the Board considers appropriate. [emphasis added]

présents lors de l'audience et d'en observer le déroulement. La Commission ou la personne qu'elle désigne autorise cette présence sauf si elle est convaincue que celle-ci entraînerait une situation visée aux alinéas (4)a), b), c) ou d).

(5.1), de ne pas autoriser la présence d'une victime ou d'un membre de sa famille lors de l'audience, elle prend les dispositions nécessaires pour que la victime ou le membre de sa famille puisse observer le déroulement de l'audience par tout moyen que la Commission juge approprié. [soulignement ajouté]

[45] In addition to permitting attendance by victims, victims' families, and observers at a Parole Board hearing, victims and their families may participate by presenting statements:

140 (10) If they are attending a hearing as an observer,

(a) a victim may present a statement describing the harm, property damage or loss suffered by them as the result of the commission of the offence and its continuing impact on them — including any safety concerns — and commenting on the possible release of the offender; and

(b) a person referred to in subsection 142(3) may present

140 (10) Lors de l'audience à laquelle elles assistent à titre d'observateur :

a) d'une part, la victime peut présenter une déclaration à l'égard des dommages ou des pertes qu'elle a subis par suite de la perpétration de l'infraction et des répercussions que celle-ci a encore sur elle, notamment les préoccupations qu'elle a quant à sa sécurité, et à l'égard de l'éventuelle libération du délinquant;

b) d'autre part, la personne visée au paragraphe 142(3)

a statement describing the harm, property damage or loss suffered by them as the result of any act of the offender in respect of which a complaint was made to the police or Crown attorney or an information laid under the Criminal Code, and its continuing impact on them — including any safety concerns — and commenting on the possible release of the offender.

(10.1) The Board shall, in deciding whether an offender should be released and what conditions might be applicable to the release, take into consideration any statement that has been presented in accordance with paragraph (10)(a) or (b).

(11) If a victim or a person referred to in subsection 142(3) is not attending a hearing, their statement may be presented at the hearing in the form of a written statement, which may be accompanied by an audio or video recording, or in any other form prescribed by the regulations.

(12) A victim or a person referred to in subsection 142(3) shall, before the hearing, deliver to the Board a transcript of the statement that they plan to present under subsection (10) or (11).

peut présenter une déclaration à l'égard des dommages ou des pertes qu'elle a subis par suite de la conduite du délinquant — laquelle a donné lieu au dépôt d'une plainte auprès de la police ou du procureur de la Couronne ou a fait l'objet d'une dénonciation conformément au Code criminel — et des répercussions que cette conduite a encore sur elle, notamment les préoccupations qu'elle a quant à sa sécurité, et à l'égard de l'éventuelle libération du délinquant.

(10.1) Lorsqu'elle détermine si le délinquant devrait bénéficier d'une libération et, le cas échéant, fixe les conditions de celle-ci, la Commission prend en considération la déclaration présentée en conformité avec les alinéas 10a) ou b).

(11) La déclaration de la victime ou de la personne visée au paragraphe 142(3), même si celle-ci n'assiste pas à l'audience, peut y être présentée sous la forme d'une déclaration écrite pouvant être accompagnée d'un enregistrement audio ou vidéo, ou sous toute autre forme prévue par règlement.

(12) La victime et la personne visée au paragraphe 142(3) doivent, préalablement à l'audience, envoyer à la Commission la transcription de la déclaration qu'elles entendent présenter au titre des paragraphes (10) ou (11).

[46] S. 140(14) indicates that because the information and documents were discussed at the hearing that does not mean it was publicly available within the meaning of the *ATIA* and *Privacy Act*:

140 (14) If an observer has been present during a hearing or a victim or a person has exercised their right under subsection (13), any information or documents discussed or referred to during the hearing shall not for that reason alone be considered to be publicly available for purposes of the Access to Information Act or the Privacy Act.	(14) Si un observateur est présent lors d'une audience ou si la victime ou la personne visée au paragraphe 142(3) a exercé ses droits au titre du paragraphe (13), les renseignements et documents qui y sont étudiés ou communiqués ne sont pas réputés être des documents accessibles au public aux fins de la Loi sur la protection des renseignements personnels et de la Loi sur l'accès à l'information.

[47] A victim or family member can request to listen to the audio recording, subject to conditions imposed by the Board and privacy interests:

140 (13) Subject to any conditions specified by the Board, a victim, or a person referred to in subsection 142(3), is entitled, on request, after a hearing in respect of a review referred to in paragraph (1)(a) or (b), to listen to an audio recording of the hearing, other than portions of the hearing that the Board considers (a) could reasonably be expected to jeopardize the safety of any person or reveal a source of information obtained in confidence; or	(13) La victime ou la personne visée au paragraphe 142(3) a le droit, sur demande et sous réserve des conditions imposées par la Commission, une fois l'audience relative à l'examen visé aux alinéas (1)a) ou b) terminée, d'écouter l'enregistrement sonore de celle-ci, à l'exception de toute partie de l'enregistrement qui, de l'avis de la Commission : a) risquerait vraisemblablement de mettre en danger la sécurité d'une personne ou de permettre de remonter à une source de renseignements obtenus de façon confidentielle;

(b) should not be heard by the victim or a person referred to in subsection 142(3) because the privacy interests of any person clearly outweighs the interest of the victim or person referred to in that subsection.	b) ne devrait pas être entendue par la victime ou la personne visée au paragraphe 142(3) parce que l'intérêt de la victime ou de la personne ne justifierait nettement pas une éventuelle violation de la vie privée d'une personne.

[48] Pursuant to s. 144 of the *CCRA*, a person who demonstrates an interest in a case is entitled to receive a copy of the Parole Board decision.

[49] There is a provision that if a transcript of the hearing is made, then on request a copy can be provided to the victim or their family providing for *ATIA* and *Privacy Act* exceptions (*CCRA* s. 140.2(1)). However, there is no requirement to make a transcript. Outside of these situations, there is no provision for observers or others to obtain a transcript.

[50] S.19 and 20 of the *ATIA* provide that the head of a government institution shall refuse to disclose any record which contains personal information, with some exceptions, including when it is in accordance with s. 8 of the *Privacy Act*, also reproduced below. S. 8(2)(m)(i) allows disclosure when “the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure...”

VII. Analysis

A. *Is there an s. 2(b) Charter right to the information requested?*

[51] For the reasons below, I find that the Applicants did not have an s. 2(b) *Charter* right to the Withheld Information because hearings of the Parole Board are not judicial or quasi-judicial in character. Stemming from that determination, all of the Applicants' constitutional challenges fail.

(1) Submissions of the Families

[52] The Families apply for judicial review of the CSC/Parole Board decisions denying the disclosure of the parts of their *ATIP* requests that were not disclosed pursuant to s. 41 of the *ATIA*. They seek the disclosure of the Withheld Information and a declaration that the legislative regime governing *ATIP* requests as employed by the CSC/Parole Board is unconstitutional. The Families' position is that the Parole Board erred in failing to apply the *DM/Sierra* test in its decision not to disclose the Withheld Information.

[53] The submissions regarding the *CCRA*, the *ATIA*, and the *Privacy Act* consist of summaries of the provisions or critiques of the statutory framework. The Families emphasize these statutes' statements of purpose and principles, notably as they relate to serving the public interest, transparency, accountability and openness.

[54] The arguments are that any restriction on disclosure and the OCP must be justified on the basis of the test set out in *Dagenais v CBC*, [1994] 3 SCR 835, *R v Mentuck*, 2001 SCC 76 and *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.

[55] Their position is that the legislative framework governing *ATIP* applications creates a presumption against the disclosure of personal information which violates the OCP that exists under s. 2(b) of the *Charter* (*Toronto Star v AG Ontario*, 2018 ONSC 2586 at para 65 [*Toronto Star 2018*]). They submit administrative tribunals are subject to the OCP, and cite *Southam Inc v Canada (Minister of Employment and Immigration)*, [1987] 3 FC 329 at para 9, 13 FTR 138 [*Southam MCI*].

[56] To better understand the Applicants' argument, a brief description of the test is that the test provides that a presumption of openness is overridden only where a restriction is necessary to prevent a serious risk to the public interest and where the salutary effects outweigh the deleterious effects of the restriction [the “*DM/Sierra*” test]. It is worth noting here that the Supreme Court of Canada [“*SCC*”] has recently updated the test for rebutting the presumption of the OCP in *Sherman Estate*. The parties provided further written submissions after the release of *Sherman Estate*. I will proceed with my analysis under the new state of the law.

[57] While they do not expressly state it, the Families implicitly argue that the *DM/Sierra* test is not satisfied under the circumstances, and that the *ATIP* decision-making framework therefore infringes on s. 2(b) of the *Charter*. Then, the assertion is that the infringement on s. 2(b) is not justified under s. 1 of the *Charter*.

[58] The Families cite a series of cases (see below) that contain statements of principle relating to the importance of public accessibility and openness to maintaining the public's confidence in the administration of justice. These principles, they assert, weigh in favour of granting the disclosure of the Withheld Information (*Toronto Star* 2018; *CTV Television v Ontario Superior Court of Justice*, [2002] OJ No 1141, 59 OR (3d) 18; *Attorney General of Nova Scotia v MacIntyre*, [1982] 1 SCR 175; *Canadian Broadcasting Corporation v New Brunswick (Attorney General)*, [1996] 3 SCR 480; *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326; and *Dodd v Cossar*, [1998] OJ No 335, 77 ACWS (3d) 287; *Canadian Broadcasting Corporation v Lessard*, [1991] SCJ No 87, 67 CCC (3d) 517).

[59] Finally, the Families in their written submissions fault the Parole Board for its reliance on article 1.3.3 of the Parole Board's *Decision-Making Policy Manual for Board Members* (2018 edition) [Annex E], which provides that only victims and families who do not attend a hearing are entitled to listen to audio recording under s. 140(13) of the *CCRA*. They argue that there is further fault because this right is limited to the recording of the most recent parole hearing. The Families suggest this reliance on the manual was a reviewable error given that s. 140(13) of the *CCRA* contains no such restrictions.

[60] In post-hearing written submissions on *Sherman Estate*, the Families submitted that the decision of the SCC bolsters their argument. They say that the decision stands for a strong presumption of openness, and that the exceptional circumstances required for rebutting the principle of openness has not been met. They characterize the SCC's decision as requiring the affront to dignity being required to rise to a level of public importance, which they assert is not

the case here. They also deny the facts of this matter even go to the issue of human dignity, and even if they do, there is no affront to the human dignity of the Inmates.

(2) Submissions of CBC

[61] CBC takes no position on the disposition of the applications in T-1358-12 or T-465-20. Note that in addition to its submissions in T-1358-12 as intervener, it adopts and relies on its submissions in T-1884-19, summarized below, whereby the OCP applies to parole hearings and therefore requires that presumptive access be granted unless a restriction is justified under the *DM/Sierra* test.

[62] CBC's core submission is that requests for records from Parole Board hearings should be presumed to meet the public interest threshold under s. 8(2)(m)(i) of the *Privacy Act* unless restrictions are warranted under the *DM/Sierra* test. CBC makes submissions on three issues grounded in the OCP and s. 2(b) of the *Charter*, and suggests a new test they believe the Court should adopt.

[63] CBC argues that the framework governing *ATIP* disclosures under the *ATIA* and the *Privacy Act* must operate consistently with s. 2(b) of the *Charter*. Since competing interests of public access to adjudicative records and privacy are at issue, CBC invokes the OCP and the *DM/Sierra* Test.

[64] CBC cites *Lukács v Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140 at para 37 [*Lukács*], as an authority for the proposition that quasi-judicial administrative

decision-makers are subject to the *DM/Sierra* test. As such, CBC suggests that incorporating the *DM/Sierra* test into the assessment of *ATIP* disclosures insulates the framework from *Charter* scrutiny.

[65] CBC contends that the OCP and s. 2(b) of the *Charter* apply to parole hearings and that the *DM/Sierra* test for withholding the hearing recordings is not satisfied. CBC relies on jurisprudence indicating that administrative tribunals are subject to the *Charter* and that the OPC applies to tribunals engaged in quasi-judicial acts.

[66] CBC submits that Parole Board hearings satisfy the four-part *Coopers & Lybrand* framework (see *Minister of National Revenue v Coopers and Lybrand*, [1979] 1 SCR 495 [*Coopers & Lybrand*]) for determining whether a tribunal is acting in a quasi-judicial capacity: a hearing is contemplated; individual rights are directly affected; the hearing can be adversarial; and the board applies substantive rules to individual cases. CBC asserts that the Parole Board's reliance on *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 [*Mooring*] is misplaced in light of the SCC's subsequent decision in *R v Bird*, 2019 SCC 7 [*Bird*]. They say that *Bird* held that the Parole Board was a court of competent jurisdiction for the purpose of granting *Charter* remedies.

[67] CBC's position that the Parole Board's current practice with respect to *ATIP* disclosures erroneously creates "an unconstitutional presumption of non-disclosure for all personal information." This approach they say is inconsistent with s. 2(b) of the *Charter* and the OCP because it places on the *ATIP* requestor the onus of satisfying that an exception to the default

rule of non-disclosure is met. Rather, quasi-judicial proceedings and connected records are required to be open and accessible subject to the restrictions of the *DM/Sierra* Test. CBC relies on *Toronto Star 2018*, *Langenfeld v Toronto Police Services Board*, 2019 ONCA 716 [*Langenfeld*] and *Ferrier* for its conclusion that the presumption against disclosure infringes s. 2(b) regardless of whether the openness principle is found to be applicable.

[68] CBC says that the Parole Board/CSC erroneously applies a “reverse onus” that improperly subordinates interests under s. 2(b) of the *Charter* to an overly expansive interpretation of “invasion of privacy”. In conducting an *ATIP* disclosure analysis, the first branch of the *DM/Sierra* test should involve only necessity because proportionality—i.e. balancing—should occur at the second step. This sequencing CBC says helps ensure that interests under s. 2(b) of the *Charter* are not improperly subordinated to privacy interests. Conversely, they say that the Parole Board/CSC improperly started with a presumption of non-disclosure and require the party seeking disclosure to demonstrate that one of the exceptions is met. Given that the Parole Board has acknowledged that the public interest outweighs an inmate’s privacy interests only under very restricted circumstances, such an approach, they say, is inconsistent with *DM/Sierra* test, and, as a result also being inconsistent with s. 2(b) of the *Charter*.

[69] In the alternative, if the Court disagrees that the *ATIP* framework should begin with a presumption of disclosure, CBC asserts that the statutory framework violates s. 2(b) and cannot be saved by s. 1 of the *Charter*. They provide no further argument in support of this assertion.

[70] CBC's position is that systemic delays in obtaining adjudicative records from Parole Board hearings create an ongoing violation of s. 2(b) rights. Freedom of the press, as protected under s. 2(b) of the *Charter*, requires that it have timely access to the subject of its reporting. Delays in public access, it notes, has a deleterious effect on the public's right to be informed.

[71] Finally, in their submissions on file T-1884-19, CBC suggests that the Court adopt a "modern functional public interest test" where any tribunal deciding matters involving important public interest must be open to the public. They argue that this would be in line with the modern approach to tribunal openness, and not a significant departure from jurisprudence and the *Coopers & Lybrand* test.

[72] With this approach, any administrative tribunal deciding matters of public interest is subject to the openness principle, subject only to the *DM/Sierra* test. CBC's position is that the public interest in Parole Board hearings in general is manifest in the *CCRA* itself, and the public interest in these specific hearings is clear on account of the Inmates' violent offences and the public's right to observe the functioning of the criminal justice system.

[73] Given that the OCP and s. 2(b) of the *Charter* apply, CBC submits the Parole Board erred in its analysis when they declined to release the hearing recordings to them. The Parole Board erred CBC says in not applying the *DM/Sierra* test in its decision. The Parole Board's application of the test for the disclosure of documents in government hands from *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 [*Criminal Lawyers*] to the hearing recordings was erroneous, given that the recordings are adjudicative records and not

government information, and that CBC's request was not made pursuant to the *ATIA*. Rather, CBC submits that on a proper application of the *DM/Sierra* test, there is no serious risk to a public interest, and the salutary effects of withholding access do not outweigh the rights and interests of the public. The Parole Board's refusal to release the hearing recordings was not justified.

[74] In post-hearing submissions, CBC argues that *Sherman Estate* does not assist the Respondent. They say that there is no serious risk of harm to dignity such that society as a whole has a stake in protecting, and that there must be a serious risk well grounded in the record or the circumstances of the particular case.

(3) Canada's Submissions

[75] As regards the Families' applications, Canada stated that the CSC and Parole Board "correctly determined that the withheld records contain personal information, and reasonably exercised their discretion not to disclose them after balancing the two competing values of governmental disclosure and individual privacy as required by the *ATIA*."

[76] They argue that the *Privacy Act* and the *ATIA* act together to reconcile two competing values: governmental disclosure and individual privacy. They cite *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 [*Dagg*] for the principle that a court reviewing under s. 41 of the *ATIA* must have regard to the purpose of both statutes, balancing privacy and disclosure.

[77] Canada strongly asserts that decisions made by the CSC under the *CCRA* and parole reviews are neither judicial nor quasi-judicial, but rather inquisitorial. For the CSC decisions, they cite *Boudreau v Canada*, 2000 CanLII 16709 at para 7 (FCTD); *Canada (Correctional Services) v Plante*, [1995] FCJ No 1509 at para 6 (FCTD); *Hendrickson v Kent Institution*, [1990] FCJ No 19, 1990 CarswellNat 771 at para 10 (FCTD); *Blanchard v Millhaven Institution*, [1983] 1 FC 309, 1982 CarswellNat 78 at para 2 (FCTD); *Martineau v Matsqui Institution*, [1980] 1 SCR 602 at 631-632. For the Parole Board hearings, they cite *Mooring*, at paragraph 25 and *Smith v Canada*, 2019 FC 1658 at paragraph 64.

[78] In support of the argument that Parole Board reviews are not judicial or quasi-judicial proceedings, Canada provided a number of considerations. They noted that parole reviews do not always involve hearings and that the parole review is conducted in a non-adversarial, inquisitorial capacity without contending parties irrespective of whether there is a hearing or not. Other factors that point to the fact that the Parole Board is not judicial or quasi-judicial board is that there is no evidence received under oath, and the tribunal is not bound to apply rules of evidence. The Parole Board, they argue, acts on information, and must consider all relevant available information, including that which is received from the CSC and victims which is evidence they are not judicial or quasi-judicial. As well, there is no right of cross-examination, and while the offender may be assisted by someone, that person's role is not equivalent to that of a lawyer. Nor are the Parole Board members required to have legal training, and they may not issue subpoenas which are matters that are judicial in nature. While the reasons for decisions of the Parole Board are available to the public, the audio recordings of the hearings are not part of the record.

[79] Canada submits that a person must apply in writing to attend a hearing for a parole review as an observer. The Parole Board may refuse attendance if they are satisfied that the person's presence is likely to adversely affect: "(i) the security and good order of the institution where the hearing is to be held; (ii) the Parole Board's ability to consider the matter; (iii) those who have provided information to the Parole Board including victims; or (iv) the balance between the public's interest in knowing and the public's interest in the effective reintegration of the offender into society". They cite s. 140(4) of the *CCRA*.

[80] Canada also points out that s. 140(13) of the *CCRA* was amended effective June 21, 2019. The amendment allows victims to listen to audio recordings of proceedings irrespective of whether they attended the hearing. The Applicants' submissions do not reflect this amendment which Canada indicates is a proper balancing and also shows that parliament is open to amendments when appropriate.

[81] Regarding CBC Application, Canada argues that the Parole Board reasonably exercised its discretion in refusing to disclose the hearing recordings after considering all relevant, including constitutional, factors. Canada notes that there was no formal request for information under the *ATIA*, and so that the only applicable statutory provisions come from the *CCRA* and the *Privacy Act*.

[82] Regarding *Sherman Estate*, Canada asserts that the case is not applicable because the instant matters are not judicial or quasi-judicial.

(4) Analysis

[83] To summarize, the Applicants base their position on the characterization of the Parole Board hearing as being a judicial or quasi-judicial proceeding. From that position, their argument is that since the public has a considerable and legitimate interest in the hearings, the additional material they seek should be disclosed.

[84] The first step in deciding this issue is determining whether Parole Board hearings are judicial or quasi-judicial in nature. I find that they are not.

[85] The SCC in *Mooring* addressed this issue and held that a Parole Board hearing is inquisitorial rather than judicial or quasi-judicial. Admittedly in a somewhat different context, Justice Sopinka addressed the character of parole hearings in *Mooring* at paragraph 25, writing “[t]he Parole Board acts in neither a judicial nor a quasi-judicial manner.” He noted several factors that distinguish parole hearings from hearings before a court, including: the limited role of counsel; the inquisitorial nature of the hearing; and the inapplicability of rules of evidence or the presumption of innocence (*Mooring*, at paras 25-26).

[86] This Court has subsequently followed *Mooring* for the proposition that parole hearings are not judicial or quasi-judicial in nature in *Gallone v Canada (Attorney General)*, 2015 FC 608 at paragraph 16; *Elliott v Canada (Attorney General)*, 2018 FC 673 at paragraph 20; *Barrett v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1030 at paragraph 43; *Bilodeau-*

Massé v Canada (Attorney General), 2017 FC 604 at paragraph 173. See also *MacInnis v Canada (Attorney General)*, [1997] 1 FC 115 at page 9 (FCA).

[87] This Court has consistently followed *Mooring* and I see no reason to depart from those precedents on these facts. The *Coopers & Lybrand* test for determining whether a decision is judicial or quasi-judicial in nature provides no assistance to the Applicants given the established jurisprudential findings regarding the Parole Board.

[88] I agree with Canada that the SCC’s decision in *Bird* neither overturns nor displaces *Mooring*. The decision in *Bird* merely distinguishes *Mooring* given that the Court in the latter took no position on whether a Parole Board could award *Charter* remedies other than remedies under s. 24(2) of the *Charter* (*Bird*, at para 54). That said, the Court in *Bird* did acknowledge that there was an open question as to whether *Mooring* remains good law, in light of a subsequent SCC decision in *R v Conway*, 2010 SCC 22 (*Bird*, at para 54). Nevertheless, in light of the subsequent treatment of *Mooring* by this Court, it remains a valid precedent for the proposition that federal Parole Boards are neither judicial nor quasi-judicial bodies.

[89] CBC’s position is that I should instead rely on the decision of Justice Morgan in *Toronto Star 2018*, in which he found that Ontario’s application of parts of the *Freedom of Information and Protection of Privacy Act* [“FIPPA”]—a regime similar to the *ATIA* and *Privacy Act*—violated the OCP under s. 2(b) of the *Charter*. The Court held that the statutory imposition of an onus on the requesting party in order to obtain the disclosure of an “Adjudicative Record” was unconstitutional (*Toronto Star 2018*, at paras 57-65).

[90] That is not the case before me with the Parole Board and the binding decision in *Mooring*. I am not bound by *Toronto Star 2018* and, in any event, it is distinguishable since it addressed the application of the *FIPPA* to tribunals that “preside over adversarial processes... and act judicially or quasi-judicially” (*Toronto Star 2018*, at para 2). For the reasons discussed above, I am of the opinion that the Parole Board cannot be so characterized. Indeed, the Court did not list the Ontario Parole Board as one of the administrative tribunals to which the OCP applies (*Toronto Star 2018*, at endnote 2).

[91] I agree with Canada that the jurisprudence advanced by both CBC and the Families applying s. 2(b) of the *Charter* to courts exercising judicial functions is of no assistance in this case. Canada puts it succinctly: “Courts exercising judicial functions and tribunals exercising quasi-judicial functions involving adversarial processes operate in an entirely different legal and institutional context, compared to government organizations exercising administrative functions.”

[92] Given that the jurisprudence does not characterize the Parole Board as either a judicial or a quasi-judicial body, and that no jurisprudence has demonstrated that the OCP or s. 2(b) require the disclosure of the Withheld Information, I am of the view that the Applicants’ constitutional challenge to the disclosure framework does not succeed. CBC and the Families have failed to demonstrate that the statutory disclosure framework infringes their *Charter* rights.

[93] Further the “Modern Functional Public Interest Test” proposed by CBC is also not supported in the authorities. The two decisions cited by CBC, *Southam MCI* and *Canadian*

Broadcasting Corp v Summerside (City) (1999), 170 DLR (4th) 731 (PEI SC (TD)), both involved proceedings that were judicial or quasi-judicial in nature, and are therefore unhelpful in the present circumstances. CBC seems merely to be trying to attempt to alter the legislative framework to better suit its interests in broad-based disclosure by administrative tribunals. It provides no judicial support for engaging in such a far-reaching change.

[94] This Court will not engage in legislative reform in this judicial review and these are arguments for Parliament. For example s. 140(13) of the *CCRA* was amended effective June 21, 2019. That amendment allows victims to listen to audio recordings of proceedings irrespective of whether or not they attended the hearing. Over the course of time other amendments have been made and it is possible parliament will see fit to make future amendments.

[95] As well, the SCC in *Criminal Lawyers* establishes the test for circumstances in which s. 2(b) of the *Charter* entitles a party to access documents in the government's possession. Justices Abella and McLachlin, writing for the Court, note that "s. 2(b) does not guarantee access to all documents... access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the function of government" (*Criminal Lawyers* at para 30). The Court articulated a two-step test, whereby s. 2(b) entitles access: "only where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned" (*Criminal Lawyers* at para 5).

[96] While the Families have not made detailed submission on this point, I am of the view that the *Criminal Lawyers* test is not satisfied. On the first condition, it is not apparent that access to

the Withheld Information is “a necessary precondition of meaningful expression”. The meaning of that phrase was further discussed in *Criminal Lawyers*, with the Court writing that a right of access exists where, in its absence, “meaningful discussion and criticism on matters of public interest would be substantially impeded” (*Criminal Lawyers* at para 37). That exacting standard is not met here. After all, Parole Board hearings may be attended by the public and the media. Although the matters at hand are certainly of public interest, there is no reason to believe that meaningful discussion is substantially impeded by the decision to withhold the sought-after records yet allow persons to attend the hearings themselves.

[97] There is consequently no constitutional right of access to records, and s. 2(b) of the *Charter* has not been violated. Due to this finding, I answer the constitutional question that the sections noted are not in violation of the *Charter*.

[98] If I am wrong about the non-judicial nature of the proceedings, then I must proceed to analyze whether the presumption of an open court is rebutted in this case. As explained below, I believe the presumption has been rebutted.

[99] A unanimous SCC in *Sherman Estate*, in a decision penned by Justice Kasirer, restated the test to rebut the presumption of the OCP. The decision re-characterizes the *DM/Sierra* test into a three step process, requiring that those asking a court to limit the OCP must establish that:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

(*Sherman Estate* at para 38)

[100] Justice Kasirer goes on to say that privacy does have some social importance beyond the person most immediately concerned, and cannot be simply excluded as an interest that could limit court openness (*Sherman Estate* at para 46). He then connects the types of privacy rights that could justify limits to the OCP as ones related to the protection of dignity (*Sherman Estate* at para 46), and says that there will be times when interests in protecting personal privacy will have a public interest (*Sherman Estate* at para 52).

[101] He notes that “in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases” (*Sherman Estate* at para 63). He clarifies that “[v]iolations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one’s ability to present aspects of oneself to others in a selective manner...” (*Sherman Estate* at para 71).

[102] Specifically, he notes that:

[72] Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences,

including psychological distress ... Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

[73] I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

(*Sherman Estate* at paras 72-3)

[103] He further expands these principles:

...The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is “personal” to the affected person.

(*Sherman Estate*, at para 75)

[104] The SCC leaves the list of possible examples of what will qualify open, but does note that stigmatized medical conditions and sexual orientation (among other listed examples) would potentially qualify. He says that “[t]he question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences”

(*Sherman Estate* at para 77).

[105] Finally, Justice Kasirer notes that for the risk to justify a limit, an applicant must show that “the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity” (*Sherman Estate* at para 84).

[106] Although these Inmates’ crimes are repugnant beyond reproach or human decency, this legislation equally applies to all inmates. I have to see the intensely intimate details of the requests by the Applicants as potentially striking at individual dignity, and thereby rebutting the presumption of the OCP. Not only are copies of medical records and psychological assessments asked for, but every detail of their lives since their incarceration. Parliament must have considered this given they specifically address that, though attendees can hear what is said regarding the reports for instance they may not receive copies it and it is not considered as being public (see paragraph 46).

[107] I do not read *Sherman Estate* as the Families do. They seem to argue that the affront to dignity must specifically be something that society as a whole has a stake in protecting. I disagree. When reading the whole decision, and specifically the paragraph cited by the parties for this, it seems to me that the Court has recognized a concept of “dignity” (as opposed to simple privacy) which must be protected, and that society as a whole has a stake in protecting it:

Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person’s dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club*. **Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large.** A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects

of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. **The question is not whether the information is “personal” to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.**

(*Sherman Estate* at para 33, emphasis added)

In my view, the highly sensitive nature of the information requested does go to the dignity of the Inmates. This satisfies the first stage of the test.

[108] As for the other two stages of the test, I am of the view that they are satisfied in this case. For the second stage, when the records are released, there is no control over if or how widely they will be distributed. For the final stage of the test, there is no reason to believe that the release of this information will have any bearing on the parole status of the Inmates given that the tribunal which actually makes the decision will have unfettered access to the information.

[109] I understand the Families need to put forth the emotional argument that the Inmates do not deserve any right to privacy given their crimes, but on this judicial review that may not be considered. The Parole Board is charged with hearing the impact on the victims and making decisions concerning their incarceration. The Families submits that if they attend the hearing then they can hear the details, so it is illogical that they cannot have the underlying documents and the recordings. *CCRA* s. 140(14) indicates that because the information and documents were discussed at the hearing that does not mean it was publicly available within the meaning of the *ATIA* and *Privacy Act*. My answer to the Applicants is that parliament has chosen to draw a line, and it is not this Court's job to alter it.

B. *Were the decisions of the Parole Board and CSC unreasonable?*

[110] The Families and CBC advance a series of arguments on the Parole Board/CSC's decisions with respect to their *ATIP* requests. These arguments, and my analysis, are grouped thematically below.

(1) Insufficient reasons

[111] The Families argue that the Parole Board and CSC provided insufficient reasons for rejecting the *ATIP* requests and instead relied on “boiler-plate” language in their reasons and that the Parole Board and CSC decisions “are completely devoid of any reasons or analysis.” The submissions are that the outcome of the *ATIP* requests was pre-determined and that the Parole Board failed to adequately assess the particular merits of each request. They also state that the Parole Board/CSC provided no evidence that granting the *ATIP* requests would “subvert the ends of justice” or result in a “serious danger of an injustice” and then provided insufficient reasons for which the public interest in disclosure was not satisfied. The Families cite no jurisprudence for their various arguments relating to the insufficiency of reasons.

[112] As regards the sufficiency of reasons, the SCC instructs that “if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met” (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). I find that the reasons satisfy this requirement.

[113] In judicial reviews of a decision to withhold information under the *ATIA*, the reviewing court may consult “all of the evidence in the record, including the entire history of the OIC’s investigation and the correspondence provided by the [decision maker] during the investigation” (*Canada (Information Commissioner) v Toronto Port Authority*, 2016 FC 683 at para 206). The FCA has likewise noted that correspondence and memoranda relating to the OIC investigation may be considered in assessing whether there is a sufficiently clear account of why officials opposed disclosure (*3430901 Canada Inc v Canada (Minister of Industry)*, 2001 FCA 254 at para 114; also see *Vavilov* at para 96). Contrary to what the Families argue, the justifications for the decision under review are not limited to what is contained in the decision-maker’s written response to the *ATIP* requestor.

[114] On that basis, and on a review of the six Parole Board/CSC decisions, the correspondence between the Parole Board /CSC and the OIC, and the OIC investigative reports, I am of the view that the record in each instance discloses sufficient reasons and evidence to understand the decisions and to assess whether they were reasonable. The Families are correct in stating that the letters communicating the outcome of the decisions in PBC-1 and CSC-1 are devoid of analysis. However, those letters are supported in the record by letters from Parole Board and CSC, respectively, which outline the rationale for those decisions. As for the remaining decisions, PBC-2, CSC-2, PBC-3, and the letter from the Parole Board to CBC, they all contain analysis justifying the decision to withhold information. These materials identify the basis on which the decision-makers weighed the Inmates’ privacy interests against the public interest in disclosure, identify the variety of factors under consideration by the decision makers, and provide an overall basis to understand how the decision-makers arrived at their decisions.

(2) Pre-Determined Outcome

[115] The Families’ argument that “use of boiler-plate paragraphs for the substantive part of the analysis demonstrates the outcome of the *ATIP* requests has been pre-determined” is likewise misplaced. While portions of the decisions do indeed use identical language in describing their statutory obligations and the general framework within which decisions are made, the analysis is varied across the impugned decisions. The factors that are considered and weighed across the decisions are largely similar, but this does not mean the decisions had been pre-determined. Indeed, four of the five decisions (PBC-1, CSC-1, PBC-2, and CSC-2) arise from two *ATIP* applications in relation to the same inmate. It is therefore reasonable that decision-makers would have considered similar factors. On balance, the decisions were justified, transparent and intelligible. There is no basis on which to intervene in this regard.

(3) Selection of Factors

[116] The Families’ submissions are that the Parole Board committed a series of reviewable errors in selecting the factors it considered.

- First, they argue that the Parole Board erred in not considering the interests of the victims’ families—which they claim are “entirely aligned” with the public interest—in their assessment of the public interest under s. 8(2)(m) of the *Privacy Act*.
- Second, the Parole Board and CSC erred as they were “blindly driven” by the motive of facilitating the offenders’ safe re-integration into the community.
- Third, the Families say that the Parole Board/CSC failed to account for the dangerous offender designation of the Inmates in the decision making process.

- Fourth, the Parole Board failed to consider the public interest arising from the threat to public safety that would arise if the inmates were released from prison.
- Fifth, the Parole Board erred in failing to determine an identifiable group that had a genuine stake in the information sought by the *ATIP* request.

[117] I disagree. The records containing the decision-makers' analysis demonstrate that they considered and weighed a variety of factors in their assessment of the Applicants' requests.

These factors include:

- the sensitive nature of the information;
- the existence of an imminent need for disclosure;
- a risk to public safety, the statutory framework;
- the mandate and role of the Parole Board and CSC;
- the adverse effect on rehabilitees and reintegration;
- the high probability of injury;
- the inmate's expectation of non-disclosure;
- the Families' private interest in disclosure;
- the risk of personal information being widely dispersed; and
- the absence of an identifiable group with a genuine stake in disclosure.

[118] It is apparent on reviewing the decisions that the Parole Board and CSC considered the requirements of s. 19(2)(c) of the *ATIA* and s. 8(2)(m)(i) of the *Privacy Act*, assessed the nature of the sought-after evidence through the prism of the public interest in disclosure and the

intrusion upon the Inmates' privacy interests, and arrived at a decision grounded in their assessment of the evidence.

[119] Of note is that *Vavilov* provides that “where the legislature chooses to use broad, open-ended or highly qualitative language — for example, “in the public interest” — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language” (*Vavilov*, at para 110). While the Families and CBC disagree with the Parole Board and CSC's determination about the nature and character of the public interest, I do not agree that they have demonstrated that the decisions at issue were unreasonable in this regard.

(4) Section 8(2)(m)(i) of the *Privacy Act*

[120] Both the Families and CBC suggest that the decision-maker erred in their assessment of the privacy interests of the Inmates and in their approach to the concept of the invasion of privacy. Both argue that the inmates had no reasonable expectation of privacy as it relates to records that were adduced or discussed at the hearing and to the hearing recordings, and that there was therefore no invasion of privacy in disclosing the Withheld Information. CBC further submits that the decision-makers erred in failing to adopt a contextual analysis of privacy, instead relying on “a blanket assertion” that disclosing the Withheld Information would constitute an invasion of privacy.

[121] CBC advanced the position that the Parole Board/CSC made reviewable errors by not conducting a contextual analysis of whether personal information could be released pursuant to the exception at s. 8(2)(m)(i) of the *Privacy Act*. That provision allows for the disclosure of

personal information where the public interest in disclosure clearly outweighs the invasion of privacy arising from the disclosure of the records.

[122] They say that the Parole Board/CSC erroneously adopted a *pro forma* approach to their assessment of the privacy rights at issue and they failed to appreciate that privacy rights are not absolute and that not every disclosure of personal information constitutes an invasion of privacy. The Parole Board/CSC therefore erred, argues CBC, in finding that the Inmates' privacy interests overrode the public interest in disclosure under s. 8(2)(m)(i) of the *Privacy Act*.

[123] Rather, CBC submits that the Inmates had no reasonable expectation of privacy with respect to the Withheld Information discussed or adduced in their parole hearings. They argue that:

- First, these hearings are open to the public so the information has already been exposed to the public when anything is discussed orally at the hearing. So a further disclosure by means of a copy of the hearing to listen to and the actual documents being discussed at the hearing is not a big leap from where it is already;
- second, the Inmate's application to the Parole Board to be allowed to return to society "requires giving up a level of privacy";
- third, the Inmates already forfeited considerable privacy as a result of having been convicted and incarcerated;
- fourth, the Parole Board has a mandate to facilitate openness, transparency and accountability, which suggests that there is a lowered expectation of privacy; and

- fifth, the Parole Board/CSC did consider that some personal information had already been made public.

[124] Again, I disagree. The decision-makers considered the privacy interests at stake and their reasons reflected the context in which the requests were made. The CSC rejected the suggestion that offenders have no privacy interests because they were convicted. The decision-makers considered that the Inmates expected that their personal information would remain protected from public disclosure. Likewise, the decision-makers drew a distinction between the receipt of information at a *viva voce* hearing and being supplied audio recordings. Whereby the latter marks a heightened invasion of privacy on account of the possibility that information could be widely distributed. The SCC recognized that distinction, albeit in the context of surveillance by law enforcement, noting that the infringement on privacy associated with a permanent electronic recording is “of a different order of magnitude” vis-à-vis having someone merely listening in (*R v Duarte*, [1990] 1 SCR 30 at p 48). I find that the Parole Board and CSC did not make a reviewable error in their analysis of the Inmates’ privacy interests under s. 8(2)(m)(i) of the *Privacy Act*.

(5) Weighing of Factors

[125] The Families say that the decision-makers improperly weighed the various factors they considered. This argument is without merit. The SCC instructs that a reviewing court “must also refrain from reweighing and reassessing the evidence considered by the decision maker” (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at

para 55). The decision-makers' weighing of the factors should not be disturbed on judicial review and is not a basis to intervene in the decision.

(6) Inmates' privacy interests

[126] The Applicants make several submissions with respect to the Inmates' privacy interests.

[127] Generally, they argue that the Parole Board/CSC arrived at unreasonable decisions as the Inmates have "no expectation of privacy in documents relevant to the decision-making process of the PBC at a public hearing" or at Parole Board hearings generally. They likewise suggest that the privacy interests of inmates seeking parole are "far removed from the core privacy interest contemplated by the *Privacy Act*." Given that they misapprehended the privacy interest at stake, the Parole Board /CSC arrive at unreasonable decisions in weighing the invasion of privacy against the public interest.

[128] The Applicants assert that s. 8(2)(m)(i) of the *Privacy Act* does not apply to a public hearing, but make no further argument in this regard.

[129] They likewise fault the Parole Board/CSC for using an "invasion of privacy" test that they say is unfounded in the statutory framework and inconsistent with the policy objectives of the *ATIA* and *Privacy Act* statutes. The Applicants state that the relatively limited instances identified by the Parole Board/CSC as instances where the public interest might override the private interest have no basis in s. 8(2)(m)(i) of the *Privacy Act* and skewed the Parole Board's

assessment of the balance between the public interest in disclosure and the Inmates' privacy interests.

[130] Finally, they fault the Parole Board for failing to differentiate between the privacy interests at issue in the hearing recordings and the withheld files. They submit that the Inmates had no reasonable expectation of privacy in the recordings as a result of the attendance of media and the victims' families at the hearings.

[131] The Applicants' foregoing submissions are without merit. Rather, I agree that the Parole Board and CSC's decisions to withhold personal information in the five *ATIP* requests bear "the hallmarks of reasonableness — justification, transparency and intelligibility — [they are] justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[132] Under s. 19(2) of the *ATIA*, a decision-maker may make a discretionary decision to disclose otherwise protected personal information under s. 19(1) *ATIA* on three grounds:

- (a) the individual to whom it relates consents to the disclosure;
- (b) the information is publicly available; or
- (c) the disclosure is in accordance with s. 8 of the *Privacy Act*.

[133] As a preliminary matter, it is useful to consider how the OIC's investigative findings fit into this Court's reasonableness review. There appear to be two strands of jurisprudence on this issue. Several decisions provide that an OIC's investigative findings should be given "significant deference and weight" in light of the OIC's expertise (*Blank v Canada (Minister of*

Justice), 2015 FC 753 at para 56 [*Blank 753*]; *Blank v Canada (Minister of Justice)*, 2010 FCA 183 at para 35; *Tomar v Canada (Parks Canada Agency)*, 2018 FC 224 at para 40 [*Tomar*]).

Conversely, other authorities suggesting that the OIC's findings are merely "a relevant factor" to be considered (*Layoun v Canada (AG)*, 2014 FC 1041 at para 55 [*Layoun*]; *Blank v Canada (Minister of Justice)*, 2009 FC 1221 at para 26 [*Blank 1221*]).

[134] Notwithstanding this disagreement on the amount of deference owed to the OIC findings, there is agreement in the jurisprudence that "it is the refusal of the head of a government institution that the Court is charged to review, not the Commissioner's recommendations" (*Blank 1221* at para 26; *Blank 753* at para 56).

[135] The Parole Board and CSC reasonably decided that the first two grounds for disclosing personal information under s. 19(2) *ATIA* were not met. First, the record indicates that the Inmates did not consent to the release of their respective personal information. This fact is not contested by the Applicants.

[136] Second, the Withheld Information was not "publicly available" within the meaning of s. 19(2)(b) of the *ATIA*. The FCA in *Lukács* defined "publicly available" as meaning information "that is available or accessible to the citizenry at large" (*Lukács*, at para 69). Neither the Families nor CBC have advanced a competing definition of the meaning of "publicly available" and they have not suggested that the Withheld Information was publicly available within the meaning of *Lukács*.

[137] The fact that the Withheld Information was disclosed during parole hearings does not make it “publicly available” for the purpose of s. 19(2)(b) of the *ATIA*. Subsection 140(14) of the *CCRA* is explicative and clear that “information or documents discussed or referred to during a hearing shall not for that reason alone be considered to be publicly available for the purpose of the [*ATIA* or *Privacy Act*].” Parliament put its mind to this particular situation when enacting this section. As frustrating this may be for the Families, it remains valid law. A similar restriction applies to information discussed or referred to in a hearing transcript, pursuant to s. 140.2(3) of the *CCRA*.

[138] I find the CSC/Parole Board’s decision that the public interest in disclosing the Withheld Information did not clearly outweigh the invasion of the Inmates’ privacy to be reasonable. The OIC arrived at the same conclusion in all five of its investigations. Recalling this Court’s decisions in the *Blank* cases, and in *Tomar*, and in *Layoun*—all discussed above at paragraph 133 the OIC’s determination of reasonableness is at the very least a factor that militates in favour of a finding of reasonableness, and may attract significant deference.

[139] As noted above, the Families and CBC challenge the reasonableness of the decisions to not disclose the Withheld Information in both the written request by CBC and in PBC-1, CSC-1, PBC-2, CSC-2 and PBC-3 and in CBC request.

[140] CBC’s argument faults the Parole Board and CSC for not conducting a contextual analysis of the privacy interests at issue; for considering that all infringement of privacy are “invasions of privacy”; and for relying on a generalized statement that the disclosure of personal

information constitute invasions of privacy. The Inmates, according to CBC, did not have a reasonable expectation of privacy in records that were discussed or introduced at parole hearings, and it was unreasonable that the decision-makers did not consider this context in arriving their decisions in weighing the competing factors under s. 8(2)(m)(i) of the *Privacy Act*. Moreover, CBC faults the Parole Board for failing to consider what information was already public and for not conducting an analysis of particular records at issue.

[141] Under the first prong of the two step test for s. 41 *ATIA* reviews articulated in *Husky* at paragraphs 15 and 17, Canada argues, and I agree, that the Parole Board and CSC correctly determined that the Withheld Information contains personal information, and therefore fall within the exemption at s. 19(1) of the *ATIA*. Canada notes that the Applicants do not dispute that the Withheld Information contain “information about an identifiable individual that is recorded in any form” which is the *ATIA* definition of personal information.

[142] Under the second prong, Canada argues that the Parole Board and CSC reasonably exercised their discretion not to release the information under s. 19(2) of the *ATIA*. Judicial intervention is warranted only where the decision was made in bad faith or for an improper purpose, or if the decision took into account irrelevant considerations or failed to take relevant ones into consideration. They assert that the Parole Board and CSC made no such errors in the decisions under review.

[143] Canada submits that this Court owes significant deference to the OIC, who reviewed the decisions of the Parole Board and CSC and found them to be reasonable (*Layoun* at para 55;

Tomar at para 40). Thus they say that the decision-makers reasonably determined that none of the conditions for disclosure at s. 19(2) of the *ATIA* were met.

[144] Canada further invokes the fact that the Inmates did not consent (s. 19(2)(a) of the *ATIA*) and that the Withheld Information was not publically available (s. 19(2)(b) of the *ATIA*) in support of its submissions. None of the Withheld Information form part of the Parole Board's registry of decisions that are generally available to members of the public. Furthermore the public interest in disclosing the records did not clearly outweigh any invasion of privacy (s. 19(2)(c) of the *ATIA*). The CSC and Parole Board acted reasonably in balancing the public interest in disclosure and the invasion of privacy, and any other relevant statutory and constitutional principles in accordance with s. 8(2)(m)(i) of the *Privacy Act*.

[145] In doing so, Canada submits, the Parole Board and CSC considered the "need for victims and the community", and the degree to which public discussion about the Parole Board's decision-making can take place, even without access to the withheld information. There was also, they say, the possibility of review from the Parole Board Appeal Division, and judicial review by the Federal Court of the parole decisions. Canada also asserts that the interests of the victims were considered, the privacy interests of the offenders, the expectation of the individual regarding the personal information, the sensitivity of the information, the high probability of injury, adverse effects on rehabilitation and re-integration, the statutory context and balances struck by the *CCRA* between access and privacy and noted their consideration in their reasons.

[146] Finally, regarding constitutional consideration, Canada argues that while there is no jurisprudence on the application of s. 2(b) of the *Charter* to records withheld by CSC and the Parole Board, the applicable test is set out in *Criminal Lawyers*. They argue that s. 2(b) of the *Charter* only guarantees access to government documents “where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned” (*Criminal Lawyers* at para 5). Further, that necessity is shown if denial of access would mean that public discussion and criticism on matters of public interest would be substantially impeded (*Criminal Lawyers* at para 37). Canada says there must be a proportionate balancing of interests.

[147] I agree with Canada’s submissions on these points.

(7) *Doré/Loyola*

[148] A reasonable administrative decision must be transparent, intelligible, and justified (*Vavilov* at para 15). When an administrative decision risks infringing *Charter* rights, the decision maker must take those constitutional interests into account and apply the *Doré/Loyola* framework to their decision-making process, balancing the statutory aims with the rights of the parties (*Doré* at para 57 and *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 39 [*Loyola*]). Reasons are a good indication of the process used by the decision maker when considering the decision (*Vavilov* at paras 79-81).

[149] Under the *Doré/Loyola* framework, the reviewing court must first ask whether the *Charter* has been engaged by limiting *Charter* protections, and if so, whether the decision

reflects a proportionate balancing of the *Charter* protections with the statutory objectives (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 58 [*Trinity Western*]).

[150] For the reasons discussed above, I do not find that the Applicants' *Charter* rights were limited. However, if I am wrong, I find that the reasons show an acceptable balancing of the Applicants' *Charter* rights with the Inmates' privacy rights. The majority decision in *Trinity*

Western gives a helpful summary of what a reasonable and proportionate decision under the *Doré/Loyola* framework will look like:

...For a decision to be proportionate, it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. Rather, the reviewing court must be satisfied that the decision proportionately balances these factors, that is, that it "gives effect, as fully as possible to the Charter protections at stake given the particular statutory mandate" (*Loyola High School*, at para. 39). Put another way, the *Charter* protection must be "affected as little as reasonably possible" in light of the applicable statutory objectives (*Loyola High School*, at para. 40). When a decision engages the *Charter*, reasonableness and proportionality become synonymous. Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.

81 The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. This does not mean that the administrative decision-maker must choose the option that limits the *Charter* protection least. The question for the reviewing court is always whether the decision falls within a range of reasonable outcomes (*Doré*, at para. 57; *Loyola High School*, at para. 41, citing *RJR-Macdonald Inc. v. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), at para. 160). However, if there was an option or avenue reasonably open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes. This is a highly contextual inquiry.

82 The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context (*Loyola High School*, at para. 68; *Doré*, at para. 56). The *Doré* framework therefore finds "analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing" (*Loyola High School*, at para. 40). In working "the same justificatory muscles" as the *Oakes* test (*Doré*, at para. 5), the *Doré* analysis ensures that the pursuit of objectives is proportionate. In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not at issue, the proper inquiry is whether the decision-maker has furthered his or

her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.

(*Trinity Western* at paras 80-82)

[151] The reasons given here show that there was a consideration of the factors required in a *Doré/Loyola* analysis. The decision contemplates the effects of disclosure with the effectiveness of the legislative scheme, the potential for public safety and harming reintegration.

[152] In my review of the reasons, I find that the Parole Board sufficiently contemplated other reasonable possibilities. The reasons discuss losing control of future use of the information, showing that the decision-maker considered a limited disclosure. It is also difficult to see what other possibilities would be reasonable, and CBC's letter to the Parole Board suggests no alternatives other than disclosure of the hearing recordings. The reasons point out that the media has been in attendance to some of the Parole Board hearings for which the disclosure is requested, which could be seen as an alternative to disclosure of the information.

[153] Reasons do not have to be perfect and address every possibility (*Vavilov* at para 91). “‘Administrative justice’ will not always look like ‘judicial justice’, and reviewing courts must remain acutely aware of that fact” (*Vavilov* at para 92). The reasons must be read in light of the history and context of the proceedings, and should be read in light of the record (*Vavilov* at paras 91, 94). This does not mean that the reviewing court may provide reasons that were not given, but it does allow it to read reasons “holistically and contextually, for the very purpose of understanding the basis on which a decision was made” (*Vavilov* at para 97). While the Parole Board may not have considered the alternatives that CBC wished, such as releasing parts of the

recordings, the reasons and the legislation shows that it considered how to permit the media to access the information at parole hearings. The alternative is that is that the media can attend the hearings as observers and hear the submissions and discussions. It was conceded at the hearing that media requests to attend Parole Board hearings were not refused to date.

[154] While CBC argues that there is a blanket policy of refusal of providing the withheld information, such a policy is not reflected in the lengthy, reasoned response from the Parole Board.

[155] The reasoning is that because the media has access to the hearings, the media has direct access to the information when it is being recorded. I find that because the Parole Board refuses to disclose the audio recordings, pursuant to s. 140(13) of the *CCRA*, this does not show that they have not considered the rights of the media — and the fact that they are allowed at the hearing shows that the legislation has contemplated this.

[156] Further, just because the Parole Board does not release audio recordings to the media does not show that there was no balancing — a tribunal can consider an issue, make a determination on disclosure, and then follow that determination on subsequent requests with the same facts. The assertion of CBC that the decision did not engage with any case-specific factors is simply not true — there is engagement with factors that would be common to any case, but that does not mean they are not also specific to the Inmates. The decision specifically mentions rehabilitation, reintegration, and other factors which would directly affect the specific people potentially being granted parole even if in these cases that is highly unlikely.

[157] The decision by the Parole Board in response to CBC request addressed the *Doré/Loyola* balancing in its reasons, explaining their rationale for why they came to the decision. First, the decision points out that the Parole Board has exclusive jurisdiction and absolute discretion to grant, deny, terminate, or revoke parole. As for the hearings being open to the public, they note that measures are taken to ensure the safety of all parties, and that requests to observe hearings must be submitted in advance. The decision goes on to explain why the hearings are inquisitorial, not adversarial. It points out that the Parole Board decisions often involve third parties and contain medical and psychological evidence, and that despite the fact that observers may apply to attend, the hearings are not considered open to the public. The decision goes on to cite *Mooring* to reply to the argument that the Parole Board is a judicial or quasi-judicial proceeding, concluding that the OCP does not apply to the Parole Board. This issue is addressed above.

[158] The reasons go on to address the s. 2(b) *Charter* issues. The reasons note that the SCC has recently held that the *Charter* does not guarantee access to all government documents, and that, in their view, CBC has the burden of showing that disclosure “is necessary to permit meaningful discussion on a matter of public importance.” The decision’s subsequent seven paragraphs give a detailed explanation of how the Parole Board arrived at its decision and how they balanced *Charter* rights with their statutory mandates. The reasons include reference to CBC, as well as direct replies to both the *CCRA* and the *Privacy Act*.

[159] While it is true that the decision does not detail the specific rights and privacy interests of the particular persons involved, I do not conclude that is fatal to the completeness of the reasons. There is no reason why the balancing of the factors cannot be at a higher level, and be

generalised to include “victims” and “offenders”. It is notable in this respect that CBC’s request was for the disclosure of recordings of multiple parole hearings of multiple inmates. I conclude that the Parole Board giving general reasons is appropriate in the case, and allows the party receiving the decision to understand how the Parole Board came to its decision.

[160] In sum, I am of the opinion that the Parole Board proportionately balanced *Charter* values with its statutory objectives and mandates. The media and the public have the right to request attendance at the hearings. Requests are only denied based on the list of potential issues described in s. 140(4) *CCRA*. The media has been in attendance at the parole hearings. This shows reasonable balancing between the *Charter* rights of the media and public and the Inmates’ privacy rights. Nothing is being hidden, but there is a control of the flow of private information. There is nothing disproportionate about putting the onus on the media to ensure they are in attendance at the parole hearings in question.

[161] In sum, I find that the Parole Board and CSC’s decisions to not disclose the Withheld Information was reasonable.

VIII. Conclusion

[162] I will dismiss the applications.

IX. Costs

[163] Both the Families and Canada provided post-hearing submissions on costs and bills of costs for the five applications they brought. Those parties were unable to agree to an amount.

[164] The Families' bill of costs dated March 11, 2021 was \$33,195.01. Canada's was \$19,142.27. The Families submit "...that they are entitled to their costs, whether they win or lose. In the alternative, no cost [*sic*] should be awarded against the applicants."

[165] The Families assert that this was a test case and public interest litigation, and so should be treated differently. As well, the Families have suffered enough and the Canadian public would be shocked if costs were awarded against them. The submissions go on to ask that even if they are not successful that they should be entitled to costs because "[t]he clear message from Parliament is that the public benefits from these types of legal proceedings and they should be encouraged. There should be no Sword of Damocles hanging over the heads of Canadians who bring forward responsible and bona fide public interest cases." The Families then list a number of reasons to award the costs to them if they are the unsuccessful party. The Families relied on *Ruby v Canada (Solicitor General)*, 2002 SCC 75; *Yeager v Canada (Correctional Service)*, 2003 FCA 30 at paragraph 68 [*Yeager*]; and *Bonner v VIA Rail Canada Inc*, 2009 FC 857 at paragraph 130. These are all cases where costs were awarded to the unsuccessful party.

[166] Canada' submissions are that costs should follow the event and they should be awarded an inclusive lump sum of \$19,142.27. This amount calculated on the basis of Column III of

Tariff B of the *Federal Courts Rules*. Canada relies on the *ATIA* s. 53(1) that deals with s. 41 review applications.

[167] Canada argues that the Families have not provided a valid argument to have me exercise my discretion otherwise, given that they do not meet the factors to be considered a public interest litigant as set out in *Bielli v Canada*, 2013 FC 953 at paragraphs 13-14 . Those factors are:

- a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
- b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
- c) The issues have not been previously determined by a court in a proceeding against the same defendant.
- d) The defendant has a clearly superior capacity to bear the costs of the proceeding.
- e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

[168] Canada submits that this application is not public interest litigation and is in fact an inherently personal interest as is “their personal motivation is to use the information sought to make statements to the Parole Board.” They also argue that if the first application brought in 2012 had been heard in a timely manner then there would have been precedent to follow but instead there have been a “...multiple, duplicative proceedings that unnecessarily delayed and complicated the process, requiring additional case management conference, two status review hearings and large volumes of material.” They say that it was the Families conduct which militates against a reasonable cost order against them.

[169] As well, Canada strongly opposes an award of costs to the Families if they are unsuccessful given “[t]he resolution of these proceedings involved the application of these well-established principles of interpretation to personal information records in the correctional and parole review context, not a novel or unique issue relating to the interpretation of any provision of the *ATIA*.” Nor were the s. 2(b) constitutional issues novel as this principle of open court has been raised by litigants in the past when seeking to gain access to private records (*Toronto Star* 2018; *Southam MCI*). Canada also distinguish *Yeager* and note that even though it is similarly a s. 53(2) case, it was the first time that s. 4(3) of the *ATIA* and s. 3 of the related regulations were being considered, and in contrast s. 19 of the *ATIA* and s. 8(2)(m)(i) of the *Privacy Act* are often litigated. I note that s. 3 of the Regulations was never brought to the attention of the Court nor argued by the Families in their submissions.

[170] Though I agree with Canada that this is not public interest matter or a test case, I do have discretion after considering all of the factors listed in s. 400 of the *Federal Courts Rules*. The Families have suffered enough. What I heard in the lengthy application is that the Families really are seeking legislative change that is accomplished politically. However, an application for judicial review is not the vehicle to achieve what they seek.

[171] I considered the submissions regarding the Families particular personal financial situations and will award costs to Canada as the successful party in the lump sum amount (inclusive of taxes and disbursements) of \$4000.00. The Inmates did not participate so will not receive costs. Nor will costs be awarded against the intervener CBC.

[172] The Applicant, CBC and the Respondent, the Parole Board of Canada, have agree to costs in the amount of \$5,770.00 to the successful party in the T-1884-19 application. Therefore, lump sum costs will be awarded against CBC in the amount of \$5,770.00 payable to the Respondent.

JUDGMENT IN T-1358-12, T-101-18, T-102-18, T-103-18, T-465-20

THIS COURT’S JUDGMENT is that:

1. The Applications are dismissed;
2. With regards to the applications in T-1358-12; T-101-18; T-102-18; T-103-18, T-465-20, costs are awarded in a lump sum inclusive of fees, taxes and disbursements are payable forthwith to the Respondents, Minister of Public Safety and Emergency Preparedness, Attorney General of Canada, Correctional Service Canada, Parole Board of Canada by the Applicants in the amount of \$4,000.00;
3. With regards to the file- T-1884-19 costs are awarded in a lump sum inclusive of taxes and disbursements payable forthwith to the Respondent, Parole Board of Canada, by the Applicant CBC in the amount of \$5,770.00.

“Glennys L. McVeigh”
Judge

ANNEX A

*Access to Information Act (R.S.C., 1985, c. A-1)***Purpose of Act**

2 (1) The purpose of this Act is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.

Personal information

19 (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Part that contains personal information.

Where disclosure authorized

(2) The head of a government institution may disclose any record requested under this Part that contains personal information if

(a) the individual to whom it relates consents to the disclosure;

(b) the information is publicly available; or

(c) the disclosure is in accordance with section 8 of the Privacy Act.

Third party information

20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part that contains

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government

Objet de la loi

2 (1) La présente loi a pour objet d'accroître la responsabilité et la transparence des institutions de l'État afin de favoriser une société ouverte et démocratique et de permettre le débat public sur la conduite de ces institutions.

Renseignements personnels

19 (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements personnels.

Cas où la divulgation est autorisée

(2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :

a) l'individu qu'ils concernent y consent;

b) le public y a accès;

c) la communication est conforme à l'article 8 de la Loi sur la protection des renseignements personnels.

Renseignements de tiers

20 (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

a) des secrets industriels de tiers;

b) des renseignements financiers, commerciaux, scientifiques ou techniques

institution by a third party and is treated consistently in a confidential manner by the third party;

(b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the Emergency Management Act and that concerns the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

b.1) des renseignements qui, d'une part, sont fournis à titre confidentiel à une institution fédérale par un tiers en vue de l'élaboration, de la mise à jour, de la mise à l'essai ou de la mise en oeuvre par celle-ci de plans de gestion des urgences au sens de l'article 2 de la Loi sur la gestion des urgences et, d'autre part, portent sur la vulnérabilité des bâtiments ou autres ouvrages de ce tiers, ou de ses réseaux ou systèmes, y compris ses réseaux ou systèmes informatiques ou de communication, ou sur les méthodes employées pour leur protection;

c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

d) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

ANNEX B

Privacy Act (R.S.C., 1985, c. P-21)

Disclosure of personal information

8 (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

Where personal information may be disclosed

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

- (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
- (b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;
- (c) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;
- (d) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;
- (e) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request

Communication des renseignements personnels

8 (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.

Cas d'autorisation

(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :

- a) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;
- b) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;
- c) communication exigée par subpoena, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de renseignements;
- d) communication au procureur général du Canada pour usage dans des poursuites judiciaires intéressant la Couronne du chef du Canada ou le gouvernement fédéral;
- e) communication à un organisme d'enquête déterminé par règlement et qui en fait la demande par écrit, en vue de faire

specifies the purpose and describes the information to be disclosed;

(f) under an agreement or arrangement between the Government of Canada or any of its institutions and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation as defined in subsection 2(1) of the First Nations Jurisdiction over Education in British Columbia Act, the council of a participating First Nation as defined in section 2 of the Anishinabek Nation Education Agreement Act, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;

(g) to a member of Parliament for the purpose of assisting the individual to whom the information relates in resolving a problem;

(h) to officers or employees of the institution for internal audit purposes, or to the office of the Comptroller General or any other person or body specified in the regulations for audit purposes;

(i) to the Library and Archives of Canada for archival purposes;

(j) to any person or body for research or statistical purposes if the head of the government institution

(i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that

respecter des lois fédérales ou provinciales ou pour la tenue d'enquêtes licites, pourvu que la demande précise les fins auxquelles les renseignements sont destinés et la nature des renseignements demandés;

f) communication aux termes d'accords ou d'ententes conclus d'une part entre le gouvernement du Canada ou l'un de ses organismes et, d'autre part, le gouvernement d'une province ou d'un État étranger, une organisation internationale d'États ou de gouvernements, le conseil de la première nation de Westbank, le conseil de la première nation participante — au sens du paragraphe 2(1) de la Loi sur la compétence des premières nations en matière d'éducation en Colombie-Britannique —, le conseil de la première nation participante — au sens de l'article 2 de la Loi sur l'accord en matière d'éducation conclu avec la Nation des Anishinabes — ou l'un de leurs organismes, en vue de l'application des lois ou pour la tenue d'enquêtes licites;

g) communication à un parlementaire fédéral en vue d'aider l'individu concerné par les renseignements à résoudre un problème;

h) communication pour vérification interne au personnel de l'institution ou pour vérification comptable au bureau du contrôleur général ou à toute personne ou tout organisme déterminé par règlement;

i) communication à Bibliothèque et Archives du Canada pour dépôt;

j) communication à toute personne ou à tout organisme, pour des travaux de recherche ou de statistique, pourvu que soient réalisées les deux conditions suivantes :

would identify the individual to whom it relates, and

(ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;

(k) to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada;

(l) to any government institution for the purpose of locating an individual in order to collect a debt owing to Her Majesty in right of Canada by that individual or make a payment owing to that individual by Her Majesty in right of Canada; and

(m) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or

(ii) disclosure would clearly benefit the individual to whom the information relates.

Personal information disclosed by Library and Archives of Canada

(3) Subject to any other Act of Parliament, personal information under the custody or control of the Library and Archives of Canada that has been transferred there by a government institution for historical or archival purposes may be disclosed in accordance with the regulations to any

(i) le responsable de l'institution est convaincu que les fins auxquelles les renseignements sont communiqués ne peuvent être normalement atteintes que si les renseignements sont donnés sous une forme qui permette d'identifier l'individu qu'ils concernent,

(ii) la personne ou l'organisme s'engagent par écrit auprès du responsable de l'institution à s'abstenir de toute communication ultérieure des renseignements tant que leur forme risque vraisemblablement de permettre l'identification de l'individu qu'ils concernent;

k) communication à tout gouvernement autochtone, association d'autochtones, bande d'Indiens, institution fédérale ou subdivision de celle-ci, ou à leur représentant, en vue de l'établissement des droits des peuples autochtones ou du règlement de leurs griefs;

l) communication à toute institution fédérale en vue de joindre un débiteur ou un créancier de Sa Majesté du chef du Canada et de recouvrer ou d'acquitter la créance;

m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :

(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,

(ii) l'individu concerné en tirerait un avantage certain.

Communication par Bibliothèque et Archives du Canada

(3) Sous réserve des autres lois fédérales, les renseignements personnels qui relèvent de Bibliothèque et Archives du Canada et

person or body for research or statistical purposes.

Copies of requests under paragraph (2)(e) to be retained

(4) The head of a government institution shall retain a copy of every request received by the government institution under paragraph (2)(e) for such period of time as may be prescribed by regulation, shall keep a record of any information disclosed pursuant to the request for such period of time as may be prescribed by regulation and shall, on the request of the Privacy Commissioner, make those copies and records available to the Privacy Commissioner.

Notice of disclosure under paragraph (2)(m)

(5) The head of a government institution shall notify the Privacy Commissioner in writing of any disclosure of personal information under paragraph (2)(m) prior to the disclosure where reasonably practicable or in any other case forthwith on the disclosure, and the Privacy Commissioner may, if the Commissioner deems it appropriate, notify the individual to whom the information relates of the disclosure.

Definition of Indian band

(6) In paragraph (2)(k), Indian band means

- (a) a band, as defined in the Indian Act;
- (b) the band, as defined in subsection 2(1) of the Naskapi and the Cree-Naskapi Commission Act;
- (c) the Band, as defined in the Sechelt Indian Band Self-Government Act,

qui y ont été versés pour dépôt ou à des fins historiques par une institution fédérale peuvent être communiqués conformément aux règlements pour des travaux de recherche ou de statistique.

Copie des demandes faites en vertu de l'al. (2)e)

(4) Le responsable d'une institution fédérale conserve, pendant la période prévue par les règlements, une copie des demandes reçues par l'institution en vertu de l'alinéa (2)e) ainsi qu'une mention des renseignements communiqués et, sur demande, met cette copie et cette mention à la disposition du Commissaire à la protection de la vie privée.

Avis de communication dans le cas de l'al. (2)m)

(5) Dans le cas prévu à l'alinéa (2)m), le responsable de l'institution fédérale concernée donne un préavis écrit de la communication des renseignements personnels au Commissaire à la protection de la vie privée si les circonstances le justifient; sinon, il en avise par écrit le Commissaire immédiatement après la communication. La décision de mettre au courant l'individu concerné est laissée à l'appréciation du Commissaire.

Définition de bande d'Indiens

(6) L'expression bande d'Indiens à l'alinéa (2)k) désigne :

- a) soit une bande au sens de la Loi sur les Indiens;
- b) soit la bande au sens du paragraphe 2(1) de la Loi sur les Naskapis et la Commission crie-naskapie;
- c) soit la bande au sens de la Loi sur l'autonomie gouvernementale de la bande

chapter 27 of the Statutes of Canada, 1986; or

(d) a first nation named in Schedule II to the Yukon First Nations Self-Government Act.

Definition of aboriginal government

(7) The expression aboriginal government in paragraph (2)(k) means

(a) Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the Nisga'a Final Agreement Act;

(b) the council of the Westbank First Nation;

(c) the Tlicho Government, as defined in section 2 of the Tlicho Land Claims and Self-Government Act;

(d) the Nunatsiavut Government, as defined in section 2 of the Labrador Inuit Land Claims Agreement Act;

(e) the council of a participating First Nation as defined in subsection 2(1) of the First Nations Jurisdiction over Education in British Columbia Act;

(e.1) the Tla'amin Government, as defined in subsection 2(2) of the Tla'amin Final Agreement Act;

(f) the Tsawwassen Government, as defined in subsection 2(2) of the Tsawwassen First Nation Final Agreement Act;

(f.1) the Cree Nation Government, as defined in subsection 2(1) of the Cree Nation of Eeyou Istchee Governance Agreement Act or a Cree First Nation, as defined in subsection 2(2) of that Act;

indienne sechelte, chapitre 27 des Statuts du Canada de 1986;

d) la première nation dont le nom figure à l'annexe II de la Loi sur l'autonomie gouvernementale des premières nations du Yukon.

Définition de gouvernement autochtone

(7) L'expression gouvernement autochtone à l'alinéa (2)k) s'entend :

a) du gouvernement nisga'a, au sens de l'Accord définitif nisga'a mis en vigueur par la Loi sur l'Accord définitif nisga'a;

b) du conseil de la première nation de Westbank;

c) du gouvernement tlicho, au sens de l'article 2 de la Loi sur les revendications territoriales et l'autonomie gouvernementale du peuple tlicho;

d) du gouvernement nunatsiavut, au sens de l'article 2 de la Loi sur l'Accord sur les revendications territoriales des Inuit du Labrador;

e) du conseil de la première nation participante, au sens du paragraphe 2(1) de la Loi sur la compétence des premières nations en matière d'éducation en Colombie-Britannique;

e.1) du gouvernement tlaamin, au sens du paragraphe 2(2) de la Loi sur l'accord définitif concernant les Tlaamins;

f) du gouvernement tsawwassen, au sens du paragraphe 2(2) de la Loi sur l'accord définitif concernant la Première Nation de Tsawwassen;

f.1) du Gouvernement de la nation crie, au sens du paragraphe 2(1) de la Loi sur l'accord concernant la gouvernance de la

(g) a Maanulth Government, within the meaning of subsection 2(2) of the Maanulth First Nations Final Agreement Act;

(h) Sioux Valley Dakota Oyate Government, within the meaning of subsection 2(2) of the Sioux Valley Dakota Nation Governance Act; or

(i) the council of a participating First Nation as defined in section 2 of the Anishinabek Nation Education Agreement Act.

Definition of council of the Westbank First Nation

(8) The expression council of the Westbank First Nation in paragraphs (2)(f) and (7)(b) means the council, as defined in the Westbank First Nation Self-Government Agreement given effect by the Westbank First Nation Self-Government Act.

nation crie d'Eeyou Istchee, ou d'une première nation crie, au sens du paragraphe 2(2) de cette loi;

g) de tout gouvernement maanulth, au sens du paragraphe 2(2) de la Loi sur l'accord définitif concernant les premières nations maanulthes;

h) du gouvernement de l'oyate dakota de Sioux Valley, au sens du paragraphe 2(2) de la Loi sur la gouvernance de la nation dakota de Sioux Valley;

i) du conseil de la première nation participante, au sens de l'article 2 la Loi sur l'accord en matière d'éducation conclu avec la Nation des Anishinabes.

Définition de conseil de la première nation de Westbank

(8) L'expression conseil de la première nation de Westbank aux alinéas (2)f) et (7)b) s'entend du conseil au sens de l'Accord d'autonomie gouvernementale de la première nation de Westbank mis en vigueur par la Loi sur l'autonomie gouvernementale de la première nation de Westbank.

ANNEX C

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Libertés fondamentales

2 Chacun a les libertés fondamentales suivantes :

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

Recours en cas d'atteinte aux droits et libertés

24 (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

ANNEX D

*Corrections and Conditional Release Act (S.C. 1992, c. 20)***Paramount consideration**

3.1 The protection of society is the paramount consideration for the Service in the corrections process.

Principles that guide Service

4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:

(a) the sentence is carried out having regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process, the release policies of and comments from the Parole Board of Canada and information obtained from victims, offenders and other components of the criminal justice system;

(b) the Service enhances its effectiveness and openness through the timely exchange of relevant information with victims, offenders and other components of the criminal justice system and through communication about its correctional policies and programs to victims, offenders and the public;

(c) the Service uses the least restrictive measures consistent with the protection of society, staff members and offenders;

(c.1) the Service considers alternatives to custody in a penitentiary, including the alternatives referred to in sections 29 and 81;

Critère prépondérant

3.1 La protection de la société est le critère prépondérant appliqué par le Service dans le cadre du processus correctionnel.

Principes de fonctionnement

4 Le Service est guidé, dans l'exécution du mandat visé à l'article 3, par les principes suivants :

a) l'exécution de la peine tient compte de toute information pertinente dont le Service dispose, notamment les motifs et recommandations donnés par le juge qui l'a prononcée, la nature et la gravité de l'infraction, le degré de responsabilité du délinquant, les renseignements obtenus au cours du procès ou de la détermination de la peine ou fournis par les victimes, les délinquants ou d'autres éléments du système de justice pénale, ainsi que les directives ou observations de la Commission des libérations conditionnelles du Canada en ce qui touche la libération;

b) il accroît son efficacité et sa transparence par l'échange, au moment opportun, de renseignements utiles avec les victimes, les délinquants et les autres éléments du système de justice pénale ainsi que par la communication de ses directives d'orientation générale et programmes correctionnels tant aux victimes et aux délinquants qu'au public;

c) il prend les mesures qui, compte tenu de la protection de la société, des agents et des délinquants, sont les moins privatives de liberté;

(c.2) the Service ensures the effective delivery of programs to offenders, including correctional, educational, vocational training and volunteer programs, with a view to improving access to alternatives to custody in a penitentiary and to promoting rehabilitation;

(d) offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted;

(e) the Service facilitates the involvement of members of the public in matters relating to the operations of the Service;

(f) correctional decisions are made in a forthright and fair manner, with access by the offender to an effective grievance procedure;

(g) correctional policies, programs and practices respect gender, ethnic, cultural, religious and linguistic differences, sexual orientation and gender identity and expression, and are responsive to the special needs of women, Indigenous persons, visible minorities, persons requiring mental health care and other groups;

(h) offenders are expected to obey penitentiary rules and conditions governing temporary absences, work release, parole, statutory release and long-term supervision and to actively participate in meeting the objectives of their correctional plans, including by participating in programs designed to promote their rehabilitation and reintegration; and

(i) staff members are properly selected and trained and are given

c.1) il envisage des solutions de rechange à la mise sous garde dans un pénitencier, notamment celles prévues aux articles 29 et 81;

c.2) il assure la prestation efficace des programmes offerts aux délinquants, notamment les programmes correctionnels et les programmes d'éducation, de formation professionnelle et de bénévolat, en vue d'améliorer l'accès aux solutions de rechange à la mise sous garde dans un pénitencier et de promouvoir la réadaptation;

d) le délinquant continue à jouir des droits reconnus à tout citoyen, sauf de ceux dont la suppression ou la restriction légitime est une conséquence nécessaire de la peine qui lui est infligée;

e) il facilite la participation du public aux questions relatives à ses activités;

f) ses décisions doivent être claires et équitables, les délinquants ayant accès à des mécanismes efficaces de règlement de griefs;

g) ses directives d'orientation générale, programmes et pratiques respectent les différences ethniques, culturelles, religieuses et linguistiques, ainsi qu'entre les sexes, l'orientation sexuelle, l'identité et l'expression de genre, et tiennent compte des besoins propres aux femmes, aux Autochtones, aux minorités visibles, aux personnes nécessitant des soins de santé mentale et à d'autres groupes;

h) il est attendu que les délinquants observent les règlements pénitentiaires et les conditions d'octroi des permissions de sortir, des placements à l'extérieur, des libérations conditionnelles ou d'office et des ordonnances de surveillance de longue durée et participent activement à la

- (i) appropriate career development opportunities,
- (ii) good working conditions, including a workplace environment that is free of practices that undermine a person's sense of personal dignity, and
- (iii) opportunities to participate in the development of correctional policies and programs.

Disclosure of information to victims

26 (1) At the request of a victim of an offence committed by an offender, the Commissioner

(a) shall disclose to the victim the following information about the offender:

- (i) the offender's name,
 - (ii) the offence of which the offender was convicted and the court that convicted the offender,
 - (iii) the date of commencement and length of the sentence that the offender is serving, and
 - (iv) eligibility dates and review dates applicable to the offender under this Act in respect of temporary absences or parole;
- (b) may disclose to the victim any of the following information about the offender, where in the Commissioner's opinion the interest of the victim in such disclosure clearly outweighs any invasion of the offender's privacy that could result from the disclosure:
- (i) the offender's age,

réalisation des objectifs énoncés dans leur plan correctionnel, notamment les programmes favorisant leur réadaptation et leur réinsertion sociale;

i) il veille au bon recrutement et à la bonne formation de ses agents, leur offre de bonnes conditions de travail dans un milieu exempt de pratiques portant atteinte à la dignité humaine, un plan de carrière avec la possibilité de se perfectionner ainsi que l'occasion de participer à l'élaboration des directives d'orientation générale et programmes correctionnels.

Communication de renseignements à la victime

26 (1) Sur demande de la victime, le commissaire :

a) communique à celle-ci les renseignements suivants :

- (i) le nom du délinquant,
 - (ii) l'infraction dont il a été trouvé coupable et le tribunal qui l'a condamné,
 - (iii) la date de début et la durée de la peine qu'il purge,
 - (iv) les dates d'admissibilité et d'examen applicables aux permissions de sortir ou à la libération conditionnelle;
- b) peut lui communiquer tout ou partie des renseignements suivants si, à son avis, l'intérêt de la victime justifierait nettement une éventuelle violation de la vie privée du délinquant :
- (i) l'âge du délinquant,
 - (ii) le nom et l'emplacement du pénitencier où il est détenu,

(ii) the name and location of the penitentiary in which the sentence is being served,

(ii.1) if the offender is transferred, a summary of the reasons for the transfer and the name and location of the penitentiary in which the sentence is being served,

(ii.2) if the offender is to be transferred to a minimum security institution as designated by Commissioner's Directive and it is possible to notify the victim before the transfer, a summary of the reasons for the transfer and the name and location of the institution in which the sentence is to be served,

(ii.3) the programs that were designed to address the needs of the offender and contribute to their successful reintegration into the community in which the offender is participating or has participated,

(ii.4) the serious disciplinary offences that the offender has committed,

(iii) information pertaining to the offender's correctional plan, including information regarding the offender's progress towards meeting the objectives of the plan,

(iv) the date of any hearing for the purposes of a review under section 130,

(v) that the offender has been removed from Canada under the Immigration and Refugee Protection Act before the expiration of the sentence, and

(vi) [Repealed, 2015, c. 13, s. 46]

(vii) whether the offender is in custody and, if not, the reason why the offender is not in custody;

(ii.1) en cas de transfèrement dans un autre pénitencier, le nom et l'emplacement de celui-ci et un résumé des motifs du transfèrement,

(ii.2) dans la mesure du possible, un préavis du transfèrement dans un établissement à sécurité minimale au sens des directives du commissaire, le nom et l'emplacement de l'établissement et un résumé des motifs du transfèrement,

(ii.3) les programmes visant à répondre aux besoins et à contribuer à la réinsertion sociale des délinquants auxquels le délinquant participe ou a participé,

(ii.4) les infractions disciplinaires graves qu'il a commises,

(iii) des renseignements concernant son plan correctionnel, notamment les progrès qu'il a accomplis en vue d'en atteindre les objectifs,

(iv) la date de toute audience prévue à l'égard de l'examen visé à l'article 130,

(v) son renvoi du Canada dans le cadre de la Loi sur l'immigration et la protection des réfugiés avant l'expiration de sa peine,

(vi) [Abrogé, 2015, ch. 13, art. 46]

(vii) s'il est sous garde et, le cas échéant, les raisons pour lesquelles il ne l'est pas;

c) lui communique tout ou partie des renseignements ci-après si, à son avis, cette communication n'aurait pas d'incidence négative sur la sécurité du public :

(i) la date de la mise en liberté du délinquant au titre d'une permission de sortir, d'un placement à l'extérieur ou de la libération conditionnelle ou d'office,

(c) shall disclose to the victim any of the following information about the offender, if, in the Commissioner's opinion, the disclosure would not have a negative impact on the safety of the public:

(i) the date, if any, on which the offender is to be released on temporary absence, work release, parole or statutory release,

(ii) the conditions attached to the offender's temporary absence, work release, parole or statutory release,

(iii) the destination of the offender on any temporary absence, work release, parole or statutory release, whether the offender will be in the vicinity of the victim while travelling to that destination and the reasons for any temporary absence; and

(d) shall provide the victim with access to a photograph of the offender taken on the occurrence of the earliest of any of the following — and any subsequent photograph of the offender taken by the Service — if, in the Commissioner's opinion, to do so would not have a negative impact on the safety of the public:

(i) the release of the offender on unescorted temporary absence,

(ii) the offender's work release,

(iii) the offender's release on parole, and

(iv) the offender's release by virtue of statutory release or the expiration of the sentence.

Information to be given to offenders

27 (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender,

(ii) les conditions dont est assorti la permission de sortir, le placement à l'extérieur ou la libération conditionnelle ou d'office,

(iii) la destination du délinquant lors de sa permission de sortir et les raisons de celle-ci, sa destination lors de son placement à l'extérieur, sa libération conditionnelle ou d'office et son éventuel rapprochement de la victime, selon son itinéraire;

d) lui donne accès à une photographie du délinquant au premier des événements ci-après, ou à toute nouvelle photographie du délinquant prise par le Service par la suite, si, à son avis, cet accès n'aurait pas d'incidence négative sur la sécurité du public :

(i) la mise en liberté du délinquant lors d'une permission de sortir sans escorte,

(ii) son placement à l'extérieur,

(iii) sa libération conditionnelle,

(iv) sa libération d'office ou l'expiration de sa peine.

Communication de renseignements au délinquant

27 (1) Sous réserve du paragraphe (3), la personne ou l'organisme chargé de rendre, au nom du Service, une décision au sujet

the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.

Idem

(2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.

Purpose and Principles

Paramount consideration

100.1 The protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases.

Principles guiding parole boards

101 The principles that guide the Board and the provincial parole boards in achieving the purpose of conditional release are as follows:

(a) parole boards take into consideration all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process and information obtained from victims, offenders and other components of the criminal justice system, including

d'un délinquant doit, lorsque celui-ci a le droit en vertu de la présente partie ou des règlements de présenter des observations, lui communiquer, dans un délai raisonnable avant la prise de décision, tous les renseignements entrant en ligne de compte dans celle-ci, ou un sommaire de ceux-ci.

Idem

(2) Sous réserve du paragraphe (3), cette personne ou cet organisme doit, dès que sa décision est rendue, faire connaître au délinquant qui y a droit au titre de la présente partie ou des règlements les renseignements pris en compte dans la décision, ou un sommaire de ceux-ci.

Objet et principes

Critère prépondérant

100.1 Dans tous les cas, la protection de la société est le critère prépondérant appliqué par la Commission et les commissions provinciales.

Principes

101 La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes suivants :

a) elles doivent tenir compte de toute l'information pertinente dont elles disposent, notamment les motifs et les recommandations du juge qui a infligé la peine, la nature et la gravité de l'infraction, le degré de responsabilité du délinquant, les renseignements obtenus au cours du procès ou de la détermination de la peine et ceux qui ont été obtenus des victimes, des délinquants ou d'autres éléments du système de justice pénale, y compris les

assessments provided by correctional authorities;

(b) parole boards enhance their effectiveness and openness through the timely exchange of relevant information with victims, offenders and other components of the criminal justice system and through communication about their policies and programs to victims, offenders and the general public;

(c) parole boards make the least restrictive determinations that are consistent with the protection of society;

(d) parole boards adopt and are guided by appropriate policies and their members are provided with the training necessary to implement those policies; and

(e) offenders are provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

Review Hearings

Attendance by observers

140 (4) Subject to subsections (5) and (5.1), the Board or a person designated, by name or by position, by the Chairperson of the Board shall, subject to such conditions as the Board or person considers appropriate and after taking into account the offender's views, permit a person who applies in writing therefor to attend as an observer at a hearing relating to an offender, unless the Board or person is satisfied that

(a) the hearing is likely to be disrupted or the ability of the Board to consider the

évaluations fournies par les autorités correctionnelles;

b) elles accroissent leur efficacité et leur transparence par l'échange, au moment opportun, de renseignements utiles avec les victimes, les délinquants et les autres éléments du système de justice pénale et par la communication de leurs directives d'orientation générale et programmes tant aux victimes et aux délinquants qu'au grand public;

c) elles prennent les décisions qui, compte tenu de la protection de la société, sont les moins privatives de liberté;

d) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la mise en oeuvre de ces directives;

e) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la possibilité de les faire réviser.

Audience

Présence des observateurs

140 (4) Sous réserve des paragraphes (5) et (5.1), la Commission, ou la personne que le président désigne nommément ou par indication de son poste, doit, aux conditions qu'elle estime indiquées et après avoir pris en compte les observations du délinquant, autoriser la personne qui en fait la demande écrite à être présente, à titre d'observateur, lors d'une audience, sauf si elle est convaincue que, selon le cas :

a) la présence de cette personne, seule ou en compagnie d'autres personnes qui ont

matter before it is likely to be adversely affected by the presence of that person or of that person in conjunction with other persons who have applied to attend the hearing;

(b) the person's presence is likely to adversely affect those who have provided information to the Board, including victims, members of a victim's family or members of the offender's family;

(c) the person's presence is likely to adversely affect an appropriate balance between that person's or the public's interest in knowing and the public's interest in the effective reintegration of the offender into society; or

(d) the security and good order of the institution in which the hearing is to be held is likely to be adversely affected by the person's presence.

Exclusion of observers

Attendance by victim or member of their family

(5.1) In determining whether to permit a victim or a member of the victim's family to attend as an observer at a hearing, the Board or its designate shall make every effort to fully understand the need of the victim and of the members of his or her family to attend the hearing and witness its proceedings. The Board or its designate shall permit a victim or a member of his or her family to attend as an observer unless satisfied that the presence of the victim or family member would result in a situation described in paragraph (4)(a), (b), (c) or (d).

Attendance not permitted

(5.2) If the Board or its designate decides under subsection (5.1) to not permit a

demandé d'assister à la même audience, nuira au déroulement de l'audience ou l'empêchera de bien évaluer la question dont elle est saisie;

b) sa présence incommodera ceux qui ont fourni des renseignements à la Commission, notamment la victime, la famille de la victime ou celle du délinquant;

c) sa présence compromettra vraisemblablement l'équilibre souhaitable entre l'intérêt de l'observateur ou du public à la communication de l'information et l'intérêt du public à la réinsertion sociale du délinquant;

d) sa présence nuira à la sécurité ou au maintien de l'ordre de l'établissement où l'audience doit se tenir.

Poursuite de l'audience à huis clos

Présence d'une victime ou d'un membre de sa famille

(5.1) Lorsqu'elle détermine si une victime ou un membre de sa famille peut être présent, à titre d'observateur, lors d'une audience, la Commission ou la personne qu'elle désigne s'efforce de comprendre le besoin de la victime ou des membres de sa famille d'être présents lors de l'audience et d'en observer le déroulement. La Commission ou la personne qu'elle désigne autorise cette présence sauf si elle est convaincue que celle-ci entraînerait une situation visée aux alinéas (4)a), b), c) ou d).

Présence refusée

(5.2) Lorsque la Commission ou la personne qu'elle désigne décide, en application du paragraphe (5.1), de ne pas

victim or a member of his or her family to attend a hearing, the Board shall provide for the victim or family member to observe the hearing by any means that the Board considers appropriate.

Presentation of statements

140 (10) If they are attending a hearing as an observer,

(a) a victim may present a statement describing the harm, property damage or loss suffered by them as the result of the commission of the offence and its continuing impact on them — including any safety concerns — and commenting on the possible release of the offender; and

(b) a person referred to in subsection 142(3) may present a statement describing the harm, property damage or loss suffered by them as the result of any act of the offender in respect of which a complaint was made to the police or Crown attorney or an information laid under the Criminal Code, and its continuing impact on them — including any safety concerns — and commenting on the possible release of the offender.

Consideration of statement

(10.1) The Board shall, in deciding whether an offender should be released and what conditions might be applicable to the release, take into consideration any statement that has been presented in accordance with paragraph (10)(a) or (b).

Forms of statement

140 (11) If a victim or a person referred to in subsection 142(3) is not attending a hearing, their statement may be presented at the hearing in the form of a written

autoriser la présence d'une victime ou d'un membre de sa famille lors de l'audience, elle prend les dispositions nécessaires pour que la victime ou le membre de sa famille puisse observer le déroulement de l'audience par tout moyen que la Commission juge approprié.

Déclaration par la personne à l'audience

140 (10) Lors de l'audience à laquelle elles assistent à titre d'observateur :

a) d'une part, la victime peut présenter une déclaration à l'égard des dommages ou des pertes qu'elle a subis par suite de la perpétration de l'infraction et des répercussions que celle-ci a encore sur elle, notamment les préoccupations qu'elle a quant à sa sécurité, et à l'égard de l'éventuelle libération du délinquant;

b) d'autre part, la personne visée au paragraphe 142(3) peut présenter une déclaration à l'égard des dommages ou des pertes qu'elle a subis par suite de la conduite du délinquant — laquelle a donné lieu au dépôt d'une plainte auprès de la police ou du procureur de la Couronne ou a fait l'objet d'une dénonciation conformément au Code criminel — et des répercussions que cette conduite a encore sur elle, notamment les préoccupations qu'elle a quant à sa sécurité, et à l'égard de l'éventuelle libération du délinquant.

Déclaration — formes

140 (11) La déclaration de la victime ou de la personne visée au paragraphe 142(3), même si celle-ci n'assiste pas à l'audience, peut y être présentée sous la forme d'une

statement, which may be accompanied by an audio or video recording, or in any other form prescribed by the regulations.

Communication of statement in writing

140 (12) A victim or a person referred to in subsection 142(3) shall, before the hearing, deliver to the Board a transcript of the statement that they plan to present under subsection (10) or (11).

Audio recording

140 (13) Subject to any conditions specified by the Board, a victim, or a person referred to in subsection 142(3), is entitled, on request, after a hearing in respect of a review referred to in paragraph (1)(a) or (b), to listen to an audio recording of the hearing, other than portions of the hearing that the Board considers

(a) could reasonably be expected to jeopardize the safety of any person or reveal a source of information obtained in confidence; or

(b) should not be heard by the victim or a person referred to in subsection 142(3) because the privacy interests of any person clearly outweighs the interest of the victim or person referred to in that subsection.

Access to information

déclaration écrite pouvant être accompagnée d'un enregistrement audio ou vidéo, ou sous toute autre forme prévue par règlement.

Communication préalable de la transcription

140 (12) La victime et la personne visée au paragraphe 142(3) doivent, préalablement à l'audience, envoyer à la Commission la transcription de la déclaration qu'elles entendent présenter au titre des paragraphes (10) ou (11).

Enregistrement sonore

140 (13) La victime ou la personne visée au paragraphe 142(3) a le droit, sur demande et sous réserve des conditions imposées par la Commission, une fois l'audience relative à l'examen visé aux alinéas (1)a) ou b) terminée, d'écouter l'enregistrement sonore de celle-ci, à l'exception de toute partie de l'enregistrement qui, de l'avis de la Commission :

a) risquerait vraisemblablement de mettre en danger la sécurité d'une personne ou de permettre de remonter à une source de renseignements obtenus de façon confidentielle;

b) ne devrait pas être entendue par la victime ou la personne visée au paragraphe 142(3) parce que l'intérêt de la victime ou de la personne ne justifierait nettement pas une éventuelle violation de la vie privée d'une personne.

Accès aux renseignements

140 (14) If an observer has been present during a hearing or a victim or a person has exercised their right under subsection (13), any information or documents discussed or referred to during the hearing shall not for that reason alone be considered to be publicly available for purposes of the Access to Information Act or the Privacy Act.

Disclosure of information to victims

142 (1) At the request of a victim of an offence committed by an offender, the Chairperson

(a) shall disclose to the victim the following information about the offender:

- (i) the offender's name,
 - (ii) the offence of which the offender was convicted and the court that convicted the offender,
 - (iii) the date of commencement and length of the sentence that the offender is serving, and
 - (iv) eligibility dates and review dates applicable to the offender under this Part in respect of unescorted temporary absences or parole; and
- (b) may disclose to the victim any of the following information about the offender, where in the Chairperson's opinion the interest of the victim in the disclosure clearly outweighs any invasion of the offender's privacy that could result from the disclosure, namely,

- (i) the offender's age,
- (ii) the location of the penitentiary in which the sentence is being served,

140 (14) Si un observateur est présent lors d'une audience ou si la victime ou la personne visée au paragraphe 142(3) a exercé ses droits au titre du paragraphe (13), les renseignements et documents qui y sont étudiés ou communiqués ne sont pas réputés être des documents accessibles au public aux fins de la Loi sur la protection des renseignements personnels et de la Loi sur l'accès à l'information.

Communication de renseignements à la victime

142 (1) Sur demande de la victime, le président :

a) communique à celle-ci les renseignements suivants :

- (i) le nom du délinquant,
- (ii) l'infraction dont il a été trouvé coupable et le tribunal qui l'a condamné,
- (iii) la date de début et la durée de la peine qu'il purge,
- (iv) les dates d'admissibilité et d'examen applicables aux permissions de sortir sans escorte ou à la libération conditionnelle;

b) peut lui communiquer, tout ou partie des renseignements suivants si, à son avis, l'intérêt de la victime justifierait nettement une éventuelle violation de la vie privée du délinquant :

- (i) l'âge du délinquant,
- (ii) l'emplacement du pénitencier où il est détenu,
- (iii) la date de ses permissions de sortir sans escorte, de ses permissions de sortir avec escorte approuvées par la Commission au titre du paragraphe

(iii) the date, if any, on which the offender is to be released on unescorted temporary absence, escorted temporary absence where the Board has approved the absence as required by subsection 746.1(2) of the Criminal Code, parole or statutory release,

(iv) the date of any hearing for the purposes of a review under section 130,

(v) any of the conditions attached to the offender's unescorted temporary absence, parole or statutory release and the reasons for any unescorted temporary absence,

(vi) the destination of the offender when released on unescorted temporary absence, parole or statutory release, and whether the offender will be in the vicinity of the victim while travelling to that destination,

(vii) whether the offender is in custody and, if not, the reason that the offender is not in custody,

(viii) whether or not the offender has appealed a decision of the Board under section 147, and the outcome of that appeal, and

(ix) the reason for a waiver of the right to a hearing under subsection 140(1) if the offender gives one.

Registry of decisions

144 (1) The Board shall maintain a registry of the decisions rendered by it under this Part or under paragraph 746.1(2)(c) or (3)(c) of the Criminal Code and its reasons for those decisions.

Access to registry

(2) A person who demonstrates an interest in a case may, on written application to the Board, have access to the contents of the registry relating to that case, other than

746.1(2) du Code criminel, de sa libération conditionnelle ou de sa libération d'office,

(iv) la date de toute audience prévue à l'égard de l'examen visé à l'article 130,

(v) les conditions dont est assortie la permission de sortir sans escorte et les raisons de celle-ci, ainsi que les conditions de la libération conditionnelle ou d'office,

(vi) sa destination lors de sa mise en liberté et son éventuel rapprochement de la victime, selon son itinéraire,

(vii) s'il est sous garde et, le cas échéant, les raisons pour lesquelles il ne l'est pas,

(viii) si le délinquant a interjeté appel en vertu de l'article 147 et, le cas échéant, la décision rendue au titre de celui-ci,

(ix) si le délinquant a renoncé à son droit à une audience au titre du paragraphe 140(1), le motif de la renonciation, le cas échéant.

Constitution du registre

144 (1) La Commission constitue un registre des décisions qu'elle rend sous le régime de la présente partie ou des alinéas 746.1(2)c) ou (3)c) du Code criminel et des motifs s'y rapportant.

Accès au registre

(2) Sur demande écrite à la Commission, toute personne qui démontre qu'elle a un intérêt à l'égard d'un cas particulier peut avoir accès au registre pour y consulter les

information the disclosure of which could reasonably be expected

(a) to jeopardize the safety of any person;

(b) to reveal a source of information obtained in confidence; or

(c) if released publicly, to adversely affect the reintegration of the offender into society.

Idem

(3) Subject to any conditions prescribed by the regulations, any person may have access for research purposes to the contents of the registry, other than the name of any person, information that could be used to identify any person or information the disclosure of which could jeopardize any person's safety.

Idem

(4) Notwithstanding subsection (2), where any information contained in a decision in the registry has been considered in the course of a hearing held in the presence of observers, any person may, on application in writing, have access to that information in the registry.

Copy of decision

144.1 At the request of a victim, or a person referred to in subsection 142(3), the Board shall, despite section 144, provide the victim or person with a copy of any decision rendered by it under this Part or under paragraph 746.1(2)(c) or (3)(c) of the Criminal Code in relation to the offender and its reasons for that decision, unless doing so could reasonably be expected

(a) to jeopardize the safety of any person;

renseignements qui concernent ce cas, à la condition que ne lui soient pas communiqués de renseignements dont la divulgation risquerait vraisemblablement :

a) de mettre en danger la sécurité d'une personne;

b) de permettre de remonter à une source de renseignements obtenus de façon confidentielle;

c) de nuire, s'ils sont rendus publics, à la réinsertion sociale du délinquant.

Idem

(3) Sous réserve des conditions fixées par règlement, les chercheurs peuvent consulter le registre, pourvu que soient retranchés des documents auxquels ils ont accès les noms des personnes concernées et les renseignements précis qui permettraient de les identifier ou dont la divulgation pourrait mettre en danger la sécurité d'une personne.

Accès aux documents rendus publics

(4) Par dérogation au paragraphe (2), toute personne qui en fait la demande écrite peut avoir accès aux renseignements que la Commission a étudiés lors d'une audience tenue en présence d'observateurs et qui sont compris dans sa décision versée au registre.

Copie de la décision

144.1 La Commission remet, malgré l'article 144, à la victime ou à la personne visée au paragraphe 142(3), si elles en font la demande, une copie de toute décision qu'elle a rendue sous le régime de la présente partie ou des alinéas 746.1(2)(c) ou (3)(c) du Code criminel à l'égard du

(b) to reveal a source of information obtained in confidence; or

(c) to prevent the successful reintegration of the offender into society.

délinquant, motifs à l'appui, sauf si cela risquerait vraisemblablement :

a) de mettre en danger la sécurité d'une personne;

b) de permettre de remonter à une source de renseignements obtenus de façon confidentielle;

c) d'empêcher la réinsertion sociale du délinquant.

ANNEX E



Decision-Making Policy Manual for Board Members

Manuel des politiques décisionnelles à l'intention des commissaires



Second Edition/Deuxième édition
No. 12 – 2018-04-18

Canada

1.3 Victims Access to Audio Recordings of Hearings

Legislative References

1. Corrections and Conditional Release Act (CCRA), subsections 2(1), 140(13) and (14), and 142(3).

Purpose

2. To provide guidance to Board members on authorizing the release of an audio recording of a parole hearing that has occurred on or after June 1st, 2016.

Decision-Making Criteria and Process

3. A victim who does not attend a hearing for day or full parole, including accelerated parole review, as an observer, may request to listen to an audio recording of the hearing in accordance with subsection 140(13) of the CCRA. The request can be made prior to the hearing or after the hearing. Only the audio recording of the most recent parole hearing will be accessible.

1.3 Accès des victimes aux enregistrements sonores des audiences

Références législatives

1. Loi sur le système correctionnel et la mise en liberté sous condition (LSCMLC), paragraphes 2(1), 140(13) et (14), et 142(3).

Objet

2. Guider les commissaires concernant l'examen des demandes présentées par une victime qui veut écouter l'enregistrement sonore d'une audience de libération conditionnelle qui a eu lieu le 1^{er} juin 2016 ou après cette date.

Critères et processus décisionnels

3. La victime qui n'est pas présente à l'audience de semi-liberté ou de libération conditionnelle totale, y compris la procédure d'examen expéditif, à titre d'observateur, a le droit de présenter une demande pour écouter l'enregistrement sonore de l'audience en vertu du paragraphe 140(13) de la LSCMLC. La demande peut être présentée avant ou après l'audience. Seul l'enregistrement sonore de l'audience la plus récente sera accessible.

Audio Recordings of Hearings

10. The Board will make an audio recording of all hearings to provide an account of what occurred at each hearing and to allow for reviews to ensure that procedural safeguards were met.
11. Audio recordings of hearings will not include the Board members' deliberations.

Enregistrements sonores des audiences

10. La Commission procède à l'enregistrement sonore de toutes les audiences pour fournir un compte rendu de ce qui s'est passé à chacune d'elles et de permettre des examens visant à vérifier si les garanties procédurales ont été respectées.
11. Les enregistrements sonores des audiences ne comprennent pas les délibérations des commissaires.



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Decision-Making Policy Manual for Board Members

Manuel des politiques décisionnelles à l'intention des commissaires



Second Edition/Deuxième édition
No. 15 – 2019-06-21

Canada

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1.3 Victim Requests to Listen to Audio Recordings of Hearings

Legislative References

1. *Corrections and Conditional Release Act* (CCRA), subsections 2(1), 140(13) and (14), and 142(3).

Purpose

2. To provide guidance to Board members on authorizing a victim to listen to an audio recording of a parole hearing that has occurred on or after June 1st, 2016.

Decision-Making Criteria and Process

3. A victim may request to listen to an audio recording of a day or full parole hearing, including accelerated parole review, in accordance with subsection 140(13) of the CCRA. The request can be made prior to or after the hearing.

1.3 Demandes des victimes pour écouter aux enregistrements sonores des audiences

Références législatives

1. *Loi sur le système correctionnel et la mise en liberté sous condition* (LSCMLC), paragraphes 2(1), 140(13) et (14), et 142(3).

Objet

2. Guider les commissaires concernant l'examen des demandes présentées par une victime qui veut écouter l'enregistrement sonore d'une audience de libération conditionnelle qui a eu lieu le 1^{er} juin 2016 ou après cette date.

Critères et processus décisionnels

3. La victime peut demander d'écouter l'enregistrement sonore d'une audience de semi-liberté ou de libération conditionnelle totale, y compris la procédure d'examen expéditif, en vertu du paragraphe 140(13) de la LSCMLC. La demande peut être présentée avant ou après l'audience.

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Hearing Process

9. Hearings before the Board are administrative processes in nature with no formal rules of evidence.

Audio Recordings of Hearings

10. The Board will make an audio recording of all hearings to provide an account of what occurred at each hearing and to allow for reviews to ensure that procedural safeguards were met.
11. Audio recordings of hearings will not include the Board members' deliberations.

Processus d'audience

9. Les audiences de la Commission constituent un processus de nature administrative qui n'est pas assujéti aux règles de preuve traditionnelles.

Enregistrements sonores des audiences

10. La Commission procède à l'enregistrement sonore de toutes les audiences pour fournir un compte rendu de ce qui s'est passé à chacune d'elles et de permettre des examens visant à vérifier si les garanties procédurales ont été respectées.
11. Les enregistrements sonores des audiences ne comprennent pas les délibérations des commissaires.



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Second Edition/Deuxième édition
No. 16 – 2019-09-20

Canada

1.3 Victim Requests to Listen to Audio Recordings of Hearings

Legislative References

1. *Corrections and Conditional Release Act* (CCRA), subsections 2(1), 140(13) and (14), and 142(3).

Purpose

2. To provide guidance to Board members on authorizing a victim to listen to an audio recording of a parole hearing that has occurred on or after June 1st, 2016.

Decision-Making Criteria and Process

3. A victim may request to listen to an audio recording of a day or full parole hearing, including accelerated parole review, in accordance with subsection 140(13) of the CCRA. The request can be made prior to or after the hearing.

1.3 Demandes des victimes pour écouter aux enregistrements sonores des audiences

Références législatives

1. *Loi sur le système correctionnel et la mise en liberté sous condition* (LSCMLC), paragraphes 2(1), 140(13) et (14), et 142(3).

Objet

2. Guider les commissaires concernant l'examen des demandes présentées par une victime qui veut écouter l'enregistrement sonore d'une audience de libération conditionnelle qui a eu lieu le 1^{er} juin 2016 ou après cette date.

Critères et processus décisionnels

3. La victime peut demander d'écouter l'enregistrement sonore d'une audience de semi-liberté ou de libération conditionnelle totale, y compris la procédure d'examen expéditif, en vertu du paragraphe 140(13) de la LSCMLC. La demande peut être présentée avant ou après l'audience.

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Hearing Process

9. Hearings before the Board are administrative processes in nature with no formal rules of evidence.

Audio Recordings of Hearings

10. The Board will make an audio recording of all hearings to provide an account of what occurred at each hearing and to allow for reviews to ensure that procedural safeguards were met.
11. Audio recordings of hearings will not include the Board members' deliberations.

Processus d'audience

9. Les audiences de la Commission constituent un processus de nature administrative qui n'est pas assujéti aux règles de preuve traditionnelles.

Enregistrements sonores des audiences

10. La Commission procède à l'enregistrement sonore de toutes les audiences pour fournir un compte rendu de ce qui s'est passé à chacune d'elles et de permettre des examens visant à vérifier si les garanties procédurales ont été respectées.
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Second Edition/Deuxième édition
No. 17 – 2019-12-18

Canada

1.3 Victim Requests to Listen to Audio Recordings of Hearings

Legislative References

1. *Corrections and Conditional Release Act* (CCRA), subsections 2(1), 140(13) and (14), and 142(3).

Purpose

2. To provide guidance to Board members on authorizing a victim to listen to an audio recording of a parole hearing that has occurred on or after June 1st, 2016.

Decision-Making Criteria and Process

3. A victim may request to listen to an audio recording of a day or full parole hearing, including accelerated parole review, in accordance with subsection 140(13) of the CCRA. The request can be made prior to or after the hearing.

1.3 Demandes des victimes pour écouter aux enregistrements sonores des audiences

Références législatives

1. *Loi sur le système correctionnel et la mise en liberté sous condition* (LSCMLC), paragraphes 2(1), 140(13) et (14), et 142(3).

Objet

2. Guider les commissaires concernant l'examen des demandes présentées par une victime qui veut écouter l'enregistrement sonore d'une audience de libération conditionnelle qui a eu lieu le 1^{er} juin 2016 ou après cette date.

Critères et processus décisionnels

3. La victime peut demander d'écouter l'enregistrement sonore d'une audience de semi-liberté ou de libération conditionnelle totale, y compris la procédure d'examen expéditif, en vertu du paragraphe 140(13) de la LSCMLC. La demande peut être présentée avant ou après l'audience.

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Hearing Process

9. Hearings before the Board are administrative processes in nature with no formal rules of evidence.

Audio Recordings of Hearings

10. The Board will make an audio recording of all hearings to provide an account of what occurred at each hearing and to allow for reviews to ensure that procedural safeguards were met.
11. Audio recordings of hearings will not include the Board members' deliberations.

Processus d'audience

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Enregistrements sonores des audiences

10. La Commission procède à l'enregistrement sonore de toutes les audiences pour fournir un compte rendu de ce qui s'est passé à chacune d'elles et de permettre des examens visant à vérifier si les garanties procédurales ont été respectées.
11. Les enregistrements sonores des audiences ne comprennent pas les délibérations des commissaires.



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Manuel des politiques d'É!cisionnelles

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Second Edition/Deuxième édition
No. 18 – 2020-09-22

Canada

1.3 Victim Requests to Listen to Audio Recordings of Hearings

Legislative References

1. *Corrections and Conditional Release Act* (CCRA), subsections 2(1), 140(13) and (14), and 142(3).

Purpose

2. To provide guidance to Board members on authorizing a victim to listen to an audio recording of a parole hearing that has occurred on or after June 1st, 2016.

Decision-Making Criteria and Process

3. A victim may request to listen to an audio recording of a day or full parole hearing, including accelerated parole review, in accordance with subsection 140(13) of the CCRA. The request can be made prior to or after the hearing.

1.3 Demandes des victimes pour écouter aux enregistrements sonores des audiences

Références législatives

1. *Loi sur le système correctionnel et la mise en liberté sous condition* (LSCMLC), paragraphes 2(1), 140(13) et (14), et 142(3).

Objet

2. Guider les commissaires concernant l'examen des demandes présentées par une victime qui veut écouter l'enregistrement sonore d'une audience de libération conditionnelle qui a eu lieu le 1^{er} juin 2016 ou après cette date.

Critères et processus décisionnels

3. La victime peut demander d'écouter l'enregistrement sonore d'une audience de semi-liberté ou de libération conditionnelle totale, y compris la procédure d'examen expéditif, en vertu du paragraphe 140(13) de la LSCMLC. La demande peut être présentée avant ou après l'audience.

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Hearing Process

9. Hearings before the Board are administrative processes in nature with no formal rules of evidence.

Audio Recordings of Hearings

10. The Board will make an audio recording of all hearings to provide an account of what occurred at each hearing and to allow for reviews to ensure that procedural safeguards were met.
11. Audio recordings of hearings will not include the Board members' deliberations.

Processus d'audience

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Enregistrements sonores des audiences

10. La Commission procède à l'enregistrement sonore de toutes les audiences pour fournir un compte rendu de ce qui s'est passé à chacune d'elles et de permettre des examens visant à vérifier si les garanties procédurales ont été respectées.
11. Les enregistrements sonores des audiences ne comprennent pas les délibérations des commissaires.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: T-101-18,T-102-18,T-103-18 and T-1358-12,

STYLE OF CAUSE: KAREN FRASER, JENNIFER SWEET, NICOLE SWEET, KIM SWEET, JOHN SWEET, J. ROBERT SWEET, CHARLES SWEET, PATRICIA, CORCORAN, ANN PARKER AND TORONTO POLICE ASSOCIATION v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS,, ATTORNEY GENERAL OF CANADA, CORRECTIONAL SERVICE, CANADA, PAROLE BOARD OF CANADA AND CRAIG MUNRO

AND DOCKET: T-465-20

STYLE OF CAUSE: DOUG FRENCH, DONNA FRENCH AND DEBORAH MAHAFFY v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS,, ATTORNEY GENERAL OF CANADA, PAROLE BOARD OF CANADA,, AND PAUL BERNARDO

AND DOCKET: T-1884-19

STYLE OF CAUSE: CANADIAN BROADCASTING CORPORATION v. PAROLE BOARD OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO – BY VIDECONFERENCE ZOOM

DATE OF HEARING: FEBRUARY 24, 2021

JUDGMENT AND REASONS: THE HONOURABLE MADAM JUSTICE MCVEIGH

DATED: AUGUST 4, 2021

APPEARANCES:

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Marjan Delavar

FOR THE APPLICANTS
KAREN FRASER *et al*

Iris Fischer
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Joel Robichard
Roy Lee
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FOR THE RESPONDENTS
MINISTER OF PUBLIC SAFETY AND EMERGENCY
PREPARDESNESS *et al.*

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FOR THE RESPONDENT
MINISTER OF PUBLIC SAFETY AND EMERGENCY
PREPARDESNESS *et al*

NOVA SCOTIA COURT OF APPEAL

Citation: *Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General)*,
2013 NSCA 134

Date: 20131126

Docket: CA 416544

Registry: Halifax

Between:

Cape Breton Explorations Ltd.

Appellant

v.

The Attorney General of Nova Scotia,
Nova Scotia Power Incorporated, and
The Nova Scotia Utility and Review Board

Respondents

Judges: Saunders, Oland and Farrar, JJ.A.

Motion Heard: September 20, 2013, in Halifax, Nova Scotia

Held: The matter of the confidential treatment of Nova Scotia Power Incorporated documents submitted to the Nova Scotia Utility and Review Board is remitted to the Board.

Counsel: Richard P. Stephenson for the appellant

Edward A. Gores Q.C. for the Attorney General of Nova
Scotia

Daniel M. Campbell, Q.C., Nicole Godbout and Jack
Townsend for Nova Scotia Power Inc.

Richard J. Melanson for Nova Scotia Utility And Review
Board

David Henley for Oxford Frozen Foods Limited

Ian Breneman for Minas Basin Pulp and Power Company
Limited

Reasons for judgment:

[1] In a hearing before it, the Nova Scotia Utility and Review Board (the “Board”) treated certain documents as confidential. In its appeal of the Board’s decision, Cape Breton Explorations Limited (“CBEx”) alleges, among other things, that the Board erred in doing so. It says that, pursuant to the principle of open courts, much of that material should be disclosed at the hearing of its appeal. The motion which is central to this decision seeks an order to preserve the confidentiality of that material.

[2] Nova Scotia Power Incorporated (“NSPI”) applied to the Board for approval of a capital expenditure of over \$93,000,000 in a certain project. CBEx was an unsuccessful bidder in that project. When it submitted its material, NSPI sought confidential treatment for a large volume of the documents it filed in support of its application. Subject to minor variances, the Board approved the confidential treatment of that information.

[3] By a decision dated April 26, 2013, reported as 2013 NSUARB 92, and Order dated April 30, 2013, the Board approved NSPI’s investment.

[4] On the appellant’s motion for dates and directions for the appeal, Farrar J.A. directed that both confidential and non-confidential versions of the Appeal Book be filed, and a motion be heard to determine which filings and/or arguments on the hearing of the appeal will be confidential. Accordingly, NSPI brought this motion for a confidentiality order. It, CBEx and the Board, filed briefs and made submissions. As permitted by the Court, NSPI’s minority partners in the project filed written submissions and made short presentations.

Background*The Board Decision:*

[5] In its decision, the Board described NSPI’s application and the nature of the project thus:

[1] On December 10, 2012, Nova Scotia Power Inc. (“NSPI”, “Company”) filed an Application for review and approval by the Nova Scotia Utility and

Review Board (“Board”) of a capital item called the South Canoe Wind Project (“Project”) in the amount of \$93,091,536. This item was included in NSPI’s 2013 Annual Capital Expenditure (“ACE”) Plan as a capital item for subsequent approval.

[2] The Project is a combination of two wind projects selected by the Renewable Electricity Administrator (“REA”) where NSPI has a 49% interest in each. The two projects total 34 turbines, and NSPI will own half of the turbines in each project.

[3] The two projects are located on adjacent properties in an area between provincial Highway 14 and New Russell Road, in Lunenburg County. One project is for 78 MW and is in conjunction with Oxford Frozen Foods Limited (“OFF”), and the other is for 24 MW, in conjunction with Minas Basin Pulp and Power Company Limited (“MBPP”).

[4] These projects are two of the three selected by the REA to meet the *Renewable Electricity Regulations*, N.S. Reg 155/2012, as amended (“*RE Regs.*”) for NSPI to meet a 25% renewable electricity standard by 2015. Evaluation of the projects submitted in response to a Request for Proposals was undertaken by the REA. The REA’s mandate and process and the *RE Regs.* as they relate to this Application are discussed later in this Decision.

[5] These are lease agreements for the lands on which the turbines will be located, some of which is owned by Timberland Holdings (2010) Limited, which is a sister company to MBPP. The other lands are owned by Atlantic Star Forestry Ltd.

[6] Additionally, there is an asset sharing agreement between NSPI, OFF and MBPP, a project construction and operating agreement, as well as agreements relating to the purchase, installation, and maintenance of the wind turbines and foundations. These agreements have been reviewed as part of the Board’s consideration of the Application, and are discussed more fully later in the Decision.

[7] NSPI stated that there are four additional work orders for the interconnection substation, transmission line, line upgrades and substation network upgrades which will come forward in 2013 and are related to the Project. The total cost of those four projects is around \$23 million. NSPI stated in the Application that the line upgrades and substation network upgrades would be required whether or not NSPI was a part owner of the Project.

[8] NSPI asked the Board for approval by March 31, 2013, in order to confirm contractual arrangements for turbine purchases and to maintain the

construction schedule to have commercial operation in place by December 31, 2014.

[6] According to CBEx, and not disputed by NSPI, the original application NSPI filed with the Board contained 884 pages. NSPI claimed confidentiality over 734 of those pages and redacted terms from an additional three pages, leaving only some 150 pages available for public review. It also sought confidential treatment for most of the other material it filed later. NSPI responded to an Information Request with 224 pages of confidential information, 25 pages of redacted information and 178 pages of publicly available information. Its reply evidence consisted of 368 pages of confidential information, four pages of redacted information and 36 pages of publicly available information.

[7] The hearing before the Board took place on February 20 and 21, 2013. NSPI was represented by counsel, as were CBEx (which the Board had granted intervenor status), the Consumer Advocate and the Small Business Advocate. Not until its closing submissions to the Board did CBEx raise any concerns with regard to the confidential treatment of NSPI documents. Neither the Consumer Advocate nor the Small Business Advocate addressed the confidentiality issue.

[8] In its decision, the Board set out its authority with regard to confidential documents and what had transpired with NSPI's request for confidential treatment:

[34] The *Board Regulatory Rules* include provisions regarding confidential documents as follows:

- 12 (1) Subject to Rule 12(2), all documents filed in respect of an application shall be placed on the public record.
- (2) A party may request that all or any part of the document be held in confidence by the Board, which request shall be placed on the public record.
- ...
- (6) A party may object to a request for confidentiality by filing an objection and serving the objection on the parties.
- (7) An objection shall state the reasons
 - (a) why the party requires disclosure of the document; and

(b) why disclosure would be in the public interest.

[35] In its initial Application dated December 7, 2012 and filed on December 10, 2012, NSPI claimed confidential treatment for certain parts of the Application. The Board responded by letter dated December 14, 2012, that it accepted the claim for confidentiality with the exception of two documents, Appendices D and E (the Nova Scotia Power 100 MW – Wind Turbine Generators Request for Information, and the Nova Scotia Power Wind Turbine Generator Request for Proposal, respectively). As a result, NSPI re-filed its Application on December 20, 2012, with Appendix D being entirely non-confidential, and Appendix E being partially redacted.

[36] The Board stated in a letter dated January 14, 2013, that:

Therefore, in response to NSPI’s request in its letter of December 20, 2012, the Board approves the confidential treatment of information in this Application as requested at this time. Should an intervenor object to such treatment, however, the Board reserves the right to re-consider this issue pursuant to Board Rule 12.

[NSPI Reply Submission, March 8, 2013, p. 17]

[37] No intervenor filed an objection pursuant to *Regulatory Rule 12(6)* with respect to confidentiality prior to the hearing, and no objection was received during the hearing.

[9] Respectfully, the Board’s consideration of NSPI’s claim of confidentiality was perfunctory at best. For example, the Board began its reasons on the confidentiality aspect of the application before it with this comment:

“The Board considers that once a hearing has concluded, it should not entertain a request to adjudicate the claim for confidentiality.”

Then, after reiterating its recognition of the importance of having “an open and transparent process to the extent possible” [¶ 45], the Board concluded:

[46] The Board notes that many of the documents filed in confidence in this matter in fact either had or required very limited redactions. While the Board agrees with NSPI that in essence the interests of ratepayers in having good commercial terms and thus lower rates, and not shareholder interests in returns, are the primary consideration in requests for confidentiality, the Board believes that filing an entire document as confidential may not always be necessary. As a result, the Board intends to continue to exercise vigilance in future filings regarding requests under *Regulatory Rule 12*, and expects that NSPI will take

steps to ensure that confidentiality is claimed only on demonstrably justifiable terms, and not in a routine or wholesale fashion.

[47] The Board is not prepared to allow CBEx's request that "all application documents be made publicly available, subject to limited redactions". As noted earlier, the Board has endeavoured to exercise care in its discussion of the contents of documents over which confidentiality was maintained in this application. The Board's discussion of them is limited to the extent considered imperative in order to provide an understandable and reasoned Decision.

[10] The Board then proceeded to deal with issues such as its jurisdiction to consider NSPI's application, NSPI's inclusion of its capital costs in rate base, and whether NSPI could apply under the *Public Utilities Act*, R.S.N.S. 1989, c. 380, as amended, for approval of its capital costs. In its decision and order, the Board approved NSPI's capital expenditure subject to certain conditions.

The CBEx Appeal

[11] In its appeal from the Board's order, CBEx raises four grounds of appeal:

1. The Board erred in law in finding that s. 35 of the *Public Utilities Act* gave the Board jurisdiction to require the ratepaying public to pay for, and guarantee the profits of, Nova Scotia Power Incorporated's ("NSPI") minority financial investment in a renewable electricity project to be controlled and operated by third party independent power producers (the "South Canoe Wind Project");
2. The Board erred in law in finding no conflict between the inclusion of the costs in the rate base of NSPI's investment in the South Canoe Wind Project and the process established by the *Electricity Act* for procurement of renewable electricity by the Renewable Electricity Administrator and payment for the procured electricity;
3. The Board erred in law in finding that NSPI was legally permitted to directly own some of the assets of the South Canoe Wind Project;
4. The Board erred in law in agreeing to treat as confidential from the public a large volume of documents submitted by NSPI to support its application requesting that the ratepaying public pay for its investment and profits in the South Canoe Wind Project;

[12] The motion before this Court pertains only to the fourth ground dealing with the confidential treatment of documents. By motion dated October 3, 2013 NSPI brought a motion to sever the first three grounds of appeal from the fourth, and to abridge the record on appeal pursuant to *Rules* 37.01 and 37.05. Justice Farrar dismissed that motion in *Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General)*, 2013 NSCA 116.

The NSPI Motion:

[13] In this motion pursuant to *Rules* 85.04 - 85.06, NSPI seeks a Confidentiality Order which, according to its brief, would provide for the following:

- a. sealing the confidential version of the Appeal Book (the “Confidential Record”), and providing that only the Court and counsel for the parties to the appeal may access the Confidential Record;
 - b. providing that a factum of any party which refers to information contained only in the Confidential Record must be redacted to remove the references to the confidential information, and sealing the unredacted version of the factum;
- and
- c. providing that if any party wishes to make reference to information contained in the Confidential Record on the hearing of the argument on the appeal must first ask the Court to go *in camera* for that portion of the discussion only.

In support of its motion, NSPI filed the affidavit of Robin McAdam, its Executive Vice-president, Strategic Business & Customer Service (the “McAdam Affidavit”). It contained numerous attachments, some of which will be described later.

[14] CBEx filed a brief which opposed the motion. The Board submitted a brief limited to general principles relating to its statutory mandate, its process and the *Board Regulatory Rules*.

[15] As recounted in the Board’s description of NSPI’s application quoted in ¶ 5 above, NSPI has a 49% interest in each of the two wind projects. Oxford Frozen Foods Limited (“Oxford”) has the remaining 51% in one of the projects, and Minas

Basin Pulp and Paper Company Limited (“Minas Basin”) 51% in the other. Shortly before the hearing, each of Oxford and Minas Basin sought to participate in the confidentiality motion. Neither NSPI nor CBEx had consented. In the circumstances, the Court granted Oxford and Minas Basin permission, as non-parties, to participate by the provisional filing of affidavits and a brief on their behalves, and by brief oral submissions by their mutual counsel.

Issue:

[16] The sole issue on this motion is whether the Court should grant the confidentiality order sought by NSPI.

[17] I must first consider if this Court has the jurisdiction to hear such a motion.

Jurisdiction Issue:

[18] *Civil Procedure Rule 85.04* which pertains to proceedings in the Supreme Court of this Province reads:

85.04 (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.

(2) An order that provides for any of the following is an example of an order for confidentiality:

- (a) sealing a court document or an exhibit in a proceeding;
- (b) requiring the prothonotary to block access to a recording of all or part of a proceeding;
- (c) banning publication of part or all of a proceeding;
- (d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including in a heading.

(3) A judge who is satisfied that it is in accordance with law to make an order excluding the public from a courtroom, under Section 37 of the

Judicature Act, may make an order for confidentiality to aid the purpose of the exclusion.

[19] *Rule 90.02(1)* provides that the *Civil Procedure Rules* not inconsistent with *Rule 90* apply to proceedings in the Court of Appeal, with any modifications as directed by the Court or one of its judges. The only provision in *Rule 90* which deals with confidentiality orders is *Rule 90.37(15)*:

90.37 (15) A judge of the Court of Appeal, on motion, may make an order to do any of the following, until the Court of Appeal provides a further order:

- (a) allow the use of pseudonyms in the pleadings;
- (b) impose a publication ban;
- (c) require a sealing of a court file;
- (d) require a hearing to be *in camera*.

[20] There being no inconsistency between *Rule 90.37(15)* and *Rule 85.04*, the latter provides authority for the motion for the confidentiality order to proceed before this Court. See also *Rule 90.48(1)(e)* which gives this Court authority to “make any order ... that the Court of Appeal considers necessary.”

[21] In the result, it is my view that this Court has the jurisdiction to hear and determine the confidentiality motion brought by NSPI.

Analysis:

[22] I begin my consideration of the motion with a brief description of the principle of open courts, and the respective positions of NSPI and CBEx.

[23] The open courts principle is well-established. Importantly, it is linked to the fundamental freedom of expression, including freedom of the press and other media of communication, set out in s. 2(b) of the *Canadian Charter of Rights and Freedoms*. In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at ¶ 36, the Supreme Court of Canada quoted with approval this passage from *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at ¶ 23:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

[24] Confidentiality orders are permitted as an exception to the open courts principle, but only when certain criteria set out in *Sierra Club* at ¶ 53 are met, these being that:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[25] NSPI argues that a confidentiality order is warranted for the hearing of CBEx's appeal in the particular circumstances here. It says that disclosure of the information the Board accepted and treated as confidential would not only cause direct harm to NSPI and its customers, but also would cause NSPI to be in violation of agreements with third parties, including Oxford, Minas Basin and suppliers, which contain confidentiality provisions. According to NSPI, disclosure would also impair the efficient and effective operation of the regulatory processes of the Board. Alternatively, NSPI argues that the salutary effects of the confidentiality order it seeks outweighs its deleterious effects.

[26] CBEx does not dispute NSPI's assertion of confidentiality over the financial terms in the documents the Board treated as confidential. However, it claims that everything else is either not truly confidential or the public interest favours disclosure. It also submits that the agreements with third parties included provisions allowing disclosure before the Board and the courts.

[27] In short, NSPI and CBEx agree that *Sierra Club* is the relevant law. They differ on whether the strict test for the granting of a confidentiality order has been

satisfied. The focus of their submissions necessarily turned to the voluminous record before the Board and contained in the materials filed with this Court. The McAdam Affidavit NSPI presented in support of its motion included a table listing over 50 documents and a detailed explanation for each of them as to why confidential treatment for its entirety, or part or parts of it, was justified.

[28] For its part, CBEx argues that NSPI's claim is "grossly overbroad" and that NSPI has not identified a serious risk of harm to a societal interest of sufficient importance to outweigh the *Charter*-protected public interest in open court proceedings. Attached to its brief was a table setting out the identical documents as contained in the McAdam Affidavit. Again, there was a detailed explanation for each, this time by CBEx as to why it disputed confidential treatment or redactions, or indicating those instances where it accepted NSPI's position.

[29] The record before this Court pertaining to the Board's decision to grant confidential treatment to many or portions of NSPI's documents in support of its application for approval of its capital expenditure in the South Canoe Wind Project is slim. In its two-page December 7, 2012 letter to the Board which accompanied its application, NSPI asked that certain information and supporting documentation contained in appendices be maintained as confidential, pursuant to *Board Rule 12(4)* as "Commercial Information – Full and Partial Redaction". It stated that certain items associated with the cost of this project were considered "confidential to protect value for customers and mitigate the risk of prospective proponents having access to pricing quotes and other commercially sensitive information." NSPI also sought Board approval of an attached confidentiality undertaking pertaining to the provisions and access to "Designated Confidential Information" as defined in that document.

[30] The Board's response a week later advised its approval of the confidentiality undertaking and sought justification for confidential treatment of two appendices. In its reply dated December 20, 2012 NSPI re-designated one appendix as non-confidential and supplied a partially redacted version of the other.

[31] By letter dated January 14, 2013 the Board accepted NSPI's explanations and continued:

Therefore, in response to NSPI's request in its letter of December 20, 2012, the Board approves the confidential treatment of information in this Application as

requested at this time. Should an intervenor object to such treatment, however, the Board reserves the right to re-consider this issue pursuant to Board Rule 12.

[32] Finally, the record includes the Board's decision on the confidentiality question. In its reasons, the Board observed that no objection had been made pursuant to its *Rule 12(6)* before or during the hearing of NSPI's application. It stated its intention to continue to exercise vigilance in future and its expectations of NSPI in regard to its claims to confidentiality. However, its decision does not squarely address what the Board considered and weighed in determining that all or any part of the documents should be held in confidence.

[33] Without such reasons, it is not apparent that the Board conducted an analysis according to its *Regulatory Rule 12* which its counsel suggests in many respects is a codification of the principles set out in *Sierra Club*. Counsel for the Board acknowledged that, except for the Board's mention of *Nova Scotia Power Incorporated (Re)*, 2009 NSUAR 179 (CanLII) and its inquiry regarding two of NSPI's documents, there was nothing on the record which could suggest that the Board considered those criteria in deciding to accept NSPI's request for confidential treatment of most of its documents.

[34] The result is a hugely difficult situation. This Court would be reviewing the Board's decision without being able to appreciate its reasoning on the confidentiality of the complex and extensive commercial contracts involved in a \$93,000,000 project, such as power purchase agreements, financial model spread sheets, land leases, asset sharing agreements, supplier agreements, and a project construction and operating agreement.

[35] Accordingly, at the end of the hearing of the motion, the panel asked counsel for NSPI, CBEx and the Board whether the matter could be remitted to the Board, with an invitation that it provide more detailed reasons for having granted confidential treatment. It asked NSPI, CBEx and, if it wished, the Board, to file post-hearing submissions.

[36] In its post-hearing submissions, CBEx argues that notwithstanding the paucity of its reasons, the Board clearly decided that the documents were confidential. Its fundamental position is that the Board having finally ruled on this case, it is now *functus officio* and cannot issue further reasons on the confidential treatment of the NSPI materials.

[37] In this regard, CBEx relies on *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 where Sopinka J. writing for the majority stated at p. 861:

... As a general rule, once [an administrative tribunal] has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error ...

CBEx also points to *Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353*, 2009 ONCA 749 where the Ontario Court of Appeal, relying on *Chandler* for guidance on the application of *functus officio* to administrative tribunals, concluded at ¶ 33 that the *functus officio* principle also precluded a tribunal from issuing supplementary reasons for decision.

[38] With respect, CBEx's reliance on these decisions is misplaced. In *Chandler*, it was the tribunal on its own motion which sought to continue a hearing and prepare a further report after the Alberta Court of Appeal held that the Practice Review Board did not have the powers it initially purported to exercise. In *Jacobs Catalytic*, the Ontario Labour Relations Board rendered supplementary reasons after the successful union, according to the Ontario Court of Appeal at ¶ 70, asked the Board to improve upon its reasons favourable in the result but deficient in their content to immunize them from review. Those are very different situations from what is contemplated here.

[39] In my view, referral back to the Board would be consistent with the observations of the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61. There the question was how a court may give adequate deference to a tribunal when an issue which was never raised before the tribunal and so not addressed in its decision, is raised before the court on judicial review. Rothstein J. writing for the majority commented:

[55] In some cases, it may be that a reviewing court cannot adequately show deference to the administrative decision maker without first providing the decision maker the opportunity to give its own reasons for the decision. In such a case, even though there is an implied decision, the court may see fit to remit the issue to the tribunal to allow the tribunal to provide reasons. However,

remitting the issue to the tribunal may undermine the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place. Accordingly, remitting the issue to the tribunal is not necessarily the appropriate option available to a court when it is asked to review a tribunal's implied decision on an issue that was not raised before the tribunal. Indeed, when a reasonable basis for the decision is apparent to the reviewing court, it will generally be unnecessary to remit the decision to the tribunal. Instead, the decision should simply be upheld as reasonable. On the other hand, a reviewing court should show restraint before finding that an implied decision on an issue not raised before the tribunal was unreasonable. It will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without first giving the tribunal an opportunity to provide one. This, of course, assumes that the Court has thought it appropriate in the particular circumstances to allow the issue to be raised for the first time on judicial review. Care must be taken not to give parties an opportunity for a second hearing before a tribunal as a result of their failure to raise at the first hearing all of the issues they ought to have raised. [Emphasis added]

In this case, CBEx challenged the confidentiality of the NSPI documents in its final submissions before the Board, and the Board addressed this issue in its decision albeit in a cursory fashion. Consequently the caution against remittal in the above passage does not apply.

[40] CBEx contends that remittance to the Board is a process fraught with peril as any reasons the Board issues could represent not the real reasoning process that led to its decision, but rather a justification of the decision it made earlier. In *R. v. Teskey*, [2007] 2 S.C.R. 267, the majority of the Supreme Court of Canada wrote:

18 Reasons rendered long after a verdict, particularly where it is apparent that they were entirely crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge may not have reviewed and considered the evidence with an open mind as he or she is duty-bound to do but, rather, that the judge has engaged in result-driven reasoning. In other words, having already announced the verdict, particularly a verdict of guilt, a question arises whether the post-decision review and analysis of the evidence was done, even subconsciously, with the view of defending the verdict rather than arriving at it. It is most important in a criminal case to guard against any result-driven consideration of the evidence because the accused is presumed innocent and entitled to the benefit of any reasonable doubt. A reasonable doubt is not always obvious. Its presence may be far more subtle and only discernible through the eyes of the person who keeps an open mind. It is in this sense that the trial judge who appears to have already committed to a verdict of

guilt before completing the necessary analysis of the evidence may cause a reasonable person to apprehend that he or she has not kept an open mind. Further, if an appeal from the verdict has been launched, as here, and the reasons deal with certain issues raised on appeal, this may create the appearance that the trial judge is advocating a particular result rather than articulating the reasons that led him or her to the decision.

[41] In *Jacobs Catalytic* at ¶ 52, the Ontario Court of Appeal stated that while *Teskey* is a criminal case, the rationale applied where the adjudicator purports to issue final reasons and later issues supplemental reasons without explaining why those were not contained in the initial reasons. I cannot say that a results-driven analysis is outside the realm of possibility. However, as explained in *Teskey*, this is particularly concerning in a criminal proceeding, which involves the presumption of innocence and requires proof beyond a reasonable doubt.

[42] Receiving more fulsome reasons from the Board would accomplish several important objectives:

- (a) the Board would be given an opportunity to set out its analytic path of reasoning leading to its determination regarding the confidential treatment of complex industry documents in this particular case,
- (b) it being familiar with the application, the materials, and its analysis, the Board's reasons will likely be released on a timely basis. Thus, any undue delay in the hearing of the merits of this appeal might be avoided or reduced; and
- (c) such reasons would permit meaningful judicial review by this Court, which would include consideration of the open courts principle and the *Sierra Club* criteria.

[43] The *Alberta Teachers' Association* decision which stated that in some cases a reviewing court cannot adequately show deference without giving the administrative decision maker the opportunity to provide reasons, was a judicial review. An appeal to this Court from a decision of the Board is a statutory appeal, as the *Utility and Review Board Act*, S.N.S. 1992, c. 11, s. 1 provides:

30 (1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board upon any question as to its jurisdiction or upon any

question of law, upon filing with the Court a notice of appeal within thirty days after the issuance of the order.

...

(4) Where there is a conflict between this Section and another enactment, that enactment prevails.

[44] However, remittance to the administrative body in the statutory appeal context has been granted in other cases. See, for example, *Allstate Insurance Company of Canada v. Nova Scotia (Insurance Review Board)*, 2006 NSCA 70, where the issue pertained to the setting of insurance rates, which had actuarial and technical features. The majority stated:

[58] ... The appellants submit that in these circumstances it is inappropriate for the Board to hear their applications again, and that there was sufficient evidence before this court for it to determine whether or not the rates were reasonable. I am unable to agree that the court should make this determination. The Board is given exclusive jurisdiction (s. 16S) subject to appeals on matters of jurisdiction or law (s. 16Z). The *Act* does not specify the remedies available to the court. Moreover, a great deal of specialized and technical evidence was submitted for the Board's consideration. Finally, there is nothing to indicate that a panel, even if some or all of its members sat on the Initial Panels and the Appeal Panels, due to the number of members which constitute the Board, would not deal with the applications appropriately.

While the dissenting judge would have dismissed the appeal, at ¶ 98 he agreed that this Court has neither the time nor the resources to decide whether these applications meet the statutory criteria and that, in light of the specialized and technical evidence in the record, the administrative body was best suited to make that determination.

[45] As to the powers of this Court to send the matter back to the Board, *Civil Procedure Rule* 90.48(1)(e) provides:

Powers of the Court of Appeal

90.48 (1) Without restricting the generality of the jurisdiction, powers and authority conferred on the Court of Appeal by the *Judicature Act* or any other legislation the Court of Appeal may do all of the following:

...

- (e) make any order or give any judgment that the Court of Appeal considers necessary.

[46] CBEx submits that this Court could only order the Board to issue expanded reasons if it ordered this as a remedy, if it allowed the appeal in whole or in part. However, it cites no authority for this proposition. Furthermore, the issue of the confidential treatment of documents is quite distinct from the other grounds of appeal it raises, and further exposition of the Board's reasons will not impact on them.

Disposition

[47] I would remit the matter of the confidential treatment of the NSPI documents submitted to the Board with NSPI's application for Board approval to the Board so that this Court can receive the benefit of its analysis in reaching its decision.

[48] Once the Board's expanded reasons are released, NSPI may apply for a date to bring a confidentiality motion regarding disclosure on the hearing of the appeal. The Chambers judge hearing any such motion will deal with any requests regarding any further submissions or fresh evidence. If NSPI does not bring such a motion within 30 days of the release of the Board's expanded reasons, CBEx may bring a motion to set down its appeal for hearing with all documents before the Board on the public record.

Oland, J.A.

Concurred in:

Saunders, J.A.

Farrar, J.A.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Joint Industry Electricity Steering
Committee v.
British Columbia Utilities Commission,***
2005 BCCA 330

Date: 20050614

Docket: CA032700; CA032708

Docket: CA032700

**IN THE MATTER OF THE *UTILITIES COMMISSION ACT*,
R.S.B.C. 1996, c. 473; and**

**IN THE MATTER OF THE ORDERS DATED
JANUARY 27, 2005 AND FEBRUARY 17, 2005
OF THE BRITISH COLUMBIA UTILITIES COMMISSION**

Between:

Joint Industry Electricity Steering Committee

Appellant

And

**British Columbia Utilities Commission,
British Columbia Hydro and Power Authority and
Duke Point Power Limited Partnership**

Respondents

- and -

Docket: CA032708

**IN THE MATTER OF THE *UTILITIES COMMISSION ACT*,
R.S.B.C. 1996, c. 473; and**

**IN THE MATTER OF THE ORDERS DATED
JANUARY 27, 2005 AND FEBRUARY 17, 2005
OF THE BRITISH COLUMBIA UTILITIES COMMISSION**

Between:

**GSX Concerned Citizens Coalition,
British Columbia Sustainable Energy Association and
Society Promoting Environmental Conservation**

Appellants

And

**British Columbia Utilities Commission,
British Columbia Hydro and Power Authority and
Duke Point Power Limited Partnership**

Respondents

Before: The Honourable Madam Justice Rowles
 The Honourable Mr. Justice Hall
 The Honourable Madam Justice Levine

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Place and Date of Hearing:

Vancouver, British Columbia
3 June 2005

Place and Date of Judgment:

Vancouver, British Columbia
14 June 2005

Written Reasons Granting Leave to Appeal by:

The Honourable Madam Justice Rowles

Written Reasons Dismissing Leave to Appeal by:

The Honourable Mr. Justice Hall (Page 34, para. 74)

Concurring Reasons Granting Leave to Appeal on one issue by:

The Honourable Madam Justice Levine (Page 52, para. 96)

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Introduction

[1] The applications before us are brought under s. 9(6) of the ***Court of Appeal Act***, R.S.B.C. 1996, c. 77, to review the order of a chambers judge dated 12 April 2005, refusing leave to appeal an order of the British Columbia Utilities Commission (the "Commission") dated 17 February 2005, by which the Commission accepted an Energy Purchase Agreement ("EPA") entered into between the British Columbia Hydro and Power Authority ("BC Hydro") and the Duke Point Power Limited Partnership ("DPP"), subject to certain conditions. The reasons of the chambers judge for denying leave may be found at 2005 BCCA 233 and on QuickLaw at [2005] B.C.J. No. 860.

[2] The applicants appeared as intervenors on the hearing which culminated in the Commission's order approving the EPA. The Joint Industry Electricity Steering Committee ("JIESC"), the applicant in appeal CA032700, is an association of many of the major industrial users of purchased electric power in British Columbia. Their operations are largely in the pulp and paper, mining and mineral processing, and electro-chemical production sectors. JIESC and its predecessors have appeared before the Commission and its predecessors on most BC Hydro hearings since the 1980s. During oral submissions, we were told that the industrial users of electricity which make up the association purchase about 25 percent of the electricity consumed in this Province. JIESC is primarily concerned about matters affecting the reliability and cost of generating and delivering electricity in British Columbia.

[3] The applicants in appeal CA032708, GSX Concerned Citizens Coalition, British Columbia Sustainable Energy Association, and Society Promoting Environmental Conservation ("GSXCCC"), are associations concerned with environmental conservation and sustainable energy.

[4] The Commission is a statutory body created pursuant to the **Utilities Commission Act**, R.S.B.C. 1996, c. 473 (the "**Act**"). In addition to its general duty to regulate public utilities, the Commission must determine, under s. 71 of the **Act**, whether energy supply contracts are in the public interest. Section 71 of the **Act** provides:

71(1) Subject to subsection (1.1), a person who, after this section comes into force, enters into an energy supply contract must

- (a) file a copy of the contract with the commission under rules and within the time it specifies, and
- (b) provide to the commission any information it considers necessary to determine whether the contract is in the public interest.

(1.1) Subsection (1) does not apply to an energy supply contract for the sale of natural gas unless the sale is to a public utility.

(2) The commission may make an order under subsection (3) if the commission, after a hearing, finds that a contract to which subsection (1) applies is not in the public interest by reason of

- (a) the quantity of the energy to be supplied under the contract,
- (b) the availability of supplies of the energy referred to in paragraph (a),
- (c) the price and availability of any other form of energy, including but not limited to petroleum products, coal or biomass, that could be used instead of the energy referred to in paragraph (a),

- (d) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (a), or
 - (e) any other factor that the commission considers relevant to the public interest.
- (3) If subsection (2) applies, the commission may
- (a) by order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or
 - (b) make any other order it considers advisable in the circumstances.
- (4) If an energy supply contract is, under subsection (3) (a), declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order under that subsection be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.
- (5) An energy supply contract or other information filed with the commission under this section must be made available to the public unless the commission considers that disclosure is not in the public interest.

[5] Section 101(1) of the **Act** provides that "An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court." While not expressly stated in s. 101, it is accepted that an appeal from the Commission is restricted to questions of law.

[6] On their leave applications, the applicants argued that significant aspects of the process by which the Commission arrived at its decision to approve the EPA failed to accommodate the "public interest" requirements of s. 71 of the **Act** and failed to accord with the common law duty of fairness in the regulatory context. The issues of law on which JIESC sought leave were couched in these terms:

- (i) whether the Commission erred in its interpretation and application of section 71 of the *Utilities Commission Act* by placing inappropriate limitations on the scope of the hearing and reversing the onus regarding the question of the public interest;
- (ii) whether the Commission committed a breach of the rules of natural justice by receiving and relying on confidential information;
- (iii) whether there was a reasonable apprehension of bias; and
- (iv) whether the Commission committed a breach of the rules of natural justice by directing BC Hydro to enter into a contract for gas transmission with TGV I [Terasen Gas Vancouver Island] for the Island Cogeneration Plant.

[7] The third issue in JIESC's grounds arises from the Commission's Order No. L-10-05, pronounced 27 January 2005 (Reasons issued 9 February 2005), in which the Commission Panel refused to accede to the intervenors' assertions of a reasonable apprehension of bias arising from statements made by the Chairperson of the Commission during an *in camera* session called at his request. This issue was also raised in the application for leave to appeal filed by GSXCCC and we heard extensive submissions on the question of whether the chambers judge had erred in not granting leave on this ground.

[8] On the review application before us, JIESC contends that the chambers judge erred in principle by applying too stringent a test in determining whether leave to appeal should be granted. In the submission of counsel for JIESC, the learned chambers judge erred in principle by considering whether the various points would succeed on an appeal rather than considering whether the proposed grounds raised "substantial issues to be argued".

[9] The governing authority in this Province on leave applications from statutory tribunals is ***Queens Plate Dev. Ltd. v. Vancouver Assessor, Area 09*** (1987), 16 B.C.L.R. (2d) 104, 22 C.P.C. (2d) 265 (C.A.) [cited to B.C.L.R.], *per* Taggart J.A. (In Chambers), in which the factors relevant to an application for leave to appeal are summarized at 108-110:

Since September 1982, a justice of this court has been authorized to hear applications for leave to appeal from special tribunals established by provincial legislation. Neither the Court of Appeal Act nor the Acts establishing special tribunals set out the principles which a justice must follow in reaching his decision. However, the decisions made on applications for leave to appeal since September 1982 refer to some of the principles that are applicable. A very useful article written by Patrick G. Foy entitled "Leave to Appeal: Civil Cases in the British Columbia Court of Appeal" was published in *The Advocate*, vol. 45, Pt. 3, p. 339 (May 1987); see especially para. 4 at pp. 342-43. From that source, and from a review of decisions given since September 1982, it seems a justice may have regard for one or more of the matters listed below:

(a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from (*Chevron Can. Ltd. v. Vancouver Assessor, Area 09*, [1986] B.C.W.L.D. 2210, No. CA005532, 17th April 1986 (not yet reported));

(b) whether the appeal is limited to questions of law involving:

(i) the application of statutory provisions (*Allard Contr. Ltd. v. Coquitlam Assessor, Area 12*, [1986] B.C.W.L.D. 2601, No. CA003122, 29th March 1985 (not yet reported));

(ii) a statutory interpretation that was particularly important to the litigant (*Richard's on Richards Cabaret Ltd. v. Gen. Manager, Liquor Control & Licensing Branch*, [1986] B.C.W.L.D. 2032, No. CA005509, 2nd April 1986 (not yet reported); and *Alkali Lake Indian Band v. West Coast Transmission Co.* (1984), 57 B.C.L.R. 110 (C.A.)); or,

(iii) interpretation of standard wording which appears in many statutes, for example the in force provisions of retroactive legislation

(*Avon Can. Inc. v. Min. of Fin.*, No CA006313, 23rd December 1986 [now reported 8 B.C.L.R. (2d) 56, 14 C.P.C. (2d) 208, 33 D.L.R. (4th) 154]);

(c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward (*Shewan v. Bd. of Sch. Trustees*, [1986] B.C.W.L.D. 2086, No. CA005520, 24th March 1986 (not yet reported), and *B.C. Assess. Commr. v. Chevron Can. Ltd.*, [1987] B.C.W.L.D. 2677, No. CAV000502, 11th June 1987 (not yet reported));

(d) whether there is some prospect of the appeal succeeding on its merits (*Clarke v. Supt. of Brokers* (1985), 67 B.C.L.R. 294, 23 D.L.R. (4th) 315 (C.A.), and *Re Wasmuth* (1984), 58 B.C.L.R. 17 (C.A.)); although there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued;

(e) whether there is any clear benefit to be derived from the appeal (*Assessor of Area 09 (Vancouver) v. Trizec Equities Ltd.*, [1985] B.C.W.L.D. 2096, No. CA003649, 13th May 1985 (not yet reported); and *MacMillan Bloedel Ltd. v. Min. of Fin.*, [1984] B.C.W.L.D. 2535, No. CAV11/84 (not yet reported)); and

(f) whether the issue on appeal has been considered by a number of appellate bodies (*Re Commercial App. Commn. Act*, B.C.C.A., No. CA004464, 4th October 1985 (not yet reported); and *Telep v. Supt. of Ins., Brokers & Real Estate*, No. CA004523, 10th October 1985 [now reported 67 B.C.L.R. 242]). Leave to appeal has consistently been denied where the Court is asked to retry a case a third or fourth time on issues involving judgment exercised by tribunals with specialized expertise where no error of principle has been shown.

[10] In ***Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)***

(2000), 91 B.C.L.R. (3d) 74, 6 C.P.C. (5th) 91, 2000 BCCA 591 [cited to B.C.L.R.],

Southin J.A., for the Court, affirmed that the applicable authority on a leave

application from a statutory tribunal is ***Queens Plate*** (at para. 9). In ***Omineca***

Enterprises, appeals had been brought in the Supreme Court of British Columbia

from decisions of appeal boards established under forestry legislation. The appeals

had been dismissed and leave to appeal was then sought in this Court on a point of law involving the interpretation of a statutory provision and its application to undisputed facts. A chambers judge dismissed the leave application on the ground that it had “no realistic possibility of success”. In relation to that standard being applied on a leave application, Southin J.A. said at para. 13:

As I understand the learned chambers judge, his conclusion was really founded on the proposition that there was “no realistic possibility of success” which is analogous to the test in *Queens Plate Development Ltd. v. Vancouver Assessor, Area 9*, “whether there is some prospect of the appeal succeeding on its merits”. There is, however, a subtle difference between the test “realistic possibility of success” and “substantial questions to be argued”; so this case resolves itself, in my opinion, to this question: Is there here a “substantial” question of law to be argued?

[Underlining added.]

[11] The reference to “substantial issue to be argued” is, of course, to paragraph (d) of *Queens Plate*, quoted above. In *Omineca Enterprises*, the respondent argued before the panel that the applicant’s proposition was “wholly without merit”. Of that argument, Southin J.A. said, at para. 16:

At the end of counsel’s submission, I was not persuaded that that was so. To my mind, if a proposition is not wholly devoid of merit, it raises a substantial question to be argued.

[12] As JIESC has pointed out in its written brief, a leave application is not intended to be a full and final review of the merits of an appeal. Among other things, there are limits on time and materials available for consideration by the Court on a leave application.

[13] While the chambers judge in this case referred to **Queens Plate** in his reasons, he made no reference to the decision of this Court in **Omineca Enterprises** which confirmed that **Queens Plate** was the applicable authority when leave is sought from a statutory tribunal.

[14] As in **Omineca Enterprises**, the applications before us are to review the order of a chambers judge refusing leave to appeal. The accepted formulation of the test to be applied on a review of an order of a single justice under s. 9(6) of the **Court of Appeal Act** is that set out in **Haldorson v. Coquitlam (City)** (2000), 3 C.P.C. (5th) 225, 2000 BCCA 672, at para. 7, *per* Lambert J.A:

It comes to this: that the review hearing is not a hearing of the original application as if it were a new application brought to a division of the court rather than to a chambers judge, but is instead a review of what the chambers judge did against the test encompassed by asking: was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts. If the chambers judge did not commit any of those errors, then the division of the court in review should not change the order of the chambers judge.

[15] On its application to review the order refusing leave to appeal, JIESC asks whether the chambers judge erred in principle or in law by:

(a) ...applying too stringent a test in determining whether leave to appeal should be granted?

(b) ...failing to recognize that the Commission breached the rules of natural justice by directing, as a condition of approval of the EPA that BC Hydro enter into a long term firm contract for gas transmission for the Island Cogeneration Plant at Elk Falls, when the possibility of such a requirement was never a part of the Duke Point EPA Approval Proceeding?

- (c) ...failing to consider whether the Commission should have adopted reasonable alternative means to allow disclosure of critical information behind the determination of the principle issue in the EPA Approval Proceeding, while preserving commercial confidentiality?
- (d) ...making a determination of the prospects of success on the issue of reasonable apprehension of bias, rather than deciding whether there was a substantial issue to be argued?

[16] GSXCCC argues that the chambers judge erred in dismissing the application for leave to appeal by:

- (i) ... rejecting the 'reasonable apprehension of bias' ground on its merits, rather than examining whether the appeal has some prospect of success; and
- (ii) ... misconceiv[ing] the facts pertinent to the reasonable apprehension of bias argument.

II. Background

[17] The nature of the statutory and process issues which arose in this matter are more readily understood against the background of an earlier unsuccessful application made by BC Hydro in relation to a proposed electricity generating plant at Duke Point.

[18] According to an Executive Summary contained in a decision of the Commission dated 8 September 2003, BC Hydro had determined in the mid-1990s that the security of Vancouver Island's electrical supply was becoming critical. Most of the electricity consumed on the Island is generated on the Mainland and delivered across Georgia Strait by three underwater transmission systems. Given the age and deterioration of two of those systems, BC Hydro had concerns about the security of

supply and compliance with industry reliability standards, as adopted by BC Hydro.

According to the Executive Summary,

The need for a new electricity supply to Vancouver Island is driven by the expected retirement of a significant part of the bulk transmission system from the Mainland to the Island. That retirement will reduce BC Hydro's ability to meet the Island's peak demand by 240 megawatts (MW) in 2007. BC Hydro has concluded that it would be imprudent to continue to rely on this aging transmission system even with continued expenditures to maintain and repair it.

[19] BC Hydro's preferred option for securing a reliable electricity supply for Vancouver Island and the Gulf Islands was a natural gas-fired generation facility on the Island, referred to as the Vancouver Island Generation Project ("VIGP" or the "Project"). The Vancouver Island Energy Corporation ("VIEC"), a wholly owned subsidiary of BC Hydro, was incorporated to carry out the Project. BC Hydro ultimately acquired an industrial site at Duke Point in Nanaimo which was thought to be suited to the Project.

[20] BC Hydro applied to the Commission for a Certificate of Public Convenience and Necessity ("CPCN" or the "Certificate") for the proposed VIGP at Duke Point under s. 45 of the **Act**. From 16 June to 3 July 2003, the Commission conducted a public hearing to determine whether the Certificate should issue. The two applicants before us as well as other intervenors participated in that hearing process.

[21] BC Hydro proposed to the Commission that if it were to decline to grant a CPCN, it could as an alternative grant a conditional certificate, the condition being that BC Hydro would conduct a call for tenders.

[22] In its decision dated 8 September 2003, the Commission denied the application for a CPCN for the Project on the ground that BC Hydro had “not established that the Project was the most cost-effective means to reliably meet Vancouver Island power needs”. In its decision the Commission urged BC Hydro to proceed with a call for tenders and stated that it was prepared to consider any future application for approval of the VIGP or other cost-effective resources on an expedited basis. In the concluding paragraph of its decision, the Commission stated:

The Commission Panel believes that it is important that the CFT [call for tenders] be perceived as fair and open so that projects other than VIGP with GSX supply compete on a level playing field to meet the load requirements of Vancouver Island. The success of the CFT is also important to the enhancement of goodwill that may benefit future resource calls.

[23] In the material submitted to the Commission in 2003, BC Hydro had used proprietary models containing sensitive commercial information that BC Hydro considered to be confidential. In its decision of 8 September 2003, the Commission noted, under 7.6: “In future applications, the Commission Panel expects BC Hydro to use assessment models which can be made public so that the various components and assumptions can be assessed and tested by intervenors.”

[24] BC Hydro proceeded with a call for tenders and on 3 November 2004, filed with the Commission an EPA and a VIGP Transfer Agreement between BC Hydro and the Duke Point Partnership. The VIGP agreement with Duke Point Partnership was for the construction at Duke Point of a natural gas thermal generating plant

capable of generating 252 megawatts of capacity, with a completion date of May 2007. BC Hydro then filed the Agreement as required by s. 71 of the **Act**.

[25] On 30 November 2004, the Commission determined that there would be an oral hearing under s. 71(2) of the **Act**. At a pre-hearing procedural conference, the Commission chair stated that the process would be expedited so a decision could be issued by 17 February 2005. That meant the process would occur over 79 days. At that time the Commission identified what it considered to be the principal issue in the matter:

Is Tier 2, Tier 1, or the No Award option the most cost-effective option to meet the capacity deficiency on Vancouver Island commencing in the winter of 2007/08?

[26] On 2 December 2004, the Commission set out the regulatory agenda for the oral hearing and set out the schedule for written information requests from intervenors. On 16 December 2004, JIESC filed an application seeking reconsideration of the Commission's rulings on scope and confidentiality, arguing that the scope of the issues needed to be broader, and that important information needed to be disclosed.

[27] On 17 and 22 December 2004, pre-hearing conferences were held. GSXCCC brought a motion to have one of the commissioners disqualified by reason of his appointment as interim president of a company with natural gas interests. Other intervenors supported the motion and counsel for BC Hydro and DPP declined to argue to the contrary and the panel member voluntarily recused himself.

[28] There were a number of submissions made regarding the confidentiality of information and what needed to be produced. The portions of the EPA on which attention focused were "Appendix 3" and "Appendix J". Appendix 3 concerned the pricing terms of the contract. After argument based on the principles discussed in ***Sierra Club of Canada v. Canada (Minister of Finance)***, [2002] 2 S.C.R. 522, 2002 SCC 41, Appendix 3 was ordered produced.

[29] On 6 January 2005, the Commission issued reasons for ordering disclosure of Appendix 3 but not Appendix J. In its reasons the Commission noted that BC Hydro wanted to keep confidential all documents that were created for the purpose of selecting the winning bid for the generating plant. Appendix J refers to the detailed assessment and information that supported the conclusions in the cost effectiveness analysis conducted by BC Hydro's senior management in determining whether to proceed with the Duke Point Partnership EPA. The analysis compared the effectiveness of the DPP plant against two other possible alternatives: (1) a portfolio of two smaller generation projects on Vancouver Island; and (2) accepting no bids at all and using short-term contingency options. As stated earlier, the Commission characterized this analysis as the principal issue in the hearing; that is: "Is Tier 2, Tier 1, or the No Award option the most cost-effective option to meet the capacity deficiency on Vancouver Island commencing in the winter of 2007/08?"

[30] BC Hydro's conclusions under Appendix J were made public but the detailed figures, assumptions and calculations underlying those conclusions were never disclosed to the public or to the intervenors, even though requests were made by

counsel for JIESC that the Commission find alternative ways to restrict the ban while preserving the confidentiality of commercially sensitive information. The problem of withholding the information was that it made it impossible for JIESC and other intervenors to challenge the assumptions and calculations upon which the decision on the principal issue in the hearing was based.

[31] On 14 January 2005, GSXCCC sought reconsideration of the scope of the hearing and the hearing schedule but that was rejected by the Commission.

[32] JIESC continued to seek release of the analysis contained in Appendix J after the order regarding Appendix 3 had been made in an ongoing effort to find reasonable alternatives to restrict the ban while preserving the confidentiality of commercially sensitive information but it was unsuccessful. Non-disclosure agreements to protect confidentiality was one suggestion JIESC put forward.

[33] On 17 January 2005, the oral hearing commenced. "Witness panels" were held in which the interested parties presented their cases. The direct evidence of the parties was submitted in writing before the oral phase of the hearing.

[34] On 19 January 2005, at the end of the cross-examination of some BC Hydro witnesses, the Commission Chairperson asked some questions and then indicated that he had an area of questioning that he believed should be pursued *in camera* in that it involved the bidding information from an unsuccessful bidder. Only the Commission staff and counsel, BC Hydro counsel and staff, the witnesses to be questioned and the commissioners were to attend. The Chairperson was concerned

that the best "portfolio" within the winning bid should proceed, as it appeared to him that this was not what was occurring. He therefore said, "I want to pursue this issue, and I think in order to pursue this issue I need to do it *in camera*, which I think, unless there are objections to me doing that, I need advice as to how best to do that." Counsel for BC Hydro then made suggestions. Counsel for the GSXCCC made observations and the Chairperson said he would, at the end of the *in camera* session, "do my best to disclose as much as possible with respect to the line of questioning that I had." No objection was taken.

[35] On 21 January 2005, a redacted transcript of the *in camera* hearing was released. GSXCCC subsequently brought a motion to have the Commission panel disqualify itself based upon a reasonable apprehension of bias.

[36] On 24 January 2005, a virtually complete version of the transcript was released. The transcript of the *in camera* hearing contains a discussion as to whether duct firing is better customer value than "pristine without duct firing". The Chairperson said this:

This may be an area where I can add some value to customers. And I thought your answer would be just what it is, that but for the rules of the CFT [Call for Tenders], you would have chosen Pristine with duct firing. It may be – I don't know enough about this yet, but it may be that the coincidence that both portfolios are the same proponent is helpful in moving us to the outcome that's in the customers' best interest.

So you know now what I want to try to do. I need your help in telling me how I can get there.

[37] A BC Hydro witness agreed with the Chairperson that steps should be investigated to be sure the EPA was the one that was in the “customers’ best interests”. The Chairperson then stated:

But you now have DPP [Duke Point Partnership] bound by contract. You have DPP bound by contract ongoing without duct firing. If the Commission issues a decision that approves portfolio three – and this is a legal question I suppose, but is Pristine contractually bound at that stage? Are both bids live, I suppose is the question.

As it appears in the transcript, the Chairperson later suggested that there might be a need for further *in camera* hearings.

[38] On 26 January 2005, GSXCCC argued its motion for disqualification. The following day the Commission dismissed the application with reasons to follow. In the reasons, styled as L-10-05, the Commission noted that GSXCCC, in arguing that the conduct of the Commission had given rise to a reasonable apprehension of bias, advanced two themes. First, GSXCCC contended that the Commission made up its mind before hearing all of the evidence. Second, it contended that the Commission favoured BC Hydro by providing it with special advantages that were not provided to other parties, and by expressing an intention to help BC Hydro. The Commission rejected the submission that a reasonable apprehension of bias arose from its decision to conduct an *in camera* session on 19 January 2005. The Commission said that in considering the application, it was guided by ***Wewaykum Indian Band v. Canada***, [2003] 2 S.C.R. 259, 2003 SCC 45. The Commission noted that its objective in holding the *in camera* session was to avoid the disclosure of confidential information related to non-successful bids and that no improper purpose motivated

the holding of the *in camera* hearing. The Commission further noted that no objections were made by counsel to the *in camera* hearing. The Commission determined that it had not reached a conclusion on the substantive aspects of the s. 71 filing and that no final decision had been made before all the evidence was heard. Further, the Commission rejected the assertion that it had provided assistance to BC Hydro that was not available to others.

[39] In its decision the Commission stated:

The Commission Panel acknowledges that if certain isolated portions of the transcript are taken alone and not put in their context, there might be a concern as to whether the Commission Panel members had closed their minds to persuasion before all the evidence and argument had been heard.

[40] On 28 January 2005, the evidentiary portion of the EPA hearing was completed. Written arguments were filed in early February and oral argument was held on 10 February 2005.

[41] On 17 February 2005, the Commission issued order E-1-05, which accepted the EPA for filing with some specific conditions and directions. One of the conditions was that BC Hydro purchase firm gas transportation service from Terasen Gas (Vancouver Island) Inc. to serve DPP's proposed power plant at Duke Point.

[42] On 9 March 2005, the Commission issued its reasons for the decision. The reasons of the Commission deal in detail with greenhouse gas risk, gas price risk, and gas transportation risk. The reasons also set forth the terms and conditions of

the Agreement and an analysis of the process by which the EPA came to be accepted. The “Commission Decision” contains the following acknowledgement:

The Commission Panel acknowledges some deficiencies within the CFT process conducted by BC Hydro but finds no compelling evidence that the outcome of the competitive bidding process is not in the public interest and should therefore be overturned, particularly in light of the imminent capacity shortfall on Vancouver Island commencing in the winter of 2007/08 with the zero rating of the HVDC [high voltage direct current] line. The Commission Panel notes that all of the non-winning bidders in the CFT will have an opportunity to participate again in future calls for system energy and capacity. In coming to its determination that electricity supply from the Duke Point Power project is in the public interest, the Commission Panel also considered several natural gas price forecasts and has concluded that it is likely that gas prices will drive market power prices in the Pacific region of North America for most if not all of the term of the contract with DPP.

[43] Under the EPA approved by the Commission, BC Hydro will purchase, for at least 25 years, the output from a gas-fired electricity generation plant that DPP proposes to construct at Duke Point near Nanaimo, British Columbia. Approval of the EPA was in keeping with the provincial government's 2002 energy policy of encouraging private sector development of new electricity generation.

III. The errors in principle or law alleged by the applicants in relation to the decision of the chambers judge on the leave application

(i) Disclosure of confidential commercial information

[44] One of the issues on which leave was sought was whether the Commission had failed to adhere to its statutory obligations and the common law duty of fairness by declining to order disclosure of information said to be essential to the determination of the central issue in the EPA proceeding, while preserving

confidentiality in the commercial business information that had come into existence through the call for tenders process.

[45] In dismissing the leave application on this point, the chambers judge said:

[47] The legislative empowerment to govern its procedures and matters of confidentiality are difficult for the applicants to overcome in the circumstances of this case. No breach of the legislation has been revealed, rather simply a submission that the confidentiality orders were too broad considering the importance of the information to the ultimate issue. However, more than this must be established in order to have this matter form the basis for a successful appeal.

[48] This issue does not favour the granting of leave to appeal.

[Underlining added.]

[46] On the issue of receiving and relying on confidential information, the chambers judge said this:

[38] In my opinion there is nothing in the submission of the applicants that would ground a successful appeal of the decision of the Commission on the basis of either unduly limiting the scope of the hearing or of its use of and interpretation of the issue of public interest. As such, this issue does not support the application for leave to appeal.

[Underlining added.]

[47] In taking the approach he did to whether leave to appeal ought to be granted on the process issues surrounding the disclosure of confidential information, it is my respectful view that the chambers judge applied a more stringent test on the leave application than required by ***Queens Plate***, *supra*; that is, he looked to the question

of whether the appeal would succeed rather than whether the proposed points on appeal raised substantial issues to be argued.

[48] JIESC recognizes that the Commission has the right to receive information in confidence pursuant to s. 71(5) of the **Act** and that s. 42 of the **Administrative Tribunals Act**, S.B.C. 2004, c. 45, provides that all or part of the evidence of a witness or documentary evidence may be received by a tribunal in confidence to the exclusion of a party or parties or any intervenors, but points out that neither of those sections has been considered by any court.

[49] In its brief, JIESC made the following submissions, with which I agree:

24. The right to hold information confidential is not a matter of unfettered discretion. The right of parties to know the case they have to meet goes to the heart of our judicial and administrative legal system. The restrictions on the powers of Boards and Courts to direct information to be held in confidence are discussed in *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 and in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193 (S.C.C.). At paragraph 40 in *Sierra Club* the Court endorses the test from *Dagenais* that is:

“A publication ban should only be ordered when:

- a. Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
- b. The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban [emphasis in the original].”

25. At paragraph 46 of the *Sierra Club* decision the Court stated:

“The Court emphasized that under the first branch of the test, three important elements were subsumed under the “necessity” branch. First, the risk in question must be a serious risk well grounded in the evidence. Second, the phrase “proper

administration of justice” must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.”

[Their emphasis.]

[50] During the Commission’s pre-hearing and hearing process to determine whether approval ought to be given to the EPA, the intervenors made repeated submissions to the Commission to the effect that they did not have the benefit of all of the information necessary to prepare an analysis of and present argument on the cost effectiveness of the EPA.

[51] That the applicants did not have all of the information critical to the Commission’s decision is readily apparent from what the Commission said at pp. 92-93 of its reasons in relation to a submission that had been made by JIESC and another intervenor, NorskeCanada:

The JIESC and NorskeCanada argue that Tier 1 is clearly less cost-effective than No Award. Both suggest that the NorskeCanada Demand Management proposal, coupled with other unspecified resources, could offer a lower cost solution. These conclusions are reached without the full benefit of the confidential numbers filed with the Commission, and in both cases the proponents of these analyses made assumptions that the Commission Panel has determined are not appropriate.

[Underlining added.]

[52] Set out below are the submissions of JIESC concerning the significance of the information both disclosed and undisclosed:

28. Appendix 3 concerned the pricing terms of the contract and was ordered produced by the Commission after argument and a discussion of the principles in the *Sierra Club* decision in Order G-119-04 made December 24, 2004 with Reasons following on January 26, 2005. The prime reason to know about Appendix 3 in this Application is to be able to distinguish it, and arguments about its admission, from Appendix J. It is important to recognize that in its Reasons for Decision for Order G-119-04 the Commission stated, "Although there may be other documents that the intervenors may seek to be produced, the Commission Panel does not expect that the disclosure of documents other than Appendix 3 of the EPA is necessary at this time for the intervenors to fully participate in this proceeding. Therefore, the focus of these reasons will be the release of Appendix 3 of the EPA."

29. **"Appendix J"** refers to the detailed assessment and information that supported the conclusions in the Cost Effectiveness Analysis conducted by BC Hydro senior management in determining whether to proceed with the DPP EPA. The purpose of the Cost Effectiveness Analysis was to compare the cost effectiveness of the DPP plant against two other possible alternatives: (1) a portfolio of two smaller generation projects on Vancouver Island; and (2) accepting no bids at all and using short-term contingency options. The Commission characterized this analysis as the "principal issue" in the hearing.

30. The conclusions of BC Hydro under the Appendix J analysis were public, but the detailed figures, assumptions and calculations underlying those conclusions were never disclosed to the public or to intervenors, in spite of requests by counsel for the JIESC that the Commission find reasonable alternative ways to restrict the ban while preserving the confidentiality of commercially sensitive information. This withholding of fundamental information made it impossible for the JIESC to challenge the assumptions and calculations upon which the decision on the principal issue in the hearing were to be based.

31. The JIESC continued to seek release of the analysis contained in Appendix J after Order G-119-04 regarding Appendix 3 was released, in its ongoing efforts to find reasonable alternatives to restrict the ban while preserving the confidentiality of commercially sensitive information, but was not successful in doing so.

32. In a letter to the Commission dated January 3, 2004, after the disclosure of the Appendix 3 information, counsel for the JIESC again requested that the Commission consider releasing all important confidential information:

"The JIESC supports transparency and openness and continues to urge the Commission to make all confidential information in

this proceeding publicly available. Even with the information ordered made public on December 24th, confidentiality of some information continues to make this hearing much harder than it needs to be and leaves many unanswered procedural questions.”

33. During the hearing counsel for the JIESC, raised the possibility that more appropriate confidentiality processes could be adopted by the Commission:

“Some tribunals have dealt with this sort of matter. I think the International Trade Tribunal has processes under which information is provided to counsel and consultants cross-examinations do happen in confidence under non-disclosure agreements.”

34. In a letter to the Commission dated January 12, 2005, in response to a letter from BC Hydro, counsel for the JIESC pointed out that:

“Someone must test this confidential material through cross-examination and must present argument on its significance. The Commission must find ways for counsel and consultants on behalf of all parties to examine the material, with meaningful time for review and consideration, as other boards such as the Canadian International Trade Tribunal have done in even more sensitive and difficult cases.”

35. The importance of Appendix J, and the unfairness of being unable to properly challenge its assumptions and calculations, is clearly evident in the Commission Decision when the Commission decides that the DPP is more cost effective than the straw men, “Tier 2” and “No Award”. In making its Decision the Commission dismisses the JIESC arguments that Appendix J, properly adjusted, does not support the selection of the DPP EPA, stating that the JIESC’s submissions were “reached without the full benefit of the confidential numbers filed with the Commission.” This clearly demonstrates the problems the JIESC faced in arguing against the conclusions of Appendix J without access to the confidential material.

36. The Chambers Judge states at paragraph 44 that the Commission was justified in its confidentiality rulings due to the fact that the Commission considered the *Sierra Club* case and “applied the strictest possible test in making its confidentiality orders”. In coming to this conclusion, the Chambers Judge erred in two ways. First, the Commission only looked at the *Sierra Club* test in conjunction with the disclosure of Appendix 3, and not with regard to any other important

confidential information, including Appendix J. Secondly, the Commission did not consider the second part of the test in *Sierra Club*, which requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as reasonably possible while preserving the commercial interest in question.

37. Since the Commission did not apply the *Sierra Club* test correctly, it was an error of law for the Chambers Judge to hold that the requirements in *Sierra Club* had been met. Further, the Chambers Judge erred in his determination that it was insufficient for the applicant to submit that the confidentiality orders were too broad. By failing to recognize that overbreadth is a ground for overturning a confidentiality order under the second component of the test in *Sierra Club*, the Chambers Judge failed to apply the principle in *Sierra Club* and erred in law.

[53] The generally accepted public interest principles of openness and disclosure were recognized by the Commission itself when, in the course of its reasons of 8 September 2003, which led to the call for tenders in the current matter, the Commission stated at p. 71, **“In future applications the Commission Panel expects BC Hydro to use assessment models which can be made public so that the various components and assumptions can be assessed and tested by intervenors”** (bold in original).

[54] Support for the submission that the process points concerning disclosure raise substantial issues to be argued may be found in the Federal Court of Appeal’s decision in *Magnasonic Canada Ltd. v. Canada (Anti-dumping Tribunal)*, [1972] F.C. 1239, 30 D.L.R. (3d) 118, which discusses the question of how a failure to disclose evidence of a confidential commercial nature may be treated in the context of a regulatory proceeding governed by statute.

[55] In light of the 2002 government energy policy encouraging private sector development of new electricity generation, questions of commercial confidentiality may well continue to arise in EPA approval proceedings and that may be particularly so if a call for tenders is to be used as the means of ascertaining the most cost efficient way of providing a particular energy supply.

[56] Whether the disclosure issue is characterized as a breach of the principles of natural justice or as a failure to adhere to the requirements of the statute in determining whether the EPA was in the public interest is not a matter that needs to be determined on this review application. In the words of Taggart J.A, in ***Queens Plate***, *supra*, "...there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued." In view of the public interest requirement of approval by the Commission of an EPA, it seems to me that the disclosure issue constitutes a substantial question to be argued, regardless of which mode of legal analysis properly attaches. Similarly, I am of the view that the confidentiality issue constitutes a substantial question to be argued.

[57] For the reasons stated, I am of the view that the learned chambers judge erred in not granting leave on the disclosure and confidentiality issues.

[58] How the Commission is to treat confidentiality in commercial information in the course of a process that is aimed at having a cost effective and reliable energy supply in the Province is obviously of general importance to the intervenors, BC

Hydro, the Commission, and the general public both in this matter and in future applications to approve EPAs.

[59] There is a clear benefit to be derived from an appeal of those issues for, if disclosure is mandated in such a way that business confidentiality is protected, the intervenors will have the ability to ascertain whether the EPA for which approval was sought will provide a cost effective and reliable source of energy.

(ii) The imposition of the conditions concerning the natural gas contracts

[60] In its decision granting approval of the EPA, the Commission imposed the following conditions:

- (a) that BC Hydro purchase firm gas transportation service from Terasen Gas (Vancouver Island) Inc. ("TGVI") to serve Duke Point Power's proposed power plant at Duke Point near Nanaimo, British Columbia ("Duke Point Power Plant"); and
- (b) within 45 days of the date of this Order, that BC Hydro enter into, and facilitate the filing with the Commission of, a long-term firm gas transportation service agreement ("TSA") with TGVI to serve both the Duke Point Power Plant and the Island Cogeneration Plant at Elk Falls, near Campbell River, British Columbia.

[61] In its order, the Commission directed that acceptance of the EPA is further subject to the following directions:

* * *

- (b) within 45 days of the date of this Order, BC Hydro is to notify the Commission if it has been unable to reach an agreement on the terms of a TSA with TGVI; and

- (c) in the event of a failure to reach an agreement on the terms of a TSA with TGV1 within 45 days of the date of this Order, or in the event a filed TSA is not acceptable to the Commission and the Commission does not approve of the terms of a filed TSA, either wholly or in part, BC Hydro is to apply to the Commission for further directions;

[62] In refusing leave to appeal on this proposed ground of appeal, the chambers judge said, in part:

[61] I fail to understand how this “subject to” provision could be said to undermine the legal correctness of the Committee’s decision, or impugn its procedures.

[63] The intervenors submit there is a substantial question to be argued about whether the Commission breached the rules of natural justice by giving directions as a condition of approval of the EPA that BC Hydro enter into a long term, firm contract for gas transmission for the Island Cogeneration Plant at Elk Falls, when the possibility of such a requirement was never a part of the Duke Point EPA approval proceeding. To support their submissions in that regard, the applicants referred to **Penticton v. British Columbia Energy Commission** (1979), 10 B.C.L.R. 73, 96 D.L.R. (3d) 345 (C.A.), which is said to have raised an analogous issue.

[64] The transportation contract of the sort contemplated in the Order is significant, in the submission of JIESC, because the costs of firm gas transportation service will have a serious impact on members of the JIESC and on all BC Hydro ratepayers in British Columbia.

[65] JIESC further argues that the chambers judge misconceived the facts when he commented at para. 59 that “it seems clear that this issue was dealt with to some extent at the hearing and that the applicants were aware of the matter.” JIESC submits that, in fact, the matters that were discussed at the hearings included a firm gas transportation agreement with regard to the Duke Point Power Limited Partnership plant. However, an agreement was never contemplated respecting the Island Cogeneration Plant. JIESC points out that when issues related to the Island Cogeneration Plant were raised during the proceeding, counsel for BC Hydro took the position that such issues were outside the scope of the proceeding.

[66] JIESC further submits that the chambers judge accepted BC Hydro’s argument that the applicants would have the opportunity to argue the matter of the requirement of a firm gas transportation agreement for the Island Cogeneration Plant before the Commission when the rate determined by Terasen and BC Hydro is submitted for approval. This characterization of the process, in the submission of JIESC, is incorrect. JIESC argues that when the rate is submitted for approval, the contract will be submitted on the basis that BC Hydro was ordered to enter into it by the Commission, and the issues that will be discussed will pertain to the rate to be charged for firm service. The concern of JIESC is that the question of whether firm service is required will be deemed to have been determined and will therefore not be discussed.

[67] JIECS argues that, in imposing the firm gas transportation agreement condition for the Island Cogeneration Plant, when that issue was not before it, the

Commission committed an error in law and exceeded its jurisdiction. None of the parties, JIESC contends, had notice that the Commission would consider gas transportation to the Island Cogeneration Plant as part of the proceedings, and accordingly were not able to argue against the requirement of a firm gas transportation agreement.

[68] In my opinion, the learned chambers judge erred in law when he concluded that no arguable issue had been raised by the condition imposed by the Commission on the approval of the EPA. The issue of the Commission's jurisdiction to make such an order cannot be ignored simply because ss. 59-61 of the **Act** require the Commission to ensure that the tolls set out in a firm gas transportation agreement are just and reasonable.

[69] In my view, the chambers judge erred in not granting leave on the proposed ground for it raises a question of jurisdiction. If the submissions of the applicants were to prevail on this point, the order imposing the condition would be void.

(iii) Reasonable apprehension of bias

[70] In dismissing the leave application on the proposed ground of appeal concerning an apprehension of bias, the chambers judge said, in part:

[55] As in *Parmar* [**R. v. Parmar**, 2005 BCCA 187], this issue of apprehension of bias can be viewed as well from the perspective of whether the Commission came to a pre-determined conclusion. On either footing it would not be open, in my opinion, for a panel of this Court to conclude that the decision of the Commission should be set aside.

[56] This issue does not support granting leave to appeal.

[71] While this proposed ground of appeal may not be as strong as the others, it nevertheless raises a substantial issue to be argued and leave ought to have been granted.

IV. Conclusion

[72] For the reasons stated, I would set aside the order of the chambers judge dismissing the leave applications and would order that leave be granted to appeal the Commission's order approving the EPA, limited to the issues canvassed in these reasons.

[73] Since preparing these reasons, I have had the privilege of reading in draft the reasons for judgment of Mr. Justice Hall and Madam Justice Levine. As this is an urgent matter, counsel should promptly be in touch with the Deputy Registrar of the Court of Appeal to secure an expedited appeal date on the issue on which Madam Justice Levine and I concur.

"The Honourable Madam Justice Rowles"

Reasons for Judgment of the Honourable Mr. Justice Hall:

[74] This is an application to review the order of Mr. Justice Thackray of 12 April 2005 denying the applicants leave to appeal an order of the British Columbia Utilities Commission (the "Commission") dated 17 February 2005. That order had approved, on terms, an electricity purchase agreement (the "Agreement" or "EPA") filed as an energy supply contract pursuant to s. 71 of the **Utilities Commission Act** (the "**Act**"). The Commission annexed as conditions to the Agreement the following terms:

- (a) that BC Hydro purchase firm gas transportation service from Terasen Gas (Vancouver Island) Inc. ("TGVI") to serve Duke Point Power's proposed power plant at Duke Point near Nanaimo, British Columbia ("Duke Point Power Plant"); and
- (b) within 45 days of the date of this Order, that BC Hydro enter into, and facilitate the filing with the Commission of, a long-term firm gas transportation service agreement ("TSA") with TGVI to serve both the Duke Point Power Plant and the Island Cogeneration Plant at Elk Falls, near Campbell River, British Columbia.

[75] General background information relating to the intervenors and the mandate of the Commission are conveniently set out in the reasons of Rowles J.A., which I have had an opportunity to peruse in draft. I am in agreement with her conclusion that an appeal to this Court from a decision of the Commission will normally be restricted to questions of law.

[76] The test to be applied on a review by a panel of this Court of an order of a single justice is set out in **Haldorson v. Coquitlam (City)** (2000), 149 B.C.A.C. 197, 2000 BCCA 672, and also more recently in **Chaplin v. Sun Life Assurance Co. of Canada** (2004), 206 B.C.A.C. 251, 2004 BCCA 655. A panel reviewing the decision of the chambers judge must ask itself whether the chambers judge erred in law or in principle or misconceived the facts. In **Chaplin**, *supra*, Rowles J.A. said this:

[15] It is common ground that the standard of review to be applied on an application brought under s. 9(6) of the *Court of Appeal Act* is summarized in **Haldorson et al. v. Coquitlam (City)** (2000), 149 B.C.A.C. 197; 244 W.A.C. 197; 3 C.P.C. (5th) 225; 2000 BCCA 672, at paragraph 7:

"It comes to this: that the review hearing is not a hearing of the original application as if it were a new application brought to a division of the court rather than to a chambers judge, but is instead a review of what the chambers judge did against the test encompassed by asking: was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts. If the chambers judge did not commit any of those errors, then the division of the court in review should not change the order of the chambers judge."

[16] In this case, the Solicitor has not shown that the Chief Justice was wrong in law, wrong in principle or that he had misconceived the facts. Accordingly, I would dismiss the review application.

[77] In the case of **Dalhuisen v. Maxim's Bakery Ltd.**, 2002 BCCA 541, a case referred to by the applicant JIESC, I said this:

[3] As counsel for the respondent has pointed out correctly, an applicant in such a matter bears a significant onus. A review application will only succeed where the order is found to be clearly wrong, or where the discretion of the judge was exercised upon a wrong principle.

* * *

- [7] ...The learned chambers judge felt that the appeal was unlikely of success. I, myself, have formed no concluded views on the matter, but I would say there exists a serious issue to be argued. I find myself unable to say that the appeal would be bound to fail.
- [78] The background facts of the instant case are set out in the reasons for judgment of Thackray J.A.:

[2] Some background is necessary in order to understand the submissions, but in that there is the pressure of time in which to prepare and deliver these reasons I will keep this to a minimum. The need for haste arises out of the expressed concern that whatever project is undertaken to secure a continued adequate supply of electricity to Vancouver Island is now behind schedule. Further, an appeal date of 2 May 2005 has been secured in this Court and, should the applicants seek a review of this order, it must be completed within the next two weeks or the appeal date will be lost.

[3] Hydro's forecast of electricity demand on Vancouver Island predicts a capacity shortfall commencing in the winter of 2007. Hydro proposed a Vancouver Island Generation Project (the "VIGP" at Duke Point), an industrial park near Nanaimo, British Columbia. Hydro applied to a Commission for a Certificate of Public Convenience and Necessity (CPCN) for the generation project. The decision of that Commission is not under appeal but some of its findings bear upon the matters in the case at bar.

[4] The oral hearing of the VIGP application took place in Nanaimo and Vancouver from 16 June to 3 July 2003. This was followed by written arguments and an additional hearing day on 28 July 2003. Approximately 60 parties took part in the process, with about 20 playing an active role in the oral hearing. Hydro called 19 witnesses and the intervenors produced 22 witnesses. There were 250 written exhibits filed and the oral testimony required 3,000 pages of transcript.

[5] A matter of significance on this application is that Hydro proposed to the Commission in the above noted hearing that if it was to decline to grant a CPCN, a conditional certificate would be acceptable, the condition being that Hydro would conduct a Call for Tenders to determine whether the private sector could offer a more cost-effective solution to the energy supply shortage while meeting the necessary requirement for timing and reliability.

[6] The Commission denied the certificate in a decision dated 8 September 2003. The Commission concluded that Hydro had “not established that VIPG is the most cost-effective means to reliably meet Vancouver Island power needs. Therefore, the Commission Panel denies the Application for a CPCN.” (VIPG Decision, p. 77) It then added:

The Commission Panel encourages BC Hydro to proceed with a CFT... . Based on the results of the CFT, the Commission is prepared to consider any future application for CPCN approval or Electricity Purchase Agreement approval on an expedited basis.

On page 78 of the VIPG decision, the Commission made the following important statement:

The evidence in this hearing suggests that the appropriate next resource addition should be on-Island generation, provided the costs of the proponents’ projects can be confirmed near their expected values.

[7] Hydro thereby proceeded with a call for tenders for the project and advised the Commission on 3 November 2004 that Duke Point Partnership was the successful bidder. The agreement that it entered into with Hydro was for the construction at Duke Point of a natural gas thermal generating plant capable of generating 252 megawatts of capacity.

[79] The filing of the Agreement with the Commission by BC Hydro on 19 November 2004 initiated the proceedings that led to the order of the Commission and the subsequent application for leave to appeal before Thackray J.A., as well as the application for a review of his decision before the panel of this Court.

[80] In order to appreciate the core issues before the Commission, it is necessary to make some reference to its reasons. At section 3.2 of its reasons for decision dated 9 March 2005, the Commission noted that:

BC Hydro forecasts that the capacity deficit on Vancouver Island will rise from 37 MW in F2007 to 280 MW in F2008. This jump of 243 MW

is a result of the de-rating of the High Voltage Direct Current ("HVDC") transmission system (240 MW) and an increase in load requirement (4 MW) after taking into account Power Smart and transmission losses. ...

After considering various arguments pro and con from the intervenors and from BC Hydro, the Commission concluded as follows at section 3.4:

The Commission Panel concludes that the Load Forecast supports the capacity addition of 150 to 300 MW in F2008 which BC Hydro targeted in the CFT.

[Emphasis in original.]

[81] Various bids were submitted in the tendering process. Some of the bids met the criteria for Tier 1 being for production of power between 150 and 300 MW and some met the criteria for Tier 2 being projects producing less than 150 MW. The previous decision made by the Commission in 2003 was effectively a No Award option as the Commission declined to approve the proposal before it. Something perhaps similar to that in the current proceedings was a proposal by NorskeCanada called the Demand Management Proposal. As outlined in the reasons of the Commission, NorskeCanada filed a proposal that between 30 MW and 210 MW of demand could be dealt with by demand management and load shifting or curtailment to assist in meeting future load factors on Vancouver Island. The Commission concluded that in the presence of a cost-effective outcome to the call for tenders process, the NorskeCanada proposal would not constitute a viable option to accomplish the objectives of the call for tenders. The Commission also considered the Vancouver Island Transmission Reinforcement Project, which envisaged the installation of new circuits between the mainland and Vancouver Island, the first to

come into service near the end of 2008 but more likely on any realistic basis sometime around 2009 or 2010. The first circuit would be timed for that period and the other circuit would be constructed at least ten years later. Each of the proposed circuits would have a rating of about 600 MW. All of these various alternatives were before the Commission for a decision as to which was best to meet island power needs at a reasonable cost.

[82] JIESC, a consortium of industry groups, sought generally a low-cost outcome in the interest of its members. GSX Concerned Citizens Coalition, British Columbia Sustainable Energy Association, and the Society Promoting Environmental Conservation (the "GSX Group"), were generally not in favour of any new large gas-fired facility generating power on Vancouver Island. As I read the decision of the Commission, it concluded that the Tier 2 option was not acceptable because such option would not provide sufficient power to meet the anticipated power shortfall facing Vancouver Island residents. Likewise, it did not think that the NorskeCanada Demand Management Proposal had sufficient reliability and capacity to meet the anticipated power needs in the near future. Concerning the Vancouver Island Transmission Reinforcement Project, the Commission expressed concern that because of possible regulatory approval delays and construction delays, any such additional source of power would not be available until a considerable time after the anticipated shortfall of generating capacity. The Commission concluded ultimately that the most acceptable solution was a Tier 1 outcome having regard to cost, timing, and capacity requirements. In the course of its reasons, the Commission said this:

The Commission Panel agrees with BC Hydro that the Tier 1 outcome is robust under the full range of uncertainties. The Commission Panel does not accept that the preferred solution must be the least costly solution under every possible scenario. The Panel has accepted the expected case put forward by BC Hydro and notes that there is an equal, if not higher probability, that events could unfold in ways that favour Tier 1 even more than suggested in the expected value analysis. In particular, the Commission Panel believes that given permitting uncertainties alone, there is an equal, if not higher probability that the in-service date of the 230 kV line could be delayed beyond F2010. There is also evidence that the magnitude of the supply deficit will likely be higher than the base case amount assumed by BC Hydro (280 MW vs. 261 MW), which further increases the cost-effectiveness of Tier 1 relative to the Tier 2 and No Award scenarios. ...

The Commission also said:

The Commission Panel accepts the conclusions of the broader cost-effectiveness evaluation, which confirmed the Tier 1 outcome is preferable to the Tier 2 and No Award alternatives. The Commission Panel acknowledges that there are a small number of scenarios in which Tier 1 is more costly than Tier 2 or No Award but accepts that those scenarios are less likely. These results must also be weighed against qualitative considerations such as the relative reliability of alternatives and certainty over their costs.

[83] Concerning the ability of the tendering process to winnow out more costly bids and to assist in selecting a bid that met criteria for a reasonable cost solution, the Commission said this:

The CFT was designed to find through a competitive bidding process the most cost-effective long-term, on-Island generation project(s) meeting the Mandatory Criteria and with total dependable capacity of between 150 MW and 300 MW. The QEM employed in the CFT selected the project or projects meeting these criteria with the lowest Net Portfolio Cost NPV (i.e., the Tier 1 outcome) (Exhibit B-1, p. 13). A competitive CFT was intended to be the primary demonstration of cost-effectiveness of the Tier 1 outcome. BC Hydro also performed two additional tests to confirm the cost-effectiveness of the Tier 1 outcome in this CFT. First, BC Hydro compared the winning Tier 1 outcome

with the QEM results for the VIGP benchmark (Exhibit B-1, pp. 13, 21, 22; Appendix J, p. 1; Appendix L). The VIGP benchmark considered only incremental costs for completing the project, as outlined in the VIGP Decision. Second, BC Hydro compared the Tier 1 outcome with the Tier 2 and No Award alternatives. The Tier 2 alternative involved a package of on-Island generation projects from the CFT aggregating to less than the minimum 150 MW, supplemented with other short-term alternatives not eligible for the CFT such as demand management and temporary generators. The No Award alternative excluded any long-term on-Island generation, relying instead entirely on temporary generators and demand management prior to the in-service date of the next 230 kV cable to the Island. Cost-effectiveness was tested under several scenarios of future load requirement, mainland generation cost, and 230 kV project timing (Exhibit B-1, Appendix J). In addition to costs, this final cost-effectiveness test also examined important qualitative considerations such as reliability and certainty of alternatives to the Tier 1 outcome.

[84] It appears to me that the Commission in the hearing before it was embarked on a process whereby it was seeking to identify the most reliable and cost-effective method to meet the looming power capacity shortfall on Vancouver Island. It is in light of that background that the proposed grounds of appeal advanced on behalf of the applicants must be assessed. JIESC complained on the application before Thackray J.A. that the time set aside for the hearings did not give them adequate time to evaluate competing proposals or cross-examine witnesses, and further they did not have sufficient access to material that was ordered to be kept confidential by the Commission and therefore they could not effectively determine whether or not the winning bid was the most cost-effective. The GSX Group complained particularly of bias on the part of the Commission chair and in this submission they were joined by JIESC.

[85] It appears the provincial government had determined that it is desirable that to the extent possible, future power needs should be met by private providers. One result is that tendering processes will be required in future to determine how power can be acquired by the power provider at the lowest cost and in the most efficient manner. To facilitate the efficacy of the tendering process, it is of course desirable that details of losing bids not be made public. Assurances in that regard had been given by BC Hydro in the call for tenders process. For this reason, the Commission sought to not release into the public domain details of losing bids, the confidentiality of which had been assured to bidders participating in the process. As the chambers judge observed, there was specific provision in the **Act** as well as in the **Administrative Tribunals Act** for the preservation of confidentiality in the public interest. Obviously, if assurances of confidentiality were not honoured, then the ability to obtain participants in future tendering processes would be imperilled. This would not be in the public interest.

[86] In its decision on confidentiality of 6 January 2005, after referring to the case of **Sierra Club of Canada v. Canada (Minister of Finance)**, [2002] 2 S.C.R. 522, 2002 SCC 41, the Commission went on to hold that the release of material relating to the successful bid in Appendix 3 of the Agreement posed a threat to the commercial interest of the successful bidder, Duke Point Power Limited Partnership ("Duke Point Partnership") but ordered that, regardless, the material should be released with certain sensitive parts redacted. However, it found that the production of unsuccessful bidder information and certain information about the detailed cost

analysis by BC Hydro referred to as Appendix J would be likely to cause deleterious effects to future bid processes. The Commission also said this:

The Commission's practice to date has been to treat as confidential documents that are filed under s. 71 of the Act with a request that the document be kept confidential. To date there has not been a challenge in this regard and public processes have not frequently or typically been invoked to consider s. 71 filings. In these circumstances, however, in view of the unique characteristics of the EPA and the public interest in disclosure of the pricing terms, the Commission Panel accepts that a departure from its previous practice is appropriate.

This by no means is a typical s. 71 filing. Rather, as submitted by parties, the EPA and the process by which it was entered into are unique. All parties to the earlier 'VIGP process', including BC Hydro, clearly contemplated that some form of public process would be required to consider any EPA filed (or Certificate of Public Convenience and Necessity application for that matter) that may result from a CFT conducted by BC Hydro following the Commission's September 2003 VIGP decision.

In the Commission Panel's view, however, this same analysis and logic does not strictly follow for information related to the unsuccessful bids. The Commission Panel accepts that the disclosure of such information would be detrimental to future competitive bidding processes and, in balancing the competing public interests, concludes that such information should not be disclosed. As noted in the November 30 ruling, the Commission Panel considers that it should be up to parties who are unsuccessful bidders to adduce whatever evidence or information they consider necessary to support positions they may take within the scope of this proceeding.

[87] At the hearing, JIESC suggested that it wanted more information disclosed but it never did put forth any detailed proposal as to how confidentiality might be preserved concerning information that had been received in confidence. I am not sure that I perceive what it is that JIESC complains of. As I said, the competing considerations were whether the best solution to meet the anticipated power shortfall

would be a Tier 1 solution or a Tier 2 solution or No Award. The latter would presumably include the possible solution of enhanced transmission capacity from the mainland after 2008. The tendering process had resulted in the Duke Point Partnership's tender being identified as the winning bid, it being the lowest cost bid in Tier 1. The Tier 2 and No Award categories were deemed by the Commission to be unsuitable because they did not provide sufficient capacity and reliability within the needed time frame. Before us, JIESC complained that it did not have the appropriate figures to test whether in fact the Duke Point Partnership bid was the lowest cost solution to future power requirements, but that submission is in my view difficult to maintain in view of the tender process itself. JIESC had access to the financial information concerning the winning Duke Point Partnership bid and the evaluation of that bid and JIESC was therefore in a position to test its merits. I am in agreement with the conclusion of Thackray J.A. that this point concerning disclosure of confidential information was not an issue that had a possibility of success and I therefore see no error in the refusal of Thackray J.A. to grant leave to appeal on this matter.

[88] I turn next to the refusal of the chambers judge to grant leave to appeal on the issue of bias. The background circumstances are that the Commission entered into an *in camera* session on 19 January 2005. At this session, only Commission staff and counsel, BC Hydro counsel and staff, the witnesses to be questioned and the commissioners were present. That *in camera* session had been requested by the chair because it had emerged in the course of the hearing that there was an unsuccessful Duke Point Partnership bid that was not as low cost as the winning bid

but had a duct-firing feature that provided some excess production capacity at a relatively modest cost. In other words, although it might not have produced the lowest absolute cost (and thus be a winning bid) the duct-firing feature might be thought to be useful to add to the winning bid to give optimum value to customers. At this *in camera* session, a colloquy ensued between members of the Commission and counsel as to how such a feature might be incorporated into the winning bid. It seemed to be the consensus of counsel that this could not be done as a matter of law having regard to the rules of the call for tenders process and the law of contract but that this might be a matter BC Hydro and Duke Point Partnership could later negotiate. It is clear from the discussion that the chair of the Commission was seeking as he said to "add some value to customers". Virtually the whole of the transcript of the *in camera* session was provided to participants in a timely way after the conclusion of that session. In his decision, Thackray J.A. referred to the test concerning bias set out in the decision of the **Committee for Justice and Liberty v. Canada (National Energy Board)** (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, and found that in this case there was no possibility of the bias argument succeeding.

[89] I agree with his conclusion that given the facts and the context of the remarks sought to be relied on to demonstrate bias there is no possibility of an argument on bias succeeding before a division of the Court. When the *in camera* session arose, all of the competing proposals were still before the Commission. All that the Commission was doing at the *in camera* session was endeavouring to ascertain if the successful Tier 1 bid of Duke Point Partnership provided the best value for BC Hydro customers. The *in camera* discussion did not address or propose to address

the issue that was before the Commission as to whether the winning Tier 1 bid of Duke Point Partnership was the best and most cost-effective option for Vancouver Island power supply. As the cases make plain, allegations of bias must be looked at in context and when one considers the context of the discussion that occurred here, it seems inconceivable that any informed observer could consider that there was any bias demonstrated on the part of the Commission chair. I see no error in the conclusion of the chambers judge that the bias argument sought to be advanced was bound to fail.

[90] I earlier noted that requirements about gas supply were added by the Commission as conditions annexed to the approval of the Agreement. JIESC, in particular, complains that there was a breach of the principles of natural justice because the parties did not have notice prior to or at the hearing of these conditions that were annexed to the approval of the Agreement. Although the chambers judge appears to indicate in his reasons that he considered this matter was an issue before the hearing, I do not consider he was correct in that impression. It seems to me that these conditions were added by the Commission to its approval of the Agreement without notice to the parties. It could often be the case that if a tribunal hearing a matter added a term or condition to a decision that had not previously been on the table for discussion at a hearing, it would amount to a breach of natural justice. Once again, as in considering a bias argument, context is everything. Here the Commission apparently was considering how to best assure a reliable supply of gas to the successful tenderer, Duke Point Partnership, and as well to another plant on the island, known as the Island Cogeneration Plant at Elk Falls (the

"Cogeneration Plant"). It is particularly in connection with this latter plant that JIESC complains about the proposed contract for firm supplies of gas. It argues that a contract for firm supply could prove to be more costly than one for an interruptible gas supply. It submits that because the Cogeneration Plant has dual firing capacity, namely gas and distillate, an interruptible gas contract could result in cost savings, which would be beneficial to its members. Thus, it says it was prejudiced as a result of these conditions added by the Commission.

[91] It appears to me, however, that nothing has presently or finally been decided by the Commission concerning the terms or existence of any future gas contract between Duke Point Partnership, the Cogeneration Plant, and any gas suppliers. That all lies to be considered in future by the Commission under ss. 59 and 60 of the **Act**:

59(1) A public utility must not make, demand or receive

(a) an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service provided by it in British Columbia...

* * *

(4) It is a question of fact, of which the commission is the sole judge,

(a) whether a rate is unjust or unreasonable,

* * *

(5) In this section, a rate is "unjust" or "unreasonable" if the rate is

(a) more than a fair and reasonable charge for service of the nature and quality provided by the utility,

(b) insufficient to yield a fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property, or

(c) unjust and unreasonable for any other reason.

60(1) In setting a rate under this Act or the regulations

(a) the commission must consider all matters that it considers proper and relevant affecting the rate,

(b) the commission must have due regard to the setting of a rate that

(i) is not unjust or unreasonable within the meaning of section 59,

(ii) provides to the public utility for which the rate is set a fair and reasonable return on any expenditure made by it to reduce energy demands, and

(iii) encourages public utilities to increase efficiency, reduce costs and enhance performance,

[92] The order made by the Commission approving the EPA also required BC Hydro to enter into a firm gas transportation agreement with a supplier for service to Duke Point and the Cogeneration Plant. This was subject to a direction that if no agreement was reached within 45 days in an acceptable form to the Commission, BC Hydro would have to apply to the Commission for further directions. It appears that no supply agreement has hitherto been concluded, but of course one may be. When the Commission comes to consider under ss. 59 and 60 of the **Act** a proposed agreement, it will have available all of the powers under those sections of the **Act** to ensure that the agreement is acceptable and economic in light of submissions that may be received from interested parties such as JIESC. It may well be that as a result of submissions from parties at a future hearing that will have

to take place in connection with approval of contracts for gas supply that the Commission will have to determine whether to approve any contract or to require changes. I believe that the Commission could properly consider a variety of matters at any hearing such as the desirability of requiring an interruptible feature in any contract involving gas supply to the Cogeneration Plant, having regard to the concerns of JIESC. In any event, those are matters that I consider remain to be resolved in future and it would be speculative for this Court to assume what the Commission will or will not decide. I cannot see what possible relief a panel of this Court could give concerning that issue since nothing final has happened involving gas supply contracts. There would simply be no utility in granting leave on that point and I am in agreement with the chambers judge that such argument would have no possibility of success.

[93] It is submitted by the applicants that the chambers judge applied too rigorous a test on the application for leave to appeal from the decision of the Commission. The applicants acknowledge that he referred in his reasons to the case of **Queens Plate Dev. Ltd. v. Vancouver Assessor, Area 09** (1987), 16 B.C.L.R. (2d) 104, 22 C.P.C. (2d) 265, but it is argued that the chambers judge did not refer to the later case of **Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)** (2000), 91 B.C.L.R. (3d) 74, 2000 BCCA 591. The latter judgment expresses the test as whether the grounds sought to be advanced "raise a substantial question to be argued", whereas in **Queens Plate** the test for granting leave was enunciated as "whether there is some prospect of the appeal succeeding on its merits". In **Queens Plate**, Taggart J.A. observed that there is "no need for a justice before whom leave

is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued" (at 110). In the **Omineca** case, the chambers judge had been referred to the cases concerning leave to appeal from a judicial decision whereas the **Queens Plate** test focussed on leave to appeal from an administrative tribunal pursuant to a statutory appeal provision. In **Omineca**, the Court granted a review of the order of the chambers judge. I am not of the opinion that in essence there is any different test enunciated in **Queens Plate** and **Omineca**. It seems to me that if "there is a substantial question to be argued", then it could be said that "there is some prospect of the appeal succeeding on its merits". Both tests encapsulate the same idea.

[94] I do not consider that Thackray J.A. demonstrated any error in approach on the test to be applied on a leave application of this sort. He considered the various arguments sought to be advanced by the applicants and he concluded none of them had any possibility of success. To revert to the language employed in **Haldorson**, *supra*, I do not consider that Thackray J.A. was wrong in law, or wrong in principle, nor did he misconceive the facts with the sole exception of his impression that the gas transportation contract issue had been raised before the Commission. However, as I have endeavoured to point out above, that misconception has no legal impact in the circumstances of the instant case because the consideration of that matter will at a future time come before the Commission for decision and the parties will then have an opportunity to make such submissions as they think fit about the acceptability of proposed contractual arrangements for gas supply.

[95] Since I conclude that none of the points sought to be raised on the proposed appeal have any possibility of success, I would dismiss this application to vary the order of Thackray J.A.

“The Honourable Mr. Justice Hall”

Reasons for Judgment of the Honourable Madam Justice Levine:

[96] I have had the privilege of reading in draft form the reasons for judgment of my colleagues, Madam Justice Rowles and Mr. Justice Hall. Their reasons describe fully the background and issues of this application to vary the order of Thackray J.A. denying leave to appeal from the order of the B.C. Utilities Commission made February 17, 2005.

[97] There are three substantive grounds of appeal raised by the Joint Industry Electricity Steering Committee ("JIESC"). These are the receipt and disclosure of confidential information; the inclusion in the order of a condition that B.C. Hydro enter into a contract for gas transmission for the Island Cogeneration Plant; and an allegation of a reasonable apprehension of bias on the part of the Commission. The GSX Concerned Citizens Coalition ("GSXCCC") joined with JIESC on the issue of the allegation of bias on the part of the Commission. JIESC also raised a legal issue common to all three substantive issues: that Thackray J.A. applied the wrong test in determining whether leave should be granted.

[98] I agree with Mr. Justice Hall on three of these four issues. On the substantive issues, I agree with Mr. Justice Hall that leave should not be granted with respect to the inclusion in the order of the condition relating to a contract for gas transmission to the Island Cogeneration Plant and on the allegation of a reasonable apprehension of bias. I also agree with Mr. Justice Hall that Thackray J.A. did not apply the wrong test in determining whether leave should be granted. I agree with Madam Justice

Rowles on the fourth issue: leave to appeal should be granted on the issue of the receipt and disclosure of confidential information.

[99] I will deal first with JIESC's submission that Thackray J.A. applied the wrong test for determining whether leave should be granted. As explained by Mr. Justice Hall in para. 93 of his reasons for judgment, in ***Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*** (2000), 91 B.C.L.R. (3d) 74, 2000 BCCA 591, the Court dealt with an application to vary the order of a chambers judge denying leave to appeal from a statutory tribunal. The chambers judge had applied the tests for granting leave to appeal from a judicial decision, citing ***Chavez v. Sundance Cruises Corp.*** (1993), 77 B.C.L.R. (2d) 328, instead of ***Queens Plate Dev. Ltd. v. Vancouver Assessor, Area 09*** (1987), 16 B.C.L.R. (2d) 104 (C.A.). In her reasons for judgment in ***Omineca***, Southin J.A. commented on the "subtle difference" between the test of a "realistic possibility of success" (referred to by the chambers judge in that case) and "substantial questions to be argued" (referred to in ***Queens Plate***). In ***Queens Plate***, however, Taggart J.A. also referred to the test of "some prospect of the appeal succeeding on its merits". Like Mr. Justice Hall, I do not read Southin J.A.'s reasons in ***Omineca*** as excluding reference to the test of "some prospect of success".

[100] It seems to me that JIESC's real complaint is that in applying the test of whether the grounds of appeal had any merit, Thackray J.A. concluded that they did not. That, itself, is not an error of law or principle justifying variation of his order on this review.

[101] In denying leave to appeal on the issue of receipt and disclosure of confidential information, Thackray J.A. concluded (at para. 46) that “a submission that the confidentiality orders were too broad considering the importance of the information to the ultimate issue” [emphasis mine] was not a sufficient basis for a successful appeal. In my opinion, that was an error in law. As argued by JIESC and explained by Madam Justice Rowles in her reasons, the fact that the Commission did not consider alternative, less restrictive, means of disclosing the commercially sensitive information in Appendix J while preserving its confidentiality raises “substantial questions to be argued”, taking into account the directions of the Supreme Court of Canada in **Sierra Club of Canada v. Canada (Minister of Finance)** (2002), 211 D.L.R. (4th) 193 (S.C.C.) (in particular, at para. 46) and the statutory provisions governing the procedures of the Commission in s. 71(5) of the **Utilities Commission Act**, R.S.B.C. 1996, c. 473 (the “**Act**”) and s. 42 of the **Administrative Tribunals Act**, S.B.C. 2004, c. 45. These are issues of importance to the public, the practice and these parties.

[102] I adopt the reasons of Mr. Justice Hall on the issue of the inclusion in the order of the condition that B.C. Hydro enter into a contract for gas transmission to the Island Cogeneration Plant. It seems that Thackray J.A. may have misconceived the evidence on this issue, but there is little benefit to the parties of an appeal at this stage given that there is provision in the **Act** for a full review of any contract actually entered into.

[103] I also adopt the reasons of Mr. Justice Hall on the issue of reasonable apprehension of bias. Taken in context, there is no “prospect of success” or “substantial question to be argued” that the test for reasonable apprehension of bias would be met in these circumstances.

[104] In my opinion, there is a benefit to the parties in limiting the issues on the appeal because of the urgency to move forward with a decision on a solution to the electricity needs of Vancouver Island.

[105] I would therefore vary the order of Thackray J.A. and grant leave to appeal on the issue of the receipt and disclosure of confidential information, but confirm his order denying leave on the issues of the condition in the order and reasonable apprehension of bias.

“The Honourable Madam Justice Levine”

December 21, 2010

Application No. 1606609

Proceeding ID 457

Alberta Utilities Commission Ruling on Application for Confidentiality Pursuant to Section 13 of AUC Rule 001 by the Industrial Power Consumers Association of Alberta

1. Overview and Nature of the Issue to be Decided

1. On December 2, 2010, the Industrial Power Consumers Association of Alberta (IPCAA) applied to the Alberta Utilities Commission (AUC or Commission) for a confidentiality order pursuant to section 13 of Rule 001, *Rules of Practice* (Rule 001) allowing IPCAA to confidentially file the names of eight of its members that may be directly and adversely affected by the Commission's decision on the Heartland application.

2. Two parties, AltaLink Management Ltd. and EPCOR Distribution and Transmission Inc. (the applicants) and Mr. Lee Watrin objected to IPCAA's application.

3. The Commission has considered IPCAA's application and all related submissions and asked me to provide you with its ruling on this matter.

2. Background

4. The applicants jointly filed the Heartland application with the Commission on September 27, 2010, requesting approval to construct and operate the Heartland Transmission Project.

5. On October 21, 2010, IPCAA filed a statement of intention to participate (SIP) in the Heartland proceeding. IPCAA stated that its members were significant industrial consumers in Alberta and would be directly affected by any rates, costs, increases and precedents established in Alberta. It also stated that seven of its members are directly affected by the proposed transmission line. IPCAA stated that it was concerned about AC induction and pipeline integrity and intended to participate in the process to ensure that the applicants move forward with the project in a manner that is safe, responsible and cost accountable.

6. IPCAA did not attend the Commission's process meeting on November 2, 2010. In the Commission's decision following the process meeting, Decision 2010-523, the Commission requested IPCAA to address a previous ruling of the Alberta Energy and Utilities Board which found that IPCAA did not have standing to participate in a transmission facility hearing. The Commission also requested IPCAA to identify which of its members own pipelines within 800 metres of the right-of way of either the preferred or alternate route and to confirm that IPCAA was authorized to represent those members in the Heartland proceeding.

7. On November 30, 2010, the Commission ruled on IPCAA's request for standing and found as follows:

42. The Commission finds that IPCAA has standing on the basis that the rights of one or more of its members may be directly and adversely affected by the Commission's decision on the application. The rights of seven IPCAA members may be directly and adversely affected because they own pipelines or facilities that may be affected by the Commission's decision on routing for the Heartland project.

43. IPCAA's standing is conditional. On or before December 2, 2010 IPCAA must:

(a) identify which of its members have pipelines or facilities that may be directly and adversely affected by the Commission's decision on routing;

(b) identify the location(s) of the affected pipelines or facilities; and

(c) confirm that IPCAA is authorized to represent the interests of one or more of those members identified in subparagraph(a).

44. IPCAA does not have to provide a list of all of its members' names. If, however, IPCAA believes that identifying one or more of these members requires confidentiality, IPCAA may apply to the Commission pursuant to section 13 of *AUC Rule 001: Rules of Practice* for a confidentiality order.

...

47. Nevertheless, the Commission would have allowed IPCAA to participate in this proceeding if IPCAA asked the Commission to exercise its discretion to allow IPCAA to do so although IPCAA's rights may not be directly and adversely affected by the Commission's decision on this application. The Commission would have permitted IPCAA to call evidence, cross examine witnesses and submit argument....

8. On December 2, 2010, IPCAA applied for a confidentiality order pursuant to section 13 of Rule 001 allowing IPCAA to keep confidential the names of eight of its members that may be directly and adversely affected by the Commission's decision on the Heartland application. IPCAA's grounds for its confidentiality application were as follows:

- IPCAA has a long-standing policy of confidentiality with respect to its membership. This policy was established as an Annual General Meeting Resolution. The disclosure of the eight affected parties from its membership list would be directly adverse to this policy of confidentiality and contrary to IPCAA policies and the basis upon which members have chosen to join IPCAA;
- If IPCAA were to disclose the eight affected parties from IPCAA's membership list to the Commission, IPCAA's confidentiality policy would be called into question, thereby directly affecting the relationship between IPCAA and all of its members;
- The disclosure of the eight affected parties from IPCAA's membership list would negatively impact the commercial interests and government relations of those members which has the potential to materially harm those members' business interests within the larger marketplace in which they operate; and
- The Applicants have no need to know IPCAA's membership — indeed the specifics of the locations and facilities are already known to them.

9. IPCAA also stated that it is authorized to represent the interests of its members in the proceeding and noted that a motion to that effect was made and carried unanimously at a recent Board of Directors' meeting.

10. On December 6, 2010, the Commission wrote to interested parties and set a schedule by which submissions in response to IPCAA's confidentiality application could be made.

3. Discussion of Issues

11. Each of the submissions received by the Commission is summarized in the paragraphs that follow.

3.1 Views of Mr. Lee Watrin

12. The Commission received an email submission on behalf of Lee Watrin from his counsel, Darryl Carter QC, on December 6, 2010. Mr. Watrin asserted that any interest IPCAA may have in confidentiality does not outweigh the public interest in disclosure of the information for which IPCAA seeks a confidentiality order.

13. Mr. Watrin asserted that the public, especially landowners affected by the alternate route, are entitled to know who IPCAA represents and where its members' pipelines are located. Mr. Watrin contended that this information may have influenced the applicants' routing decisions and could influence the Commission's decision.

3.2 Views of the Applicants

14. The applicants responded to IPCAA's confidentiality application on December 8, 2010. The applicants submitted that IPCAA has not met the test for confidentiality set out in subsection 13(3). The applicants stated that, as a fundamental tenant of administrative law, they have the right to know the identity of parties that intervene in their application. The applicants stated that IPCAA provided no justifiable reason for keeping the identity of its members confidential.

15. The applicants stated that, without knowing the identity of the affected IPCAA members and the location of their respective facilities, they will be unable to know the case being made against them and will be unable to effectively respond to that case. The applicants stated that IPCAA's disclosure that its members were amongst those listed in section 6.3 of the Heartland application was not helpful. It noted that the list contained 80 companies who expressed diverse views and concerns on the proposed project. The applicants argued that it is unfair to expect them to guess which of the 80 companies they consulted with are intervening through IPCAA.

16. The applicants made it clear that they are not seeking disclosure of IPCAA's membership list. Rather they are seeking to know who IPCAA purports to represent in their capacity as owners of pipelines or facilities that may be affected by the Heartland project.

17. The applicants also noted that they have presumably consulted with the eight IPCAA members while preparing their application. They noted that IPCAA may intend to raise some of its members' concerns in the course of the proceeding. The applicants stated that it may have taken steps to address these concerns however, without knowing the identity of the eight intervening members, they will be unable to present such evidence to the Commission.

18. The applicants requested the Commission to deny IPCAA's request for confidentiality for all of the above reasons.

3.3 Views of IPCAA

19. IPCAA provided its response to the concerns expressed by the applicants on December 10, 2010. IPCAA stated that the applicants are aware of all facilities that may be directly affected by their application and the identity of each company that owns those facilities. It stated that the fact that some of these companies are IPCAA members does not change the applicants' state of knowledge about the concerns expressed by each company.

20. IPCAA stated that it intends only to address high level issues at the hearing and argued that the nature of the issues it intends to raise does not require it to disclose the precise identity, nature and location of its members and their facilities. It submitted that its confidential participation will not prejudice the applicants. It stated that it will make its positions very clear and opined that the applicants will be able to fully respond to the evidence it brings.

21. IPCAA stated that it is in a "Catch-22" in that it represents a significant portion of the ratepayers that will ultimately bear the full costs of the applicants' proposals but is unable to disclose its members by reason of its constitution.

22. IPCAA pointed out that the Commission stated in its November 30, 2010 ruling that it would have exercised its discretion to allow IPCAA to fully participate even if it did not have members that may be directly and adversely affected by the Commission's decision on the Heartland application. IPCAA requested the Commission to exercise its discretion and allow it to participate in the proceeding without disclosure of its membership list.

4. Commission Ruling

23. In issuing this ruling, the Commission has considered all relevant materials relating to IPCAA's application for confidentiality. References in this ruling to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record with respect to that matter.

4.1 The Tests for Confidentiality

24. The information that IPCAA seeks to keep confidential under section 13 of Rule 001 is the names of seven IPCAA members who own or have an interest in pipelines that may be directly and adversely affected by the Commission's decision on the Heartland application. IPCAA additionally requests that the Commission keep confidential the fact that another intervener in the proceeding is also an IPCAA member.

25. Subsection 13(4) of Rule 001 describes the three circumstances in which the Commission can issue a confidentiality order and reads as follows:

(4) The Commission may, with or without a hearing, grant a request for confidentiality on any terms it considers appropriate

(a) if the Commission is of the opinion that disclosure of the information could reasonably be expected

(i) to result in undue financial loss or gain to a person directly affected by the hearing or other proceeding,

or

(ii) to harm significantly that person's competitive position,

or

(b) if

(i) the information is personal, financial, commercial, scientific or technical in nature,

(ii) the information has been consistently treated as confidential by a person directly affected by the hearing or other proceeding, and

(iii) the Commission considers that the person's interest in confidentiality outweighs the public interest in the disclosure of the proceeding.

26. The Commission understands the four grounds for IPCAA's application to be:

Ground 1 IPCAA has consistently treated its membership list as confidential.

Ground 2 Disclosure of the names of its eight members could directly affect IPCAA's relationship with its members.

Ground 3 Disclosure of the names of its eight members could negatively impact the commercial interests and government relations of those members and could also impact their business interests.

Ground 4 The applicants have no need to know the names of the eight members because they are already aware of the locations and facilities that may be directly and adversely affected by the proposed project.

27. Ground 1 directly correlates with part of the test established by subsection 13(4)(b) and Ground 3 directly correlates with the test established by subsection 13(4)(a)(ii). However, the Commission finds that Grounds 2 and 4 do not correlate directly with any of the tests established under subsection 13(4). Accordingly, the Commission finds that neither Ground 2 nor Ground 4, when considered in isolation, meets any of the tests for confidentiality prescribed by subsection 13(4). However, the Commission is of the view that it may consider Grounds 2 and 4 in its overall consideration of whether IPCAA's interest in confidentiality outweighs the public interest in full disclosure.

28. The Commission specifically considers the grounds for IPCAA's application in the two sections that follow.

4.2 Ground 3: Disclosure could negatively impact commercial and business interests

29. This ground could fit under either subsection 13(4)(a)(i) or (ii) of Rule 001.

30. When deciding whether to issue confidentiality order, in addition to applying the test established in section 13, the Commission must also bear in mind the direction of Canada's courts on such matters. In *Sierra Club of Canada v. Canada Minister of Finance* 2002 SCC 41, the Supreme Court of Canada found that a confidentiality order under the Federal Rules of Court should only be granted when

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[emphasis added]²⁵⁶

31. The Court added that the "risk in question must be real and substantial, in that the risk is well grounded in the evidence and poses a serious threat to the commercial interest in question"²⁵⁷. It also stated "In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality"²⁵⁸.

32. Having regard to the foregoing, the Commission finds that IPCAA has provided insufficient information regarding the commercial interests of its eight members or the risk to those interests to warrant the granting of a confidentiality order pursuant to subsection 13(4)(a)(i) or (ii). As noted in the *Sierra Club* decision the risk in question must be real and substantial and well grounded in the evidence. In this case the Commission effectively has no evidence regarding the commercial interests asserted by IPCAA on behalf of its members or the risks thereto should the names of those parties be disclosed.

4.3 Grounds 1, 2 and 4: IPCAA's membership list has consistently been treated as confidential

33. Grounds 1, 2 and 4, when considered together, appear to most closely adhere to the test for confidentiality under subsection 13(4)(b) of Rule 001. To qualify for confidential treatment under this subsection the names of the eight potentially affected IPCAA members must be information that is personal, financial, commercial, scientific or technical in nature and must have been consistently treated by IPCAA as confidential. Further, the Commission must also find that IPCAA's interest in confidentiality outweighs the public interest in the disclosure of its members' names in the proceeding.

34. While the Commission accepts that this information has been consistently treated by IPCAA as confidential, it is not satisfied that this information is personal, financial, commercial, scientific or technical in nature. The Commission notes, in this respect, that IPCAA did not argue that the identities of its eight members were personal, financial, commercial, scientific or technical information. Accordingly, the Commission could dismiss IPCAA's application for confidentiality on the basis that the information for which confidential treatment is sought does not meet the criteria established by subsection 13(4)(b)(i) of Rule 001.

35. However, even if IPCAA had convinced the Commission that its members' names satisfied the criteria set by subsection 13(4)(b)(i) the Commission does not consider that IPCAA's interest in confidentiality outweighs the public interest in its disclosure for the following reasons.

36. While the Commission's rules contemplate the issuance of a confidentiality order, it considers that such an order should only be issued in limited circumstances. In AUC Decision 2010-210, the Commission was required to rule on a request for confidentiality under section 13 of Rule 001. The Commission found as follows:

The Commission is part of the system of administrative justice and must uphold an open public system. There is a strong presumption in favour of the open court principle in AUC proceedings to ensure the transparency of the Commission's process from the inception of a matter, and the AUC Rules reflect this presumption.

...As set out in subsection 13(1) of AUC Rule 001 and [section 2](#) of AUC Rule 014, all documents filed in respect of a hearing or other proceeding must be placed on the public record. As such, confidentiality should only be extended in exceptional circumstances as public disclosure of all relevant documents is the preferred course of action in any proceeding, including approval of settlements.

[emphasis added]²⁵⁹

37. The Commission's finds that IPCAA has failed to adequately explain why it is necessary to keep the names of its eight members with a direct interest in the proceeding confidential. All that the Commission knows in this respect is that IPCAA has kept its membership list confidential in the past. Further, it is not clear to the Commission what risk, if any, is posed to IPCAA or its members by the disclosure of those names. The only information that the Commission has in this respect are the general concerns about impact on the eight members' business interests and government relations. Given the very limited information before it, the Commission is unable to conclude whether there are any salutary effects associated with the requested confidentiality order.

38. On the other side of the equation, the Commission finds that there would be several deleterious effects associated with issuing the confidentiality order requested by IPCAA.

39. First, the Commission rejects IPCAA's argument that disclosure of the names of its eight potentially affected members is not necessary because IPCAA only intends to raise "high level" issues regarding safety and costs. In the Commission's view, "high level" evidence regarding safety concerns, specifically regarding pipelines currently located in the transportation and utility corridor, will not be as useful to it as specific evidence on particular pipelines will be.

40. Concerns about corrosion and AC induction may vary depending upon the specifications of a particular pipeline. As there are high pressure pipelines in the TUC, the Commission requires the best evidence possible on these issues. Such evidence should include the specifications of the pipeline, its operating pressure and the nature of any corresponding corrosion program. This information should come from the owners and operators of the pipelines and be specific. If the Commission grants IPCAA's request for confidentiality, it may not have efficient and effective access to this important evidence.

41. Second, the Commission finds that parties that are adverse in interest to IPCAA, whether they are the applicants or other interveners, are entitled to know the case against them as a matter of common law and pursuant to the [Alberta Utilities Commission Act](#) and the *Administrative Procedures and Jurisdiction Act*. In the Commission's view, these parties must know which of IPCAA's members are bringing forward concerns in order to effectively respond to those concerns. If the Commission were to grant IPCAA's confidentiality order these parties may be unable to effectively respond to the concerns raised by IPCAA.

42. Third, the Commission is concerned with the issue of double representation and the potential for conflicting evidence. The Commission notes in this respect IPCAA's acknowledgement that at least one of its members (the eighth member) has been granted separate intervener status in the hearing. This raises the possibility that the Commission may, in fact, hear from the same party twice on one or more issues. The Commission considers that potential for duplicate evidence would be contrary to a fair, open and transparent hearing process.

43. The Commission concludes the deleterious effects associated with the issuance of a confidentiality order outweigh any salutary effects such an order might have on IPCAA and its eight members. Accordingly, the Commission denies IPCAA's application to confidentially submit the names of the eight members that it intends to specifically represent in this proceeding.

44. The Commission emphasizes that, pursuant to the Commission's November 30, 2010, ruling, IPCAA is not required to disclose its entire membership list. However, because the Commission granted IPCAA standing to participate in the proceeding

premised upon the potential for direct and adverse impact upon eight of its members, IPCAA is required to disclose who those members are and describe the nature of the right, claim or interest they are asserting. Accordingly, if IPCAA wishes to exercise the rights accorded to a person with standing described in [subsection 9\(2\) of the *Alberta Utilities Commission Act*](#), it must provide the Commission with the following information by no later than January 7, 2011:

- (a) identify the eight IPCAA members that have pipelines or facilities that may be directly and adversely affected by the Commission's decision on routing;
- (b) identify the location(s) of the affected pipelines or facilities; and
- (c) confirm that IPCCA is authorized to represent the interests of one or more of those members identified in sub-paragraph (a).

Yours truly,

(original signed by)

JP Mousseau

Counsel to the Heartland Panel

3.c. Ruling on the standing of the FIRST group, February 10, 2011

jp.mousseau@auc.ab.ac

Writer's direct line

403-592-4452

February 10, 2011

Graves Engineering Corporation

11461 University Avenue

Edmonton, Alberta T6G 1Y9

Attention: Mr. Jim Graves

Fasken Martineau

3400 First Canada Centre

350-7th Avenue SW

Calgary, Alberta T2P 3N9

Attention: Mr. Peter Feldberg

Dear Sirs:

RE: COMMISSION RULING ON THE STANDING OF THE "FIRST" GROUP

1. Overview and Nature of the Issue to be Decided

2014 NSUARB 5
Nova Scotia Utility and Review Board

Nova Scotia Power Inc., Re

2014 NSUARB 5

In the Matter of the Public Utilities Act

In the Matter of an Application by Nova Scotia Power Incorporated for confidential treatment of material filed in its application for approval of a 2013 Capital Expenditure for the South Canoe Wind Project (CI # 42127)

Roberta J. Clarke Chair, Kulvinder S. Dhillon Member, Murray E. Doehler Member

Judgment: January 14, 2014

Docket: M05416

Proceedings: additional reasons to *Nova Scotia Power Inc., Re* (2013), 2013 CarswellINS 312, 2013 NSUARB 92 (N.S. Utility & Review Bd.)

Counsel: Nicole Godbout, David Landrigan, for Applicant, Nova Scotia Power Incorporated
John Merrick, Q.C., William J. Mahody, for Intervenor, Consumer Advocate
E.A. Nelson Blackburn, Q.C., for Intervenor, Small Business Advocate
Rodney V. Northey, Thomas Brett, for Intervenor, Cape Breton Explorations Ltd.

Related Abridgment Classifications

Public law

IV Public utilities

IV.5 Regulatory boards

IV.5.c Practice and procedure

IV.5.c.v Miscellaneous

Headnote

Public law --- Public utilities — Regulatory boards — Practice and procedure — Miscellaneous

Table of Authorities

Cases considered:

Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General) (2013), 2013 NSCA 134, 2013 CarswellINS 883 (N.S. C.A.) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Standard Form Power Purchase Agreement, Re (2012), 2012 CarswellINS 323, 2012 NSUARB 49 (N.S. Utility & Review Bd.) — referred to

Statutes considered:

Public Utilities Act, R.S.N.S. 1989, c. 380

s. 35 — considered

Regulations considered:

Electricity Act, S.N.S. 2004, c. 25

Renewable Electricity Regulations, N.S. Reg. 155/2010

Generally — referred to

Decision of the Board:

I Introduction and Background

1 Nova Scotia Power Incorporated ("NSPI") filed an application ("Application") with the Nova Scotia Utility and Review Board ("Board") on December 7, 2012, seeking approval of a 2013 capital expenditure for the South Canoe Wind Project in the amount of approximately \$93,000,000. The Application had nineteen appendices, and NSPI requested that certain information included in the Application be maintained by the Board as confidential. The Board made a decision on January 14, 2013 with respect to this request, which will be discussed in greater detail below.

2 A hearing on the merits of the Application took place on February 20 and 21, 2013, and the Board rendered its Decision on April 26, 2013 ([2013 NSUARB 92](#) (N.S. Utility & Review Bd.)). Cape Breton Explorations Limited ("CBEx"), a formal intervenor in the proceeding, filed an appeal of the Board's decision with the Nova Scotia Court of Appeal.

3 The Board understands that, as a part of that appeal process, the issue of the confidential treatment of NSPI's documentation was raised. The Board has received the decision of the Court of Appeal, issued on November 26, 2013, which states, in part;

[47] I would remit the matter of the confidential treatment of the NSPI documents submitted to the Board with NSPI's application for Board approval to the Board so that this Court can receive the benefit of its analysis in reaching its decision.

[[2013 NSCA 134](#) (N.S. C.A.)]

4 From the direction of the Court of Appeal, the Board understands it is now to more fully explain, on the record, the reasons for its decision on the request for confidentiality based on the information before it at that time.

5 This Supplemental Decision sets out the Board's reasons as requested.

6 The Board considers it useful to outline the context of NSPI's Application. Pursuant to [s. 35 of the Public Utilities Act, R.S.N.S. 1989, c. 380](#), as amended, a public utility is required to obtain Board approval for any capital expenditure over \$250,000. The requests for such approval are generally known as capital work orders. By far, of all the utilities over which the Board has jurisdiction, NSPI files the largest number of these work orders. These NSPI requests may come to the Board as part of an annual capital expenditure plan, or may be filed on a quarterly basis, and as well, "outside" the quarter. The Board's processes for consideration of such requests for approval have been established over many years.

7 It is not unusual for NSPI, or other public utilities regulated by the Board, to seek confidential treatment for certain information in these capital work orders. In general, the type of information maintained as confidential is the same as that for which similar treatment was requested in this Application.

8 Not every capital work order is the subject of an oral hearing, although some cases warrant such a process, either due to the magnitude of the cost, or the nature of the project. Others are dealt with in a "paper" hearing, and some "standard" matters are reviewed by the Board without a hearing. However, each matter is accessible through the Board's website, and unless the Board approves confidential treatment, the materials filed are publicly available.

9 The Board determined that the South Canoe Wind Project merited a formal hearing process, with the opportunity for participation by parties who wished to intervene in the proceeding. Accordingly, a Hearing Order was issued with an established timeline. NSPI had advised the Board in its Application that it was seeking Board approval by March 31, 2013, in order to meet certain deadlines for contractual obligations. This meant that time was of the essence in order to allow for any Information Requests ("IRs") to be issued and responded to, and for Intervenors to prepare and file evidence. Consequently, the Board needed to address the request for confidential treatment in a timely fashion.

- 10 The *Board Regulatory Rules* provide the manner in which requests for confidential treatment are to be addressed in [Rule 12](#):
- 12 (1) Subject to [Rule 12\(2\)](#), all documents filed in respect of an application shall be placed on the public record.
- (2) A party may request that all or any part of the document be held in confidence by the Board, which request shall be placed on the public record.
- (3) The burden of satisfying the Board that a document should be held in confidence is on the party claiming confidentiality.
- (4) Any request for confidentiality shall
- (a) include a summary of the nature of the information in the document;
 - (b) state
 - (i) the reasons for the request, including the details of the nature and extent of the specific harm that would result if the document were publicly disclosed, and
 - (ii) any objection to placing an abridged version of the document on the public record, and the reasons for such an objection; and
 - (c) be filed with the Board and served on the parties.
- (5) Where a party has made a request under [Rule 12\(2\)](#), the document shall be held in confidence unless the Board orders otherwise.
- (6) A party may object to a request for confidentiality by filing an objection and serving the objection on the parties.
- (7) An objection shall state the reasons
- (a) why the party requires disclosure of the document; and
 - (b) why disclosure would be in the public interest.
- (8) The party claiming confidentiality will have an opportunity to reply to any objection.
- (9) The Board may decide the issue with or without a hearing. Where the Board holds a hearing, the Board may direct that the hearing be held in the absence of the public.
- (10) In ruling on a request for confidentiality the Board shall consider
- (a) whether the document may disclose matters involving public security;
 - (b) whether the document may disclose sensitive financial, commercial or personal matters in relation to which the desirability of avoiding disclosure in the interest of any person affected outweighs the desirability of adhering to the principle that documents be available to the public; or
 - (c) such other matters as the Board deems appropriate.
- (11) The Board may
- (a) order that the document be held in confidence by the Board;
 - (b) order that the document be placed on the public record;

(c) order that an abridged version of the document be placed on the public record;

(d) order that the document be made available to a party to the proceeding, who has a good faith interest in accessing the confidential information and who would not otherwise be in conflict of interest, on such terms as the Board considers appropriate, including the signing of a confidentiality undertaking in a form approved by the Board;

(e) order that the document be withdrawn; and

(f) make any other order the Board may deem to be in the public interest.

(12) Where the Board rejects a claim for confidentiality, the party claiming confidentiality may, within seven (7) days of receiving the Board's decision, or such other time as the Board may allow, notify the Board in writing that

(a) if the party is an applicant, the application is withdrawn; or

(b) if the party is an intervenor, the intervention is withdrawn.

(13) Where a party provides written notice to the Board pursuant to [Rule 12\(12\)](#), if the document is on file with the Board, the Board shall immediately return the documents for which confidentiality was claimed.

11 The Board has considered that Rule 12 is in essence a codification of the criteria set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), in that it takes into account both the principle of open courts, and the prevention of "serious risk to an important interest" and balances the interests of the parties with the public interest.

II NSPI's Application

12 As noted above, NSPI filed its Application for approval of the capital expenditures for the South Canoe Wind Project on December 7, 2012. The cover letter accompanying the Application stated, in part:

Information presented in this application is non-confidential with the exception of certain information presented in the application and the supporting documentation in the appendices. NS Power's support for its request that this information be maintained by the Board as confidential is provided below.

The details, in accordance with [Rule 12\(4\)](#) are as follows:

Commercial information - Full and Partial Redaction

Costs per megawatt hour, various project cost details, IPP proposals, RFP and RFI for wind turbine procurement, procurement recommendation and other items associated with the cost of the project are considered confidential to protect value for customers and mitigate the risk of prospective proponents having access to pricing quotes and other commercially sensitive information.

The more a supplier is aware of NS Power's specific requirements and competitors' bids, the better their ability to obtain the highest price, reduce competition and ultimately increase the cost for NS Power and its customers. The cost of such transparency is not always immediately evident. Information from regulatory proceedings can provide competitive advantages over other suppliers, and that could be advantageous in bidding or negotiation. Higher prices, or avoidable contractual constraints, will result in unnecessary higher costs to customers.

NS Power strives to keep the terms and conditions of suppliers' pricing and arrangements confidential from their other customers or potential competitors. This prevents competitors from using their information to gain a competitive advantage. This is equally true for NS Power, which desires to protect its ability to acquire capital services and equipment on the most

competitive terms. Those "best" terms may not be available if there is a risk that they will be disclosed to the customers or competitors of the supplier.

Since NS Power customer rates are cost-based the maintenance of confidentiality for this item is to the direct benefit of customers.

[Emphasis added]

[NSPI Letter, December 7, 2012]

13 NSPI asked the Board to approve the confidential or partially confidential treatment of the documentation as well as a Confidentiality Undertaking which would provide Intervenor with access to confidential information on certain conditions. Such an undertaking is consistent with the provisions of [Rule 12\(11\)\(d\)](#).

14 The following chart prepared by the Board summarizes the documents filed and the nature of NSPI's request;

<i>Document Name</i>	<i>Appendix No.</i>	<i>No. of Pages</i>	<i>Confidential Treatment</i>
Application	-	26	Partially confidential
UARB Approval Sheet	A	5	Partially confidential
Renewable Energy Regulations	B	25	Non-confidential
Renewable Energy Administrator's Request for Proposals for 300 GWh	C	49	Non-confidential
Nova Scotia Power — 100 MW Wind Turbine Generators Request for Information and Expression of Interest	D	7	Non-confidential per December 20 filing in response to Board's letter of December 14
Nova Scotia Wind Turbine Generator Request for Proposals	E	43	Partially confidential per December 20 filing in response to Board's letter of December 14
Nova Scotia Power Procurement Recommendation RFP Wind Turbine Generator Map — South Canoe turbine layout	F	20	Confidential in its entirety
Power Purchase Agreement between NSPI and Oxford Frozen Foods Limited	G	1	Non-confidential
Power Purchase Agreement between NSPI and Minas Basin Pulp and Power Limited	H	90	Confidential in its entirety
South Canoe Financial Model	I	90	Confidential in its entirety
Oxford Frozen Foods Limited Response to REA RFP	J	13	Confidential in its entirety
Minas Basin Pulp and Power Limited Response to REA RFP	K	214	Confidential in its entirety
Ground Lease between Timberland Holdings (2010) Limited and NSPI	L	57	Confidential in its entirety
Asset Sharing Agreement between NSPI, Oxford Frozen Foods Limited and Minas Basin Pulp and Power Limited	M	64	Confidential in its entirety
Project Construction and Operating Agreement among NSPI, Oxford Frozen Foods Limited and Minas Basin Pulp and Power Limited	N	31	Confidential in its entirety
Term Sheet June 2012 between NSPI Minas Basin Pulp and Paper Limited and Oxford Frozen Foods Limited	O	79	Confidential in its entirety
Letter Agreement Draft (Oxford, Minas, NSPI, Acciona)	P	18	Confidential in its entirety
Lease Addendum and Option for Grant of Easement — Timberland Holdings (2010)	Q	7	Confidential in its entirety
	R	41	Non-confidential

15 In response, the Board wrote to NSPI on December 14, 2012, approving the Confidentiality Undertaking, and stating, in part:

The Board has considered the request for confidential treatment of certain information filed in support of the application. Reserving the right to consider this request further, the Board now asks NSPI to provide justification for confidential treatment of Appendices D and E. The Board understands that these documents were initially issued publicly.

16 The Board requested a response from NSPI by December 20, 2012.

17 In the interim, the Board received an email from the President of CBEx, dated December 17, 2012, stating the company wished to have formal intervenor status in the proceeding. The request included the following statement:

Our company's interest is primarily because we were a bidder in the recent RFP that awarded NSPI and its partners the PPA related to the matter above and therefore have an interest in the integrity of the process.

[Emphasis added]

18 By letter dated December 18, 2012, the Board sought comments from NSPI on the request made by CBEx, and received a letter from Eric Ferguson, Director, Regulatory Affairs, dated December 19, 2012, which stated that it did not object to the granting of intervenor status and further stating:

The Company does advise the Board that because this party is an Independent Power Producer (IPP) and as such a bidder in the REA process and potential supplier to the Company, NS Power will be unable to accept a Confidential Undertaking from this party should the IPP wish to submit one.

[Emphasis added]

19 The Board then approved the request for formal intervenor status for CBEx by letter dated December 20, 2012, which enclosed a copy of the NSPI December 19, 2012 letter to the Board.

20 The Board received requests for intervenor status from the Small Business Advocate and the Consumer Advocate on December 19, 2012 and January 1, 2013 respectively, and standing was granted to them.

21 On December 20, 2012, NSPI refiled its Application, together with a covering letter, in response to the Board's letter of December 14, 2012. The Board considers it useful to set out the covering letter in its entirety:

On December 7, 2012, NS Power submitted to the UARB CI 42127 — South Canoe Wind Project. On December 14, 2012, the UARB issued a letter to NS Power requesting justification of the confidential designation of Appendices D and E. Appendices D and E are NS Power's Request for Information (RFI) and Request for Proposals (RFP) respectively. The RFI and RFP pertain to NS Power's procurement of wind turbine generators. These were not issued publicly.

Prospective wind turbine generator manufacturers were provided the RFI and RFP on a confidential basis. Per [Section 6](#) of the RFI and [Section 13](#) of the RFP, these documents were provided to proponents on the express understanding that they would keep the information in strict confidence. NS Power had in place two-way confidentiality and Non-Disclosure Agreements with every vendor.

The RFP contains the following commercially sensitive information:

- Proprietary wind data collected by a third party consultant.

- Various locations of potential future wind farm development.

Release of this information could harm NS Power in potential future negotiations regarding the development of those sites. NS Power maintains that this information should remain confidential. In an effort to maintain confidentiality on only those commercially sensitive portions, NS Power has produced a partially confidential and redacted version of Appendix E.

(Please note that some site information pertaining to "Site 6" and "Site 7", which would otherwise be designated confidential, is non-confidential whereas these correspond to the Sable and South Canoe wind projects respectively; this information is now public.)

With respect to the RFI, it is no longer necessary to maintain confidentiality. NS Power has re-designated Appendix D as non-confidential. NS Power has produced a revised partially confidential and redacted version of the South Canoe application reflecting these changes.

[Emphasis added]

22 For the reasons which follow, the Board issued a letter dated January 14, 2013, which was sent to NSPI and all interested parties, including the President of CBEx, which gave the Board's decision on the request for confidential treatment of the materials filed in the Application. The letter stated, in part:

...The Board accepts the explanations provided for the confidential treatment of certain information in this Application.

Therefore, in response to NSPI's request in its letter of December 20, 2012, the Board approves the confidential treatment of information in this Application as requested at this time. Should an intervenor object to such treatment, however, the Board reserves the right to re-consider this issue pursuant to Board Rule 12.

[Emphasis added]

23 The confidentiality undertaking process is designed to permit all parties who are not in a conflict and who have an interest in the proceeding, full access to documentation, assuming they are prepared to abide by the terms of the Confidentiality Undertaking. The Board sees this as a mechanism to ensure full disclosure to interested parties while at the same time protecting ratepayers.

24 The Board understands that all Intervenor, including Counsel for CBEx, but not CBEx itself, executed the Confidentiality Undertaking as approved by the Board, giving them access to the information which had been redacted. In addition to the Application documents, the Board considers that by the provisions of Paragraph 2 of the Confidentiality Undertaking, "Designated Confidential Information", as described therein, extends to Responses to IRs and other evidence, including any Reply Evidence filed with the Board by NSPI. The Board also considers this applies to testimony in confidential or *in camera* sessions of the hearing, and to post-hearing submissions.

III Board Analysis and Findings

25 In its findings on the request for confidential treatment, the Board has considered that the **public interest** is equivalent to the NSPI ratepayers' interests.

26 As no request for confidentiality was made for Appendices B, C, D, G, R and S, the Board did not need to turn its attention to them.

27 With respect to the Application, the only redacted sections were certain items in the cost summary and purchase prices per MWh for the independent power producers ("IPPs") with whom NSPI has partnered for the South Canoe Wind Project. Partial confidentiality was also claimed for cost items in Appendix A.

28 In the Board's opinion the details of such costs are commercial information, which, if publicly revealed, could harm ratepayers. It is important that NSPI obtain the best prices for materials and contracts so that projects can be undertaken at the lowest cost. Thus, the rate base is maintained at an amount which is no higher than necessary in order to provide safe and reliable electricity to ratepayers. Should suppliers have access to this information through a Board proceeding, the Board agrees with NSPI that "competitive advantages" may be gained, which would ultimately result in higher costs to ratepayers.

29 In its revised filing, NSPI claimed partially confidential treatment of Appendix E for two areas; proprietary wind data collected by a third party consultant; and locations of potential future wind farm development. The Board noted that Appendix E contained specific clauses in Section 13 by which NSPI and responders to the RFP had mutual confidentiality covenants.

30 The Board agreed that third party proprietary information should not be publicly disclosed. If this information were to be made public by the Board, NSPI's representations to third parties that it would remain confidential would be undermined. This in turn could make it more difficult for NSPI to obtain the best terms for ratepayers because third parties would be reluctant to contract with NSPI in such circumstances. The Board considered that any public interest in having this information un-redacted was outweighed by the importance of ensuring the proprietary rights of the owner of the information, taking the potential impact to NSPI ratepayers into account.

31 With respect to the location of potential wind farms, the Board noted the redacted information includes the relative location of possible sites and their size. The Board was aware that NSPI has obligations under the *Renewable Electricity Regulations* to supply certain quantities of electricity generated from renewable sources by certain milestone dates. The Board was also aware that NSPI seeks opportunities to develop or participate in wind farms to satisfy these requirements. In that regard, it is in competition with other IPPs for suitable sites. Should these locations become publicly known, NSPI would likely be at a competitive disadvantage, both in terms of land lease costs, and site acquisition. This could result in NSPI having to pay higher costs for wind farm development, or pay higher costs to IPPs. Consequently, the Board found this information should be maintained as confidential.

32 Appendix F is the procurement recommendation made by NSPI staff as a result of responses to the RFP (Appendix E). NSPI's position was that this information should be confidential because it contains commercially sensitive information. The Board found this includes documentation of NSPI's due diligence in reviewing and evaluating the various responses to the RFP. The Board considered that if this information was not filed in confidence, it might prove damaging to commercial relationships which could result in higher costs for ratepayers. This might also result in NSPI's decision makers being less stringent or candid in their evaluations. Therefore, the Board accepted the claim for confidentiality.

33 Appendices H and I are Power Purchase Agreements ("PPAs") between NSPI and Oxford Frozen Foods and Minas Basin Pulp and Power Limited, respectively. These PPAs are based on the standard form of PPA for response to the REA's RFP, which was approved (with certain directed changes) by the Board in a Decision dated May 3, 2012 (2012 NSUARB 49 (N.S. Utility & Review Bd.)). The standard form PPA itself (without specific commercial terms to be negotiated) was thus in the public domain already, and was also, undoubtedly, familiar to all bidders under the REA's RFP.

34 Each PPA contains Section 8 addressing "Confidentiality". The Board recognized that stating that a document is confidential does not make it so. However, the document contains defined "Commercial Terms" which will vary with each IPP, including the Energy Bid, Energy Rate, and Marginal Cost Rate, for example, and the Project Description. These are commercial terms negotiated by the parties. NSPI claims that this is sensitive commercial information and should be maintained as confidential. The Board agreed that it is important that the commercial interests of both parties to the PPA ought to be protected because it will, ultimately, assure that the ratepayers receive the benefit of the best terms. They can negotiate without fear of disclosure, by means of a Board proceeding, of information which could impair their competitive bargaining positions.

35 The Board was aware that one of the Intervenor (CBEx) was also a bidder in the REA's RFP. The Application before the Board was not an appeal of the REA's decision. This was, in the Board's view, an example of a situation where the disclosure of commercially sensitive information about NSPI and other bidders could be damaging to ratepayers in future transactions.

36 The Board found that the PPAs should be afforded confidential treatment as a result. The PPAs are an integral part of a set of complex contractual arrangements for the South Canoe Project. Accordingly, the Board found that the confidential treatment for the PPAs applies equally to Appendices N, O, and P, all of which are negotiated contracts between NSPI, Oxford and Minas. The same is true of the negotiated land lease at Appendix M, and as discussed above regarding potential wind farm development sites, it is critical for ratepayers that NSPI be able to obtain the best commercial terms so non-disclosure is essential.

37 Financial modeling information proposed by NSPI such as contained in Appendix J has traditionally been recognized by the Board as commercially sensitive. The modeling uses the cost information presented in the Application and Appendix A, which the Board had found to be confidential. The Board found it would be inappropriate for this information to be made publicly available.

38 The Board noted that Appendices K and L are the Responses from the IPPs to the REA's RFP. They were not documents prepared by NSPI. Appendix K is clearly marked as commercially confidential. The commercial interests which warrant protection here are those of the IPPs. Consequently, it is important that they be protected from disclosure to other potential IPPs or bidders. Maintaining them as confidential also provides a benefit to NSPI, and in turn to ratepayers.

39 The Board also noted that the REA's RFP (Appendix C) allowed bidders to have their proposals treated as confidential (Section 2.5).

40 The Board was satisfied that these documents should be maintained as confidential in the proceeding.

41 Finally, with respect to Appendix Q, which contains negotiated terms of a commercial contract or draft agreement between the turbine supplier and the proponents of the South Canoe Wind Project, NSPI claimed the information about the cost is commercially sensitive. NSPI needs to acquire capital materials "...on the most competitive terms." Counterparties will be unlikely to want to have this information publicly available in order to maintain their competitive positions and prevent other suppliers from learning the terms and conditions of their business. Disclosure of such information in this instance could potentially harm NSPI, and its ratepayers, in future negotiations. The Board was satisfied this information should remain confidential.

42 The Board was aware that any party who signed the approved Confidential Undertaking, if not in a conflict of interest, would have full access to the confidential documents, and be able to participate in confidential sessions of the hearing.

43 The Board, in issuing its letter of January 14, 2013, reserved the right to reconsider the issue if an Intervenor objected to its decision. The Board observes, as noted in its Decision of April 26, 2013, no party objected before or during the hearing.

IV Conclusion

44 Pursuant to [Board Regulatory Rule 12](#), NSPI requested confidential or partially confidential treatment of certain documentation filed in this Application. After considering the reasons provided by NSPI in its letters of December 7, 2012 and December 20, 2012, the Board approved the request (as amended).

45 The Board considered, pursuant to [Rule 12\(10\)\(b\)](#), that disclosure of the documents would result in sensitive financial and commercial information becoming publicly available where the interests of NSPI, its ratepayers, and the contracting parties would be affected to an extent which outweighed the principle of making those documents available to the public.

46 The Responses to IRs and subsequent filings contain redactions of information which the Board had approved for confidential treatment, or information which, in the Board's view, was derived from or reflected such information. Thus, by virtue of the terms of the Confidentiality Undertaking approved by the Board, these are also considered confidential for the same reasons.

47 These are the extended reasons provided as a result of the direction of the Court of Appeal noted above.

2015 NSUARB 140
Nova Scotia Utility and Review Board

Friends of Harmony, Camden, Greenfield and Surrounding Areas, Re

2015 CarswellNS 447, 2015 NSUARB 140

In the Matter of the Electricity Act

In the Matter of a Claim for Confidentiality respecting a portion of the evidence filed in an Appeal
by the Friends of Harmony, Camden, Greenfield and Surrounding Areas pursuant to s. 48 of the
Renewable Electricity Regulations of a decision by the Minister of Energy approving a Comfit application

Roland A. Deveau V-Chair

Judgment: May 25, 2015
Docket: M06674

Counsel: Claudia LeClerc, Deborah Smith, for Appellant, Friends of Harmony, Camden, Greenfield and Surrounding Areas
Terry Potter, for Respondent, Nova Scotia Department of Energy
David S. MacDougall, Sara Mahaney, for Respondent, Affinity Wind Limited Partnership

Related Abridgment Classifications

Privacy and freedom of information

II Provincial privacy legislation

II.2 Collection of personal information

II.2.d Disclosure

Public law

IV Public utilities

IV.5 Regulatory boards

IV.5.c Practice and procedure

IV.5.c.iii Statutory appeals

IV.5.c.iii.C Miscellaneous

Headnote

Privacy and freedom of information --- Provincial privacy legislation — Collection of personal information — Disclosure
Public law --- Public utilities — Regulatory boards — Practice and procedure — Statutory appeals — Miscellaneous

Table of Authorities

Cases considered by *Roland A. Deveau V-Chair*:

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 1 Imm. L.R. (3d) 1, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22 (S.C.C.) — referred to
Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General) (2013), 2013 NSCA 134, 2013 CarswellNS 883, 1067 A.P.R. 271, 337 N.S.R. (2d) 271 (N.S. C.A.) — referred to

Charkaoui, Re (2008), 2008 CarswellNat 1898, 2008 CarswellNat 1899, 2008 SCC 38, (sub nom. *Charkaoui v. Canada (Minister of Citizenship & Immigration)*) 175 C.R.R. (2d) 120, 294 D.L.R. (4th) 478, 58 C.R. (6th) 45, 376 N.R. 154, (sub nom. *Charkaoui v. Canada (Minister of Citizenship and Immigration)*) [2008] 2 S.C.R. 326, 70 Imm. L.R. (3d) 1 (S.C.C.) — followed

Creaser, Re (2006), 2006 NSUARB 71, 2006 CarswellNS 315 (N.S. Utility & Review Bd.) — referred to
Khela v. Mission Institution (2014), 64 Admin. L.R. (5th) 171, (sub nom. *Mission Institution v. Khela*) [2014] 1 S.C.R. 502, 2014 SCC 24, 2014 CarswellBC 778, 2014 CarswellBC 779, 368 D.L.R. (4th) 630, 307 C.C.C. (3d) 427, (sub nom.

Mission Institution v. Khela) 306 C.R.R. (2d) 66, (sub nom. *Khela v. Mission Institution (Warden)*) 351 B.C.A.C. 91, 9 C.R. (7th) 1, 455 N.R. 279, 2014 CSC 24, (sub nom. *Khela v. Mission Institution (Warden)*) 599 W.A.C. 91 (S.C.C.) — followed
May v. Ferndale Institution (2005), 343 N.R. 69, 34 C.R. (6th) 228, [2005] 3 S.C.R. 809, 2005 SCC 82, 2005 CarswellBC 3037, 2005 CarswellBC 3038, 261 D.L.R. (4th) 541, 204 C.C.C. (3d) 1, 49 B.C.L.R. (4th) 199, 220 B.C.A.C. 1, 362 W.A.C. 1, 38 Admin. L.R. (4th) 1, 136 C.R.R. (2d) 146, [2006] 5 W.W.R. 65 (S.C.C.) — followed

Ruby v. Canada (Solicitor General) (2002), 2002 SCC 75, 2002 CarswellNat 3225, 2002 CarswellNat 3226, 99 C.R.R. (2d) 324, 219 D.L.R. (4th) 385, 295 N.R. 353, 7 C.R. (6th) 88, 22 C.P.R. (4th) 289, 49 Admin. L.R. (3d) 1, [2002] 4 S.C.R. 3, 2002 CSC 75 (S.C.C.) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Therrien c. Québec (Ministre de la justice) (2001), (sub nom. *Therrien, Re*) 200 D.L.R. (4th) 1, (sub nom. *Québec (Ministre de la Justice) v. Therrien*) 270 N.R. 1, 43 C.R. (5th) 1, (sub nom. *Therrien, Re*) 155 C.C.C. (3d) 1, 30 Admin. L.R. (3d) 171, (sub nom. *Therrien, Re*) 84 C.R.R. (2d) 1, (sub nom. *Therrien, Re*) [2001] 2 S.C.R. 3, 2001 SCC 35, 2001 CarswellQue 1013, 2001 CarswellQue 1014, 2001 CSC 35 (S.C.C.) — referred to

Statutes considered:

Electricity Act, S.N.S. 2004, c. 25

Generally — referred to

s. 4A(8) [en. 2010, c. 14, s. 4] — considered

s. 4A(8)(c) [en. 2010, c. 14, s. 4] — considered

Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5

Generally — referred to

Rules considered:

Board Regulatory Rules, N.S. Reg. 235/2005

Generally — referred to

R. 12 — considered

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Regulations considered:

Electricity Act, S.N.S. 2004, c. 25

Renewable Electricity Regulations, N.S. Reg. 155/2010

Generally — referred to

s. 20(1) — considered

s. 20(2) — considered

s. 20(2)(a) — considered

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s. 24(g) — considered

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Roland A. Deveau V-Chair:**1.0 Introduction**

1 This is a Decision respecting a claim for confidentiality over portions of an Appeal Record filed in the matter of an appeal by the Friends of Harmony, Camden, Greenfield and Surrounding Areas ("Appellant") to the Nova Scotia Utility and Review Board ("Board"). The appeal was filed pursuant to [s. 48 of the *Renewable Electricity Regulations* \("*Regulations*"\)](#) from the decision of the Minister of Energy ("Minister"), dated November 24, 2014, granting Community Feed-In Tariff ("COMFIT") approval to Affinity Wind Limited Partnership ("Affinity") for a 3.2 MW wind project in Greenfield, Nova Scotia ("Project #183").

2 The Appellant is represented by Claudia LeClerc and Deborah Smith. The Department of Energy ("DOE") is represented by its legal counsel, Terry Potter, LL.B., and Affinity is represented by its legal counsel, David S. MacDougall, LL.B., and Sara Mahaney, LL.B.

3 A preliminary hearing was held by teleconference on April 15, 2015.

4 Consistent with the practice of the Board, it requested that both Confidential and Redacted versions of the Appeal Record be filed. These were filed electronically with the Board on Friday, April 24th, but the Redacted version was only served upon the Appellant on Saturday, April 25th. The filed Appeal Record contains 486 pages.

5 Both Affinity and DOE have made a claim for confidentiality under Rule 12 of the *Board's Regulatory Rules* respecting portions of an Appeal Record filed pursuant to a direction of the Board, with the agreement of the parties, for the filing of evidence in advance of the hearing of the merits. Legal counsel for Affinity and DOE filed written submissions on April 24, 2015, in support of their position that the redacted portions of the Appeal Record should remain confidential. Affinity filed a further submission on May 19, 2015.

6 The Appellant filed their written submissions on this issue on May 15 and 19, 2015. While it agrees that certain portions may remain confidential, it submits that large portions of the redactions should be lifted and filed unredacted.

7 It is noted here that other evidentiary matters have arisen with respect to the pre-hearing filing of evidence in this appeal. Those other issues are proceeding separately and may result in the filing of an amended or supplementary Appeal Record. Clearly, the Board may be called upon in the future to rule on a claim for confidentiality respecting any supplementary evidence and it reserves the jurisdiction to do so.

2.0 Board Rules

8 Rule 12 of the *Board's Regulatory rules* provides:

Confidential documents

12 (1) Subject to Rule 12(2), all documents filed in respect of an application shall be placed on the public record.

(2) A party may request that all or any part of the document be held in confidence by the Board, which request shall be placed on the public record.

(3) The burden of satisfying the Board that a document should be held in confidence is on the party claiming confidentiality.

...

(6) A party may object to a request for confidentiality by filing an objection and serving the objection on the parties.

(9) The Board may decide the issue with or without a hearing. Where the Board holds a hearing, the Board may direct that the hearing be held in the absence of the public.

(10) In ruling on a request for confidentiality the Board shall consider

(a) whether the document may disclose matters involving public security;

(b) whether the document may disclose sensitive financial, commercial or personal matters in relation to which the desirability of avoiding disclosure in the interest of any person affected outweighs the desirability of adhering to the principle that documents be available to the public; or

(c) such other matters as the Board deems appropriate.

(11) The Board may

(a) order that the document be held in confidence by the Board;

(b) order that the document be placed on the public record;

(c) order that an abridged version of the document be placed on the public record;

(d) order that the document be made available to a party to the proceeding, who has a good faith interest in accessing the confidential information and who would not otherwise be in conflict of interest, on such terms as the Board considers appropriate, including the signing of a confidentiality undertaking in a form approved by the Board;

(e) order that the document be withdrawn; and

(f) make any other order the Board may deem to be in the public interest.

...

9 As noted in Subsection (3), the burden of satisfying the Board that a document should be held in confidence is on the party claiming confidentiality.

3.0 Law

10 In exercising its mandate in a number of matters, confidential material is often filed with the Board and, in some cases, it has been asked to rule on the confidentiality of the evidence.

11 With respect to the present proceeding, the Board has the benefit of a recent decision of the Nova Scotia Court of Appeal respecting a claim for confidentiality in a matter involving Nova Scotia Power Incorporated; *Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General)*, 2013 NSCA 134 (N.S. C.A.). The Court set out the applicable law as follows:

[23] The open courts principle is well-established. Importantly, it is linked to the fundamental freedom of expression, including freedom of the press and other media of communication, set out in s. 2(b) of the *Canadian Charter of Rights and Freedoms*. In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at 36, the Supreme Court of Canada quoted with approval this passage from *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* [1996] 3 S.C.R. 480 at ¶23:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

[24] Confidentiality orders are permitted as an exception to the open courts principle, but only when certain criteria set out in *Sierra Club* at ¶53 are met, these being that:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[2013 NSCA 134, paras. 23-24]

12 As noted by legal counsel for Affinity, the Board has indicated that its *Regulatory Rules* respecting confidentiality are a codification of the test in *Sierra Club of Canada v. Canada (Minister of Finance)* [2002 CarswellNat 822 (S.C.C.)]:

[11] The Board has considered that Rule 12 is in essence a codification of the criteria set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41, in that it takes into account both the principle of open courts, and the prevention of "serious risk to an important interest" and balances the interests of the parties with the public interest.

[Re NSPI (South Canoe), 2014 NSUARB 5, para. 11]

13 The Board considers that the balancing of those interests applies no less in this proceeding.

4.0 Analysis and Findings

14 As the Appellant correctly points out, the claim for confidentiality is generally made in relation to three types of evidence, which the Board will now examine, in turn.

(i) Commercially sensitive information of a financial or proprietary nature

15 Subject to the Board's review to confirm the appropriateness of the redactions, the Appellant does not have any objection to the redaction of commercially sensitive financial information or third party proprietary information. The Board has reviewed such redactions and finds that they are appropriate.

(ii) Information of a technical nature about the proposed wind project

16 In an application to the Minister for COMFIT approval, the applicant will inevitably include information of a technical nature about the project. Indeed, the *Renewable Electricity Regulations* require that, among other things, the following be included:

Contents of application for community feed-in tariff approval

24 An application for a community feed-in tariff approval must include all of the following information or documentation:

...

(h) documentation demonstrating the applicant's knowledge and understanding of the type and scope of environmental approvals required for the project, including a statement of the environmental impact of the project:

(i) a business case that

(i) includes a resource assessment,

(ii) demonstrates the financial viability of the project at the appropriate tariff rate, and

(iii) includes the projected capital costs of the project, including interconnection costs and the cost of and expected sources of capital;

...

(l) evidence of discussions with NSPI on the technology requirements for the project, including the availability of capacity on the distribution or transmission system for the project, as the case may be;

(m) documentation demonstrating an understanding of the detailed technical studies required for the project, including the costs of the studies;

[Emphasis added]

17 It is noted that, prior to the Minister's approval, the application must satisfy the requirements of the *Act* and *Regulations*:

Approval or rejection of application for feed-in tariff approval

28 (1) The Minister may approve or reject an application for a feed-in tariff approval if

(a) the application satisfies the requirements of the Act and these regulations; and

(b) the Minister determines that the application is consistent with the Department of Energy's policies and objectives for the development of renewable low-impact electricity resources and industries.

[Emphasis added]

18 Accordingly, Affinity's application included information of a technical nature about the proposed project. This information was filed confidentially, although the redactions are relatively few in number.

19 In its written submissions, the Appellant submitted that it requires disclosure of the technical information in order to assess whether "all aspects of the [Affinity wind project Environmental Assessment] meet the criteria for the actual approved project".

20 The Board notes that the Environmental Assessment for the project actually occurs under different legislation, and a different provincial department, pursuant to criteria of its own.

21 Based on the Board's review of the *Renewable Electricity Regulations*, there is an important distinction between the requirement in *the Regulations* respecting environmental matters versus the basis of the Appellant's grounds of appeal on this issue. Specifically, under *the Regulations*, the Minister is not required to consider the merits of the environmental review of the project. Rather, the Minister is only required to be satisfied, under s. 24(h), that the applicant has demonstrated its "knowledge and understanding of the type and scope of environmental approvals required for the project, including a statement of the environmental impact of the project". The scope of the Environment Assessment itself is not relevant in this appeal. Indeed, the Minister is entitled to rely on the results of an environmental assessment conducted by the appropriate regulatory authority having jurisdiction over the subject matter.

22 Thus, to the extent that the Appellant seeks to canvass the scope of the Environmental Assessment process, including the ultimate result, the Appellant's grounds of appeal respecting environmental issues fall outside the requirements of the *Renewable Electricity Regulations*. In the circumstances, the redacted evidence is not relevant to this appeal. The Board concludes that the technical evidence should remain confidential.

(iii) Personal information of supporters of the wind project and members of the SPCA

23 This portion of the claim for confidentiality relates to personal information contained in the Appeal Record which would assist in the identification of members of the public and others who have supported the wind project, which is a requirement under the *Renewable Electricity Regulations* for the Minister's approval of the COMFIT project.

24 Another requirement under *the Regulations* is that, if the COMFIT project is advanced by a not-for-profit body, a majority of its members must reside in the Province and at least 25 members must reside in the municipality where the project is located.

25 *Section 4A(8) of the Electricity Act* provides that, in order to qualify for a community feed-in tariff (i.e., COMFIT), the project must be majority owned by one of certain "community" entities:

4A(8) In order to qualify as a generator under this Section, the generator must be one of the following and comply with the requirements of the regulations:

(a) a council of a band for a band located in the Province as defined under the *Indian Act (Canada)*;

(b) a municipality;

(c) a not-for-profit body corporate;

(d) a community economic-development corporation;

- (e) a co-operative; or
- (f) any other entity permitted by the regulations.

[Emphasis added]

26 Further requirements relating to the ownership of COMFIT projects are outlined in [s. 20 of the Regulations](#):

Community feed-in tariff qualifications

20 (1) For the purposes of clause 4A(8)(f) of the Act, in addition to the entities listed in clauses 4A(8)(a) to (e) of the Act, each of the following entities qualifies as a generator for a community feed-in-tariff:

- (a) a university;
- (b) a wholly owned subsidiary of a municipality;
- (c) a privately owned biomass combined heat and power plant that uses a portion of the heat produced;
- (d) an entity that
 - (i) is registered with the Registrar of Joint Stocks [Companies], and
 - (ii) is a joint venture among 2 or more of any of the generators referred to in clauses 4A(8)(a) and 4A(8)(c) to (e) of the Act and [clauses \(a\) and \(b\)](#) who have contributed equity to the joint venture;
- (e) an entity that
 - (i) is registered with the Registrar of Joint Stocks [Companies], and
 - (ii) 1 of the generators referred to in clauses 4A(8)(a) and 4A(c) to (e) of the Act or in [clauses \(a\) and \(b\)](#) owns more than 50 % of the voting shares or holds majority control of the entity;
- (f) the Kwilmu'kw Maw-klusuaqn Negotiation Office.

(2) In addition to the eligibility qualifications in subsection 4A(8) of the Act and subsection (1), a generator must meet the following requirements to qualify as a generator for a community feed-in-tariff:

- (a) if it is a not-for-profit body corporate or a co-operative, a majority of its members must reside in the Province and at least 25 members must reside in the municipality where the generation facility is located;
- (b) if it is a community economic-development corporation, at least 25 shareholders must reside in the municipality where the generation facility is located.

...

(4) For the purposes of subsection (2), a generator owns a generation facility if it holds at least a majority ownership in the generation facility.

[Emphasis added]

27 As noted earlier in this Decision, an application for COMFIT approval must include documentation covering a variety of matters. For the purposes of this part of the claim for confidentiality, the following information is required:

Contents of application for community feed-in tariff approval

24 An application for a community feed-in tariff approval must include all of the following information or documentation:

...

(g) evidence of community support for the project, which may include

(i) a municipal council resolution from the municipality within which the project is to be located indicating support for the project, and

(ii) letters or other written evidence of support for the project from members of the community in which the project is to be located;

...

(n) documentation demonstrating compliance with the ownership requirements in subsection 4A(8) of the Act and, if applicable, of subsection 20(3): [Emphasis added]

28 For the purposes of this discussion, it appears from the filed materials that Affinity is a limited partnership formed by the Nova Scotia Society for the Protection and Care of Animals ("SPCA"), which the Board understands is a not-for-profit body corporate qualifying under *s. 20(2)(a) of the Regulations*.

29 Further, information about support of the project by members of the community was included in the application. In both cases, the information has been redacted, including the names of individuals and their addresses.

30 The Appellant's grounds of appeal include the assertions that the Minister did not have before him "evidence of community support for the project" (required under *s. 24(g) of the Regulations*) nor evidence that at least 25 members of the applicant reside in the municipality where the project will be located (required under *s. 20(2)(a) of the Regulations*). The Appellant submits that it is unable to adequately pursue these grounds of appeal without disclosure of the names of these individuals and the related personal information.

31 While the Board is mindful that Affinity has a limited partnership structure, it considers that the grounds of appeal raised by the Appellant respecting *s. 20(2)(a)* require an examination of whether a majority of the SPCA's members reside in the Province and whether at least 25 members reside in the municipality where the project will be located.

32 In its submission, Affinity states that the information should not be made public:

8. With respect to the identifying personal information of third parties redacted from the Appeal Record, Affinity submits that supporters of the Greenfield Wind Project would have a reasonable expectation that their identities would not necessarily be revealed to the public. Their personal information was collected by Affinity and submitted to the Department with a reasonable expectation by Affinity and those third party individuals that it would remain confidential. While those supporters were aware that their personal information would be submitted by Affinity to the Department, those supporters could reasonably have expected that their information would not be accessed by members of the public, including opponents of the Greenfield Wind Project, as a result of the protections afforded to them under the *Freedom of Information and Protection of Privacy Act*, SNS 1993, c. 5 ("FOIPOP").

9. As the third party to FOIPOP requests previously made by the Friends of Harmony/Camden, Greenfield and Surrounding Area (the "Friends of Harmony") in respect of much of the Appeal Record, Affinity is aware that much of the redacted information in the Appeal Record was determined to be properly redacted under FOIPOP. Disclosure to the public of the confidential information redacted in the Appeal Record is not necessary for the Board to make a determination in this proceeding. As such, that information should not be made public or available to parties with conflicting interests in this proceeding. Doing so would circumvent FOIPOP.

10. The disclosure of the redacted information would not be in the public interest. With respect to identifying personal information, if such information of supporters of development projects could be made available to the opponents of such projects by virtue of a statutory appeal of a project, when that information is not otherwise available under [FOIPOP](#), supporters may understandably be reticent to attach their name to their support in the future. This may result in proponents of developments such as the Greenfield Wind Project being unable to obtain the evidence of community support that they are legislatively required to obtain in order for their projects to proceed. Disclosure to the public of the identifying personal information of third party supporters in this case would therefore have a chilling effect on development of such projects and would undermine the public policy on which such development projects are based. Such a result cannot be in the public interest.

[Affinity Submission, April 24, 2015, paras. 8-10]

33 The DOE takes a similar view that the information should be kept confidential:

Community Support Information

In the context of the review of a government decision, it is an important legal principle that all parties should have available to them all documents and information that was before the decision maker. However, it is equally important to protect the personal and private information of individuals, who are not a party to the proceeding, contained in those documents.

The Department's position is that the third party confidential information should only be released when it is both clearly relevant to the issue on appeal or review AND necessary for the Appellant to have to argue the issue. This analysis should be weighed in the context of the nature of the decision and any policy concerns that may affect an increased necessity for confidentiality.

Relevance and Necessity

The confidential information in this case is the names and identifying information of individuals who have indicated support for the project in question. The individuals who have provided their information to the Department have a reasonable expectation of privacy. This information is protected under the *Freedom of Information and Protection of Privacy Act* as third party private and confidential information.

The detailed information of these individuals is neither relevant nor is it necessary for the Appellant to argue the issues they have raised.

Policy Concerns

In this case, the issue is overall community support for COMFIT projects. These documents contain the personal information of those who support the project in their area - and in some cases these projects are contentious. It is likely that the appellants would be able to discern who has support the project just from the address on the paper as some of these roads only have one or two residents. It is unfair to subject local residents to potential ostracism in their community for supporting a renewable electricity project.

...

If the Board finds that this confidential information should be provided to the Appellant, it will substantially change the way that the Department will be able to assess community support. The Department will be in the position that they can no longer request or accept letters of support from community members as it cannot guarantee confidentiality and protection of their information.

[DOE Submission, April 24, 2015, pp. 1-2].

34 The Board notes that evidence of community support and "community" ownership, as defined in the *Act* and *Regulations*, are necessary and integral components of an application to the Minister for a COMFIT approval under [the Regulations](#).

35 The Appellant's grounds of appeal challenge these specific parts of the application.

36 In the Board's view, the disclosure sought by the Appellant in this proceeding raises an issue of procedural fairness. The requirements of procedural fairness must be assessed contextually in every circumstance: *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75 (S.C.C.), (CanLII), at para. 39; *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CanLII 699, [1999] 2 S.C.R. 817 (S.C.C.), at para. 21; and *Therrien c. Québec (Ministre de la justice)*, 2001 SCC 35 (S.C.C.), at para. 82.

37 In *May v. Ferndale Institution*, 2005 SCC 82 (S.C.C.), the Court held:

[92] In the administrative context, the duty of procedural fairness generally requires that the decision maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet. If the decision maker fails to provide sufficient information, his or her decision is void for lack of jurisdiction.

[2005 SCC 82, para. 92]

38 The disclosure principles in *May v. Ferndale Institution* were recently applied in *Khela v. Mission Institution*, 2014 SCC 24 (S.C.C.), at paras. 82-83.

39 In this instance, the redacted information in question is the information that was before the Minister, which is included in the Appeal Record, and which the Board will have to consider to determine whether the appeal should succeed.

40 Moreover, in a case such as this, where the individual members of the Appellant presumably are concerned about the impact of the wind project upon the quiet enjoyment and value of their property, it could be argued that "procedural fairness includes a procedure for verifying the evidence adduced against him or her": *Charkaoui, Re*, 2008 SCC 38 (S.C.C.), at para. 56, as noted in the *May* decision. The Board is mindful that *Charkaoui* and *May* relate to instances dealing with an individual's deprivation of liberty, but it considers that the quiet enjoyment of one's property is also an instance deserving of a higher standard of procedural fairness.

41 In the Board's view, the redacted information under review is relevant to the very issues to be determined by the Board in this appeal. Without access to the full particulars of the redacted evidence, the Appellant would be unable to reasonably and effectively conduct its appeal. This information goes to the essence of its grounds of appeal on these issues. The evidence is also part of the information which must be filed in an application for COMFIT approval and it must be considered by the Minister.

42 Based on its review of the evidence and submissions, including the requirements for COMFIT projects under the *Act* and *Regulations*, the Board finds that the redacted information relating to the names and personal information of those who filed evidence in support of the project, as well as of the members of the SPCA (including those who reside in the municipality where the project is proposed to be located), must be disclosed to the Appellant.

43 DOE and Affinity submitted that the personal information is protected under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c.5 ("*FOIPOP*"). The Board has previously found that its authority to issue an order requiring the disclosure of confidential information, including personal information, is neither expressly nor impliedly impaired by *FOIPOP*: see *Creaser, Re*, 2006 NSUARB 71 (N.S. Utility & Review Bd.).

44 Further, the Board does not accept DOE's submission that there are policy reasons in support of retaining the confidentiality of this evidence. While the Board is mindful that the privacy of members of the public is to be generally protected, any such protection does not outweigh the requirement that the evidence be open to scrutiny by those opposing the wind project to ensure that the requirements of the *Act* and *Regulations* have been complied with. It is noted that the opposing views held by members of the community in this matter are no different than the disagreements which occur among members of other communities in

other contexts before the Board and the Courts. The Board considers this finding is consistent with the open courts principle and that it is in the public interest that this information not remain confidential.

(iv) Protecting Confidentiality

45 During the preliminary hearing, preceding the filing of the Appeal Record, the Board had raised with the parties the option of invoking s. 12(11)(d) of the *Board's Regulatory Rules*, which is repeated here:

12(11) The Board may

...

(b) order that the document be made available to a party to the proceeding, who has a good faith interest in accessing the confidential information and who would not otherwise be in conflict of interest, on such terms as the Board considers appropriate, including the signing of a confidentiality undertaking in a form approved by the Board;

46 In their written submissions, both DOE and Affinity rejected this as an option in this instance. Each noted, either expressly or impliedly, that the agent representatives of the Appellant are lay persons, and that the Appellant is not represented by legal counsel. They consider a confidentiality undertaking is not appropriate in the circumstances.

47 The Appellant submitted that it is prepared to accept such a condition upon its access to the confidential evidence in question. Ms. LeClerc and Ms. Smith noted that in their response to the Environmental Assessment process they did not refer to the names and addresses of the supporters of the project, of which they were aware, out of respect for those individuals. They also suggested that some of the personal information may already be available from other sources in the public domain.

48 In the Board's view, there is nothing in s. 12(11)(d) which requires that a person executing a confidentiality agreement be a lawyer or possess another professional designation. Further, while the Appellant opposes the Affinity wind project, the Board does not consider that Ms. LeClerc and Ms. Smith are in a conflict of interest position, as contemplated in that Rule, so as to disallow them from being able to sign such an undertaking.

49 Accordingly, the Board finds that the personal information ordered to be released, in accordance with the Board's findings herein, shall be subject to a confidentiality undertaking executed by Ms. LeClerc and Ms. Smith. The terms of the undertaking shall include that any information supplied to them pursuant to this direction shall be kept confidential and not used for any purpose other than the conduct of the present appeal, except to the extent that the information is otherwise available in the public domain.

5.0 Conclusion

50 The Board directs the Minister to file an unredacted version of the evidence in accordance with the findings in this Decision. Consistent with the Board's practice, DOE and Affinity will jointly file a form of Confidentiality Undertaking for the Board's approval, which will then be executed by Ms. LeClerc and Ms. Smith.

51 An Order will issue accordingly.

2012 NSUARB 137
Nova Scotia Utility and Review Board

Nova Scotia Power Inc., Re

2012 CarswellNS 828, 2012 NSUARB 137

In the Matter of the Public Utilities Act

In the Matter of an Application by Nova Scotia Power Incorporated for approval of certain revisions to its Rates, Charges and Regulations, including a request by Nova Scotia Power Incorporated for confidentiality of certain portions of the Liberty Consulting Group's FAM Audit

Peter W. Gurnham Chair, Roland A. Deveau V-Chair, Kulvinder S. Dhillon Member

Heard: August 30, 2012
Judgment: September 12, 2012
Docket: M04972

Counsel: Peter A. Downard, Rene Gallant, for Nova Scotia Power Incorporated
Nancy G. Rubin, Maggie A. Stewart, for Avon Group
John P. Merrick, Q.C., William A. Mahody — Consumer Advocate
E.A. Nelson Blackburn, Q.C. — Small Business Advocate
S. Bruce Outhouse, Q.C., Richard J. Melanson, for Board

Related Abridgment Classifications

Public law

IV Public utilities

IV.5 Regulatory boards

IV.5.c Practice and procedure

IV.5.c.v Miscellaneous

Headnote

Public law --- Public utilities — Regulatory boards — Practice and procedure — Miscellaneous

Table of Authorities

Statutes considered:

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

s. 2(b) — considered

Public Utilities Act, R.S.N.S. 1989, c. 380

Generally — referred to

Rules considered:

Board Regulatory Rules, N.S. Reg. 235/2005

R. 12(1) — considered

R. 12(2) — considered

R. 12(3) — considered

R. 12(4) — considered

Decision of the Board:

I Introduction

1 This is a preliminary hearing in connection with Nova Scotia Power Incorporated's ("NSPI's") 2013 general rate application. Consistent with the Plan of Administration ("POA") for NSPI's fuel adjustment mechanism ("FAM"), Liberty Consulting Group ("Liberty") was engaged to do a comprehensive audit with respect to the FAM ("FAM audit"). This hearing dealt with issues of confidentiality surrounding the filing of the FAM audit.

2 The POA provides that an audit will be done every second year. This is the second occasion the Board has engaged Liberty to complete the FAM audit.

3 Liberty has been advising Board Counsel on regulatory matters for more than a decade and was instrumental in the design and implementation of the FAM.

4 Consistent with the POA, NSPI was provided a draft copy of the FAM audit prior to it being filed. One of the reasons for providing a copy was so that NSPI could undertake the redaction of commercially sensitive information.

5 The Board, consistent with its practice over many proceedings, allows NSPI to redact information which would, if made public, impair NSPI's ability to acquire fuel at competitive prices. NSPI spends hundreds of millions of dollars on fuel each year. It is important that NSPI be able to purchase fuel at the best possible price in the interests of ratepayers. If, for example, through the regulatory process competitors were made aware of other bids or the strategy concerning bids, that may, and likely would, impair NSPI's ability to obtain the best price. The Board has repeatedly recognized that and permitted redactions for commercial reasons.

6 Liberty, on July 9, 2012, filed the FAM audit containing the redactions made by NSPI but made the following statement:

We also observe that NSPI has requested extraordinarily broad redactions of report content. We have accepted all proposed redactions, but wish to make clear that we did so in the interests of time, and not because we agree that all redactions consist of material that should be masked from public view.

[Liberty letter dated July 9, 2012]

7 In addition to commercial redactions, some of which continue to be contested, NSPI redacted certain comments made by Liberty that were critical of NSPI's management of its fuel operations. NSPI considered the comments to be harmful to NSPI's reputation and have taken the position that they amount to defamation.

8 By letter dated July 13, 2012, the Progressive Conservative Caucus ("PC Caucus"), a party to the proceeding, asked that the Board review the redactions to determine if more information should be released in the public interest.

9 The Board, in a letter dated July 13, 2012, requested an additional explanation from NSPI of its position.

10 By letter dated July 25, 2012, Peter A. Downard, of the Fasken Martineau law firm in Toronto, indicated that he had been retained by NSPI regarding the confidentiality of matters arising from NSPI's requested redactions of the FAM audit. In the letter he stated as follows:

The great majority of the redactions relate to sensitive commercial information. The appropriateness of redactions on this basis is generally recognized. Other redactions have been made by NSPI on the basis that if the redacted material is made public, specific and serious harm will be caused. These matters are detailed further in the attached Schedule to this letter, for which NSPI requests confidentiality.

11 Following receipt of Mr. Downard's letter the Board indicated that it would convene a hearing on the matter on August 30, 2012, to further explore the reasons for the redactions.

12 Mr. Downard and Rene Gallant represented NSPI. The Small Business Advocate ("SBA") was represented by Nelson Blackburn, Q.C., Nancy Rubin and Maggie Stewart were counsel for the Avon Group ("Avon") and John P. Merrick, Q.C., and William A Mahody appeared for the Consumer Advocate ("CA"). The Province of Nova Scotia was represented, but did not take part in the hearing, and Jamie Baillie, Leader of the PC Caucus, spoke on its behalf. Board Counsel was S. Bruce Outhouse, Q.C., and Richard J. Melanson. While no witnesses appeared in the proceeding, an Affidavit of Robert R. Bennett, President and CEO of NSPI, sworn on August 20, 2012, was filed. It contained a Schedule "A", a table of redactions for commercial confidentiality, and a Schedule "B", a table of redacted (alleged) defamatory material.

1. Redactions for Commercial Confidentiality

13 For much of the material that was redacted for commercial confidentiality no party made any objection to it remaining confidential. This, as noted, is consistent with past practice.

14 Counsel for Avon, in a very helpful memorandum dated August 27, 2012, included a schedule of material citing a number of instances where Avon felt commercial redactions had been unnecessary or improper.

15 At a break in the preliminary hearing counsel for the parties met and agreed to try and informally resolve these commercial confidentiality issues raised by Avon. NSPI agreed to produce a new version of the FAM audit pages in issue which would involve changes to a number of the current redactions. Those new pages would be provided to other counsel for their review to see if counsel could come to an agreement on a resolution of those issues. Mr. Gallant indicated that the reproduced pages would be available late in the week of September 4, 2012. As at the date of this Decision the Board has not heard from the parties so the Board retains jurisdiction on that issue.

2. Redacted Reputational Material

16 The bulk of the hearing focused on material that NSPI says it redacted on the basis that it is defamatory of Emera Inc., NSPI and their management.

II Positions of the Parties

1. NSPI

17 Mr. Downard, at the opening of the hearing, indicated that NSPI had amended its original position with respect to the alleged defamatory material, agreeing that all of that material should ultimately be made public, but requesting that it remain redacted until the Board has reached a decision on the merits of the FAM audit recommendations, after which NSPI will take no objection to its release.

18 Mr. Downard indicated that, in his view, there are three important public interests at play in addition to the public interest in open proceedings:

1. A public interest in maintaining appropriate commercial confidentiality;
2. A public interest in the protection of persons from defamation; and
3. A public interest in ensuring that the ability of NSPI to obtain competitively priced fuel is not compromised.

19 He suggested the role of the Board is to strike an appropriate balance between the public interest in open proceedings and these other important public interests.

20 Mr. Downard outlined six reasons why the redactions should continue which are summarized as follows:

1. There is a public interest in the protection of persons from defamation and from harm to their reputations;

2. There is a public interest in protection of reasonable commercial confidentiality so that NSPI's ability to work effectively in competitive markets is not damaged. He stated that defamation to NSPI and its management is also damaging to NSPI's ability to carry on its business;
3. There is a particular concern as to why protection is important and that is the pervasive ability to publicize information over the internet. Indeed, the Board makes significant use of the internet in its regulatory proceedings;
4. A reasonable degree of protection is appropriate because Liberty has made the statements in issue as the appointed auditor of the Board;
5. While there is undoubtedly a public interest in open regulatory proceedings, it has always been recognized that interest is not absolute and overriding in all cases. It has to be weighed against other important considerations. Mr. Downard went on to say:

Now, the — and I don't intend to spend time with legal chapter and verse but in my submission it's fair to observe that the Supreme Court has repeatedly recognized that the principle of open public proceedings is a principle of freedom of expression.

That's the constitutional route. It protects the ability of persons to receive information about proceedings and to participate in the proceedings. However, in what I say is the leading case in this area, the Supreme Court of Canada's Decision in **Sierra Club v. Canada**, which is in my materials, the Court has stated that in deciding upon a Confidentiality Order one should examine in the context of the particular case — having regard to the particular context — the particular negative effects on freedom of expression that the Confidentiality Order might or might not have.

[Transcript, August 30, 2012, pp. 15-16]

6. As an expert witness testifying in these proceedings Liberty has the benefit of absolute privilege and, therefore, they are able to say what they say with complete impunity.

- 21 In his brief dated August 20, 2012, Mr. Downard expanded on the importance of protecting reputations:

Defamation engages a deep public interest in the protection of reputations. The Supreme Court of Canada has repeatedly stated that the protection of persons from false and defamatory attacks is a fundamental principle of Canadian law. The Supreme Court has held that the protection of individual reputation has "quasi-constitutional status". The Supreme Court has recognized that a democratic society has an interest in "ensuring that its members can enjoy and protect their good reputation so long as it is merited."

[Exhibit N-61, p. 2]

2. Avon

- 22 On behalf of Avon, Ms. Rubin, in her August 27, 2012 submission, indicated that in order to maintain the public trust in the regulation of NSPI, the public must be able to see the process at work. She noted that the public's ability to meaningfully engage in discussion about the Board's decisions on rates depends primarily on having sufficient knowledge as to why a particular decision has been made. She went on to say:

The case law has, as a result, consistently attempted to enhance the openness and visibility of the judicial system and the confidence of the public.

As Cory J. stated in **Edmonton Journal v. Alberta (Attorney General)**:

Members of the public have a right to information pertaining to public institutions and particularly the courts ... only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court

He continued that access to *documents* furthers the same societal needs served by open trials and pretrial civil and criminal proceedings.

In **Sierra Club**, Justice Iacobucci for the Court re-formulated the classic **Dagenais/Mentuck** test as it applied to a request for a discretionary confidentiality order for documentary filings under *Federal Court Rule 151* in a civil matter.

Justice Iacobucci stated:

53 Applying the rights and interests engaged in this case to the analytical framework of **Dagenais** and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under Rule 151 should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right of free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in **Mentuck**, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in **Re F.N. (Re)**, [2000]1 S.C.R. 880, 2000 sec 35, at para 10, the open court rule yields "where the public interest in confidentiality outweighs the public interest in openness".

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. [citation omitted]

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

[Exhibit N-72, pp. 2-4]

23 Ms. Rubin went on to state:

The starting point therefore is that the Liberty Audit is open, on the public record. The onus is on NSPI seeking to restrict openness to demonstrate that the order is "necessary" to prevent a serious risk to an important interest. The test is not one of convenience but of necessity and the Board must have a convincing evidentiary basis to grant the redactions sought.

Here, in requesting the redactions, it also follows that (i) questions on the redactions must take place in-camera; (ii) the contents are banned from publication; and (iii) the Board may not recite the redacted evidence in reaching its conclusions and rendering a decision.

It is also important to note that the necessity branch focuses exclusively on the existence of a serious risk to a public interest that can only be addressed by some form of nonpublication or sealing order. The potential benefits of the order are irrelevant at this first stage of the inquiry: **Mentuck**, at para. 34. Unless a serious risk to a public interest is established, the Board does not proceed to the second branch of the inquiry where competing interests must be balanced. Purely personal interests cannot justify nonpublication or sealing orders. Parties often prefer privacy. But accountability and openness are generally the dominant value. Thus, the arguments respecting personal concerns of individual managers at NSPI, including concerns about the emotional distress, embarrassment or reputational harm that can be occasioned when justice is done in public, will not, standing alone, satisfy the necessity branch of the test.

[Exhibit N-72, pp. 4-5]

24 She also stated during the hearing:

And when balancing the ability to intrude upon Court openness and freedom of expression, the Court has said it has to have a public aspect to it. So purely personal or private interests aren't sufficient to trump the public aspect of openness and free expression. So personal privacy interests, personal embarrassment, personal damage to reputation to these unknown and unnamed managers or employees or personnel of Nova Scotia Power, we can set that aside. That is not enough.

Nova Scotia Power raised a public aspect which might justify intruding upon Court openness. And that public aspect is that these statements may cause the bond-rating agencies to downgrade Nova Scotia Power resulting in higher borrowing rates.

With respect, we are forever hearing about these bond-rating or credit agencies and what they may or may not do. And this Board can't be handcuffed by the fear of what these bond-rating agencies may do.

...

The **Dagenais/Mentuck** test, as it has been applied in a civil context in **Sierra Club**, is an evidence-based test. We need to show the necessity for the ban because of real harm. What we have here is a fear of a downgrade. In our respectful submission that's only speculative. There is no real evidence of that, and it's not sufficient to close the Court — or to close this proceeding.

[Transcript, August 30, 2012, pp. 41-42]

25 She summarized the legal test as outlined in her letter as follows:

Now, you don't get to the balancing stage, the impact on the public's right to know, until you get past the hurdle of the necessity stage. So at the first stage, you have to find that these redactions are necessary. And it's not just the redactions; it's the redactions, the closed hearing, and the inability to respond on the public record through the currency of the proceedings

[Transcript, August 30, 2012, p. 47]

26 Ms. Rubin pointed out that the FAM audit, while critical of NSPI, is an integral part of the process of regulation of NSPI and a foundation of the FAM. In her view it is imperative that critical comments underlying an imprudence recommendation should be made public.

27 In her oral submissions Ms. Rubin commented on the process followed by NSPI in commenting on the FAM audit:

The day the Liberty audit was filed Nova Scotia Power held a press conference. It has filed, I believe, 10 or 11 consultants reports in response along with its own 125-page reply. Each of those was accompanied by press releases, and the substance of those reports are highly critical of the Liberty report. They go so far as to say they're fundamentally flawed, they impugn the integrity of Liberty, Liberty's motivations for writing the report, and suggest and infer that Liberty's comments were made with the goal of securing additional business for liberty. All of that has been made public.

[Transcript, August 30, 2012, p. 38]

3. CA and SBA

28 The CA and SBA made submissions similar to those of Ms. Rubin.

29 The CA indicated that a critical component as to whether the public has confidence in the functioning of the Board depends on the public perception as to whether the Board is able to discharge its regulatory oversight publicly. The Board must be able to provide transparency as to how it reaches its decisions and the justification for the regulatory steps it takes, according to Mr. Merrick.

30 He also indicated that NSPI and its senior executives would have fully anticipated one of the consequences of obtaining a FAM was the expectation of a full, complete audit inquiry and assessment. Mr. Merrick went on to say:

The regulatory regime in Nova Scotia is an essential part of the public institutions of government. People must have confidence in the functioning of their public institutions. Now, that's a grandiose statement to make, but it's a bloody important one because it's fundamental to how we operate in this jurisdiction and in this society.

For the public to have that confidence, they have to be aware of criticisms that Liberty may feel are justified, whether ultimately they are borne out or not. The public has to have access to the evidence relevant to those criticisms, and nobody is going to suggest that the public isn't able to adequately assess and digest and understand at least the main thrusts of that evidence. And the public has to understand how and why the Board deals with those criticisms.

[Transcript, August 30, 2012, pp. 52-53]

31 Likewise, Mr. Blackburn argued that everything should be on the public record.

4. PC Caucus

32 Mr. Baillie, on behalf of the PC Caucus, stated in part as follows:

People from one end of the province to the other have told me and my colleagues that they can't afford to pay more for their power bills. They are truly struggling and seeing their standards of living begin to decline. It is most definitely in their interest to know if they were asked to pay more costs that were avoidable, and it is also in their interest to know the reasons why; however, through this audit, the reasons why have been withheld, and we do not believe that is right.

[Transcript, August 30, 2012, pp. 65-66]

III Analysis and Findings

1. Board's Regulatory Rules

33 NSPI's request for confidentiality is made under s.12(4) of the *Board's Regulatory Rules*. Section 12, in part, provides:

Confidential documents

12 (1) Subject to Rule 12(2), all documents filed in respect of an application shall be placed on the public record.

(2) A party may request that all or any part of the document be held in confidence by the Board, which request shall be placed on the public record.

(3) The burden of satisfying the Board that a document should be held in confidence is on the party claiming confidentiality.

(4) Any request for confidentiality shall

(a) include a summary of the nature of the information in the document;

(b) state

(i) the reasons for the request, including the details of the nature and extent of the specific harm that would result if the document were publicly disclosed, and

(ii) any objection to placing an abridged version of the document on the public record, and the reasons for such an objection; and

(c) be filed with the Board and served on the parties.

34 As noted in s.12(3), the burden of satisfying the Board that a document (or excerpts of a document) should be held in confidence is on the party claiming confidentiality. In this case, although Liberty prepared the FAM audit, it is NSPI that is claiming the confidentiality.

2. Context of the FAM audit

35 Avon, in its written submission, provided an overview of the context of the FAM audit.

36 Avon noted that on two occasions, in its 2005 and 2006 rate decisions, the Board refused NSPI's request for a FAM on the basis that it was not in the public interest to transfer the fuel price volatility risk to ratepayers when the Board still questioned NSPI's ability to obtain the best fuel prices.

37 Ms. Rubin went on to say:

In the 2007 General Rate Application, a number of parties reached a settlement agreement, an element of which was to establish a process leading to a hearing to determine whether or not it was appropriate to adopt a FAM for NSPI. In approving the settlement agreement, the Board stated:

[45] For the guidance of the parties, however, and without in any way prejudging the issue, in the Board's view there are several prerequisites that must be in place in order for the Board to consider the adoption of a FAM now or in the future:

1. an adequate and appropriate fuel procurement policy at NSPI in which the Board has confidence;

2. timely disclosure of complete and adequate information by NSPI so as to ensure confidence that the procurement policy is being appropriately administered;

3. disclosure and transparency with respect to the administration of the FAM;

4. a meaningful audit process under the administration of the Board.

The FAM approval hearing took place later in 2007. The Board granted conditional approval with an implementation date in 2009, subject to all conditions being successfully met. The issues of disclosure and transparency were discussed by the Board at paragraphs 45-50. Ralph Tedesco then President and CEO of NSPI committed to "providing full evidence, full factual access and review to determine all relevant factors that went into the company's fuel procurement decisions".

The Board reiterated that there would "not be final approval of the FAM until 'a meaningful audit process under the administration of the Board' is in place".

[Emphasis added]

[Exhibit N-72, pp. 6-7]

38 Mr. Outhouse noted that audits are a fundamental feature of the FAM because, in effect, what was given up to adopt the FAM was the protection afforded by a public hearing in advance and a predetermination of fuel costs. It was accepted, he indicated, by all parties including NSPI, that there would be a FAM audit which would be very vigorous where the issues of prudence in purchasing of fuel would be determined.

39 He suggested the following question for consideration by the Board:

In that context, you have to ask yourself, and I think it's something the Board has to ask itself in this process; can the FAM operate successfully, as it was intended to do, if — if severe criticism of NSPI by the auditor, findings of imprudence, are shielded from the public view until the Board makes its decision. That's the issue.

[Transcript, August 30, 2012, p. 70]

40 The Board notes that much of the Liberty comments, which NSPI feels should be redacted, related to NSPI's handling of natural gas purchases and affiliate transactions. Indeed, the two issues are connected.

41 It is worthy of note that the Board, Liberty and other parties had previously questioned NSPI's role in ensuring a competitive supply of natural gas. Liberty has, on more than one occasion, indicated that NSPI has failed to assert itself before the NEB and elsewhere, with respect to the natural gas market.

42 Mr. Outhouse read into the record unredacted comments from both the 2010 audit and the 2011 report on natural gas activities prepared by Liberty which appear, in substance, to be similar to the criticisms NSPI wants redacted in this report. He stated as follows:

...

In that audit, Liberty made the following statements:

"NSPI's response to the Board's question [that's this Board's question] about future plans for remaining in substantial contact with the market and for assuring competitive supplies — supply costs do not exhibit sufficient activism." (As read)

And then it goes on to say in the report — and this is the non-confidential report:

"Any suggestion that NSPI does not have remedies to respond to market participant actions in Maritimes Canada ignores its potential role as an enforcer of the NEB stated policies about gas markets and its value to a gas supplier with large volumes to place. Any unwillingness to assert itself as a force in the Maritimes gas market would constitute a disservice to its customers. NSPI's responsibility to its customers include aggressive pursuit of a functioning competitive market in the Maritime Provinces and its responsibility is not dischargeable solely through expressions of concern to the Board." (As read)

It went on to say at the next page, this is page — Chapter 3, page 15:

"Liberty remains concerned that NSPI's gas buying and selling activities are too restrained considering a value to be realized from effective performance of those activities. The company's response to the Board's question about assuring competitive supply costs reinforces this concern. Liberty believes that NSPI in these circumstances should use all

available opportunities to pursue its customers' interests in competitively priced fuels. Warning the Board about the likelihood of higher gas prices does not discharge the company's responsibilities." (As read)

That was the 2010 audit published — with respect to 2009, published mid-2010. That issue was picked up again in Liberty's report on natural gas activities filed on July 25th, 2011. It took a long while to get the agreed redactions on that report. I don't think it was filed for several months thereafter but I'm looking at the non-confidential — sorry, the confidential version. In that non-confidential version Liberty concluded, and I quote:

"That NSPI has not been sufficiently forceful in approaching gas supply issues." (As read)

In its conclusion and recommendations it states, on page 16:

"As we did in the FAM audit report, Liberty concludes that NSPI has not been sufficiently forceful in approaching gas supply issues. Liberty estimates that at the current rate of consumption, NSPI is not only the largest single consumer of gas in the Maritime Provinces but it is now consuming over one-half of all gas consumed in the Maritimes." (As read)

That theme was picked up finally in the Liberty evaluation of NSPI's natural gas report of December 22nd, 2011 dated February 24th, 2012. And this is what Liberty said in that report, page 1:

"Liberty is concerned that physical and contractual segregation of the LNG from the Maritimes' gas market discussed in our July 11th gas activities report to the Board permits Repsol to raise the price of gas to Maritime customers to a level above what one would expect. Liberty believes that as the largest consumer of gas in the Maritimes, NSPI should be motivated and empowered to address the situation through negotiations with the companies that have created it, through formal or informal petitions by action — for action by relevant governmental authorities, or through both types of actions. Certainly that is what we would expect a standalone utility user with so much at stake to do. As noted, NSPI's report contains no mention of either type of action." (As read)

[Transcript, August 30, 2012, pp. 72-78]

43 The Board observes that during the first 10 years of production from the Sable Offshore gas fields NSPI enjoyed a pricing mechanism which reflected Halifax being geographically closer to the supply of gas than the pricing point at Dracut, Massachusetts.

44 That advantage appears to have changed in the last number of years. While NSPI describes Liberty's assertions as baseless and irresponsible, that alone justifies some investigation.

45 With respect to affiliate transactions, there has been a long and, at times, unfortunate relationship between NSPI and its affiliates starting with an attempt to assign, without compensation, to an affiliate a very valuable natural gas contract in 2002. The Board, on two occasions, has had to strengthen the Affiliate Code of Conduct in order to protect customers. Affiliate transactions are something the Board has had to police very carefully.

3. The Regulatory Compact

46 Under the regulatory compact, NSPI is given a monopoly; that is, the exclusive right to supply power and energy to almost all of the consumers of electricity in Nova Scotia. In exchange for that right it has an obligation to serve those customers requiring service at rates approved by the Board.

47 NSPI is given the opportunity under the *Public Utilities Act* to recover its prudently incurred costs through the rates set by the Board. Therefore, a focus of this Board and any other tribunal in the economic regulation of a public utility is to examine whether the utility's costs are prudently incurred. That goes to the heart of the regulatory compact and the FAM is an integral component of the costs NSPI seeks to recover.

48 When questioned by the Board, Mr. Downard indicated that he had not been able to find another decision in North America where a utility has been shielded from criticism during a prudence review.

49 The Board suggested in the hearing that the reason he could not find a precedent is because an open and transparent examination of the prudence issue is critical to the regulatory process and is needed in order to maintain confidence in the regulator.

4. The Legal Test

50 Mr. Downard argued, for the reasons noted above, that the task of the Board is to strike a reasonable balance between the public interest in open proceedings and the other important public interests he cites. He stated that the Supreme Court of Canada has held that protection of individual reputation has quasi-constitutional status.

51 Ms. Rubin indicated that the open court principle is derived from common law, but is also constitutionally embedded as an element of freedom of expression in s. 2(b) of the *Charter of Rights and Freedoms*. She stated that unless a serious risk to an important public interest is established, the Board does not have to proceed to the second branch of inquiry where competing interests must be balanced.

5. Findings

52 The Board is of the view that whether one applies the test as stated by Ms. Rubin, or by Mr. Downard, the balance is in favour of disclosure for a number of reasons.

53 First, the evidentiary record is complete. In order to impeach the FAM audit NSPI has filed a series of experts' reports, all refuting various aspects of Liberty's recommendations, some using language which appears to the Board to be similar, if not identical, to the wording to which NSPI takes such serious objection. However, an informed observer of the process now has a balanced view of the FAM audit *issues*.

54 Second, in reviewing Schedule "B" to Mr. Bennett's Affidavit dated August 20, 2012, the Board notes that a number of the statements do not appear to be the least bit objectionable. For example, during the hearing, theCA pointed out the extracts from page 1-17 and 111-23 of the FAM audit, which are the first two examples of alleged "defamatory material" in Mr. Bennett's Affidavit.

55 The Board has chosen not to repeat those comments in this Decision in the event NSPI wishes to appeal the Decision.

56 The third and most important reason for disclosure however is, in the view of the Board, that public interest in disclosure outweighs private confidentiality.

57 Two of the conditions imposed by the Board prior to the adoption of the FAM were:

- Disclosure and transparency with respect to the administration of the FAM; and
- A meaningful audit process under the administration of the Board.

58 The Board believed in 2007, and believes now, that there is a public interest in ensuring disclosure and transparency and in having a meaningful audit process. If the meaningful audit process is shielded from the public there is not disclosure and transparency with respect to the administration of the FAM.

59 It is critical to the Board's work that the public, whose interest in part the Board serves, see the regulatory process in action. It cannot occur behind closed doors.

60 While there is a clear public interest in preserving some of the commercial information so as to permit NSPI to obtain fuel at competitive prices, that imperative does not exist with respect to criticism an auditor might direct against NSPI in the

operation of the FAM. It is critical to maintaining public confidence that as much of the regulatory process as possible take place in public because, after all, it is a public process.

61 While the Board agrees with Mr. Downard that there is a public interest in the protection of reputations, in weighing the competing interests here the Board finds that an open process is the more important public interest, by a significant measure.

62 While the Board continues, as noted above, to support redactions in order to obtain competitive fuel prices, the Board does not believe that comments outlined in Schedule "B" of Mr. Bennett's Affidavit will impair NSPI's ability to procure fuel or carry on business.

63 While the Board agrees with Mr. Downard that the internet provides a pervasive ability to publicize information, the Board does not see the fact that these comments may be published on the internet, or indeed that the Board makes significant use of the internet, sufficient reason to bar publication.

64 The Board acknowledges that people may see Liberty's comments as having special significance as the auditor appointed by the Board; however, the Board has provided, and NSPI has taken advantage of, the opportunity to file considerable rebuttal evidence on this issue. The Board will provide NSPI with a full and fair opportunity to litigate these issues.

65 In the Board's view, granting NSPI's request would set a troubling precedent as the Board fully expects that NSPI would attempt to use it to shield future criticisms from public view.

66 Accordingly, the Board orders disclosure of the redacted materials as outlined in Schedule "B" of Mr. Bennett's Affidavit and any other redactions which were made for reputational reasons, but not listed. Liberty is to provide an updated version implementing this Decision as soon as conveniently possible.

67 All parties and the public should be aware that in making the decision to order disclosure the Board is not adjudicating on, and takes no position on, the merits of the findings of Liberty in the FAM audit. Those issues, and the Board's ultimate findings, will be dealt with in a fair and open process in a hearing during the week of October 29, 2012.

68 An Order will issue accordingly.

2020 NSUARB 121
Nova Scotia Utility and Review Board

Nova Scotia Power Inc., Re

2020 CarswellNS 594, 2020 NSUARB 121

IN THE MATTER OF THE PUBLIC UTILITIES ACT

IN THE MATTER OF an application by NOVA SCOTIA POWER INCORPORATED
for approval of an Extra Large Industrial Active Demand Control (ELIADC) Tariff,
under which Port Hawkesbury Paper LP will take electric service from NS Power and

IN THE MATTER OF an application by RESOLUTE FOREST PRODUCTS INC., pursuant
to Rule 12 of the Board Regulatory Rules, for disclosure of confidential information

Peter W. Gurnham Chair, Roland A. Deveau V-Chair, Roberta J. Clarke Member

Judgment: October 7, 2020

Docket: M09420

Counsel: Martin J. Valasek, for Resolute Forest Products Inc.
Blake Williams, for Nova Scotia Power Incorporated
David MacDougall, for Port Hawkesbury Paper LP
Mark A. Luz, for Global Affairs Canada-Trade Law Bureau
S. Bruce Outhouse, Q.C., for Board

Related Abridgment Classifications

Public law

IV Public utilities

IV.5 Regulatory boards

IV.5.c Practice and procedure

IV.5.c.v Miscellaneous

Headnote

Public law --- Public utilities — Regulatory boards — Practice and procedure — Miscellaneous

Table of Authorities

Cases considered by *Peter W. Gurnham Chair, Roland A. Deveau V-Chair, Roberta J. Clarke Member*:

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.)

Sparks v. Holland (2019), 2019 NSCA 3, 2019 CarswellNS 27, 2019 C.E.B. & P.G.R. 8309 (headnote only), 86 C.C.L.I. (5th) 41, 430 D.L.R. (4th) 597, 31 C.P.C. (8th) 328, [2019] I.L.R. I-6124 (N.S. C.A.)

Statutes considered:

Public Utilities Act, R.S.N.S. 1989, c. 380

Generally

Utility and Review Board Act, S.N.S. 1992, c. 11

Generally

Rules considered:

Board Regulatory Rules, N.S. Reg. 235/2005

Generally

R. 4(f) "party"

R. 12

R. 12(1)

R. 12(2)

R. 12(3)

R. 12(4)

R. 12(10)

R. 12(11)

R. 12(11)(d)

R. 12(11)(f)

Treaties considered:

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612

Chapter 11

Peter W. Gurnham Chair, Roland A. Deveau V-Chair, Roberta J. Clarke Member:

1.0 INTRODUCTION

1 NS Power applied to the Nova Scotia Utility and Review Board, on September 27, 2019, for approval of a proposed new tariff, the Extra Large Industrial Active Demand Control (ELIADC) Tariff and Rate, under which Port Hawkesbury Paper would take electric service from NS Power.

2 Port Hawkesbury Paper previously took power under the Load Retention Tariff, which expired on December 31, 2019. The ELIADC is a new rate design which is an annually adjusted tariff that is to have an initial term from 2020-2023.

3 The Board approved the ELIADC Tariff and Rate, with some amendments, in its Decision dated March 26, 2020.

4 On September 11, 2020, Resolute Forest Products Inc. made an application, pursuant to [Rule 12 of the Board Regulatory Rules, N.S. Reg. 235/2005](#), as amended, that a complete version of Exhibit N-2 from the ELIADC application be made available to Resolute to be used in an arbitration against the Government of Canada, under Chapter 11 of the North American Free Trade Agreement (NAFTA). Resolute advised it would execute a confidentiality undertaking. Exhibit N-2 contains the direct evidence filed by Port Hawkesbury Paper and includes the following materials for which PHP claimed confidentiality:

- Confidential Appendix B - Mill Profit Comparison (2012-2018);
- Confidential Appendix C - PHP 5-Year (2020-2024) Financial Projection; and
- Partially Confidential Appendix D - Report of Duncanson Investment Research Inc.

5 The Board finds, for the reasons outlined in this Decision, that Resolute does not meet the requirements set out in [Rule 12](#) concerning disclosure and, therefore, denies the application to disclose the confidential information to Resolute.

2.0 ANALYSIS AND FINDINGS

2.1 Should the requested information be disclosed under Rule 12 (including public interest)?

6 The relevant parts of [Rule 12](#) are as follows:

Confidential documents

12 (1) Subject to [Rule 12\(2\)](#), all documents filed in respect of an application shall be placed on the public record.

(2) A party may request that all or any part of the document be held in confidence by the Board, which request shall be placed on the public record.

(3) The burden of satisfying the Board that a document should be held in confidence is on the party claiming confidentiality.

(4) Any request for confidentiality shall

(a) include a summary of the nature of the information in the document;

(b) state

(i) the reasons for the request, including the details of the nature and extent of the specific harm that would result if the document were publicly disclosed, and

(ii) any objection to placing an abridged version of the document on the public record, and the reasons for such an objection; and

(c) be filed with the Board and served on the parties.

...

(10) In ruling on a request for confidentiality the Board shall consider

(a) whether the document may disclose matters involving public security;

(b) whether the document may disclose sensitive financial, commercial or personal matters in relation to which the desirability of avoiding disclosure in the interest of any person affected outweighs the desirability of adhering to the principle that documents be available to the public; or

(c) such other matters as the Board deems appropriate.

(11) The Board may

(a) order that the document be held in confidence by the Board;

(b) order that the document be placed on the public record;

(c) order that an abridged version of the document be placed on the public record;

(d) order that the document be made available to a party to the proceeding, who has a good faith interest in accessing the confidential information and who would not otherwise be in conflict of interest, on such terms as the Board considers appropriate, including the signing of a confidentiality undertaking in a form approved by the Board;

(e) order that the document be withdrawn; and

(f) make any other order the Board may deem to be in the public interest. [Emphasis added]

7 The definition of party in the Board's *Rules* is also relevant to this matter.

Definitions

4 In these rules, unless the context otherwise requires,

...

(f) "party" means, in respect of an application, an applicant, a respondent or a intervenor;

8 The Board has for many years, consistent with [Rule 12](#), allowed parties to file sensitive financial and commercial information in confidence. Access is provided only to those parties to the proceeding who execute a form of confidentiality undertaking approved by the Board and who otherwise meet the requirements of [Rule 12](#) and, in particular, are not in a conflict of interest. A confidentiality undertaking normally provides that the confidential information is to be used only for purposes of the hearing before the Board.

9 The largest utility that the Board regulates is NS Power which is a fully integrated public utility. Accordingly, NS Power owns and operates generators. A frequent use of [Rule 12](#) is to permit NS Power to file fuel contracts and other power purchase arrangements in confidence to protect NS Power (and thereby ratepayers) in ensuring that NS Power can obtain competitive fuel prices. Disclosing these contracts would advantage fuel suppliers in the bidding process.

10 There are many other examples in which parties file commercially sensitive information with the Board in confidence.

11 The rate Port Hawkesbury Paper and NS Power applied for, which was subject to this proceeding, has certain characteristics similar to a load retention rate. In that regard, Port Hawkesbury Paper filed commercially sensitive financial information on the Company for the Board's review.

12 As required under [Rule 12](#), with the request for confidentiality, PHP filed a form of confidentiality undertaking for Board approval. Clause 10 of that undertaking provides:

10. The use of Designated Confidential Information provided in accordance with this undertaking will be solely in relation to this matter and for no other purpose.

13 In accordance with [Rule 12](#), and the Board approved Confidentiality Undertaking, PHP filed its confidential financial information.

14 Counsel, on behalf of Resolute, indicated its application was made pursuant to two provisions of the Rule, [Rule 12\(11\)\(d\)](#) and [Rule 12\(11\)\(f\)](#). Resolute argued that PHP is not a party to the arbitration proceeding and, therefore, is not adverse in interest to Resolute on the arbitration matter, pursuant to [Rule 12\(11\)\(d\)](#). Resolute argued that there is a broader public interest in disclosure under [Rule 12\(11\)\(f\)](#), including that it is in the best interests of Nova Scotians to have a determination as to whether the measures adopted by the Government of Nova Scotia to financially support PHP are consistent with the provisions of NAFTA.

15 PHP argued that Resolute was not a party to the ELIADC proceeding, and that Resolute is requesting access to these confidential documents for use in a separate arbitration proceeding, not before this Board. It also argued that Resolute is in a conflict of interest. PHP's counsel stated as follows:

... Resolute's submission states that as PHP is not a party to the arbitration between Resolute and the Government of Canada it is therefore not adverse in interest to Resolute in that matter. That of course in no way abrogates from the much wider conflict of interest, in that Resolute is a competitor to PHP in the supercalendared and related paper markets. (See in this regard: <https://www.resolutefp.com/Products/Paper/>)

[PHP Submission, September 22, 2020, pp. 3-4]

16 NS Power argued, in connection with the public interest issue, that the Board's public interest mandate is not infinitely broad in scope. It went on to say, "any public interest or interest in general served by Resolute's application are not rooted in or otherwise related to the Board's function or mandate under the *[Public Utilities Act]*".

17 Canada supports the argument of PHP that Resolute does not meet the requirements of the Rule because it is not an applicant or a party to the original proceeding. Resolute argued that making this application cures that defect. Both PHP and NS Power urged the Board to consider the impact if the Board were to release confidential information for use in a matter not before the Board. PHP stated:

One can only imagine the chilling effect that would occur if parties wholly unrelated to the matter in which confidential information is filed with the Board, are able to request the Board release such information, for unrelated purposes. The current request is even more extreme, in that it is occurring months after the Board's final Decision in the matter before it, and is being made by a party who is a competitor to PHP as discussed below.

[PHP Submission, September 22, 2020, p. 3]

18 NS Power stated:

In considering the Application, NS Power urges the Board to consider not only the merits of this specific request, but also the potential implications for future proceedings. The issuance of the requested order would potentially have a chilling effect on the production of confidential information in all proceedings before the NSUARB, impacting both regulatory efficiency and transparency. Rather than serving to fulfill the public interest, as claimed by Resolute, the issuance of the requested order would adversely impact the mandate and function of the Board.

[NS Power Submission, September 22, 2020, p. 2]

2.1.1 Findings

19 In connection with its request, Resolute faces several challenges under [Rule 12\(11\)\(d\)](#). [Rule 12\(11\)\(d\)](#) provides that the document may be made available "to a party to the proceeding who has a good faith interest in accessing the confidential information and who would not otherwise be in a conflict of interest...". Clause 10 of the Confidentiality Undertaking approved by the Board provides that the designated confidential information will be used solely in relation to the matter before the Board and "for no other purpose".

20 In the view of the Board, Resolute fails on all these counts. Resolute was not a party to the proceeding before the Board whereby NS Power and PHP sought the ELIADC Tariff and Rate. In the Board's opinion, interpreting the words of [Rule 12](#) "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme ... [and] object" of the [Board Regulatory Rules](#) require that a person or entity seeking the release of confidential information must be a "party" in the sense that it relates to the original application in which the information was filed and which is to be considered by the Board in the matter: see *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at ¶21 and *Sparks v. Holland*, 2019 NSCA 3 (N.S. C.A.). Simply by making a collateral application, five months after the original matter is determined, that defect is not cured, as suggested by Resolute.

21 Further, Resolute does not intend to use the information in relation to this matter but in relation to an arbitration wholly unconnected to the matter before the Board, which offends the condition of Clause 10.

22 Finally, the Board finds that Resolute has a conflict of interest in that it is a competitor of PHP. Proof of that is its claim against the Government of Canada for \$100 million because of assistance it believes was unfairly provided to PHP, Resolute's competitor.

23 With respect to Resolute's public interest argument under [Rule 12\(11\)\(f\)](#), the Board, as an administrative tribunal, is only given those powers provided by the Legislature of Nova Scotia in the various statutes that delegate mandates to the Board.

In this circumstance, the relevant statutes are the *Public Utilities Act* and the *Utility and Review Board Act*. Under the *Public Utilities Act*, the Board's role is to regulate utilities. In regulating those utilities, the Board's primary role is to ensure that:

- (a) rates are just and reasonable, and
- (b) service is safe and adequate in all respects.

24 Both rates and service must be supplied in a non-discriminatory manner.

25 In the Board's view, its public interest mandate must relate to the jurisdiction that the Legislature of Nova Scotia provided under the *Public Utilities Act*.

26 Unlike the superior courts, the Board has no inherent jurisdiction. The Board does not, as suggested by Resolute, have any public interest mandate to ensure these documents are provided to the arbitration panel or any public interest mandate to determine whether financial assistance provided to PHP by the Government of Nova Scotia violates the provisions of NAFTA.

27 Accordingly, the Board finds that Resolute has not met the requirements of [Rule 12](#). In the circumstances, the Board denies Resolute access to the requested documents.

2.2 Other Issues

28 Several other issues were raised by parties to the proceeding. PHP raised the issue of the implied undertaking rule in discovery matters. NS Power argued that the Board did not have jurisdiction to issue the Order sought by Resolute; however, in the Board's view, that argument is, in effect, based in an interpretation of [Rule 12](#). Canada argued that Resolute did not have standing. Again, that argument was really rooted in the provisions of [Rule 12](#).

29 Canada also argued that Resolute's application was a contravention of the NAFTA arbitration process.

30 The Board examined all of the issues but, in light of the Board's finding under [Section 2.1](#) of this Decision, the Board does not consider it necessary to make further specific findings on those issues.

3.0 CONCLUSION

31 The Board finds that Resolute has not met the various requirements of [Rule 12](#), including the public interest criteria. Therefore, the Board denies Resolute access to PHP's confidential information.

32 An Order will issue accordingly.

2022 NSUARB 2
Nova Scotia Utility and Review Board

Nova Scotia Power Inc., Re

2022 CarswellNS 7, 2022 NSUARB 2

IN THE MATTER OF THE PUBLIC UTILITIES ACT

IN THE MATTER OF AN APPLICATION by NOVA SCOTIA POWER INCORPORATED for accounting treatment and net book value recovery relating to the retirement of the Annapolis Tidal Generation Station

Roland A. Deveau V-Chair, Steven M. Murphy Member, Richard J. Melanson Member

Heard: September 13, 2021

Judgment: January 13, 2022

Docket: M10013

Counsel: Blake Williams, Erin MacRae, for Nova Scotia Power Incorporated
William J. Mahody, Q.C., Emily J. Mason, for Consumer Advocate
E.A. Nelson Blackburn, Q.C., Melissa P. MacAdam, for Small Business Advocate
Nancy G. Rubin, Q.C., for Industrial Group
S. Bruce Outhouse, Q.C., for Board

Related Abridgment Classifications

Public law

IV Public utilities

IV.2 Operation of utility

IV.2.g Miscellaneous

Public law

IV Public utilities

IV.4 Termination, valuation and privatization

IV.4.b Termination of franchise

Headnote

Public law --- Public utilities — Operation of utility — Miscellaneous

Public law --- Public utilities — Termination, valuation and privatization — Termination of franchise

Table of Authorities

Statutes considered:

Fisheries Act, R.S.C. 1985, c. F-14

Generally

Nova Scotia Power Privatization Act, S.N.S. 1992, c. 8

Generally

Rules considered:

Board Regulatory Rules, N.S. Reg. 235/2005

Generally

R. 12

R. 12(4)(b)(i)

R. 12(10)

Roland A. Deveau V-Chair, Steven M. Murphy Member, Richard J. Melanson Member:

1.0 SUMMARY

1 Nova Scotia Power Incorporated (NS Power or Company) has operated the Annapolis Tidal Generating Station since the mid-1980s. At the time of its commissioning a few years earlier, the Generating Station was originally anticipated to be a short-term research initiative led by the Federal Government to test tidal barrage technology and determine the viability for further development of this technology in the Bay of Fundy.

2 NS Power has experienced operational and maintenance issues with the Generating Station over the past few years and applied to the Board for approval to treat the Station as "Not Used and Not Useful" in accordance with its approved Accounting Policy 6350. It also requested approval to amortize the undepreciated value and remaining Construction Work in Progress (CWIP) of the Station (in the total approximate amount of \$27.7 million) over the 10-year period between 2021 and 2030 in accordance with the same Accounting Policy.

3 The thrust of this application, if approved, would effectively take the Generating Station out of service and its remaining undepreciated value would be recovered from ratepayers over 10 years. However, NS Power is not applying to decommission the Station at this time. Rather, it intends to submit a capital work order later, after it has determined the costs to decommission the Station.

4 The Board is not satisfied that the Company has provided sufficient evidence to establish that decommissioning of the Generating Station is the least cost alternative available to NS Power. As such, the Board is not in a position, at this time, to find that the accounting treatment under Accounting Policy 6350 should be approved. The Board has provided guidance in the form of additional information which could assist in its determination. The Board is of the view that the best manner of proceeding is to reconsider the request for the accounting treatment in conjunction with a decommissioning application, with all potential options being adequately addressed. That said, NS Power is free to consider if it has sufficient evidence to reopen its application prior to that time. In any event, the Company is to report on the status of the matter by January 31, 2023. The Board, therefore, holds the application in abeyance.

2.0 BACKGROUND

5 On February 19, 2021, NS Power applied to the Board as follows:

- With respect to the Accounting Treatment of the Station, NS Power requests approval to treat the Station as Not Used and Not Useful in accordance with approved Accounting Policy 6350.
- With respect to the undepreciated value of the assets and in adherence to the regulatory principles of rate stability and inter-generational equity, NS Power requests Board approval to amortize the undepreciated value and remaining Construction Work in Progress (CWIP) of the Station over the 10-year period between 2021 and 2030 in accordance with approved Accounting Policy 6350.

[Exhibit N-1, p. 4]

6 However, NS Power is not applying to decommission the Station at this time. It proposes to wait to file such an application after it has better determined the decommissioning costs. In its application, it stated:

Consistent with approved accounting policies, NS Power intends to submit a decommissioning capital work order for approval of the capital costs associated with decommissioning the Station. In order to refine the decommissioning scope and develop Class III estimates, NS Power will engage in an appropriate stakeholder engagement process and complete an Environmental Assessment which will involve a review of the proposed decommissioning scope to ensure environmental impacts are mitigated. NS Power will also engage with the Province of Nova Scotia and other stakeholders to coordinate the return of operation and maintenance responsibilities of certain causeway assets to the Province.

2.1 Description of Generating Station/Property

7 The Province of Nova Scotia (Province) built a causeway across the Annapolis River in 1960. It was designed to control water flow and protect agricultural lands along the river. This was done to alleviate issues arising from the deterioration of the dyke system which had previously been the main method of protecting these lands. Sluice gates were designed to control water flows and storm surges impacted by the high tides in the Annapolis Basin. They could also be used to enable hydro power generation. This led to the selection of the Annapolis River causeway as a location to test tidal power generation.

8 The Generating Station was built as part of a research initiative involving Tidal Power Corporation, the Province, and the Federal Ministry of Energy, Mines and Resources. It was commissioned in 1984 for what was intended to be a short-term pilot project. At the time, it was one of only three tidal barrage hydro generating stations in the world.

9 Tidal Power and the Province entered into an agreement about the operation of the Generating Station in 1984. Tidal Power took title to the lands upon which the Generating Station assets were located. Tidal Power also agreed to be responsible for the operation and maintenance of the sluice gates, although the Province retained ownership of these assets. Upon abandonment of the Generating Station, title to the lands and responsibility for operating and maintaining the sluice gates would revert to the Province.

10 In 1984, Nova Scotia Power Corporation, the Crown-owned electric utility, applied to the Board of Commissioners of Public Utilities (the Board's predecessor) for approval of the purchase of the Generating Station. Approval was granted on July 24, 1985. NS Power acquired the Generating Station in 1992, by virtue of the vesting of assets provisions in the [Nova Scotia Power Privatization Act, S.N.S. 1992, c. 8](#).

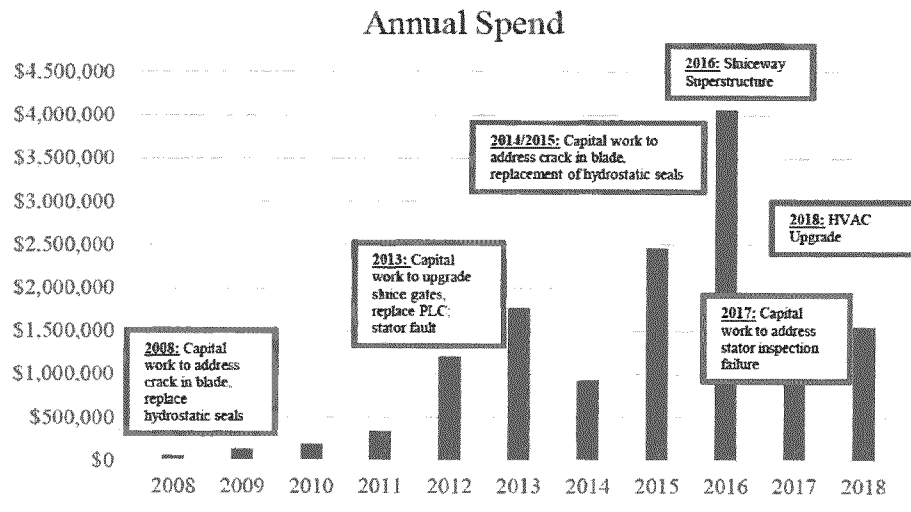
11 Although the site was selected because of the existing causeway and sluice gates infrastructure, there was little land to work with. This led to a compact and unique design. The major components of the Generating Station are:

- The powerhouse where the major power generating assets are located, including the turbine and generator; the wicket gates and distribution ring; servomotors and weights; the draft tube housing the turbine and generator; and mechanical and electrical auxiliary components.
- Two fishways located adjacent to the powerhouse and the sluice gates.
- Sluice gates which are used to regulate water flow for power generation.
- A control room building used by staff to monitor and control the operation of the Generating Station. It also houses a viewing area for tourists and a tourist information centre operated by the Municipality of the County of Annapolis.

2.2 History of Operation Leading to Application

12 The Generating Station was intended to be a pilot project with a short lifespan. As of 2019, it had been in operation for about 34 years. Perhaps not surprisingly, as time has gone by, the capital costs required to keep the Generating Station operational have been increasing. Since 2008, there have been significant capital expenditures made to address numerous failed components of the Generating Station, as depicted in Figure 2 in the application:

Figure 2: Annual Capital Expenditure 2008-2018

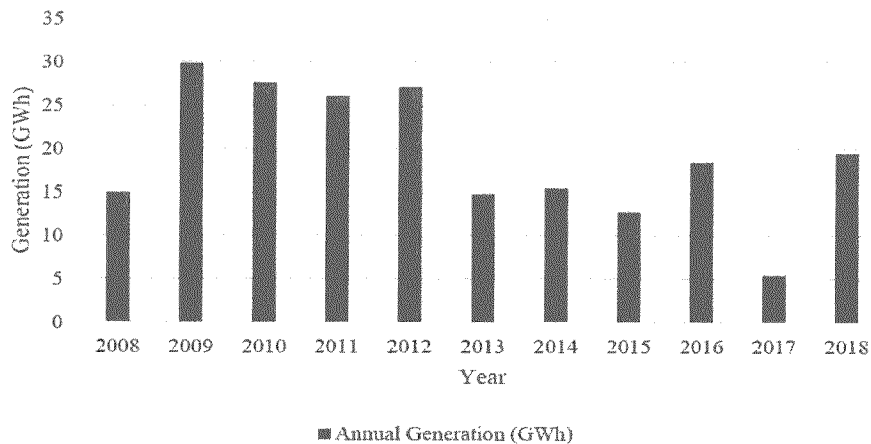


Graphic 1

[Exhibit N-1, p. 10]

13 NS Power indicated that while capital costs have been increasing, annual generation has been decreasing. This was partly due to the Generating Station being out of service while major overhauls were being completed. The foregoing is graphically depicted in Figure 3 found in the application:

Figure 3: Annapolis Annual Generation from 2002-2018



Graphic 2

[Exhibit N-1, p. 11]

14 NS Power advised that the combination of increasing sustaining capital cost requirements and decreasing output led the Company to initiate an analysis to investigate whether continued operation of the Generating Station was in the best interests of ratepayers. The Company's review began in early 2018. On January 15, 2019, while this investigation was ongoing, the Generating Station's exciter failed. The exciter is a required component of the generator which provides a magnetizing current for the electromagnets. The Generating Station has not produced any power since this event. Also, on April 1, 2019, following the exciter's failure, Fisheries and Oceans Canada issued a notice to the Company indicating NS Power would need an authorization under the *Fisheries Act* to continue operating the Generating Station. The foregoing sequence of events led NS Power to conclude the station should not be returned to service.

3.0 ANALYSIS AND FINDINGS

3.1 Should the Generating Station receive accounting treatment as Not Used and Not Useful?

3.1.1 Accounting Policy 6350

15 The basis of this application is NS Power's request for the use of the Company's Accounting Policy 6350 - Assets Not Used and Useful. The Board finds it instructive to first consider the main choices for NS Power in classifying and retiring its capital assets.

16 Capital assets that are currently providing service to the public and are intended for use on a continuing basis are recorded as assets that will benefit future periods. Depreciation and amortization are methods of charging asset costs to fiscal periods over their useful life¹, which reduce future net earnings. At the time of NS Power's application to the Board, the Annapolis Tidal Generating Station and associated assets were being treated as used and useful, which allows NS Power to include the assets in rate base, earning the allowed return, and to collect an annual depreciation expense, recovered through rates. The unrecovered net book value of these assets at the time of NS Power's application was approximately \$25.8 million (excluding \$1.9 million in CWIP), being depreciated at a rate of 2.02% per year, resulting in an annual depreciation expense of approximately \$800,000².

17 NS Power has two accounting policies related to the retirement of capital assets: 6420 - Retirement and Disposal of Capital Assets, and 6350 - Assets Not Used and Useful.

18 Accounting Policy 6420 provides in part:

Policy

08 Assets that are not used and not expected to be used in the foreseeable future should be retired from plant in service.

Procedures

09 For retirements of property, plant and equipment other than land, the original cost is charged to accumulated depreciation, with no immediate gain or loss recognized.

19 NS Power stated that the intent of Policy 6420 is for routine asset retirements, where assets that are not used and not expected to be used in the foreseeable future are retired from plant in service. The Board notes that in the case of generating stations, it would expect that this accounting policy would be used only when a station came to the end of its useful life in the normal course, and within an expected time frame. This accounting policy notes factors causing assets to lose their ability to provide service include reaching the end of their useful lives, irreparable equipment failure, and technological obsolescence.

20 Using Policy 6420, original cost amounts being charged to accumulated depreciation remain in accumulated depreciation until the next depreciation study. The Board expects that a future depreciation study brought forward by NS Power would analyze the capital assets retired since the last study³, and result in recommendations for changes to depreciation rates based on actual retirement experience.

21 The second asset retirement Accounting Policy 6350 - Assets Not Used and Useful, states that "Assets that are not both used and useful should be classified in one of the following categories: a) Not used and not useful; b) Not used but useful for standby purposes; or c) Not used but useful for future service."⁴ The Board notes that Policy 6350 was reviewed in detail in a prior Board proceeding (Matter M09229), NS Power's Revised Accounting Policies.

22 In its Decision in that matter dated May 5, 2020, the Board stated that "NS Power agreed that while Policy 6350 does not expressly state significant unforeseen or extra-ordinary events are to be considered in line with this policy, it has consistently been interpreted by both NS Power and the Board as requiring this consideration." NS Power filed the current application under Accounting Policy 6350.

23 The first category of Policy 6350, "Not used and not useful" is described as assets that meet both criteria of not currently providing service to the consuming public, and that they are not expected to provide a benefit to customers in the foreseeable future:

Policy (Not used and not useful)

07 Where an asset is neither used nor useful, there is no current or future benefit against which the undepreciated cost of the asset can be matched. Therefore, the undepreciated cost should be written off in the period in which an asset is determined to be not used and useful.

24 The effect of a write-off under this category is the removal of the undepreciated net book value from rate base at the time when the asset is determined no longer used and useful. This removal also results in the cessation of depreciation expense, as that asset is no longer on the Company's books. Where the write-off is significant, NS Power can apply to the Board for approval to amortize the undepreciated cost of the asset on a straight-line basis, over five years or over a reasonable period. The Board notes that this category is the one under which NS Power has made this application for the Annapolis Tidal Generating Station assets.

25 The second category, "Not used but useful for standby purposes" is described in the policy as assets that do not currently provide service to the consuming public but are available for service and are required to maintain standby capacity:

Policy (Not used but useful for standby purposes)

11 An asset that is not used but is useful as a standby facility is to be treated the same as an asset that is used and useful. The asset is to be depreciated over its expected useful life. The undepreciated cost of the asset is to be included in rate base, and the related cost of capital recognized as an expense of the period in which it is incurred.

26 Given the evidence presented by NS Power, the Annapolis Tidal Plant does not appear to be available for service and would therefore not meet the criteria necessary to be included in the category of "Not used but useful for standby purposes."

27 The third and final category under this accounting policy are assets that are "Not used but useful for future service." This is described in the policy as assets which do not currently provide service to the consuming public but are expected to be used and useful in providing service in the future or to form part of the normal level of standby capacity in the future:

Policy (Not used but useful for future service)

13 Assets not currently used, but expected to be used in providing service in the future will provide value to customers at a future date. Accordingly, the cost of the asset is to be matched to the future periods in which the asset will provide value to customers.

14 To the extent that the cost of the asset plus any other costs of maintaining the asset until it is placed (or returned) to service exceed its expected future value, the excess cost is similar to the cost of an asset that is neither used nor useful. Where it is expected that there will be an impairment loss of the long-lived asset when returned to service, the excess is to be written off and recovered from customers in the period in which the excess is identified. However, to enhance rate stability, where the excess is significant, it may be deferred and amortized over a five year period or over a reasonable period subject to the approval of the UARB.

15 Depreciation on these assets is deferred until they are returned to service. The unamortized cost of the assets (net of any write offs) is to remain in rate base.

28 NS Power has expressed that "The Station is now considered to have run to failure and will be decommissioned,"⁵ solidifying their intention to retire the station. However, the Board notes that if the Annapolis Tidal Generating Station assets were expected to provide future use and classified under this category, the unrecovered net book value of these assets of

approximately \$27.7 million would remain in rate base, earning the allowed return, and the recovery of depreciation expense would be deferred until such time that NS Power returned these assets to service.

29 To summarize the impact of these policies, which cannot be read in isolation but instead, as two potential paths, Policy 6420 is used in the normal course of business for retirements, where the asset is merely rolled back into accumulated depreciation and rate base is unaffected, while Policy 6350 is used when assets are not both used and useful and may be written off, effectively removing them from rate base. The Board notes that it considers it best practice to ensure that no large amounts of redundant assets are sitting in rate base. One-off situations outside of the normal course of business, such as the retirement of a full generating station before the planned end of its useful life, are truly what the Policy 6350 is made to address.

30 Board Counsel consultant, Grant Thornton, was engaged to analyze the proposed accounting treatment of the Annapolis Tidal Generating Station assets. In their evidence dated June 30, 2021, Grant Thornton stated:

In the Application, NSPI states that the undepreciated costs qualify under Accounting Policy 6350 as being Not Used and Not Useful. The accounting implications of the retirement are ultimately dependent upon the results of the DA [Decision Analysis]. Our observations on the DA model and the conclusions reached by the DA are provided in Appendix A. If, based upon our recommendations, the conclusion of the DA was to change, the accounting implications would have to be revisited accordingly. For example, if the conclusion of the DA was to pursue life extension and modernization as the lowest cost option, Accounting Policy 6350 would no longer be applicable as the assets would no longer be considered Not Used and Not Useful.

[Exhibit N-9, p. 3]

31 The closing submissions by both the Industrial Group and the Consumer Advocate stated that as it has been sufficiently demonstrated that the generating station is not currently being used, the crux of the application is the determination of future usefulness. This was addressed during cross-examination of the NS Power panel by Board Counsel in the hearing on September 13, 2021.

Q. So, I want to turn to page 4 of the application. So, in the middle of page 4, lines 12 to 13, you're setting out the first thing that you're — that NSPI is asking for. And it says:

"With respect to the accounting treatment of the station, Nova Scotia Power requests approval to treat the station as not used and not useful in accordance with approved Accounting Policy 6350"

Correct?

A. (Sidebottom) Correct.

Q. Now, I don't think there's any dispute at all about the fact that the station isn't being used, and it hasn't been since January 2019. So, it's clear that we're talking about an asset that's not used.

The substantive issue, at least in my mind, is whether the plant is useful, and will be useful going forward. Do you agree?

A. (Sidebottom) I agree.

Q. And it seems to me, at least, that in order to approve NSPI's request to treat the station as not used and not useful that NSPI must satisfy the Board, it must satisfactorily demonstrate that retirement and decommissioning of the station is the best solution for customers. Is that correct?

A. (Sidebottom) That's correct, yes.

[Transcript, pp. 85-86]

32 The closing submissions of the Small Business Advocate, the Industrial Group, the Consumer Advocate, and the Town of Annapolis Royal all expressed concerns relating to NS Power's assertion that the retirement of the Generating Station is the lowest cost option to customers. All four stakeholders noted that they do not agree that NS Power has put forth a sufficiently comprehensive analysis to convince them that there is no viable future use of the assets in question for public utility purposes.

33 In the past, NS Power has come forward with complete applications for the retirement of generating stations which include both the recovery of net book value and decommissioning costs of a facility⁶. However, this application is only looking at recovery of the net book value of the Annapolis Tidal Generating Station assets, with the approval for the decommissioning and the recovery of related costs deferred to a subsequent application.

34 NS Power has put forth this application with an expectation that there will be two distinct decisions made on the Annapolis Tidal Generating Station assets. The first decision is predicated on the assumption that the costs are sufficiently accurate to perform a Decision Analysis (defined later) and rely on the output representing decommissioning as the lowest cost option for customers. The second is the treatment of the decommissioning costs once NS Power has performed Class 3 design work to refine the estimate and file a subsequent application, a process which NS Power has stated will take approximately 1-2 years⁷.

35 In the hearing, NS Power confirmed that the future process of performing the Class 3 design would better inform the Company of the full costing details of retirement and decommissioning. NS Power stated that if, at that future time, the Decision Analysis resulted in a determination of the Life Extension and Modernization (LEM) or another alternative being found to be the lowest cost option, NS Power would then plan to reclassify that asset back to used and useful⁸.

36 John Reed of Concentric Energy Advisors, NS Power's consultant, spoke to this point, stating that he does not view the decision of advancing the accounting treatment as being carved in stone. He stated that in the event further work to better define the cost of decommissioning was to change substantially (resulting in the LEM being the lower cost alternative), then NS Power could revisit the accounting treatment and transfer the plant into one held for future use. Board Counsel questioned Mr. Reed further on the subject:

Q. All right. And I just want to ask a question about how you see that working. In other words, the application, at least, is looking for that accelerated amortization to commence this year and be extended over the next 10 years. And I think the application for the — if there is an application for retirement and decommissioning, that that may be a couple of years down the road, a year or two down the road.

So, if you were to implement the decision as requested, and collect two years of amortization, how would that egg be unscrambled in terms of customers?

A. (Reed) Again, perhaps I can start. The decision to implement this year and to extend for two years, to use your example, would cause approximately five million of the 27 to 28 million of book value to be written off over that period of time, leaving, presumably, 22 to 23 million remaining book value for this asset.

So, maybe, if it was determined at a future date, that that remaining balance at that time, the 22 to 23 million, should be returned to account of client, held for future use, that's the way, in my view, the mechanics would work. But you still have recovery of that client balance, but that would be recovered through the subsequent operation of the unit following life extension, if again, in the unlikely case that were to be the least cost option.

[Transcript, pp. 88-89]

37 In the hearing, Mr. Reed explained why he believed that the timing of this application was appropriate. He stated that Accounting Policy 6350 contemplates the Company bringing forth an application to determine the appropriate treatment of the asset when that asset is no longer considered to be used and useful. He also noted the need to minimize the intergenerational equity issue relating to the length of time between the benefits being received from an asset (pre-2019), and who in the future will be paying for the remaining cost, stating the need to promptly present an application to accelerate the cost recovery of that asset.

3.1.2 Analysis of options

38 Increasing annual capital investment, decreasing annual generation, and the overall condition of the Annapolis Tidal Generating Station after 34 years of operation have prompted NS Power to evaluate whether the lowest cost option for customers is continued investment in the station or decommissioning. Before undertaking this evaluation, the Company determined that a broad range of potential costs would need to be considered for any station re-investment option. This determination was based on the uniqueness of the existing station's design and the lack of similar existing facilities in the power generation industry. The Company believes this results in a level of uncertainty around the capital costs associated with an assessment of continued operation due to a lack of benchmarking and historical comparison. Further, given the fisheries issues discussed later in Section 3.1.3 of this Decision, NS Power concluded that a wide range of potential costs would also need to be considered for related permitting and operating impacts.

39 Given the complexity created by these cost uncertainties, NS Power decided that a probabilistic model, which tested a broad range of outcomes and allowed for consideration of multiple variables and probabilities for each alternative, would be the most suitable tool to assess the range of risk associated with each variable and determine the lowest cost alternative for customers on a Net Present Value of Revenue Requirement (NPVRR) basis. The Company has referred to this probabilistic modelling as its "Decision Analysis":

The Decision Analysis process varies from NS Power's traditional Economic Analysis Model (EAM) in that the Decision Analysis is probabilistic; incorporating various probabilities and determining the most likely outcome along with a range of outcomes at various probabilities, whereas the EAM is deterministic; incorporating parameter values and initial conditions which fully determine the output of the model.

[Exhibit N-1, p. 16]

3.1.2.1 Decision Analysis Model

40 Compared to an Economic Analysis Model (EAM), the Decision Analysis requires additional internal and external input and analysis to develop the range of probabilities for each of the key uncertainties. In addition to determining the lowest cost alternative on a NPVRR basis, the Decision Analysis includes a simulation of cost estimates which evaluates the range of potential outcomes associated with the decision and the potential impacts of key variables on the overall Net Present Value (NPV) for each alternative. Each simulation calculates the total range of NPVs of a selected strategy based on the defined inputs, which is represented by the probability curves. The Decision Analysis included the following steps:

1. Determine and review project alternatives.
2. Commission studies. NS Power worked with internal subject matter experts (SMEs) to develop a range of values for scope, timing and costs of key variables for the project alternatives examined in the Decision Analysis. These SMEs had expertise in environmental matters, asset management, hydro operations, stakeholder engagement and power generation planning. The Company also engaged external consultants to complete studies and provide estimates for uncertainties associated with each project alternative.
3. Define probability ranges for key Decision Analysis variables. These key variables included:
 - Capital construction cost;
 - Environmental assessment costs and timeline;
 - Engineering and design costs;
 - Fish shut down periods;

- Run to failure timeline;
- Sustaining capital costs;
- Operating costs;
- Mi'kmaq engagement capacity costs; and
- Replacement energy costs.

NS Power indicated that the cost estimates produced for these variables were developed at an Association for Advancement of Cost Engineering (AACE) Class Level 5. Cost estimates produced at that level are generally expected to be accurate to -50% to +100% after inclusion of an appropriate contingency allowance. Each of these variables was assigned distributions for the Decision Analysis modeling at 10 percent (P10), median (P50) and 90 percent (P90) of the probability range. The P10 and P90 values represent the high and low ends of the range of probable values for any given variable (P90 being the highest probable value, at which only 10 percent of the values would be greater, and P10 being the lowest probable value, at which only 10 percent of the values would be less).

4. Calculate NPVRRs. The calculation of the NPVRR follows NS Power's standard approach to determining project value as provided in the Board-approved Capital Expenditure Justification Criteria (CEJC). The Decision Analysis calculates the NPVRR for a range of values based on the risk profile for each scenario considered.

5. Perform Monte Carlo Simulation. NS Power stated that the Monte Carlo simulation provides a formal means for quantifying model uncertainty. It assigns a probability distribution to each of the key variables using the range of values provided by internal and external experts. The simulation randomly samples values between P10 and P90 for each variable and calculates a range of possible outcomes for the revenue requirement associated with each alternative. In this case, the simulation was repeated 1,000 times for each alternative to ensure sufficient range of resulting costs.

6. Assess results. The assessment of the Decision Analysis results includes two steps. The first step is a comparison of the median (P50) NPVRR for each alternative and determination of the lowest cost option for customers. The second step includes an evaluation of the probability curves and tornado diagrams produced by the Monte Carlo system to assess the risks created by the uncertainties associated with each alternative. The probability curves developed by the Monte Carlo simulation demonstrate the risk associated with the potential range of NPVRR outcomes for each of the alternatives evaluated in the analysis. Tornado diagrams highlight the key variables that have the potential to have the greatest impact on the outcome of the Decision Analysis for each project alternative. In effect, they provide the relative sensitivity of each key variable on the ultimate NPVRR of each project alternative.

3.1.2.2 Project Alternatives

41 NS Power's Decision Analysis considered four project alternatives for the Annapolis Tidal Generating Station:

1. Run to Failure and Subsequent Decommissioning;
2. Decommissioning;
3. Life Extension and Modernization; and
4. New Technology.

Run to Failure and Subsequent Decommissioning (RTFD)

42 One of the options evaluated by NS Power regarding the future of the Generating Station was identified as "Run to Failure and Subsequent Decommissioning". The RTFD alternative was defined as allowing the Generating Station to run until failure occurs, which would be followed by retiring and decommissioning the assets once the station had ceased generating.

43 In its application, NS Power defined failure as:

...failure of the Station Is defined as an unplanned shut down resulting from a failure of a crucial Station component that would require capital investment (in excess of the cumulative annual sustaining capital value over a three year period) in order for the Station to resume generation.

[Exhibit N-1, Figure 6, p. 26]

44 NS Power's Decision Analysis modelled this RTFD alternative assuming that failure might occur under three possible timing scenarios. Those timeframes were one year, three years, and six years, which corresponded to P10, P50, and P90 values, respectively. Based on that analysis, the RTFD alternative was determined to be the lowest cost option for customers when compared to the other three alternatives, which were the immediate retirement and decommissioning, a Life Extension and Modernization project, and the installation of new technology.

45 Prior to NS Power completing its review of the modelling and making a final determination, the exciter component of the station generator failed on January 15, 2019. Consequently, NS Power's analysis was amended to assess whether the estimated capital investment of about \$920,000 required to replace the exciter, coupled with additional forecast capital investments to rehabilitate mechanical auxiliary components and the turbine, was greater than the forecasted sustaining capital spending for the RTFD alternative (about \$260,000 annually over three years). NS Power stated that without the exciter, the station can no longer generate. Although the failure occurred sooner than had been expected, NS Power determined that the cost to repair the exciter exceeded the forecasted amount of sustaining capital and confirmed that the Generating Station had run to failure. Given those circumstances, decommissioning was considered to be the next step in the RTFD alternative.

46 During this proceeding, NS Power was questioned about the exciter failure mode and preventative maintenance. In response to NSUARB IR-2(a) and (b), NS Power stated:

(a) Yes. NS Power conducted an analysis to determine the cause of the exciter failure, though not formal. This analysis concluded that the failure was caused by a failed control card for the exciter which allowed current to pass through the field discharge resistor for longer than is intended by design causing excessive heating and damaging key components beyond repair.

(b) NS Power completed preventative maintenance on the exciter which included operators rounds, inspections, maintenance of the fans and louvres etc. These activities would not have foreshadowed this event as control system card failures are difficult to predict. Assessing condition of control cards is challenging in the industry as there are limited preventative maintenance activities that can accurately assess failure modes. These devices do not normally exhibit physical changes prior to failure. Due to this concern, NS Power had planned to complete a replacement of the exciter in 2018 prior to this failure as outlined in ACE 2018 NSUARB IR-55.

[Exhibit N-6, p. 3]

47 NS Power was also asked how much longer the station could run until failure if the exciter was replaced. In response to NSUARB IR-15(c), NS Power stated:

(c) The exciter was not the only component of the system that required overhaul/replacement to allow for the reliable operation of the tidal plant. Many auxiliary components are original to the unit and unless the other components referenced in the LEM scope of work were also replaced, a failure would be expected in the near future. As such, NS Power is unable to predict how much longer the station would run until it failed again if the exciter was replaced.

[Exhibit N-6, p. 24]

48 Regarding NS Power's Decision Analysis of the RTFD alternative, NS Power was asked about its justification for using the three-year period with respect to annual forecast sustaining capital. Its response to NSUARB IR-15(d) was:

(d) The DA identified a 3-year period as the P50 value for the generation life span for the RTFD scenario. Since the tidal plant failed less than one year from the start of the DA timeline, NS Power reasoned that the exciter failure would be considered a "failure event" for this scenario if the cost exceeded the sum of the sustaining capital value for the duration of the original P50 assumption of 3 years.

[Exhibit N-6, p. 24]

49 During the hearing, further clarity was sought regarding the RTFD alternative and how the exciter failure event impacted the range of alternatives considered in the Decision Analysis. In cross-examination by Board Counsel, the following exchange occurred:

Q. As I understand it, the run to failure and decommissioning is lower than the decommissioning cost by [redacted] because the first of those options had in the model a three-year period in which it would run and produce energy?

A. (Peachey) Yes, that is correct. A good way to look at the scenarios, decommissioning versus RTFD, is that RTFD is essentially decommissioning that is experiencing the benefit of having continued operation until a failure event occurs. Which is why we implemented the sustaining capital threshold as part of that scenario, in order to understand when spending has occurred above which it's in the best interest of customers to proceed with decommissioning.

Q. All right. So, what we're really looking at here, because of the premature failure in terms of what was in the model, isn't what we're looking at the decommissioning option, as opposed to the run to failure and decommissioning?

A. (Peachey) That is correct, yes. Since a run to failure event has occurred, we're essentially moving towards the decommissioning scenario, yes.

[Transcript, pp. 101-102]

50 These issues were further canvassed by the Board:

Q. Okay. Thank you. I have some questions on the exciter failure and the decision to identify the plant as being [in failure] mode now. But my questions may be moot given what was referenced earlier during Mr. Outhouse's questioning. So, I just want to confirm at this point, it is in fact the [run to] failure decommission options presented to the [Decision] Analysis, is that really off the table at this point? Are we really comparing LEM and new technology to the decommissioning option?

A. (Peachey) Yes. We are comparing yes decommissioning to the other two rebuild scenarios. That's correct.

Q. So, I guess the cost associated with the replacing the exciter and those identified nine hundred and twenty-thousand and Midgard perhaps suggested that was high. And then there's the same threshold cost of two hundred and sixty thousand that Nova Scotia Power developed based on historical costs. Are those at this point really irrelevant to the decision sort of moving forward and you compare - we're going to compare LEM and new technology to decommissioned. RTFD is off the table?

A. (Peachey) They're relevant in that we had to determine that a run to failure event had occurred before we could determine that decommissioning was the next best option. So, decommissioning is essentially - or sorry, RTFD is essentially the decommissioning scenario with the added benefit of having continued generation until a failure event had occurred.

But in order for us to understand if a failure event had occurred, we had to put in place a reasonable proxy that would act as threshold value by which any expense or capital cost above that would indicate that the best option would be to move towards decommissioning. And just to revisit that, the proxy that we did use was representative of a sustaining capital cost.

So, it looked at our historic cost and our historic overhaul frequency model that over the 40-year life of the model and took the annual average of that total amount. And so, that's representative of the value to keep the plant operating. Anything above that is essentially characterized by the LEM scenario. What would be required as part of that.

So, at the time when the failure event occurred the plant was operating. So, we did have to - and understanding that the RTFD scenario was showing us the best interests for customers as part of the decision analysis. That information around the replacement cost of the exciter became very important for us to understand whether or not a failure event had occurred, and that decommissioning was the next best option.

[Transcript, pp. 143-145]

Q. Okay. Thank you. But again, moving forward the options that really should be compared are LEM, new technology and decommissioning?

A. (Peachey) That is correct, now that we understand that a run failure event has occurred decommissioning is the next task forward, and those are the options that we should be comparing, yes. Thank you.

[Transcript, p. 147-148]

51 This exchange during the hearing confirmed that the RTFD alternative is moot, given NS Power's determination that a run to failure had occurred, thereby shifting the Decision Analysis to focusing on the decommissioning alternative as the proposed course of action in comparison to other options.

Decommissioning

52 The decommissioning scope modelled in the Decision Analysis assumed full decommissioning of the existing Annapolis Tidal Generating Station. No costs were included for decommissioning of the existing sluice gates, causeway, and fish passages because, pursuant to the Provincial Agreement, those assets would remain intact and operation and maintenance returned to the Province upon abandonment by NS Power. The scope for decommissioning the station includes the following items:

- Installing stop logs (and bulkheads, if required);
- Dewatering the unit;
- Removing the equipment from the powerhouse;
- Filling the powerhouse with rockfill and removing the control room building;
- Removing assets within the control room building;
- Installing telecom equipment to maintain communications with other systems routed through the Annapolis communication point; and
- Removing the substation and transmission line to Hog Island.

This decommissioning scope involves returning the area to its original function before the station was commissioned in 1984, with no water flow through the causeway at the location of the Station.

Life Extension and Modernization (LEM)

53 The LEM alternative includes a complete overhaul to all components of the powerhouse with the intent of extending the operating life of the station by 40 years. The LEM scope includes:

- Turbine: refurbishment of the sealing system and the bearings as well as a redesign of the turbine blades to reduce the risk of blade cracking;
- Generator: refurbishment of the rotor and stator;
- Electrical auxiliary components: replacement of electrical components, which are now obsolete;
- Mechanical auxiliary components: combination of refurbishment and replacement of mechanical auxiliary components that have reached their end of expected useful life; and
- Sluice gates: eventual upgrades to the mechanical components of the gates.

The LEM alternative also includes the requirement for a *Fisheries Act* Authorization from Fisheries and Oceans Canada (DFO) which would result in additional operating requirements to support fish migration activities. The Decision Analysis model assumes these requirements would involve a range of shut down periods to accommodate migration patterns of fish species.

New Technology

54 The new technology alternative involves removing the existing turbine and generator and replacing it with a bulb turbine. NS Power considered the bulb turbine was the only technically feasible alternative for new technology because it met the following station requirements set by NS Power in the Decision Analysis:

- The turbine/generator must be horizontal to accommodate barrage type tidal operation;
- The turbine/generator is required to meet the current energy rating of the existing turbine/generator model (20MW); and
- The turbine/generator RPM must match that of the existing turbine/generator, which operates at a lower RPM to minimize impacts to fish while in operation.

The scope associated with the installation of a bulb turbine also includes the replacement of mechanical and electrical auxiliary components for compatibility purposes, and concrete work to allow the station to meet the size and support requirements of the new turbine.

3.1.2.3 NS Power Decision Analysis Results

55 NS Power's Decision Analysis calculated that the RTFD project alternative has the lowest median P50 NPVRR value. Decommissioning had the next lowest NPVRR P50 value, followed by the LEM and New Technology option, respectively. The calculated NPVRR of the New Technology option was significantly higher than the other project alternatives. Consequently, NS Power eliminated the New Technology option as a potential project alternative and did not complete any further preliminary engineering for that option. Further, the Monte Carlo simulations completed by the Company produced probability curves that indicate the RTFD and Decommissioning alternatives had a lower potential range of possible NPVRR values than the LEM and New Technology options. NS Power has, therefore, concluded that the RTFD project alternative is the lowest cost option for customers and poses the least risk when the potential range of NPVRR values are considered.

56 The tornado diagrams produced by NS Power's Decision Analysis indicate that construction capital costs are the largest source of cost risk in each project alternative. This means that according to the Company's Decision Analysis, a change in the construction capital key variable inputs will have the most significant impact on the ultimate revenue requirement for each alternative. The Decision Analysis also shows that costs associated with fish shut down periods are the next largest source of

costs in the LEM option. NS Power noted that the fish shut down periods would reduce generation and have a significant impact on the replacement energy cost and ultimately on revenue requirement.

57 NS Power retained Robert Griesbach, Director, Energy Consulting at Hatch Ltd., as an independent expert to review the current application. Based on his experience and expertise, Mr. Griesbach expressed the following opinion:

- NS Power's Decision Analysis provided a reasonable approach in assessing the options for the future of the station;
- The internal and external inputs used in the Decision Analysis were appropriate; and
- The conclusion reached by NS Power to retire the Generating Station is reasonable.

3.1.2.4 Review of Decision Analysis by Board Counsel Consultants

58 Board counsel engaged two expert consultants to review and provide opinion evidence related to NS Power's application. The consultants were Midgard Consulting and Grant Thornton. Midgard's specific focus was a technical analysis of NS Power's assertion that the station is "not used and not useful", the project alternatives analyzed by NS Power after having arrived at the preceding conclusion, and the resulting conclusion that decommissioning the station is the preferred course of action going forward. Grant Thornton was engaged to review the application as it relates to the treatment of the station retirement under NS Power Accounting Policy 6350. Grant Thornton also contracted Matthew Schoenhardt of MS Consulting to review and provide opinion on the Monte Carlo simulation completed by NS Power as part of its Decision Analysis.

3.1.2.4.1 Review by Midgard

59 With respect to the LEM project alternative presented by NS Power, Midgard found that NS Power acted prudently in its efforts to characterize this option. Midgard noted that NS Power's definition of the alternative as a 40-year life extension appears reasonable. Midgard also indicated that NS Power's estimated cost for the LEM alternative are significant but not unexpected, given the unique challenges posed by the station's design and environment. Nonetheless, given the difference between NS Power's calculated NPVRR of the LEM option versus the RTFD option, Midgard stated:

In light of the significant risk of increase to the RTFD cost estimate, Midgard recommends that NSPI be directed to "keep alive" the LEM alternative to ensure that it remains a viable course of action until decommissioning activities, risks, and costs are better characterized.

[Exhibit N-8, p. 22]

60 With regards to the New Technology project alternative analyzed by NS Power, Midgard concluded that NS Power acted reasonably in focusing its effort on Kaplan bulb turbines when considering a turbine-generator replacement. Midgard did note, however, that NS Power only sought information from one bulb turbine manufacturer, rather than soliciting information from multiple firms. Midgard indicated that consideration of offerings from multiple manufacturers would have constituted a more appropriate and thorough investigation of the replacement avenues available to NS Power.

61 Midgard also found it concerning that NS Power's level of study of the New Technology alternative appears to have been cursory. Midgard noted that NS Power's supporting documentation for the New Technology option consists solely of a one-page, high-level estimate provided by the manufacturer, whereas the RTFD, decommissioning and LEM alternatives are supported by multiple appendices comprising larger, more comprehensive reports. Further, while Midgard acknowledged the need for the use of fish-friendly turbine technology, Midgard found that NS Power's insistence that the only means that this can be achieved is to employ a turbine whose RPM exactly matches the existing turbine (which, it should be noted, the DFO currently believes is harmful to fish) is indicative of "inflexible" and "uncreative thinking" from NS Power. Midgard also suggested that NS Power could have considered a broader range of possibilities for its New Technology alternative. Such consideration may have led to the New Technology option receiving further attention and more detailed analysis by NS Power. Overall, Midgard expressed its opinion that NS Power's process of generating and evaluating available New Technology options available to it was inflexible

and cursory. Therefore, Midgard recommended that the Board direct NS Power to more fully and flexibly evaluate station replacement options before committing itself to a decommissioning alternative.

62 With respect to the decommissioning project alternative, Midgard found that NS Power appears to have taken appropriate first steps towards characterizing that option. However, Midgard expressed concerns with areas of the decommissioning alternative: the risks associated with a decommissioning project, and NS Power's cost estimate included in the Decision Analysis.

63 Midgard noted that all decommissioning scenario cost estimates include significant lists of exclusions from the expected project scope. As such, Midgard stated:

In this context, NSPI has still justified its claim that "the RTFD and Decommissioning alternatives carry lower overall risk to customers" [Application, pg. 31 of 41] compared to the other alternatives by stating that "the RTFD and Decommissioning scopes are relatively simple in comparison to the scope for both the LEM and New Technology scenarios" [Midgard-RIR 14a]. This statement does not appear to appreciate or incorporate the significant list of risks and unknowns that still surround the RTFD option.

[Exhibit N-8, p. 35]

64 Midgard also stated that NS Power appears to have an inconsistent approach to accounting for the risk posed by DFO requirements between its alternatives. Specifically, Midgard believes that NS Power has assumed onerous and conservative requirements for the LEM and New Technology alternatives, while it has assumed relatively optimistic related cost requirements for the RTFD and decommissioning alternatives. Midgard noted that this approach appears imbalanced in favour of the RTFD and decommissioning alternatives.

65 With regards to NS Power's decommissioning cost estimates, Midgard noted that NS Power stated that it had used a conservative decommissioning cost estimate in its Decision Analysis. However, Midgard also noted that of the five decommissioning scenario cost estimates it received, NS Power chose to use the least expensive as the basis of its estimate. Midgard also pointed out that NS Power's decommissioning cost estimate in the current application is significantly less than the station decommissioning cost estimate the Company presented in its 2018 Hydro Asset Study. In NS Power's response to IRs about this issue, Midgard found that NS Power had not adequately explained this difference.

66 Overall, Midgard believes that NS Power has underestimated the costs and risks associated with the RTFD and decommissioning options. Midgard stated that should any of these risks materialize and result in significant incremental costs, the results of NS Power's Decision Analysis may be materially affected. Midgard also stated that the failure of NS Power's Monte Carlo analysis to incorporate the significant unknowns associated with decommissioning serves to undermine its usefulness in comparing the alternatives provided in the application.

3.1.2.4.2 Review by MS Consulting

67 MS Consulting stated that the primary purpose of Monte Carlo Economic Analysis (MCEA) is:

... The primary purpose of using MCEA is to compare project alternatives and understand under which scenarios does the ordinal ranking of each alternative change. Once the variables are identified that change the ordinal ranking, investigation of the most significant variables should have priority funding in the next stage so that their ranges can be further refined and/or reduced (i.e., de-risked by progressive project development). Investigating these key variables allows for reduced project development costs.

One method of understanding critical conditions are "tornado diagrams". A tornado diagram runs the economic analysis moving each variable through its maximum and minimum range to determine the impact value on the outcome. This allows a user to see which variables are the most important to the desired outcome.

[Exhibit N-9, Appendix A, p. 6]

68 MS Consulting does not believe that NS Power effectively completed a key variable investigation as part of the Annapolis Tidal Generating Station Decision Analysis. In particular, MS Consulting stated that there appear to be a number of inconsistencies in variable selection among NS Power's project alternatives. In addition, MS Consulting believes there are a number of clerical discrepancies in the Analysis, as well as several significant omissions. These omissions involve the impact of the station write off and terminal values of the station's assets. MS Consulting also noted that NS Power's Decision Analysis model is a "nominal" model, where all costs and revenues must be escalated. However, MS Consulting found that while project expenses are escalated in NS Power's model, operating expenses and the benefit of avoided expenses (i.e., revenue) are not. MS Consulting believes this is an error that penalizes the LEM and New Technology project alternatives.

69 MS Consulting also noted that NS Power's application presented cost estimates that are to an AACE Class V level. Generally, this means that the estimates are prepared based on desktop studies where 0% to 2% of the related engineering is complete. However, MS Consulting indicated that NS Power has completed field inspections and limited quantity take-off measurements for the LEM and Decommissioning options. As a result, MS Consulting believes that many of the engineering deliverables for those options are at an AACE Class IV level or better, putting the New Technology alternative at a systemic disadvantage in the Decision Analysis. Further, MS Consulting stated that the capital cost ranges provided by NS Power are undefended, inconsistent, larger than typically supported by AACE principles, and have unreasonable contingency values.

70 Given the above findings, MS Consulting prepared its own modified Decision Analysis using what it believes are industry best practices and adjusted ranges for the key variables in the Monte Carlo Economic Analysis. The modified model also accounted for the clerical discrepancies and omissions that MS Consulting believes exist in the NS Power model, and adjusted the model from a "nominal" to "real" economic analysis. After preparing its modified model and completing the related analysis, MS Consulting found the preferred solution to be the LEM alternative. In the modified model results, MS Consulting said the LEM solution has the lowest P5, expected, and P95 costs. However, the cost ranges of the LEM project vary more widely in the modified model than the Decommissioning option, and therefore carry greater risk for ratepayers. MS Consulting stated that if certainty around cost ranges is more desirable, the Decommissioning option may still be the preferred option due to lower variability in costs.

71 Overall, MS Consulting concluded that the Decision Analysis completed by NS Power did not develop all identified project alternatives to the same level of scrutiny and support, which does not align with typical project development principles. In addition, MS Consulting found that the Decision Analysis contained inconsistencies in key variable selection, resulting in the RTFD option not necessarily being the lowest cost option and in the best interest of customers. These inconsistencies included disproportionate engineering effort on the presented alternatives, lack of investigation into key model variables, and different application of engineering principles for developing cost and contingency ranges. MS Consulting recommended that further refinement and engineering work be undertaken to validate significant assumptions to determine if the conclusion reached by NS Power's Decision Analysis is appropriate. MS Consulting recommended that this work include:

1. Authorize further engineering work to:
 - a. properly Investigate the risk of sediment changes;
 - b. confirm the viability of rock filling during decommissioning;
 - c. properly understand fish protection for both the capital and competing operational solutions; and
 - d. properly understand the impact of proposed carbon taxes on NPSI's forecasted Levelized Cost of Power and how this asset can help support the move towards a carbon-neutral power grid.
2. Estimate current portion of capital costs that derive from USD priced goods and services.
3. Confirm parameters for the terminal value analysis.
4. Confirm economic impact on rate payers of early write off of the asset.

5. Complete missing AACE Class V deliverables including: risk register, schedule, project execution plan, stakeholder registry, regulatory and environmental road maps.
6. Complete a proper risk and contingency analysis on all viable options.

[Exhibit N-9, Appendix A, p. 21]

72 MS Consulting also presented several process related recommendations for the Board aimed at improving the quality of future NS Power applications for Board approval. These include:

1. Develop all project alternatives with equal support during a Class V study;
2. Include Monte Carlo Economic Analysis in the project development process at the Class V stage. Take at least two options into a "modified" Class IV study. Only develop those variables identified as key in the modified Class IV study to reduce project development costs;
3. Define expectations for submissions along AACE guidelines including a risk register, contingency analysis and schedule;
4. Define expectations for submissions for Monte Carlo Economic Analysis including formulas for all variables to provide transparency and ease of recalculation;
5. Retain or develop sufficient support resources to critique NSPI's submission for economic analysis; and
6. Require a defensible Risk and Contingency analysis completed by a qualified third party for capital cost ranges.

3.1.3 DFO issue

73 NS Power stated that it was already reviewing the status of the Generating Station when there was a failure of the exciter on January 15, 2019. Moreover, NS Power noted that DFO issued a notice on April 1, 2019, stating that continued operation of the Generating Station would require authorization under the federal *Fisheries Act*. NS Power stated that it "factored these two events into the ongoing review and confirmed that the failure of the exciter constituted a 'run-to-failure' event". After incorporating these issues into its Decision Analysis, the Company ultimately decided that the Generating Station should be retired.

74 In the lead up to its review of the Generating Station, there were already indications that NS Power may need to address DFO regulatory requirements with respect to its operation of the Station. In 2018, DFO advised NS Power:

...the Department of Fisheries and Oceans (DFO) initiated a Canadian Science Advisory Secretariat (CSAS) study in July 2018 and it was understood by NS Power at the time that the conclusions of the study could result in the requirement for a *Fisheries Act* Authorization in order to allow the Station to continue operation. NS Power determined, as a result, that a range of costs for potential permitting requirements and operating impacts related to fish protection would also need to be considered in the analysis.

[Exhibit N-1, p. 14]

75 On April 1, 2019, DFO issued a letter to NS Power, stating, in part, as follows:

The operation of the Annapolis [Generating Station] has been reviewed to determine whether it is likely to result in serious harm to fish which is prohibited under [subsection 35\(1\) of the *Fisheries Act*](#) unless authorized. The operation has also been reviewed to determine whether it is likely to affect listed aquatic species at risk, any part of their critical habitat or the residences of their individuals in a manner which is prohibited under [sections 32, 33 and subsection 58\(1\) of the *Species at Risk Act*](#), unless authorized.

Based on the review of the available information, the Program has concluded that the following work, undertaking or activity is likely to result in serious harm to fish:

- The death of fish associated with the operation of the Annapolis [Generating Station] located in the Annapolis River estuary, Annapolis County, Nova Scotia.

The operation of the Annapolis [Generating Station] requires an authorization, pursuant to [paragraph 35\(2\) \(b\) of the Fisheries Act](#). As your proposal will not result in prohibited effects on listed aquatic species at risk, no permit will be required under the *Species at Risk Act* at this time.

Please submit the following information and documentation to apply for a [Fisheries Act](#) authorization:

- a completed Application for Authorization under [Paragraph 35\(2\) \(b\) of the Fisheries Act](#) Form ...
- the required information and documentation set out in the *Applications for Authorization under Paragraph 35(2) (b) of the Fisheries Act Regulations* ...
- an irrevocable letter of credit (for requirements see: ... to cover the cost of implementing the offsetting plan, if you are required to provide one as set out in subsection 3(2) of the Regulations.

Should you be able to modify your operation to reduce the potential impacts to a level where serious harm to fish can be avoided and a [Fisheries Act](#) authorization would no longer be required. If you choose to modify your operation to avoid the need for authorization, please advise and submit in writing to DFO.

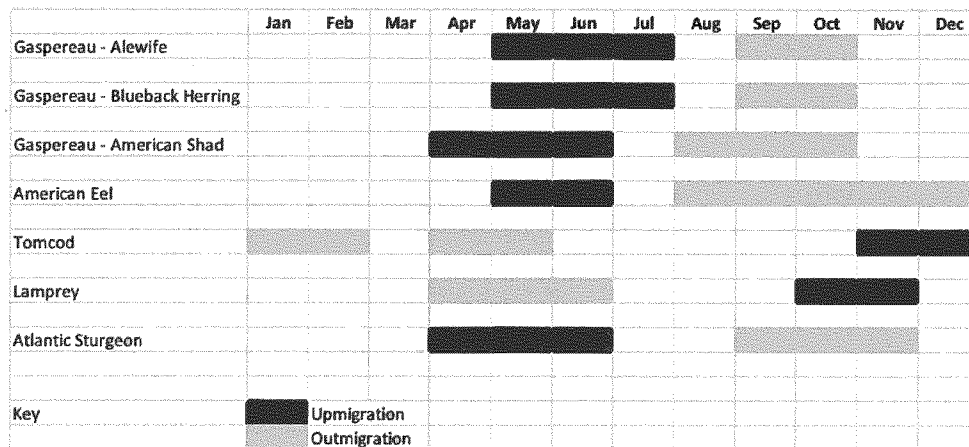
[Exhibit N-1, pp. 253-254]

76 It appears NS Power did not take any action whatsoever in relation to DFO's notice. It did not complete an application or develop any alternative compliance plan; it did not conduct any studies with respect to the operation of the Generating Station and its impact on fish mortality; it did not conduct any analysis into modifying its operation to reduce or mitigate the potential impacts on fish so as to avoid the requirement for the DFO authorization; it did no analysis or consider other studies, short of operating the Generating Station, to determine the species of fish present in that location and their migratory patterns; and, remarkably, it did not engage with DFO personnel whatsoever on the issues related to the Annapolis site.

77 Instead, in its Decision Analysis to determine the lowest cost option for the Generating Station, it used a probabilistic analysis to consider multiple variables and their probabilities to determine a broad range of outcomes and assess the range of risk associated with each variable, including for the DFO compliance issue. Such variables included, among others, the need for various studies on the species of fish impacted, their migratory patterns, and the potential impact of these factors on the periods the Generating Station may be allowed to operate throughout the year.

78 The impact of shutting down the Generating Station due to fish migratory patterns is potentially significant. In its Reply Evidence, NS Power provided a chart depicting the overlap of migration periods of various fish species present at the Annapolis site:

Figure 1: Timing of Presence of Fish Species in the vicinity of the Annapolis Tidal Generating Station ⁴⁵



Graphic 3

[Exhibit N-11, p. 29]

79 Indeed, one of the most important variables influencing the NPVRR outcome of the LEM scenario in the Decision Analysis was the fish shutdown period used in the modeling. At the hearing, Erin Peachey, NS Power's Senior Project Manager, Capital Projects, confirmed that the construction capital and the fish shutdown periods were the two most significant factors influencing the outcome of the LEM analysis.

80 Nevertheless, while NS Power indicated at various times that it engaged with DFO "to understand DFO's expectations concerning an Authorization for the Station", one is left wondering the extent of that engagement following the Company's testimony at the hearing. Upon questioning by the Board, Terry Toner, Senior Director of Strategic Environmental Projects, confirmed that DFO was not contacted about the authorization for the Annapolis Generating Station:

Q. Okay. So, on receipt of the application, am I correct that you have not met formally with DFO on the issue of the authorization for the Annapolis Tidal Plant. You have not met with them formally, on that issue.

A. (Toner) That is correct.

Q. So, there is no minute of any meeting that you —

A. (Toner) There's no minute, because there is no meeting.

Q. Okay. So, you haven't - you haven't spoken to them about it?

A. (Toner) No, I've spoken to them about many other things, but not about that.

Q. Okay. So, you actually still haven't spoken to them about it.

A. (Toner) That is correct.

[Transcript, p. 205]

81 The Board considers that the decommissioning option presented by NS Power also involves an environmental component, including compliance with DFO requirements. As noted in the application, the scope of the decommissioning involves returning the area to its original function before the Station was commissioned in 1984, with no water flow through the causeway at the location of the Station. No costs were included for decommissioning of the sluice gates, causeway, and fish passages because, pursuant to the Provincial Agreement, those assets would remain intact and operation and maintenance returned to the Province upon abandonment by NS Power. However, the Board infers that some costs would be involved for dealing with DFO, including engagement with Indigenous communities, about restoring the area to its original condition prior to the construction

of the Generating Station. Notwithstanding the above, NS Power appears to have given little attention to this point in the decommissioning option of its Decision Analysis.

82 In their Closing Submissions, the Consumer Advocate and counsel for the Industrial Group urged the Board to require NS Power to take further steps to better determine the costs associated with the DFO authorization. The Consumer Advocate submitted:

The Consumer Advocate is concerned by NS Power's lack of diligence to take even the most basic steps to speak with DFO regarding the authorization. Roughly 22 months elapsed between receipt of the April 2019 DFO letter and NS Power's filing of this application. It is the Consumer Advocate's view that NS Power's failure to take any steps to meet with DFO regarding the authorization has left a material gap in the evidence supporting this Application. That highly relevant (and currently absent) evidence would be required to make a determination as to whether the Annapolis Station is likely to provide a benefit to customers in the foreseeable future.

[Exhibit N-28, pp. 6-7]

Whether a two-year lead time (to bring the Application) is necessary or justified is not the primary question before the Board. However, having taken two years to prepare the Application, it is reasonable for the Board to expect very narrow information gaps. The estimated decommissioning costs and the steps required to comply with DFO's expectations are highly material factors that require more evidence than has been presented by NS Power.

[Exhibit N-28, p. 9]

83 In her Closing Submission, counsel for the Industrial Group concluded:

At this stage, the Industrial Group shares the concerns expressed by the Board's consultants that there is an evidentiary lacuna; NSPI's decision to retire the Station as not used and useful has been made without fully assessing the alternatives and their costs. While we appreciate that NSPI has a history of dealings with DFO, it is not enough to say, effectively, "trust us; it's not worth it," rather than present a qualitative and quantitative evaluation of the options to avoid, mitigate or offset impacts to fish and fish habitat so as to secure a DFO Authorization.

The Industrial Group recommends that the Application be denied at this time, and that NSPI be directed to study the variables recommended by Midgard and Grant Thornton/MS. It would then remain open to NSPI to reapply, pending further evaluation of alternatives, if it still believed the Station to no longer be used and useful.

[Exhibit N-30, p. 4]

84 In his testimony, Mr. Schoenhardt stated that he would have expected NS Power to incur some costs to help more precisely define the scope of the risks that may be required to address the DFO issues:

I've heard their discussion today about fish protection. I'm still of the opinion that monies spent during the project development stage at a Class 5 or a Class 4, where we are right now, is money well spent to avoid poor decisions. The decision in front of us today is some 30 million dollars, and spending about 10, 50, a 100,000 dollars to understand the consequences of the DFO's request is money well spent for ratepayers.

[Transcript, p. 232]

85 It would have been helpful to the Board and the Intervenor customer groups if NS Power had provided greater certainty about the potential costs of DFO compliance and used these results in its probabilistic modeling and Decision Analysis, including for the decommissioning option. In the Board's view, this might reasonably have been accomplished if NS Power had engaged with DFO personnel to identify the priority concerns for DFO with respect to potential shutdown of the Generating Station during fish migration periods of various fish species (as identified in DFO's CSAS Report), and their expectations for alternative studies or data that could be submitted in potential compliance plans.

3.1.4 Findings

86 The Board agrees with NS Power, supported by Mr. Reed's expert evidence, that where an asset is no longer used and useful, it should be removed from rate base as soon as practical to alleviate potential concerns about intergenerational inequities. That public utility accounting principle was not challenged by the parties or other expert witnesses. That said, for this principle to apply, NS Power must show in this case that the Generating Station is no longer useful, there being no dispute it is not currently being used. This means, in the context of this matter, that NS Power must establish the decommissioning option is the least cost option for ratepayers.

87 The Board also agrees with NS Power's position, and Mr. Reed's opinion, that if decommissioning is the least cost option, Accounting Policy 6350 is applicable. As discussed during the hearing, as late as 2018, NS Power was making major capital investments with a view to keeping the Generating Station in service for a much longer period than the decommissioning option advanced in this proceeding. The current depreciation rates do not align with the short-term decommissioning of the Generating Station. This proposed decommissioning, at a point much earlier than the expected useful life of a major asset, is the type of extraordinary and unexpected event which Accounting Policy 6350 is designed to address.

88 Accounting Policy 6350 allows NS Power, with Board approval, to extend the write-off of an asset's undepreciated cost beyond the fiscal period when the determination is made that the asset is no longer used and useful. Otherwise, the entire undepreciated amount would have to be taken in one year. This part of the policy is applied when the amount of the write-off is significant. The policy allows for amortization on a straight-line basis over five years or such other time as is reasonable. The purpose of this accounting treatment is to avoid unreasonable impacts on rates occasioned by an extraordinary event.

89 In this case, given the significant amount of the undepreciated cost remaining in rate base, NS Power proposed a 10-year amortization period. No party challenged the proposed length of the amortization period. It was supported by both Mr. Reed and Grant Thornton. The Board agrees that, if decommissioning is established as the least cost option, a 10-year amortization period appears to create a reasonable balance between negative impacts to current ratepayers and intergenerational equity considerations.

90 The substantive issue in dispute in this case is whether NS Power has shown that decommissioning of the Generating Station is the least cost option for ratepayers. The Board recognizes that in preparing its case NS Power took several steps in this application which are appropriate. The use of external consultants to supplement in-house expertise follows Board guidance. The Board acknowledges these consultants support the approach set out in the application. As well, the use of probabilistic modelling was appropriate in this case, given the number of uncertainties which could impact cost estimates. That said, the Board has determined it does not have enough information to find that decommissioning is, in fact, the least cost option. The Board therefore finds NS Power has not met the burden of proof to obtain the accounting treatment relief sought in this matter.

91 The Board is in general agreement with the Intervenor, based on the evidence filed by Midgard and MS Consulting, that there are too many cost variables which have not been sufficiently addressed, or have been addressed in an inconsistent manner across the various options. The Board acknowledges there is contention between NS Power and MS Consulting as to the actual impact of certain inputs on the modelling results, including certain inputs used by MS Consulting. The Board also recognizes that Midgard's ultimate recommendation was that the LEM option be kept alive. This could theoretically be done by approving the current application and revisiting the issue, if necessary, when a decommissioning application is filed.

92 That said, given the magnitude and scope of the unaddressed issues, the Board concludes approval of the accounting treatment at this point is premature. The evidence indicates there are varying levels of class estimates for the different options. In particular, the spread in NPVRR values between the LEM option and the decommissioning option are not that wide. In certain scenarios, the LEM option might actually be more cost-effective, although with greater risk.

93 It is therefore important that, as far as it is possible, there be an apples-to-apples comparison between the LEM option and the decommissioning option. The Board is concerned that if the accounting treatment is approved now, there may be a tendency

to focus on having the decommissioning option approved. This may create less incentive to continue robustly assessing the LEM option.

94 The Board further notes the second largest cost input in the probabilistic modelling relates to the DFO issue. In the Board's view, the cursory nature of NS Power's review of this major cost is problematic. As well, no negotiations have taken place with the Province with respect to ultimate decommissioning. No engagement with Mi'kmaq First Nations has taken place. Assumptions have been made with respect to how engagement costs will vary between scenarios. The Board appreciates that the correspondence from Ms. Maloney, Executive Director of the Kwilmu'kw Maw-klusuaqn Negotiation Office, takes the position that the Generating Station "has operated for far too long". That said, alternative scenarios, impacts and costs have not been explored in any detail. While Ms. Maloney has outlined current concerns about the potential scope of engagement and consultation, the detailed views of the Mi'kmaq First Nations on the impacts of decommissioning, or any other option, and the potential cost impacts, are currently unknown.

95 The Board understands there will be additional expenses in arriving at cost estimates that are more refined and comparable. Often it receives capital cost approval applications where the costs estimates are not of the same class for all options considered. There is an element of professional judgment involved as to the costs and benefits of further expenditures to refine cost estimates. That said, Midgard and MS Consulting both said further investigation and assessment was warranted. The representatives of major classes of ratepayers, who ultimately bear the costs through rates, supported this proposition. Given that issues with significant cost overruns have arisen on some other major hydro projects, the Board agrees that as much detail as possible at the front end of the process might alleviate difficulties down the road.

96 The Board further understands that probabilistic modelling can, to an extent, alleviate some concerns about different class level estimate inputs. Mr. Schoenhardt addressed this in response to a question from the Board:

A. But what you can do is, if you're assessing different projects, different levels of classifications and you're assessing a contingency method appropriately, rather than just applying the blanket 100 to 250 percent, you can account for that underlying different level of uncertainty. So, hopefully that answers your question.

Q. Okay.

A. So, can you compare a Class 5 with a Class 3, yes, but what you need is a sophisticated risk and contingency analysis to do so. You cannot use basic rules of thumb.

[Transcript, p. 271]

97 The Board finds that NS Power did not adequately undertake this level of contingency analysis when entering inputs into the probabilistic modelling.

98 Insofar as keeping the LEM option alive, as recommended by Midgard, the Board is of the view the best way to ensure that this occurs is if NS Power keeps all options open and continues refining costs associated with them until it is able to file its decommissioning option. This would seem to be the more standard and prudent way of proceeding. Delaying any eventual accounting treatment by another two years, if the application were ultimately approved, would not significantly impact intergenerational equity, when balanced with the goal of obtaining the best and most comparable data which can reasonably be provided.

99 While it will not direct NS Power to undertake any specific studies, it would seem to the Board that the following information would be of assistance in determining the least cost option in this matter:

1. A more fulsome assessment of LEM costs;
2. A more fulsome assessment of the new technology option, including:
 - a. A more thorough assessment of options and costs to change station capacity under the new technology option; and

- b. Solicitation of pricing from multiple manufacturers for the new technology option;
- 3. A more fulsome assessment of sedimentation issues and costs associated with the decommissioning option;
- 4. Completion of environmental studies needed to assess environmental risks and costs associated with each alternative;
- 5. A more fulsome assessment of station asset disposal options;
- 6. A detailed explanation of why capital cost estimates for the decommissioning option have decreased so dramatically from the estimates included in NS Power's 2018 Hydro Asset Study;
- 7. Engagement with DFO personnel on if NS Power can satisfactorily present alternative studies or data on fish migratory periods and fish mortality for the site, short of returning the Generating Station into operation, including potentially modifying its operation to reduce or mitigate the potential impacts on fish so as to avoid the requirement for a DFO Authorization;
- 8. Engagement with DFO personnel on whether it would consider any compliance plan with an accompanying request for authorization. If DFO will entertain such a request, NS Power could estimate the cost of preparing and implementing a compliance plan in its Decision Analysis;
- 9. Engagement with DFO personnel and the Province on any *Fisheries Act* or environmental compliance issues under the Decommissioning option with respect to restoring the area to its original condition (i.e., with no water flow through the causeway at the location of the Generating Station and any resulting decommissioning compliance costs related to the sluice gates, causeway, and fish passages). The results of these discussions could be incorporated into the Decommissioning option in the Decision Analysis; and
- 10. With respect to the above initiatives, engagement with Indigenous communities respecting the various options (including LEM, New Technology and Decommissioning), to better inform the potential costs to be incorporated into the Decision Analysis.

100 While the Board is of the view that the accounting treatment of the Generating Station is best addressed as part of a decommissioning application, it will not specifically direct NS Power how to proceed in this matter. If NS Power is of the view that it has sufficient evidence at any point to address the Board's concerns, it can reopen the application. As well, to keep abreast of the matter, the Board directs that NS Power provide a status update by January 31, 2023. In the interim, the Board will keep the application in abeyance.

3.2 Confidentiality of data relating to options

101 When NS Power filed this application, it requested confidentiality over certain information pursuant to [Rule 12 of the Board Regulatory Rules](#). Appendix G is an Excel file which contains the Company's data and modelling for its probabilistic analyses of the various options considered when NS Power was deciding the best course of action to take with the Generating Station. It is referred to in the evidence as the Decision Analyses. It was filed as an entirely confidential document because NS Power explained that it was unable to redact confidential information in electronic Excel files. NS Power went on to explain that information derived from confidentially filed data was also redacted from the body of the application. This included the NPVRR figures for each option considered by the Company. These are the values used to compare the relative cost of the various options to ratepayers.

102 NS Power said confidentiality was required to protect customers by mitigating the risk that competitors or vendors could access proprietary or commercially sensitive information. NS Power explained that the more knowledge potential suppliers have about NS Power's costs, the less competitive the bidding process becomes.

103 On February 25, 2021, the Board approved NS Power's confidentiality request "subject to the right of any party to object to such treatment in accordance with the *Board Regulatory Rules*" No party to this proceeding objected to the confidential treatment of the redacted materials.

104 During the hearing, certain redacted information, related to both total NPVRR values and percentage differences between these values, was referenced in both questions and answers. This is perhaps not surprising, since the type of information referenced in the hearing is usually not filed in confidence. There was also some uncertainty as to whether certain referenced information was in fact confidential. In any event, the Board indicated the transcript should be reviewed prior to it being posted on its website.

105 NS Power suggested the following transcript redactions, which the Board has summarized with the assistance of Ms. Rubin's submissions:

- *Page 95, Line 14* Estimated cost of decommissioning.
- *P95 L17-18 & P96 L11-12* Total estimated costs, including decommissioning.
- *P98 L6 & L20* Total (rough) estimated costs, including decommissioning.
- *P100 L18-19* Relative dollar cost difference of scenarios.
- *P103 L15-16* Dollar value for escalation adjustment.
- *P152 L19* Percentage value.
- *P153 L5 & L7* Studies cost.
- *P232 L6* Percentage value.
- *P246 L7 & L21-P247 L1* Percentage value.
- *P261 L1* Percentage value.
- *P282 L17* Relative cost of alternatives.

106 The suggested transcript redactions put a focus on the confidentiality issue. It caused the Board some concerns, both as to specific redactions, and as to potential issues of transparency if NPVRR comparisons could not be discussed in its decision. The Board wrote to the parties on September 24, 2021, stating in part:

The Board has concerns about the necessity of some of the redactions in the Transcript. As the parties will be aware, the Board strives for transparency in its reasons set out in its decisions. In this matter, an important issue canvassed in the evidence is the magnitude of the difference and the ranking among the options to decommissioning. In its decision, the Board may be required to comment on the relative difference among the various options in its consideration of NS Power's overall application.

The Board notes that Rule 12 of the *Board Regulatory Rules* addresses confidentiality. The burden of satisfying the Board that a document should be held in confidence is on the party claiming confidentiality.

In particular, the Board observes that the percentage differences among the various options have been redacted. Specifically, the Board questions why percentage values set out at pages 232, 246, 247 and 261, where the numbers to which these percentages apply are not revealed, should be considered confidential. This concern was raised by the Board during the hearing. Further, on page 152, NS Power redacted a percentage figure. However, on page 21 of 60 of its Reply Evidence, this number does not appear to be redacted.

107 In an October 7, 2021 letter, NS Power agreed the percentage values set out at pages 246, 247 and 261 of the transcript could be treated as non-confidential. NS Power also advised it was no longer seeking confidential treatment of the requested redaction at page 152 of the transcript. NS Power did not agree the percentage value at page 232 of the transcript should be disclosed, as the confidential figure to which it relates had been inadvertently disclosed.

108 The Company maintained the other redactions were appropriate, including the NPVRR outcomes associated with the Decision Analysis. On this latter point, the Company stated:

NS Power confirms that it continues to seek confidential treatment for the information which has been filed confidentially in this proceeding, including the NPV RR outcomes associated with the Decision Analysis. As noted in the NS Power Letter, this is because release of this information could prejudice NS Power's ability to procure services and equipment on the most competitive terms or otherwise undertake the necessary work at the lowest cost for customers. If potential vendors, or stakeholders, are aware of the difference between alternatives under consideration by NS Power, they could potentially seek to use this information in negotiating to adjust the terms offered to, or the scope proposed by, NS Power such that that the difference between such alternatives is reduced or exhausted.

109 The CA said the percentage value set out at page 232 of the transcript should be disclosed as the figure to which it relates had now been redacted from the transcript. NS Power's response to this is that it was publicly reported in the press. The CA further indicated NS Power should, in future, strive to make disclosure of relative percentage differences publicly available so the public can understand Board decisions.

110 Ms. Rubin, on behalf of the Industrial Group, submitted that NS Power had not provided any rationale for the suggested redactions which it still sought, beyond generic statements about the potential impact on competitive bidding. She went on to say:

The Industrial Group is concerned there continues to be a creeping tendency toward more and more confidentiality. As recently as the FAM Audit, NSPI was challenged on its extensive redactions for confidentiality, resulting in referral of this issue to the FAM Small Working Group.

It is acknowledged that knowledge of specific contract values or units as an input has the potential to influence competitive bids, but when the figure being redacted is the cumulative dollar value comprised of multiple inputs, or a relative percentage of two global values to compare alternatives, the ability for a competitor to extract meaningful information to the prejudice of NSPI's customers is not at all evident. It is not enough to make generalized assertions about confidentiality when the starting point is openness and only when it is demonstrably necessary should public access and transparency be curtailed.

In prior ACE submissions for the past few years, even when NSPI redacts information regarding the estimated costs of specific portions of a capital project, it has provided the total amount of the project, along with the % of contingency applied. There are countless examples in which NSPI has redacted the amounts for specific portions of each of the capital projects, but included subtotals, overall totals, and the contingency % applied for each project.

Reference is also made to *Nova Scotia Power Incorporated (Re)*, 2019 NSUARB 11, the application for approval of capital work for the Tusket Main Dam Refurbishment. The decision reads:

[138] The results of the new EAM attached as Appendix C to NS Power's Reply Evidence indicates the following:

Figure 5. Summary of Project Alternative

	Alternative	PV of Revenue Requirement	Rank
A	Refurbish Main Dam	17,042,259	1
B	System Partial Decommissioning	28,260,981	2
C	System Full Decommissioning	55,176,532	3

[Exhibit N-21, p. 40]

[139] While not entirely convinced that the cost differences would be as large as suggested by NS Power, given the magnitude of the potential decommissioning costs, and the potential they could be understated, from an economic analysis perspective, in the particular circumstances of this Application, NS Power has satisfied the Board that replacement of the Tusket Main Dam, as proposed, is justified.

In relation to Tusket, NSPI provided the specific amounts in comparing the options of refurbishment to decommissioning, in order for the Board to decide what was in the best interest of the customers. The Board had to consider the potential costs of each, and the difference between each, in determining whether the replacement of the Dam was justified.

[Exhibit N-30, pp. 5-6]

111 Ms. Rubin submitted the Tusket Main Dam Refurbishment matter was directly on point. If the NPVRR values could be disclosed in that matter, there was no basis for not providing similar information in this proceeding.

112 In its Reply Argument, rather than providing more detailed information to justify its position that the release of information related to NPVRR figures, or total cost amounts, could realistically lead to potential suppliers gaining a bidding advantage which could harm ratepayers, NS Power essentially reverted to a procedural argument. The Company said it made a confidentiality request pursuant to [Rule 12](#) which was granted. No objections were filed, and it has governed itself accordingly. NS Power submits it is now being asked to justify redactions outside the *Board Regulatory Rules* process.

113 The Board has concerns about the manner which NS Power appears to be approaching issues of confidentiality. Under [Rule 12](#), the default position is that documents are filed unredacted on the public record. [Rule 12\(4\)\(b\)\(i\)](#) requires "...details of the nature and extent of the specific harm that would result if the document were publicly disclosed...".

114 In the case of sensitive financial or commercial information, under [Rule 12\(10\)](#) NS Power must show that "...the desirability of avoiding disclosure ... outweighs the desirability of adhering to the principle that documents be available to the public". This means there must be a significant public interest component related to the nondisclosure of this type of information. Unlike private litigants in a court process, NS Power is subject to continuous oversight by the Board. **There is a significant public interest in not having the regulatory process itself create undue costs to NS Power, and by extension the consumers of its regulated monopoly service. In other words, disclosure of financial or commercial information which undermines NS Power's ability to obtain goods and services at the lowest possible cost impacts NS Power's customers, which include most businesses and residents of the province.** That said, there is still a balancing act to be performed between a demonstrable risk of harm and the transparency of a public process.

115 If disclosure of cumulative cost totals, subtotals and NPVRR values have not caused undue harm to competitive bidding in the past, and no evidence has been submitted to show harm based on this past practice, it begs the question as to why NS Power would submit it could reasonably do so in this application. One difference is the NPVRR figures are derived not only from cost inputs, but from the probabilistic modeling pursuant to the Decision Analysis. The model is explained to some degree in the application. The Board has some concern about the potential for reverse engineering to derive specific cost figures.

116 Based on this concern, as well as a concern about procedural fairness related to addressing confidentiality rulings outside the full [Rule 12](#) process, the Board has decided not to revisit its prior confidentiality ruling at this late stage. The Board is satisfied that the remaining redactions in the transcript are related to or derived from information which has been ruled to be confidential. It, therefore, accepts NS Power's remaining suggested redactions.

117 The Board would put NS Power on notice that it has serious concerns about what it perceives to be slippage in its approach to confidentiality. It will expect a full and robust explanation, backed by evidence, to support any future similar request for the confidential treatment of cumulative cost totals, subtotals, NPVRR values and comparisons, or similar data and information. While the Board is always mindful of regulatory burden, it is becoming apparent such an approach will be necessary and may well extend to many requests for confidentiality.

4.0 CONCLUSION

118 The Board has determined that it has insufficient evidence at this time to find that decommissioning of the Generating Station is the least cost option for ratepayers. It therefore is not able to find that the asset is not used and not useful in accordance with Accounting Policy 6350. Therefore, the Board will not approve the application at this time. The Board believes the best way of proceeding is to reconsider the application for accounting treatment approval along with a decommissioning application. That said, NS Power is at liberty to reopen the matter if it is in a position to address the Board's concerns.

Footnotes

- 1 NS Power Accounting Policy - Capitalization of Cost - 6000
- 2 NS Power Application for Annapolis Tidal Generation Station Retirement (M10013), February 22, 2021, page 37
- 3 M03665, NS Power 2010 Depreciation Study, October 29, 2010
- 4 NS Power Accounting Policy - Assets Not Used and Useful - 6350
- 5 NS Power Application for Annapolis Tidal Generation Station Retirement (M10013), February 22, 2021, page 15
- 6 NS Power response to Board IR-33, June 9, 2021, Glace Bay Generating Station
- 7 NS Power Application for Annapolis Tidal Generation Station Retirement (M10013), February 22, 2021, page 4
- 8 Hearing Transcript, September 13, 2021, page 61

2022 NSUARB 2
Nova Scotia Utility and Review Board

Nova Scotia Power Inc., Re

2022 CarswellNS 7, 2022 NSUARB 2

IN THE MATTER OF THE PUBLIC UTILITIES ACT

IN THE MATTER OF AN APPLICATION by NOVA SCOTIA POWER INCORPORATED for accounting treatment and net book value recovery relating to the retirement of the Annapolis Tidal Generation Station

Roland A. Deveau V-Chair, Steven M. Murphy Member, Richard J. Melanson Member

Heard: September 13, 2021

Judgment: January 13, 2022

Docket: M10013

Counsel: Blake Williams, Erin MacRae, for Nova Scotia Power Incorporated
William J. Mahody, Q.C., Emily J. Mason, for Consumer Advocate
E.A. Nelson Blackburn, Q.C., Melissa P. MacAdam, for Small Business Advocate
Nancy G. Rubin, Q.C., for Industrial Group
S. Bruce Outhouse, Q.C., for Board

Related Abridgment Classifications

Public law

IV Public utilities

IV.2 Operation of utility

IV.2.g Miscellaneous

Public law

IV Public utilities

IV.4 Termination, valuation and privatization

IV.4.b Termination of franchise

Headnote

Public law --- Public utilities — Operation of utility — Miscellaneous

Public law --- Public utilities — Termination, valuation and privatization — Termination of franchise

Table of Authorities

Statutes considered:

Fisheries Act, R.S.C. 1985, c. F-14

Generally

Nova Scotia Power Privatization Act, S.N.S. 1992, c. 8

Generally

Rules considered:

Board Regulatory Rules, N.S. Reg. 235/2005

Generally

R. 12

R. 12(4)(b)(i)

R. 12(10)

1.0 SUMMARY

1 Nova Scotia Power Incorporated (NS Power or Company) has operated the Annapolis Tidal Generating Station since the mid-1980s. At the time of its commissioning a few years earlier, the Generating Station was originally anticipated to be a short-term research initiative led by the Federal Government to test tidal barrage technology and determine the viability for further development of this technology in the Bay of Fundy.

2 NS Power has experienced operational and maintenance issues with the Generating Station over the past few years and applied to the Board for approval to treat the Station as "Not Used and Not Useful" in accordance with its approved Accounting Policy 6350. It also requested approval to amortize the undepreciated value and remaining Construction Work in Progress (CWIP) of the Station (in the total approximate amount of \$27.7 million) over the 10-year period between 2021 and 2030 in accordance with the same Accounting Policy.

3 The thrust of this application, if approved, would effectively take the Generating Station out of service and its remaining undepreciated value would be recovered from ratepayers over 10 years. However, NS Power is not applying to decommission the Station at this time. Rather, it intends to submit a capital work order later, after it has determined the costs to decommission the Station.

4 The Board is not satisfied that the Company has provided sufficient evidence to establish that decommissioning of the Generating Station is the least cost alternative available to NS Power. As such, the Board is not in a position, at this time, to find that the accounting treatment under Accounting Policy 6350 should be approved. The Board has provided guidance in the form of additional information which could assist in its determination. The Board is of the view that the best manner of proceeding is to reconsider the request for the accounting treatment in conjunction with a decommissioning application, with all potential options being adequately addressed. That said, NS Power is free to consider if it has sufficient evidence to reopen its application prior to that time. In any event, the Company is to report on the status of the matter by January 31, 2023. The Board, therefore, holds the application in abeyance.

2.0 BACKGROUND

5 On February 19, 2021, NS Power applied to the Board as follows:

- With respect to the Accounting Treatment of the Station, NS Power requests approval to treat the Station as Not Used and Not Useful in accordance with approved Accounting Policy 6350.
- With respect to the undepreciated value of the assets and in adherence to the regulatory principles of rate stability and inter-generational equity, NS Power requests Board approval to amortize the undepreciated value and remaining Construction Work in Progress (CWIP) of the Station over the 10-year period between 2021 and 2030 in accordance with approved Accounting Policy 6350.

[Exhibit N-1, p. 4]

6 However, NS Power is not applying to decommission the Station at this time. It proposes to wait to file such an application after it has better determined the decommissioning costs. In its application, it stated:

Consistent with approved accounting policies, NS Power intends to submit a decommissioning capital work order for approval of the capital costs associated with decommissioning the Station. In order to refine the decommissioning scope and develop Class III estimates, NS Power will engage in an appropriate stakeholder engagement process and complete an Environmental Assessment which will involve a review of the proposed decommissioning scope to ensure environmental impacts are mitigated. NS Power will also engage with the Province of Nova Scotia and other stakeholders to coordinate the return of operation and maintenance responsibilities of certain causeway assets to the Province.

2.1 Description of Generating Station/Property

7 The Province of Nova Scotia (Province) built a causeway across the Annapolis River in 1960. It was designed to control water flow and protect agricultural lands along the river. This was done to alleviate issues arising from the deterioration of the dyke system which had previously been the main method of protecting these lands. Sluice gates were designed to control water flows and storm surges impacted by the high tides in the Annapolis Basin. They could also be used to enable hydro power generation. This led to the selection of the Annapolis River causeway as a location to test tidal power generation.

8 The Generating Station was built as part of a research initiative involving Tidal Power Corporation, the Province, and the Federal Ministry of Energy, Mines and Resources. It was commissioned in 1984 for what was intended to be a short-term pilot project. At the time, it was one of only three tidal barrage hydro generating stations in the world.

9 Tidal Power and the Province entered into an agreement about the operation of the Generating Station in 1984. Tidal Power took title to the lands upon which the Generating Station assets were located. Tidal Power also agreed to be responsible for the operation and maintenance of the sluice gates, although the Province retained ownership of these assets. Upon abandonment of the Generating Station, title to the lands and responsibility for operating and maintaining the sluice gates would revert to the Province.

10 In 1984, Nova Scotia Power Corporation, the Crown-owned electric utility, applied to the Board of Commissioners of Public Utilities (the Board's predecessor) for approval of the purchase of the Generating Station. Approval was granted on July 24, 1985. NS Power acquired the Generating Station in 1992, by virtue of the vesting of assets provisions in the [Nova Scotia Power Privatization Act, S.N.S. 1992, c. 8](#).

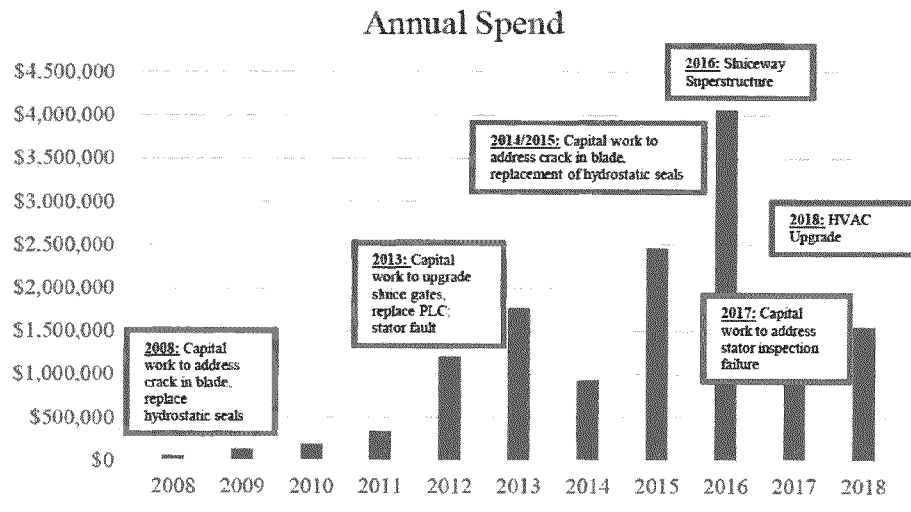
11 Although the site was selected because of the existing causeway and sluice gates infrastructure, there was little land to work with. This led to a compact and unique design. The major components of the Generating Station are:

- The powerhouse where the major power generating assets are located, including the turbine and generator; the wicket gates and distribution ring; servomotors and weights; the draft tube housing the turbine and generator; and mechanical and electrical auxiliary components.
- Two fishways located adjacent to the powerhouse and the sluice gates.
- Sluice gates which are used to regulate water flow for power generation.
- A control room building used by staff to monitor and control the operation of the Generating Station. It also houses a viewing area for tourists and a tourist information centre operated by the Municipality of the County of Annapolis.

2.2 History of Operation Leading to Application

12 The Generating Station was intended to be a pilot project with a short lifespan. As of 2019, it had been in operation for about 34 years. Perhaps not surprisingly, as time has gone by, the capital costs required to keep the Generating Station operational have been increasing. Since 2008, there have been significant capital expenditures made to address numerous failed components of the Generating Station, as depicted in Figure 2 in the application:

Figure 2: Annual Capital Expenditure 2008-2018

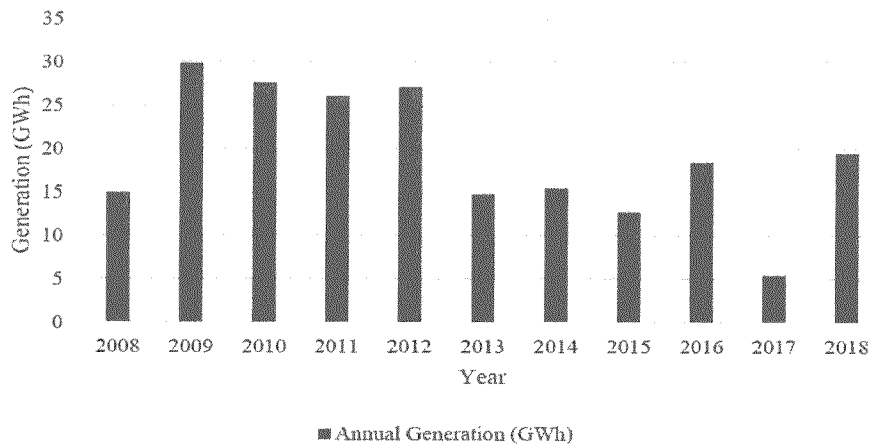


Graphic 1

[Exhibit N-1, p. 10]

13 NS Power indicated that while capital costs have been increasing, annual generation has been decreasing. This was partly due to the Generating Station being out of service while major overhauls were being completed. The foregoing is graphically depicted in Figure 3 found in the application:

Figure 3: Annapolis Annual Generation from 2002-2018



Graphic 2

[Exhibit N-1, p. 11]

14 NS Power advised that the combination of increasing sustaining capital cost requirements and decreasing output led the Company to initiate an analysis to investigate whether continued operation of the Generating Station was in the best interests of ratepayers. The Company's review began in early 2018. On January 15, 2019, while this investigation was ongoing, the Generating Station's exciter failed. The exciter is a required component of the generator which provides a magnetizing current for the electromagnets. The Generating Station has not produced any power since this event. Also, on April 1, 2019, following the exciter's failure, Fisheries and Oceans Canada issued a notice to the Company indicating NS Power would need an authorization under the *Fisheries Act* to continue operating the Generating Station. The foregoing sequence of events led NS Power to conclude the station should not be returned to service.

3.0 ANALYSIS AND FINDINGS

3.1 Should the Generating Station receive accounting treatment as Not Used and Not Useful?

3.1.1 Accounting Policy 6350

15 The basis of this application is NS Power's request for the use of the Company's Accounting Policy 6350 - Assets Not Used and Useful. The Board finds it instructive to first consider the main choices for NS Power in classifying and retiring its capital assets.

16 Capital assets that are currently providing service to the public and are intended for use on a continuing basis are recorded as assets that will benefit future periods. Depreciation and amortization are methods of charging asset costs to fiscal periods over their useful life¹, which reduce future net earnings. At the time of NS Power's application to the Board, the Annapolis Tidal Generating Station and associated assets were being treated as used and useful, which allows NS Power to include the assets in rate base, earning the allowed return, and to collect an annual depreciation expense, recovered through rates. The unrecovered net book value of these assets at the time of NS Power's application was approximately \$25.8 million (excluding \$1.9 million in CWIP), being depreciated at a rate of 2.02% per year, resulting in an annual depreciation expense of approximately \$800,000².

17 NS Power has two accounting policies related to the retirement of capital assets: 6420 - Retirement and Disposal of Capital Assets, and 6350 - Assets Not Used and Useful.

18 Accounting Policy 6420 provides in part:

Policy

08 Assets that are not used and not expected to be used in the foreseeable future should be retired from plant in service.

Procedures

09 For retirements of property, plant and equipment other than land, the original cost is charged to accumulated depreciation, with no immediate gain or loss recognized.

19 NS Power stated that the intent of Policy 6420 is for routine asset retirements, where assets that are not used and not expected to be used in the foreseeable future are retired from plant in service. The Board notes that in the case of generating stations, it would expect that this accounting policy would be used only when a station came to the end of its useful life in the normal course, and within an expected time frame. This accounting policy notes factors causing assets to lose their ability to provide service include reaching the end of their useful lives, irreparable equipment failure, and technological obsolescence.

20 Using Policy 6420, original cost amounts being charged to accumulated depreciation remain in accumulated depreciation until the next depreciation study. The Board expects that a future depreciation study brought forward by NS Power would analyze the capital assets retired since the last study³, and result in recommendations for changes to depreciation rates based on actual retirement experience.

21 The second asset retirement Accounting Policy 6350 - Assets Not Used and Useful, states that "Assets that are not both used and useful should be classified in one of the following categories: a) Not used and not useful; b) Not used but useful for standby purposes; or c) Not used but useful for future service."⁴ The Board notes that Policy 6350 was reviewed in detail in a prior Board proceeding (Matter M09229), NS Power's Revised Accounting Policies.

22 In its Decision in that matter dated May 5, 2020, the Board stated that "NS Power agreed that while Policy 6350 does not expressly state significant unforeseen or extra-ordinary events are to be considered in line with this policy, it has consistently been interpreted by both NS Power and the Board as requiring this consideration." NS Power filed the current application under Accounting Policy 6350.

23 The first category of Policy 6350, "Not used and not useful" is described as assets that meet both criteria of not currently providing service to the consuming public, and that they are not expected to provide a benefit to customers in the foreseeable future:

Policy (Not used and not useful)

07 Where an asset is neither used nor useful, there is no current or future benefit against which the undepreciated cost of the asset can be matched. Therefore, the undepreciated cost should be written off in the period in which an asset is determined to be not used and useful.

24 The effect of a write-off under this category is the removal of the undepreciated net book value from rate base at the time when the asset is determined no longer used and useful. This removal also results in the cessation of depreciation expense, as that asset is no longer on the Company's books. Where the write-off is significant, NS Power can apply to the Board for approval to amortize the undepreciated cost of the asset on a straight-line basis, over five years or over a reasonable period. The Board notes that this category is the one under which NS Power has made this application for the Annapolis Tidal Generating Station assets.

25 The second category, "Not used but useful for standby purposes" is described in the policy as assets that do not currently provide service to the consuming public but are available for service and are required to maintain standby capacity:

Policy (Not used but useful for standby purposes)

11 An asset that is not used but is useful as a standby facility is to be treated the same as an asset that is used and useful. The asset is to be depreciated over its expected useful life. The undepreciated cost of the asset is to be included in rate base, and the related cost of capital recognized as an expense of the period in which it is incurred.

26 Given the evidence presented by NS Power, the Annapolis Tidal Plant does not appear to be available for service and would therefore not meet the criteria necessary to be included in the category of "Not used but useful for standby purposes."

27 The third and final category under this accounting policy are assets that are "Not used but useful for future service." This is described in the policy as assets which do not currently provide service to the consuming public but are expected to be used and useful in providing service in the future or to form part of the normal level of standby capacity in the future:

Policy (Not used but useful for future service)

13 Assets not currently used, but expected to be used in providing service in the future will provide value to customers at a future date. Accordingly, the cost of the asset is to be matched to the future periods in which the asset will provide value to customers.

14 To the extent that the cost of the asset plus any other costs of maintaining the asset until it is placed (or returned) to service exceed its expected future value, the excess cost is similar to the cost of an asset that is neither used nor useful. Where it is expected that there will be an impairment loss of the long-lived asset when returned to service, the excess is to be written off and recovered from customers in the period in which the excess is identified. However, to enhance rate stability, where the excess is significant, it may be deferred and amortized over a five year period or over a reasonable period subject to the approval of the UARB.

15 Depreciation on these assets is deferred until they are returned to service. The unamortized cost of the assets (net of any write offs) is to remain in rate base.

28 NS Power has expressed that "The Station is now considered to have run to failure and will be decommissioned,"⁵ solidifying their intention to retire the station. However, the Board notes that if the Annapolis Tidal Generating Station assets were expected to provide future use and classified under this category, the unrecovered net book value of these assets of

approximately \$27.7 million would remain in rate base, earning the allowed return, and the recovery of depreciation expense would be deferred until such time that NS Power returned these assets to service.

29 To summarize the impact of these policies, which cannot be read in isolation but instead, as two potential paths, Policy 6420 is used in the normal course of business for retirements, where the asset is merely rolled back into accumulated depreciation and rate base is unaffected, while Policy 6350 is used when assets are not both used and useful and may be written off, effectively removing them from rate base. The Board notes that it considers it best practice to ensure that no large amounts of redundant assets are sitting in rate base. One-off situations outside of the normal course of business, such as the retirement of a full generating station before the planned end of its useful life, are truly what the Policy 6350 is made to address.

30 Board Counsel consultant, Grant Thornton, was engaged to analyze the proposed accounting treatment of the Annapolis Tidal Generating Station assets. In their evidence dated June 30, 2021, Grant Thornton stated:

In the Application, NSPI states that the undepreciated costs qualify under Accounting Policy 6350 as being Not Used and Not Useful. The accounting implications of the retirement are ultimately dependent upon the results of the DA [Decision Analysis]. Our observations on the DA model and the conclusions reached by the DA are provided in Appendix A. If, based upon our recommendations, the conclusion of the DA was to change, the accounting implications would have to be revisited accordingly. For example, if the conclusion of the DA was to pursue life extension and modernization as the lowest cost option, Accounting Policy 6350 would no longer be applicable as the assets would no longer be considered Not Used and Not Useful.

[Exhibit N-9, p. 3]

31 The closing submissions by both the Industrial Group and the Consumer Advocate stated that as it has been sufficiently demonstrated that the generating station is not currently being used, the crux of the application is the determination of future usefulness. This was addressed during cross-examination of the NS Power panel by Board Counsel in the hearing on September 13, 2021.

Q. So, I want to turn to page 4 of the application. So, in the middle of page 4, lines 12 to 13, you're setting out the first thing that you're — that NSPI is asking for. And it says:

"With respect to the accounting treatment of the station, Nova Scotia Power requests approval to treat the station as not used and not useful in accordance with approved Accounting Policy 6350"

Correct?

A. (Sidebottom) Correct.

Q. Now, I don't think there's any dispute at all about the fact that the station isn't being used, and it hasn't been since January 2019. So, it's clear that we're talking about an asset that's not used.

The substantive issue, at least in my mind, is whether the plant is useful, and will be useful going forward. Do you agree?

A. (Sidebottom) I agree.

Q. And it seems to me, at least, that in order to approve NSPI's request to treat the station as not used and not useful that NSPI must satisfy the Board, it must satisfactorily demonstrate that retirement and decommissioning of the station is the best solution for customers. Is that correct?

A. (Sidebottom) That's correct, yes.

[Transcript, pp. 85-86]

32 The closing submissions of the Small Business Advocate, the Industrial Group, the Consumer Advocate, and the Town of Annapolis Royal all expressed concerns relating to NS Power's assertion that the retirement of the Generating Station is the lowest cost option to customers. All four stakeholders noted that they do not agree that NS Power has put forth a sufficiently comprehensive analysis to convince them that there is no viable future use of the assets in question for public utility purposes.

33 In the past, NS Power has come forward with complete applications for the retirement of generating stations which include both the recovery of net book value and decommissioning costs of a facility⁶. However, this application is only looking at recovery of the net book value of the Annapolis Tidal Generating Station assets, with the approval for the decommissioning and the recovery of related costs deferred to a subsequent application.

34 NS Power has put forth this application with an expectation that there will be two distinct decisions made on the Annapolis Tidal Generating Station assets. The first decision is predicated on the assumption that the costs are sufficiently accurate to perform a Decision Analysis (defined later) and rely on the output representing decommissioning as the lowest cost option for customers. The second is the treatment of the decommissioning costs once NS Power has performed Class 3 design work to refine the estimate and file a subsequent application, a process which NS Power has stated will take approximately 1-2 years⁷.

35 In the hearing, NS Power confirmed that the future process of performing the Class 3 design would better inform the Company of the full costing details of retirement and decommissioning. NS Power stated that if, at that future time, the Decision Analysis resulted in a determination of the Life Extension and Modernization (LEM) or another alternative being found to be the lowest cost option, NS Power would then plan to reclassify that asset back to used and useful⁸.

36 John Reed of Concentric Energy Advisors, NS Power's consultant, spoke to this point, stating that he does not view the decision of advancing the accounting treatment as being carved in stone. He stated that in the event further work to better define the cost of decommissioning was to change substantially (resulting in the LEM being the lower cost alternative), then NS Power could revisit the accounting treatment and transfer the plant into one held for future use. Board Counsel questioned Mr. Reed further on the subject:

Q. All right. And I just want to ask a question about how you see that working. In other words, the application, at least, is looking for that accelerated amortization to commence this year and be extended over the next 10 years. And I think the application for the — if there is an application for retirement and decommissioning, that that may be a couple of years down the road, a year or two down the road.

So, if you were to implement the decision as requested, and collect two years of amortization, how would that egg be unscrambled in terms of customers?

A. (Reed) Again, perhaps I can start. The decision to implement this year and to extend for two years, to use your example, would cause approximately five million of the 27 to 28 million of book value to be written off over that period of time, leaving, presumably, 22 to 23 million remaining book value for this asset.

So, maybe, if it was determined at a future date, that that remaining balance at that time, the 22 to 23 million, should be returned to account of client, held for future use, that's the way, in my view, the mechanics would work. But you still have recovery of that client balance, but that would be recovered through the subsequent operation of the unit following life extension, if again, in the unlikely case that were to be the least cost option.

[Transcript, pp. 88-89]

37 In the hearing, Mr. Reed explained why he believed that the timing of this application was appropriate. He stated that Accounting Policy 6350 contemplates the Company bringing forth an application to determine the appropriate treatment of the asset when that asset is no longer considered to be used and useful. He also noted the need to minimize the intergenerational equity issue relating to the length of time between the benefits being received from an asset (pre-2019), and who in the future will be paying for the remaining cost, stating the need to promptly present an application to accelerate the cost recovery of that asset.

3.1.2 Analysis of options

38 Increasing annual capital investment, decreasing annual generation, and the overall condition of the Annapolis Tidal Generating Station after 34 years of operation have prompted NS Power to evaluate whether the lowest cost option for customers is continued investment in the station or decommissioning. Before undertaking this evaluation, the Company determined that a broad range of potential costs would need to be considered for any station re-investment option. This determination was based on the uniqueness of the existing station's design and the lack of similar existing facilities in the power generation industry. The Company believes this results in a level of uncertainty around the capital costs associated with an assessment of continued operation due to a lack of benchmarking and historical comparison. Further, given the fisheries issues discussed later in Section 3.1.3 of this Decision, NS Power concluded that a wide range of potential costs would also need to be considered for related permitting and operating impacts.

39 Given the complexity created by these cost uncertainties, NS Power decided that a probabilistic model, which tested a broad range of outcomes and allowed for consideration of multiple variables and probabilities for each alternative, would be the most suitable tool to assess the range of risk associated with each variable and determine the lowest cost alternative for customers on a Net Present Value of Revenue Requirement (NPVRR) basis. The Company has referred to this probabilistic modelling as its "Decision Analysis":

The Decision Analysis process varies from NS Power's traditional Economic Analysis Model (EAM) in that the Decision Analysis is probabilistic; incorporating various probabilities and determining the most likely outcome along with a range of outcomes at various probabilities, whereas the EAM is deterministic; incorporating parameter values and initial conditions which fully determine the output of the model.

[Exhibit N-1, p. 16]

3.1.2.1 Decision Analysis Model

40 Compared to an Economic Analysis Model (EAM), the Decision Analysis requires additional internal and external input and analysis to develop the range of probabilities for each of the key uncertainties. In addition to determining the lowest cost alternative on a NPVRR basis, the Decision Analysis includes a simulation of cost estimates which evaluates the range of potential outcomes associated with the decision and the potential impacts of key variables on the overall Net Present Value (NPV) for each alternative. Each simulation calculates the total range of NPVs of a selected strategy based on the defined inputs, which is represented by the probability curves. The Decision Analysis included the following steps:

1. Determine and review project alternatives.
2. Commission studies. NS Power worked with internal subject matter experts (SMEs) to develop a range of values for scope, timing and costs of key variables for the project alternatives examined in the Decision Analysis. These SMEs had expertise in environmental matters, asset management, hydro operations, stakeholder engagement and power generation planning. The Company also engaged external consultants to complete studies and provide estimates for uncertainties associated with each project alternative.
3. Define probability ranges for key Decision Analysis variables. These key variables included:
 - Capital construction cost;
 - Environmental assessment costs and timeline;
 - Engineering and design costs;
 - Fish shut down periods;

- Run to failure timeline;
- Sustaining capital costs;
- Operating costs;
- Mi'kmaq engagement capacity costs; and
- Replacement energy costs.

NS Power indicated that the cost estimates produced for these variables were developed at an Association for Advancement of Cost Engineering (AACE) Class Level 5. Cost estimates produced at that level are generally expected to be accurate to -50% to +100% after inclusion of an appropriate contingency allowance. Each of these variables was assigned distributions for the Decision Analysis modeling at 10 percent (P10), median (P50) and 90 percent (P90) of the probability range. The P10 and P90 values represent the high and low ends of the range of probable values for any given variable (P90 being the highest probable value, at which only 10 percent of the values would be greater, and P10 being the lowest probable value, at which only 10 percent of the values would be less).

4. Calculate NPVRRs. The calculation of the NPVRR follows NS Power's standard approach to determining project value as provided in the Board-approved Capital Expenditure Justification Criteria (CEJC). The Decision Analysis calculates the NPVRR for a range of values based on the risk profile for each scenario considered.

5. Perform Monte Carlo Simulation. NS Power stated that the Monte Carlo simulation provides a formal means for quantifying model uncertainty. It assigns a probability distribution to each of the key variables using the range of values provided by internal and external experts. The simulation randomly samples values between P10 and P90 for each variable and calculates a range of possible outcomes for the revenue requirement associated with each alternative. In this case, the simulation was repeated 1,000 times for each alternative to ensure sufficient range of resulting costs.

6. Assess results. The assessment of the Decision Analysis results includes two steps. The first step is a comparison of the median (P50) NPVRR for each alternative and determination of the lowest cost option for customers. The second step includes an evaluation of the probability curves and tornado diagrams produced by the Monte Carlo system to assess the risks created by the uncertainties associated with each alternative. The probability curves developed by the Monte Carlo simulation demonstrate the risk associated with the potential range of NPVRR outcomes for each of the alternatives evaluated in the analysis. Tornado diagrams highlight the key variables that have the potential to have the greatest impact on the outcome of the Decision Analysis for each project alternative. In effect, they provide the relative sensitivity of each key variable on the ultimate NPVRR of each project alternative.

3.1.2.2 Project Alternatives

41 NS Power's Decision Analysis considered four project alternatives for the Annapolis Tidal Generating Station:

1. Run to Failure and Subsequent Decommissioning;
2. Decommissioning;
3. Life Extension and Modernization; and
4. New Technology.

Run to Failure and Subsequent Decommissioning (RTFD)

42 One of the options evaluated by NS Power regarding the future of the Generating Station was identified as "Run to Failure and Subsequent Decommissioning". The RTFD alternative was defined as allowing the Generating Station to run until failure occurs, which would be followed by retiring and decommissioning the assets once the station had ceased generating.

43 In its application, NS Power defined failure as:

...failure of the Station Is defined as an unplanned shut down resulting from a failure of a crucial Station component that would require capital investment (in excess of the cumulative annual sustaining capital value over a three year period) in order for the Station to resume generation.

[Exhibit N-1, Figure 6, p. 26]

44 NS Power's Decision Analysis modelled this RTFD alternative assuming that failure might occur under three possible timing scenarios. Those timeframes were one year, three years, and six years, which corresponded to P10, P50, and P90 values, respectively. Based on that analysis, the RTFD alternative was determined to be the lowest cost option for customers when compared to the other three alternatives, which were the immediate retirement and decommissioning, a Life Extension and Modernization project, and the installation of new technology.

45 Prior to NS Power completing its review of the modelling and making a final determination, the exciter component of the station generator failed on January 15, 2019. Consequently, NS Power's analysis was amended to assess whether the estimated capital investment of about \$920,000 required to replace the exciter, coupled with additional forecast capital investments to rehabilitate mechanical auxiliary components and the turbine, was greater than the forecasted sustaining capital spending for the RTFD alternative (about \$260,000 annually over three years). NS Power stated that without the exciter, the station can no longer generate. Although the failure occurred sooner than had been expected, NS Power determined that the cost to repair the exciter exceeded the forecasted amount of sustaining capital and confirmed that the Generating Station had run to failure. Given those circumstances, decommissioning was considered to be the next step in the RTFD alternative.

46 During this proceeding, NS Power was questioned about the exciter failure mode and preventative maintenance. In response to NSUARB IR-2(a) and (b), NS Power stated:

(a) Yes. NS Power conducted an analysis to determine the cause of the exciter failure, though not formal. This analysis concluded that the failure was caused by a failed control card for the exciter which allowed current to pass through the field discharge resistor for longer than is intended by design causing excessive heating and damaging key components beyond repair.

(b) NS Power completed preventative maintenance on the exciter which included operators rounds, inspections, maintenance of the fans and louvres etc. These activities would not have foreshadowed this event as control system card failures are difficult to predict. Assessing condition of control cards is challenging in the industry as there are limited preventative maintenance activities that can accurately assess failure modes. These devices do not normally exhibit physical changes prior to failure. Due to this concern, NS Power had planned to complete a replacement of the exciter in 2018 prior to this failure as outlined in ACE 2018 NSUARB IR-55.

[Exhibit N-6, p. 3]

47 NS Power was also asked how much longer the station could run until failure if the exciter was replaced. In response to NSUARB IR-15(c), NS Power stated:

(c) The exciter was not the only component of the system that required overhaul/replacement to allow for the reliable operation of the tidal plant. Many auxiliary components are original to the unit and unless the other components referenced in the LEM scope of work were also replaced, a failure would be expected in the near future. As such, NS Power is unable to predict how much longer the station would run until it failed again if the exciter was replaced.

[Exhibit N-6, p. 24]

48 Regarding NS Power's Decision Analysis of the RTFD alternative, NS Power was asked about its justification for using the three-year period with respect to annual forecast sustaining capital. Its response to NSUARB IR-15(d) was:

(d) The DA identified a 3-year period as the P50 value for the generation life span for the RTFD scenario. Since the tidal plant failed less than one year from the start of the DA timeline, NS Power reasoned that the exciter failure would be considered a "failure event" for this scenario if the cost exceeded the sum of the sustaining capital value for the duration of the original P50 assumption of 3 years.

[Exhibit N-6, p. 24]

49 During the hearing, further clarity was sought regarding the RTFD alternative and how the exciter failure event impacted the range of alternatives considered in the Decision Analysis. In cross-examination by Board Counsel, the following exchange occurred:

Q. As I understand it, the run to failure and decommissioning is lower than the decommissioning cost by [redacted] because the first of those options had in the model a three-year period in which it would run and produce energy?

A. (Peachey) Yes, that is correct. A good way to look at the scenarios, decommissioning versus RTFD, is that RTFD is essentially decommissioning that is experiencing the benefit of having continued operation until a failure event occurs. Which is why we implemented the sustaining capital threshold as part of that scenario, in order to understand when spending has occurred above which it's in the best interest of customers to proceed with decommissioning.

Q. All right. So, what we're really looking at here, because of the premature failure in terms of what was in the model, isn't what we're looking at the decommissioning option, as opposed to the run to failure and decommissioning?

A. (Peachey) That is correct, yes. Since a run to failure event has occurred, we're essentially moving towards the decommissioning scenario, yes.

[Transcript, pp. 101-102]

50 These issues were further canvassed by the Board:

Q. Okay. Thank you. I have some questions on the exciter failure and the decision to identify the plant as being [in failure] mode now. But my questions may be moot given what was referenced earlier during Mr. Outhouse's questioning. So, I just want to confirm at this point, it is in fact the [run to] failure decommission options presented to the [Decision] Analysis, is that really off the table at this point? Are we really comparing LEM and new technology to the decommissioning option?

A. (Peachey) Yes. We are comparing yes decommissioning to the other two rebuild scenarios. That's correct.

Q. So, I guess the cost associated with the replacing the exciter and those identified nine hundred and twenty-thousand and Midgard perhaps suggested that was high. And then there's the same threshold cost of two hundred and sixty thousand that Nova Scotia Power developed based on historical costs. Are those at this point really irrelevant to the decision sort of moving forward and you compare - we're going to compare LEM and new technology to decommissioned. RTFD is off the table?

A. (Peachey) They're relevant in that we had to determine that a run to failure event had occurred before we could determine that decommissioning was the next best option. So, decommissioning is essentially - or sorry, RTFD is essentially the decommissioning scenario with the added benefit of having continued generation until a failure event had occurred.

But in order for us to understand if a failure event had occurred, we had to put in place a reasonable proxy that would act as threshold value by which any expense or capital cost above that would indicate that the best option would be to move towards decommissioning. And just to revisit that, the proxy that we did use was representative of a sustaining capital cost.

So, it looked at our historic cost and our historic overhaul frequency model that over the 40-year life of the model and took the annual average of that total amount. And so, that's representative of the value to keep the plant operating. Anything above that is essentially characterized by the LEM scenario. What would be required as part of that.

So, at the time when the failure event occurred the plant was operating. So, we did have to - and understanding that the RTFD scenario was showing us the best interests for customers as part of the decision analysis. That information around the replacement cost of the exciter became very important for us to understand whether or not a failure event had occurred, and that decommissioning was the next best option.

[Transcript, pp. 143-145]

Q. Okay. Thank you. But again, moving forward the options that really should be compared are LEM, new technology and decommissioning?

A. (Peachey) That is correct, now that we understand that a run failure event has occurred decommissioning is the next task forward, and those are the options that we should be comparing, yes. Thank you.

[Transcript, p. 147-148]

51 This exchange during the hearing confirmed that the RTFD alternative is moot, given NS Power's determination that a run to failure had occurred, thereby shifting the Decision Analysis to focusing on the decommissioning alternative as the proposed course of action in comparison to other options.

Decommissioning

52 The decommissioning scope modelled in the Decision Analysis assumed full decommissioning of the existing Annapolis Tidal Generating Station. No costs were included for decommissioning of the existing sluice gates, causeway, and fish passages because, pursuant to the Provincial Agreement, those assets would remain intact and operation and maintenance returned to the Province upon abandonment by NS Power. The scope for decommissioning the station includes the following items:

- Installing stop logs (and bulkheads, if required);
- Dewatering the unit;
- Removing the equipment from the powerhouse;
- Filling the powerhouse with rockfill and removing the control room building;
- Removing assets within the control room building;
- Installing telecom equipment to maintain communications with other systems routed through the Annapolis communication point; and
- Removing the substation and transmission line to Hog Island.

This decommissioning scope involves returning the area to its original function before the station was commissioned in 1984, with no water flow through the causeway at the location of the Station.

Life Extension and Modernization (LEM)

53 The LEM alternative includes a complete overhaul to all components of the powerhouse with the intent of extending the operating life of the station by 40 years. The LEM scope includes:

- Turbine: refurbishment of the sealing system and the bearings as well as a redesign of the turbine blades to reduce the risk of blade cracking;
- Generator: refurbishment of the rotor and stator;
- Electrical auxiliary components: replacement of electrical components, which are now obsolete;
- Mechanical auxiliary components: combination of refurbishment and replacement of mechanical auxiliary components that have reached their end of expected useful life; and
- Sluice gates: eventual upgrades to the mechanical components of the gates.

The LEM alternative also includes the requirement for a *Fisheries Act* Authorization from Fisheries and Oceans Canada (DFO) which would result in additional operating requirements to support fish migration activities. The Decision Analysis model assumes these requirements would involve a range of shut down periods to accommodate migration patterns of fish species.

New Technology

54 The new technology alternative involves removing the existing turbine and generator and replacing it with a bulb turbine. NS Power considered the bulb turbine was the only technically feasible alternative for new technology because it met the following station requirements set by NS Power in the Decision Analysis:

- The turbine/generator must be horizontal to accommodate barrage type tidal operation;
- The turbine/generator is required to meet the current energy rating of the existing turbine/generator model (20MW); and
- The turbine/generator RPM must match that of the existing turbine/generator, which operates at a lower RPM to minimize impacts to fish while in operation.

The scope associated with the installation of a bulb turbine also includes the replacement of mechanical and electrical auxiliary components for compatibility purposes, and concrete work to allow the station to meet the size and support requirements of the new turbine.

3.1.2.3 NS Power Decision Analysis Results

55 NS Power's Decision Analysis calculated that the RTFD project alternative has the lowest median P50 NPVRR value. Decommissioning had the next lowest NPVRR P50 value, followed by the LEM and New Technology option, respectively. The calculated NPVRR of the New Technology option was significantly higher than the other project alternatives. Consequently, NS Power eliminated the New Technology option as a potential project alternative and did not complete any further preliminary engineering for that option. Further, the Monte Carlo simulations completed by the Company produced probability curves that indicate the RTFD and Decommissioning alternatives had a lower potential range of possible NPVRR values than the LEM and New Technology options. NS Power has, therefore, concluded that the RTFD project alternative is the lowest cost option for customers and poses the least risk when the potential range of NPVRR values are considered.

56 The tornado diagrams produced by NS Power's Decision Analysis indicate that construction capital costs are the largest source of cost risk in each project alternative. This means that according to the Company's Decision Analysis, a change in the construction capital key variable inputs will have the most significant impact on the ultimate revenue requirement for each alternative. The Decision Analysis also shows that costs associated with fish shut down periods are the next largest source of

costs in the LEM option. NS Power noted that the fish shut down periods would reduce generation and have a significant impact on the replacement energy cost and ultimately on revenue requirement.

57 NS Power retained Robert Griesbach, Director, Energy Consulting at Hatch Ltd., as an independent expert to review the current application. Based on his experience and expertise, Mr. Griesbach expressed the following opinion:

- NS Power's Decision Analysis provided a reasonable approach in assessing the options for the future of the station;
- The internal and external inputs used in the Decision Analysis were appropriate; and
- The conclusion reached by NS Power to retire the Generating Station is reasonable.

3.1.2.4 Review of Decision Analysis by Board Counsel Consultants

58 Board counsel engaged two expert consultants to review and provide opinion evidence related to NS Power's application. The consultants were Midgard Consulting and Grant Thornton. Midgard's specific focus was a technical analysis of NS Power's assertion that the station is "not used and not useful", the project alternatives analyzed by NS Power after having arrived at the preceding conclusion, and the resulting conclusion that decommissioning the station is the preferred course of action going forward. Grant Thornton was engaged to review the application as it relates to the treatment of the station retirement under NS Power Accounting Policy 6350. Grant Thornton also contracted Matthew Schoenhardt of MS Consulting to review and provide opinion on the Monte Carlo simulation completed by NS Power as part of its Decision Analysis.

3.1.2.4.1 Review by Midgard

59 With respect to the LEM project alternative presented by NS Power, Midgard found that NS Power acted prudently in its efforts to characterize this option. Midgard noted that NS Power's definition of the alternative as a 40-year life extension appears reasonable. Midgard also indicated that NS Power's estimated cost for the LEM alternative are significant but not unexpected, given the unique challenges posed by the station's design and environment. Nonetheless, given the difference between NS Power's calculated NPVRR of the LEM option versus the RTFD option, Midgard stated:

In light of the significant risk of increase to the RTFD cost estimate, Midgard recommends that NSPI be directed to "keep alive" the LEM alternative to ensure that it remains a viable course of action until decommissioning activities, risks, and costs are better characterized.

[Exhibit N-8, p. 22]

60 With regards to the New Technology project alternative analyzed by NS Power, Midgard concluded that NS Power acted reasonably in focusing its effort on Kaplan bulb turbines when considering a turbine-generator replacement. Midgard did note, however, that NS Power only sought information from one bulb turbine manufacturer, rather than soliciting information from multiple firms. Midgard indicated that consideration of offerings from multiple manufacturers would have constituted a more appropriate and thorough investigation of the replacement avenues available to NS Power.

61 Midgard also found it concerning that NS Power's level of study of the New Technology alternative appears to have been cursory. Midgard noted that NS Power's supporting documentation for the New Technology option consists solely of a one-page, high-level estimate provided by the manufacturer, whereas the RTFD, decommissioning and LEM alternatives are supported by multiple appendices comprising larger, more comprehensive reports. Further, while Midgard acknowledged the need for the use of fish-friendly turbine technology, Midgard found that NS Power's insistence that the only means that this can be achieved is to employ a turbine whose RPM exactly matches the existing turbine (which, it should be noted, the DFO currently believes is harmful to fish) is indicative of "inflexible" and "uncreative thinking" from NS Power. Midgard also suggested that NS Power could have considered a broader range of possibilities for its New Technology alternative. Such consideration may have led to the New Technology option receiving further attention and more detailed analysis by NS Power. Overall, Midgard expressed its opinion that NS Power's process of generating and evaluating available New Technology options available to it was inflexible

and cursory. Therefore, Midgard recommended that the Board direct NS Power to more fully and flexibly evaluate station replacement options before committing itself to a decommissioning alternative.

62 With respect to the decommissioning project alternative, Midgard found that NS Power appears to have taken appropriate first steps towards characterizing that option. However, Midgard expressed concerns with areas of the decommissioning alternative: the risks associated with a decommissioning project, and NS Power's cost estimate included in the Decision Analysis.

63 Midgard noted that all decommissioning scenario cost estimates include significant lists of exclusions from the expected project scope. As such, Midgard stated:

In this context, NSPI has still justified its claim that "the RTFD and Decommissioning alternatives carry lower overall risk to customers" [Application, pg. 31 of 41] compared to the other alternatives by stating that "the RTFD and Decommissioning scopes are relatively simple in comparison to the scope for both the LEM and New Technology scenarios" [Midgard-RIR 14a]. This statement does not appear to appreciate or incorporate the significant list of risks and unknowns that still surround the RTFD option.

[Exhibit N-8, p. 35]

64 Midgard also stated that NS Power appears to have an inconsistent approach to accounting for the risk posed by DFO requirements between its alternatives. Specifically, Midgard believes that NS Power has assumed onerous and conservative requirements for the LEM and New Technology alternatives, while it has assumed relatively optimistic related cost requirements for the RTFD and decommissioning alternatives. Midgard noted that this approach appears imbalanced in favour of the RTFD and decommissioning alternatives.

65 With regards to NS Power's decommissioning cost estimates, Midgard noted that NS Power stated that it had used a conservative decommissioning cost estimate in its Decision Analysis. However, Midgard also noted that of the five decommissioning scenario cost estimates it received, NS Power chose to use the least expensive as the basis of its estimate. Midgard also pointed out that NS Power's decommissioning cost estimate in the current application is significantly less than the station decommissioning cost estimate the Company presented in its 2018 Hydro Asset Study. In NS Power's response to IRs about this issue, Midgard found that NS Power had not adequately explained this difference.

66 Overall, Midgard believes that NS Power has underestimated the costs and risks associated with the RTFD and decommissioning options. Midgard stated that should any of these risks materialize and result in significant incremental costs, the results of NS Power's Decision Analysis may be materially affected. Midgard also stated that the failure of NS Power's Monte Carlo analysis to incorporate the significant unknowns associated with decommissioning serves to undermine its usefulness in comparing the alternatives provided in the application.

3.1.2.4.2 Review by MS Consulting

67 MS Consulting stated that the primary purpose of Monte Carlo Economic Analysis (MCEA) is:

... The primary purpose of using MCEA is to compare project alternatives and understand under which scenarios does the ordinal ranking of each alternative change. Once the variables are identified that change the ordinal ranking, investigation of the most significant variables should have priority funding in the next stage so that their ranges can be further refined and/or reduced (i.e., de-risked by progressive project development). Investigating these key variables allows for reduced project development costs.

One method of understanding critical conditions are "tornado diagrams". A tornado diagram runs the economic analysis moving each variable through its maximum and minimum range to determine the impact value on the outcome. This allows a user to see which variables are the most important to the desired outcome.

[Exhibit N-9, Appendix A, p. 6]

68 MS Consulting does not believe that NS Power effectively completed a key variable investigation as part of the Annapolis Tidal Generating Station Decision Analysis. In particular, MS Consulting stated that there appear to be a number of inconsistencies in variable selection among NS Power's project alternatives. In addition, MS Consulting believes there are a number of clerical discrepancies in the Analysis, as well as several significant omissions. These omissions involve the impact of the station write off and terminal values of the station's assets. MS Consulting also noted that NS Power's Decision Analysis model is a "nominal" model, where all costs and revenues must be escalated. However, MS Consulting found that while project expenses are escalated in NS Power's model, operating expenses and the benefit of avoided expenses (i.e., revenue) are not. MS Consulting believes this is an error that penalizes the LEM and New Technology project alternatives.

69 MS Consulting also noted that NS Power's application presented cost estimates that are to an AACE Class V level. Generally, this means that the estimates are prepared based on desktop studies where 0% to 2% of the related engineering is complete. However, MS Consulting indicated that NS Power has completed field inspections and limited quantity take-off measurements for the LEM and Decommissioning options. As a result, MS Consulting believes that many of the engineering deliverables for those options are at an AACE Class IV level or better, putting the New Technology alternative at a systemic disadvantage in the Decision Analysis. Further, MS Consulting stated that the capital cost ranges provided by NS Power are undefended, inconsistent, larger than typically supported by AACE principles, and have unreasonable contingency values.

70 Given the above findings, MS Consulting prepared its own modified Decision Analysis using what it believes are industry best practices and adjusted ranges for the key variables in the Monte Carlo Economic Analysis. The modified model also accounted for the clerical discrepancies and omissions that MS Consulting believes exist in the NS Power model, and adjusted the model from a "nominal" to "real" economic analysis. After preparing its modified model and completing the related analysis, MS Consulting found the preferred solution to be the LEM alternative. In the modified model results, MS Consulting said the LEM solution has the lowest P5, expected, and P95 costs. However, the cost ranges of the LEM project vary more widely in the modified model than the Decommissioning option, and therefore carry greater risk for ratepayers. MS Consulting stated that if certainty around cost ranges is more desirable, the Decommissioning option may still be the preferred option due to lower variability in costs.

71 Overall, MS Consulting concluded that the Decision Analysis completed by NS Power did not develop all identified project alternatives to the same level of scrutiny and support, which does not align with typical project development principles. In addition, MS Consulting found that the Decision Analysis contained inconsistencies in key variable selection, resulting in the RTFD option not necessarily being the lowest cost option and in the best interest of customers. These inconsistencies included disproportionate engineering effort on the presented alternatives, lack of investigation into key model variables, and different application of engineering principles for developing cost and contingency ranges. MS Consulting recommended that further refinement and engineering work be undertaken to validate significant assumptions to determine if the conclusion reached by NS Power's Decision Analysis is appropriate. MS Consulting recommended that this work include:

1. Authorize further engineering work to:
 - a. properly Investigate the risk of sediment changes;
 - b. confirm the viability of rock filling during decommissioning;
 - c. properly understand fish protection for both the capital and competing operational solutions; and
 - d. properly understand the impact of proposed carbon taxes on NPSI's forecasted Levelized Cost of Power and how this asset can help support the move towards a carbon-neutral power grid.
2. Estimate current portion of capital costs that derive from USD priced goods and services.
3. Confirm parameters for the terminal value analysis.
4. Confirm economic impact on rate payers of early write off of the asset.

5. Complete missing AACE Class V deliverables including: risk register, schedule, project execution plan, stakeholder registry, regulatory and environmental road maps.
6. Complete a proper risk and contingency analysis on all viable options.

[Exhibit N-9, Appendix A, p. 21]

72 MS Consulting also presented several process related recommendations for the Board aimed at improving the quality of future NS Power applications for Board approval. These include:

1. Develop all project alternatives with equal support during a Class V study;
2. Include Monte Carlo Economic Analysis in the project development process at the Class V stage. Take at least two options into a "modified" Class IV study. Only develop those variables identified as key in the modified Class IV study to reduce project development costs;
3. Define expectations for submissions along AACE guidelines including a risk register, contingency analysis and schedule;
4. Define expectations for submissions for Monte Carlo Economic Analysis including formulas for all variables to provide transparency and ease of recalculation;
5. Retain or develop sufficient support resources to critique NSPI's submission for economic analysis; and
6. Require a defensible Risk and Contingency analysis completed by a qualified third party for capital cost ranges.

3.1.3 DFO issue

73 NS Power stated that it was already reviewing the status of the Generating Station when there was a failure of the exciter on January 15, 2019. Moreover, NS Power noted that DFO issued a notice on April 1, 2019, stating that continued operation of the Generating Station would require authorization under the federal *Fisheries Act*. NS Power stated that it "factored these two events into the ongoing review and confirmed that the failure of the exciter constituted a 'run-to-failure' event". After incorporating these issues into its Decision Analysis, the Company ultimately decided that the Generating Station should be retired.

74 In the lead up to its review of the Generating Station, there were already indications that NS Power may need to address DFO regulatory requirements with respect to its operation of the Station. In 2018, DFO advised NS Power:

...the Department of Fisheries and Oceans (DFO) initiated a Canadian Science Advisory Secretariat (CSAS) study in July 2018 and it was understood by NS Power at the time that the conclusions of the study could result in the requirement for a *Fisheries Act* Authorization in order to allow the Station to continue operation. NS Power determined, as a result, that a range of costs for potential permitting requirements and operating impacts related to fish protection would also need to be considered in the analysis.

[Exhibit N-1, p. 14]

75 On April 1, 2019, DFO issued a letter to NS Power, stating, in part, as follows:

The operation of the Annapolis [Generating Station] has been reviewed to determine whether it is likely to result in serious harm to fish which is prohibited under [subsection 35\(1\) of the *Fisheries Act*](#) unless authorized. The operation has also been reviewed to determine whether it is likely to affect listed aquatic species at risk, any part of their critical habitat or the residences of their individuals in a manner which is prohibited under [sections 32, 33 and subsection 58\(1\) of the *Species at Risk Act*](#), unless authorized.

Based on the review of the available information, the Program has concluded that the following work, undertaking or activity is likely to result in serious harm to fish:

- The death of fish associated with the operation of the Annapolis [Generating Station] located in the Annapolis River estuary, Annapolis County, Nova Scotia.

The operation of the Annapolis [Generating Station] requires an authorization, pursuant to [paragraph 35\(2\) \(b\) of the Fisheries Act](#). As your proposal will not result in prohibited effects on listed aquatic species at risk, no permit will be required under the *Species at Risk Act* at this time.

Please submit the following information and documentation to apply for a [Fisheries Act](#) authorization:

- a completed Application for Authorization under [Paragraph 35\(2\) \(b\) of the Fisheries Act](#) Form ...
- the required information and documentation set out in the *Applications for Authorization under Paragraph 35(2) (b) of the Fisheries Act Regulations* ...
- an irrevocable letter of credit (for requirements see: ... to cover the cost of implementing the offsetting plan, if you are required to provide one as set out in subsection 3(2) of the Regulations.

Should you be able to modify your operation to reduce the potential impacts to a level where serious harm to fish can be avoided and a [Fisheries Act](#) authorization would no longer be required. If you choose to modify your operation to avoid the need for authorization, please advise and submit in writing to DFO.

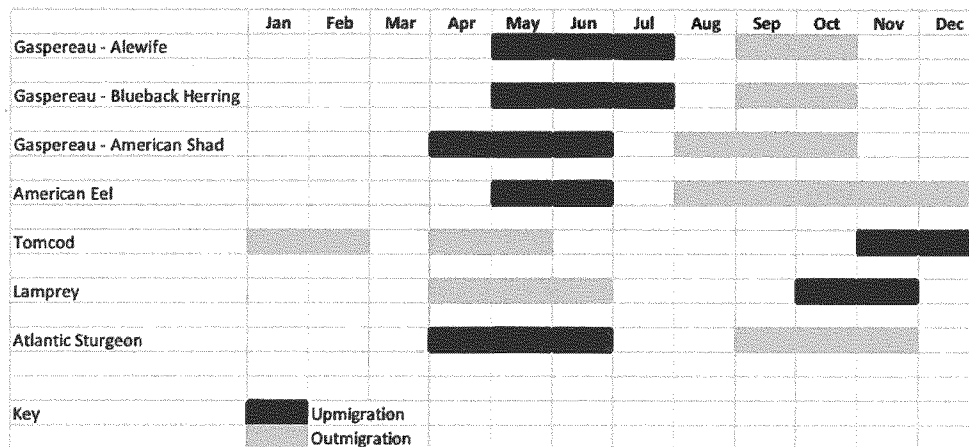
[Exhibit N-1, pp. 253-254]

76 It appears NS Power did not take any action whatsoever in relation to DFO's notice. It did not complete an application or develop any alternative compliance plan; it did not conduct any studies with respect to the operation of the Generating Station and its impact on fish mortality; it did not conduct any analysis into modifying its operation to reduce or mitigate the potential impacts on fish so as to avoid the requirement for the DFO authorization; it did no analysis or consider other studies, short of operating the Generating Station, to determine the species of fish present in that location and their migratory patterns; and, remarkably, it did not engage with DFO personnel whatsoever on the issues related to the Annapolis site.

77 Instead, in its Decision Analysis to determine the lowest cost option for the Generating Station, it used a probabilistic analysis to consider multiple variables and their probabilities to determine a broad range of outcomes and assess the range of risk associated with each variable, including for the DFO compliance issue. Such variables included, among others, the need for various studies on the species of fish impacted, their migratory patterns, and the potential impact of these factors on the periods the Generating Station may be allowed to operate throughout the year.

78 The impact of shutting down the Generating Station due to fish migratory patterns is potentially significant. In its Reply Evidence, NS Power provided a chart depicting the overlap of migration periods of various fish species present at the Annapolis site:

Figure 1: Timing of Presence of Fish Species in the vicinity of the Annapolis Tidal Generating Station ⁴⁵



Graphic 3

[Exhibit N-11, p. 29]

79 Indeed, one of the most important variables influencing the NPVRR outcome of the LEM scenario in the Decision Analysis was the fish shutdown period used in the modeling. At the hearing, Erin Peachey, NS Power's Senior Project Manager, Capital Projects, confirmed that the construction capital and the fish shutdown periods were the two most significant factors influencing the outcome of the LEM analysis.

80 Nevertheless, while NS Power indicated at various times that it engaged with DFO "to understand DFO's expectations concerning an Authorization for the Station", one is left wondering the extent of that engagement following the Company's testimony at the hearing. Upon questioning by the Board, Terry Toner, Senior Director of Strategic Environmental Projects, confirmed that DFO was not contacted about the authorization for the Annapolis Generating Station:

Q. Okay. So, on receipt of the application, am I correct that you have not met formally with DFO on the issue of the authorization for the Annapolis Tidal Plant. You have not met with them formally, on that issue.

A. (Toner) That is correct.

Q. So, there is no minute of any meeting that you —

A. (Toner) There's no minute, because there is no meeting.

Q. Okay. So, you haven't - you haven't spoken to them about it?

A. (Toner) No, I've spoken to them about many other things, but not about that.

Q. Okay. So, you actually still haven't spoken to them about it.

A. (Toner) That is correct.

[Transcript, p. 205]

81 The Board considers that the decommissioning option presented by NS Power also involves an environmental component, including compliance with DFO requirements. As noted in the application, the scope of the decommissioning involves returning the area to its original function before the Station was commissioned in 1984, with no water flow through the causeway at the location of the Station. No costs were included for decommissioning of the sluice gates, causeway, and fish passages because, pursuant to the Provincial Agreement, those assets would remain intact and operation and maintenance returned to the Province upon abandonment by NS Power. However, the Board infers that some costs would be involved for dealing with DFO, including engagement with Indigenous communities, about restoring the area to its original condition prior to the construction

of the Generating Station. Notwithstanding the above, NS Power appears to have given little attention to this point in the decommissioning option of its Decision Analysis.

82 In their Closing Submissions, the Consumer Advocate and counsel for the Industrial Group urged the Board to require NS Power to take further steps to better determine the costs associated with the DFO authorization. The Consumer Advocate submitted:

The Consumer Advocate is concerned by NS Power's lack of diligence to take even the most basic steps to speak with DFO regarding the authorization. Roughly 22 months elapsed between receipt of the April 2019 DFO letter and NS Power's filing of this application. It is the Consumer Advocate's view that NS Power's failure to take any steps to meet with DFO regarding the authorization has left a material gap in the evidence supporting this Application. That highly relevant (and currently absent) evidence would be required to make a determination as to whether the Annapolis Station is likely to provide a benefit to customers in the foreseeable future.

[Exhibit N-28, pp. 6-7]

Whether a two-year lead time (to bring the Application) is necessary or justified is not the primary question before the Board. However, having taken two years to prepare the Application, it is reasonable for the Board to expect very narrow information gaps. The estimated decommissioning costs and the steps required to comply with DFO's expectations are highly material factors that require more evidence than has been presented by NS Power.

[Exhibit N-28, p. 9]

83 In her Closing Submission, counsel for the Industrial Group concluded:

At this stage, the Industrial Group shares the concerns expressed by the Board's consultants that there is an evidentiary lacuna; NSPI's decision to retire the Station as not used and useful has been made without fully assessing the alternatives and their costs. While we appreciate that NSPI has a history of dealings with DFO, it is not enough to say, effectively, "trust us; it's not worth it," rather than present a qualitative and quantitative evaluation of the options to avoid, mitigate or offset impacts to fish and fish habitat so as to secure a DFO Authorization.

The Industrial Group recommends that the Application be denied at this time, and that NSPI be directed to study the variables recommended by Midgard and Grant Thornton/MS. It would then remain open to NSPI to reapply, pending further evaluation of alternatives, if it still believed the Station to no longer be used and useful.

[Exhibit N-30, p. 4]

84 In his testimony, Mr. Schoenhardt stated that he would have expected NS Power to incur some costs to help more precisely define the scope of the risks that may be required to address the DFO issues:

I've heard their discussion today about fish protection. I'm still of the opinion that monies spent during the project development stage at a Class 5 or a Class 4, where we are right now, is money well spent to avoid poor decisions. The decision in front of us today is some 30 million dollars, and spending about 10, 50, a 100,000 dollars to understand the consequences of the DFO's request is money well spent for ratepayers.

[Transcript, p. 232]

85 It would have been helpful to the Board and the Intervenor customer groups if NS Power had provided greater certainty about the potential costs of DFO compliance and used these results in its probabilistic modeling and Decision Analysis, including for the decommissioning option. In the Board's view, this might reasonably have been accomplished if NS Power had engaged with DFO personnel to identify the priority concerns for DFO with respect to potential shutdown of the Generating Station during fish migration periods of various fish species (as identified in DFO's CSAS Report), and their expectations for alternative studies or data that could be submitted in potential compliance plans.

3.1.4 Findings

86 The Board agrees with NS Power, supported by Mr. Reed's expert evidence, that where an asset is no longer used and useful, it should be removed from rate base as soon as practical to alleviate potential concerns about intergenerational inequities. That public utility accounting principle was not challenged by the parties or other expert witnesses. That said, for this principle to apply, NS Power must show in this case that the Generating Station is no longer useful, there being no dispute it is not currently being used. This means, in the context of this matter, that NS Power must establish the decommissioning option is the least cost option for ratepayers.

87 The Board also agrees with NS Power's position, and Mr. Reed's opinion, that if decommissioning is the least cost option, Accounting Policy 6350 is applicable. As discussed during the hearing, as late as 2018, NS Power was making major capital investments with a view to keeping the Generating Station in service for a much longer period than the decommissioning option advanced in this proceeding. The current depreciation rates do not align with the short-term decommissioning of the Generating Station. This proposed decommissioning, at a point much earlier than the expected useful life of a major asset, is the type of extraordinary and unexpected event which Accounting Policy 6350 is designed to address.

88 Accounting Policy 6350 allows NS Power, with Board approval, to extend the write-off of an asset's undepreciated cost beyond the fiscal period when the determination is made that the asset is no longer used and useful. Otherwise, the entire undepreciated amount would have to be taken in one year. This part of the policy is applied when the amount of the write-off is significant. The policy allows for amortization on a straight-line basis over five years or such other time as is reasonable. The purpose of this accounting treatment is to avoid unreasonable impacts on rates occasioned by an extraordinary event.

89 In this case, given the significant amount of the undepreciated cost remaining in rate base, NS Power proposed a 10-year amortization period. No party challenged the proposed length of the amortization period. It was supported by both Mr. Reed and Grant Thornton. The Board agrees that, if decommissioning is established as the least cost option, a 10-year amortization period appears to create a reasonable balance between negative impacts to current ratepayers and intergenerational equity considerations.

90 The substantive issue in dispute in this case is whether NS Power has shown that decommissioning of the Generating Station is the least cost option for ratepayers. The Board recognizes that in preparing its case NS Power took several steps in this application which are appropriate. The use of external consultants to supplement in-house expertise follows Board guidance. The Board acknowledges these consultants support the approach set out in the application. As well, the use of probabilistic modelling was appropriate in this case, given the number of uncertainties which could impact cost estimates. That said, the Board has determined it does not have enough information to find that decommissioning is, in fact, the least cost option. The Board therefore finds NS Power has not met the burden of proof to obtain the accounting treatment relief sought in this matter.

91 The Board is in general agreement with the Intervenor, based on the evidence filed by Midgard and MS Consulting, that there are too many cost variables which have not been sufficiently addressed, or have been addressed in an inconsistent manner across the various options. The Board acknowledges there is contention between NS Power and MS Consulting as to the actual impact of certain inputs on the modelling results, including certain inputs used by MS Consulting. The Board also recognizes that Midgard's ultimate recommendation was that the LEM option be kept alive. This could theoretically be done by approving the current application and revisiting the issue, if necessary, when a decommissioning application is filed.

92 That said, given the magnitude and scope of the unaddressed issues, the Board concludes approval of the accounting treatment at this point is premature. The evidence indicates there are varying levels of class estimates for the different options. In particular, the spread in NPVRR values between the LEM option and the decommissioning option are not that wide. In certain scenarios, the LEM option might actually be more cost-effective, although with greater risk.

93 It is therefore important that, as far as it is possible, there be an apples-to-apples comparison between the LEM option and the decommissioning option. The Board is concerned that if the accounting treatment is approved now, there may be a tendency

to focus on having the decommissioning option approved. This may create less incentive to continue robustly assessing the LEM option.

94 The Board further notes the second largest cost input in the probabilistic modelling relates to the DFO issue. In the Board's view, the cursory nature of NS Power's review of this major cost is problematic. As well, no negotiations have taken place with the Province with respect to ultimate decommissioning. No engagement with Mi'kmaq First Nations has taken place. Assumptions have been made with respect to how engagement costs will vary between scenarios. The Board appreciates that the correspondence from Ms. Maloney, Executive Director of the Kwilmu'kw Maw-klusuaqn Negotiation Office, takes the position that the Generating Station "has operated for far too long". That said, alternative scenarios, impacts and costs have not been explored in any detail. While Ms. Maloney has outlined current concerns about the potential scope of engagement and consultation, the detailed views of the Mi'kmaq First Nations on the impacts of decommissioning, or any other option, and the potential cost impacts, are currently unknown.

95 The Board understands there will be additional expenses in arriving at cost estimates that are more refined and comparable. Often it receives capital cost approval applications where the costs estimates are not of the same class for all options considered. There is an element of professional judgment involved as to the costs and benefits of further expenditures to refine cost estimates. That said, Midgard and MS Consulting both said further investigation and assessment was warranted. The representatives of major classes of ratepayers, who ultimately bear the costs through rates, supported this proposition. Given that issues with significant cost overruns have arisen on some other major hydro projects, the Board agrees that as much detail as possible at the front end of the process might alleviate difficulties down the road.

96 The Board further understands that probabilistic modelling can, to an extent, alleviate some concerns about different class level estimate inputs. Mr. Schoenhardt addressed this in response to a question from the Board:

A. But what you can do is, if you're assessing different projects, different levels of classifications and you're assessing a contingency method appropriately, rather than just applying the blanket 100 to 250 percent, you can account for that underlying different level of uncertainty. So, hopefully that answers your question.

Q. Okay.

A. So, can you compare a Class 5 with a Class 3, yes, but what you need is a sophisticated risk and contingency analysis to do so. You cannot use basic rules of thumb.

[Transcript, p. 271]

97 The Board finds that NS Power did not adequately undertake this level of contingency analysis when entering inputs into the probabilistic modelling.

98 Insofar as keeping the LEM option alive, as recommended by Midgard, the Board is of the view the best way to ensure that this occurs is if NS Power keeps all options open and continues refining costs associated with them until it is able to file its decommissioning option. This would seem to be the more standard and prudent way of proceeding. Delaying any eventual accounting treatment by another two years, if the application were ultimately approved, would not significantly impact intergenerational equity, when balanced with the goal of obtaining the best and most comparable data which can reasonably be provided.

99 While it will not direct NS Power to undertake any specific studies, it would seem to the Board that the following information would be of assistance in determining the least cost option in this matter:

1. A more fulsome assessment of LEM costs;
2. A more fulsome assessment of the new technology option, including:
 - a. A more thorough assessment of options and costs to change station capacity under the new technology option; and

- b. Solicitation of pricing from multiple manufacturers for the new technology option;
- 3. A more fulsome assessment of sedimentation issues and costs associated with the decommissioning option;
- 4. Completion of environmental studies needed to assess environmental risks and costs associated with each alternative;
- 5. A more fulsome assessment of station asset disposal options;
- 6. A detailed explanation of why capital cost estimates for the decommissioning option have decreased so dramatically from the estimates included in NS Power's 2018 Hydro Asset Study;
- 7. Engagement with DFO personnel on if NS Power can satisfactorily present alternative studies or data on fish migratory periods and fish mortality for the site, short of returning the Generating Station into operation, including potentially modifying its operation to reduce or mitigate the potential impacts on fish so as to avoid the requirement for a DFO Authorization;
- 8. Engagement with DFO personnel on whether it would consider any compliance plan with an accompanying request for authorization. If DFO will entertain such a request, NS Power could estimate the cost of preparing and implementing a compliance plan in its Decision Analysis;
- 9. Engagement with DFO personnel and the Province on any *Fisheries Act* or environmental compliance issues under the Decommissioning option with respect to restoring the area to its original condition (i.e., with no water flow through the causeway at the location of the Generating Station and any resulting decommissioning compliance costs related to the sluice gates, causeway, and fish passages). The results of these discussions could be incorporated into the Decommissioning option in the Decision Analysis; and
- 10. With respect to the above initiatives, engagement with Indigenous communities respecting the various options (including LEM, New Technology and Decommissioning), to better inform the potential costs to be incorporated into the Decision Analysis.

100 While the Board is of the view that the accounting treatment of the Generating Station is best addressed as part of a decommissioning application, it will not specifically direct NS Power how to proceed in this matter. If NS Power is of the view that it has sufficient evidence at any point to address the Board's concerns, it can reopen the application. As well, to keep abreast of the matter, the Board directs that NS Power provide a status update by January 31, 2023. In the interim, the Board will keep the application in abeyance.

3.2 Confidentiality of data relating to options

101 When NS Power filed this application, it requested confidentiality over certain information pursuant to [Rule 12 of the Board Regulatory Rules](#). Appendix G is an Excel file which contains the Company's data and modelling for its probabilistic analyses of the various options considered when NS Power was deciding the best course of action to take with the Generating Station. It is referred to in the evidence as the Decision Analyses. It was filed as an entirely confidential document because NS Power explained that it was unable to redact confidential information in electronic Excel files. NS Power went on to explain that information derived from confidentially filed data was also redacted from the body of the application. This included the NPVRR figures for each option considered by the Company. These are the values used to compare the relative cost of the various options to ratepayers.

102 NS Power said confidentiality was required to protect customers by mitigating the risk that competitors or vendors could access proprietary or commercially sensitive information. NS Power explained that the more knowledge potential suppliers have about NS Power's costs, the less competitive the bidding process becomes.

103 On February 25, 2021, the Board approved NS Power's confidentiality request "subject to the right of any party to object to such treatment in accordance with the *Board Regulatory Rules*" No party to this proceeding objected to the confidential treatment of the redacted materials.

104 During the hearing, certain redacted information, related to both total NPVRR values and percentage differences between these values, was referenced in both questions and answers. This is perhaps not surprising, since the type of information referenced in the hearing is usually not filed in confidence. There was also some uncertainty as to whether certain referenced information was in fact confidential. In any event, the Board indicated the transcript should be reviewed prior to it being posted on its website.

105 NS Power suggested the following transcript redactions, which the Board has summarized with the assistance of Ms. Rubin's submissions:

- *Page 95, Line 14* Estimated cost of decommissioning.
- *P95 L17-18 & P96 L11-12* Total estimated costs, including decommissioning.
- *P98 L6 & L20* Total (rough) estimated costs, including decommissioning.
- *P100 L18-19* Relative dollar cost difference of scenarios.
- *P103 L15-16* Dollar value for escalation adjustment.
- *P152 L19* Percentage value.
- *P153 L5 & L7* Studies cost.
- *P232 L6* Percentage value.
- *P246 L7 & L21-P247 L1* Percentage value.
- *P261 L1* Percentage value.
- *P282 L17* Relative cost of alternatives.

106 The suggested transcript redactions put a focus on the confidentiality issue. It caused the Board some concerns, both as to specific redactions, and as to potential issues of transparency if NPVRR comparisons could not be discussed in its decision. The Board wrote to the parties on September 24, 2021, stating in part:

The Board has concerns about the necessity of some of the redactions In the Transcript. As the parties will be aware, the Board strives for transparency in its reasons set out in its decisions. In this matter, an important issue canvassed in the evidence is the magnitude of the difference and the ranking among the options to decommissioning. In its decision, the Board may be required to comment on the relative difference among the various options in its consideration of NS Power's overall application.

The Board notes that Rule 12 of the *Board Regulatory Rules* addresses confidentiality. The burden of satisfying the Board that a document should be held in confidence is on the party claiming confidentiality.

In particular, the Board observes that the percentage differences among the various options have been redacted. Specifically, the Board questions why percentage values set out at pages 232, 246, 247 and 261, where the numbers to which these percentages apply are not revealed, should be considered confidential. This concern was raised by the Board during the hearing. Further, on page 152, NS Power redacted a percentage figure. However, on page 21 of 60 of its Reply Evidence, this number does not appear to be redacted.

107 In an October 7, 2021 letter, NS Power agreed the percentage values set out at pages 246, 247 and 261 of the transcript could be treated as non-confidential. NS Power also advised it was no longer seeking confidential treatment of the requested redaction at page 152 of the transcript. NS Power did not agree the percentage value at page 232 of the transcript should be disclosed, as the confidential figure to which it relates had been inadvertently disclosed.

108 The Company maintained the other redactions were appropriate, including the NPVRR outcomes associated with the Decision Analysis. On this latter point, the Company stated:

NS Power confirms that it continues to seek confidential treatment for the information which has been filed confidentially in this proceeding, including the NPV RR outcomes associated with the Decision Analysis. As noted in the NS Power Letter, this is because release of this information could prejudice NS Power's ability to procure services and equipment on the most competitive terms or otherwise undertake the necessary work at the lowest cost for customers. If potential vendors, or stakeholders, are aware of the difference between alternatives under consideration by NS Power, they could potentially seek to use this information in negotiating to adjust the terms offered to, or the scope proposed by, NS Power such that that the difference between such alternatives is reduced or exhausted.

109 The CA said the percentage value set out at page 232 of the transcript should be disclosed as the figure to which it relates had now been redacted from the transcript. NS Power's response to this is that it was publicly reported in the press. The CA further indicated NS Power should, in future, strive to make disclosure of relative percentage differences publicly available so the public can understand Board decisions.

110 Ms. Rubin, on behalf of the Industrial Group, submitted that NS Power had not provided any rationale for the suggested redactions which it still sought, beyond generic statements about the potential impact on competitive bidding. She went on to say:

The Industrial Group is concerned there continues to be a creeping tendency toward more and more confidentiality. As recently as the FAM Audit, NSPI was challenged on its extensive redactions for confidentiality, resulting in referral of this issue to the FAM Small Working Group.

It is acknowledged that knowledge of specific contract values or units as an input has the potential to influence competitive bids, but when the figure being redacted is the cumulative dollar value comprised of multiple inputs, or a relative percentage of two global values to compare alternatives, the ability for a competitor to extract meaningful information to the prejudice of NSPI's customers is not at all evident. It is not enough to make generalized assertions about confidentiality when the starting point is openness and only when it is demonstrably necessary should public access and transparency be curtailed.

In prior ACE submissions for the past few years, even when NSPI redacts information regarding the estimated costs of specific portions of a capital project, it has provided the total amount of the project, along with the % of contingency applied. There are countless examples in which NSPI has redacted the amounts for specific portions of each of the capital projects, but included subtotals, overall totals, and the contingency % applied for each project.

Reference is also made to *Nova Scotia Power Incorporated (Re)*, 2019 NSUARB 11, the application for approval of capital work for the Tusket Main Dam Refurbishment. The decision reads:

[138] The results of the new EAM attached as Appendix C to NS Power's Reply Evidence indicates the following:

Figure 5. Summary of Project Alternative

	Alternative	PV of Revenue Requirement	Rank
A	Refurbish Main Dam	17,042,259	1
B	System Partial Decommissioning	28,260,981	2
C	System Full Decommissioning	55,176,532	3

[Exhibit N-21, p. 40]

[139] While not entirely convinced that the cost differences would be as large as suggested by NS Power, given the magnitude of the potential decommissioning costs, and the potential they could be understated, from an economic analysis perspective, in the particular circumstances of this Application, NS Power has satisfied the Board that replacement of the Tusket Main Dam, as proposed, is justified.

In relation to Tusket, NSPI provided the specific amounts in comparing the options of refurbishment to decommissioning, in order for the Board to decide what was in the best interest of the customers. The Board had to consider the potential costs of each, and the difference between each, in determining whether the replacement of the Dam was justified.

[Exhibit N-30, pp. 5-6]

111 Ms. Rubin submitted the Tusket Main Dam Refurbishment matter was directly on point. If the NPVRR values could be disclosed in that matter, there was no basis for not providing similar information in this proceeding.

112 In its Reply Argument, rather than providing more detailed information to justify its position that the release of information related to NPVRR figures, or total cost amounts, could realistically lead to potential suppliers gaining a bidding advantage which could harm ratepayers, NS Power essentially reverted to a procedural argument. The Company said it made a confidentiality request pursuant to [Rule 12](#) which was granted. No objections were filed, and it has governed itself accordingly. NS Power submits it is now being asked to justify redactions outside the *Board Regulatory Rules* process.

113 The Board has concerns about the manner which NS Power appears to be approaching issues of confidentiality. Under [Rule 12](#), the default position is that documents are filed unredacted on the public record. [Rule 12\(4\)\(b\)\(i\)](#) requires "...details of the nature and extent of the specific harm that would result if the document were publicly disclosed...".

114 In the case of sensitive financial or commercial information, under [Rule 12\(10\)](#) NS Power must show that "...the desirability of avoiding disclosure ... outweighs the desirability of adhering to the principle that documents be available to the public". This means there must be a significant public interest component related to the nondisclosure of this type of information. Unlike private litigants in a court process, NS Power is subject to continuous oversight by the Board. There is a significant public interest in not having the regulatory process itself create undue costs to NS Power, and by extension the consumers of its regulated monopoly service. In other words, disclosure of financial or commercial information which undermines NS Power's ability to obtain goods and services at the lowest possible cost impacts NS Power's customers, which include most businesses and residents of the province. That said, there is still a balancing act to be performed between a demonstrable risk of harm and the transparency of a public process.

115 If disclosure of cumulative cost totals, subtotals and NPVRR values have not caused undue harm to competitive bidding in the past, and no evidence has been submitted to show harm based on this past practice, it begs the question as to why NS Power would submit it could reasonably do so in this application. One difference is the NPVRR figures are derived not only from cost inputs, but from the probabilistic modeling pursuant to the Decision Analysis. The model is explained to some degree in the application. The Board has some concern about the potential for reverse engineering to derive specific cost figures.

116 Based on this concern, as well as a concern about procedural fairness related to addressing confidentiality rulings outside the full [Rule 12](#) process, the Board has decided not to revisit its prior confidentiality ruling at this late stage. The Board is satisfied that the remaining redactions in the transcript are related to or derived from information which has been ruled to be confidential. It, therefore, accepts NS Power's remaining suggested redactions.

117 The Board would put NS Power on notice that it has serious concerns about what it perceives to be slippage in its approach to confidentiality. It will expect a full and robust explanation, backed by evidence, to support any future similar request for the confidential treatment of cumulative cost totals, subtotals, NPVRR values and comparisons, or similar data and information. While the Board is always mindful of regulatory burden, it is becoming apparent such an approach will be necessary and may well extend to many requests for confidentiality.

4.0 CONCLUSION

118 The Board has determined that it has insufficient evidence at this time to find that decommissioning of the Generating Station is the least cost option for ratepayers. It therefore is not able to find that the asset is not used and not useful in accordance with Accounting Policy 6350. Therefore, the Board will not approve the application at this time. The Board believes the best way of proceeding is to reconsider the application for accounting treatment approval along with a decommissioning application. That said, NS Power is at liberty to reopen the matter if it is in a position to address the Board's concerns.

Footnotes

- 1 NS Power Accounting Policy - Capitalization of Cost - 6000
- 2 NS Power Application for Annapolis Tidal Generation Station Retirement (M10013), February 22, 2021, page 37
- 3 M03665, NS Power 2010 Depreciation Study, October 29, 2010
- 4 NS Power Accounting Policy - Assets Not Used and Useful - 6350
- 5 NS Power Application for Annapolis Tidal Generation Station Retirement (M10013), February 22, 2021, page 15
- 6 NS Power response to Board IR-33, June 9, 2021, Glace Bay Generating Station
- 7 NS Power Application for Annapolis Tidal Generation Station Retirement (M10013), February 22, 2021, page 4
- 8 Hearing Transcript, September 13, 2021, page 61



Docket UE21801
Order UE93-10

IN THE MATTER of an Advance Plan Report filed by Maritime Electric Company, Limited.

BEFORE THE COMMISSION

on Friday, the 18th day of June, 1993.

Linda Webber, Chairman
John L. Blakney, Vice-Chairman
Anne McPhee, Commissioner

Order

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Appearances & Witnesses

1. For Maritime Electric Company, Limited

Counsel:
William G. Lea

Witnesses:
J. H. Reynolds, President and Chief Executive Officer
P. H. Newcombe, Vice-President, Production and Energy Supply
J. A. Lea, Vice-President, Corporate Planning
J. Landrigan, Director, Customer Service
R. O. Younker, Executive Assistant to the President

2. For the Environmental Coalition of Prince Edward Island.

Witness:
Jeremy Stiles

3. For the Prince Edward Island Forest Technicians Association

Witness:
D. Murnaghan

4. For Island Technologies Incorporated

Witness:
M. Lodge, President

5. For the Minister of Energy & Forestry, Government of Prince Edward Island

Counsel:
J. Gordon MacKay

Witness:
Wayne MacQuarrie, Director, Energy and Minerals Branch

6. For the Atlantic Wind Test Site

Witness:
R. J. Brandon, General Manager
B. Richards, Consultant

7. Other Witnesses:

Claude Anger and G. Raymond Brow
Ole Hammarlund and Donald Holte
Bruce McCallum, Consultant and Woodlot Owner

8. For The Island Regulatory and Appeals Commission

Counsel:
Thomas A. Matheson

Staff:
Donald G. Sutherland, Director, Utilities Division
George W. Mason, Senior Analyst, Utilities Division
Gloria Dalziel, Recording Secretary

Reasons for Order

Part One

Introduction

In December 1991, Maritime Electric Company, Limited ("Maritime Electric" or the "Company") filed an Advance Plan Report ("Advance Plan", the "Report") in accordance with rule of practice and procedure No. U-001 of the Island Regulatory and Appeals Commission (the "Commission"). Following receipt of the report, the Commission published a ***Request for Public Comment*** on the Advance Plan including a number of specific questions on which the Commission sought public input. Responses were received from the P.E.I. Forest Technicians Association ("FTA"), the Town of Summerside ("Summerside"), the P.E.I. Forest Industry Association, Island Technologies Inc. ("ITI"), the Environmental Coalition of Prince Edward Island ("ECOPEI"), Raymond Brow and Claude Anger, Melvin Gallant, the Atlantic Wind Test Site Inc. ("AWATS"), and the Minister of Energy and Forestry (the "Minister").

In view of the public response, the Commission held public hearings on the Report. The hearings commenced on October 14, 1992 and continued on October 15, 16, 20, 21, 22, 30, December 9, 10, 11, and January 5,

1993. Presentations were made by the Company, FTA, ITI, ECOPEI, Mr. Brow and Mr. Anger, AWATS and the Minister as well as by Mr. Bruce McCallum and Mr. Donald Holte.

Part Two

The Advance Plan

2.1 General

2.1.1 Introduction

The Advance Plan details the future plans for Maritime Electric's generation, transmission and distribution system, for rate structures, for demand side management and for other related matters. In general, the planning process of the Company commences with a forecast of future electricity sales and then evaluates the company's existing system and future options to determine how the Company can best provide safe and adequate service to its customers. While all of the components are important, the focus of the hearing was on new generation—an area involving high capital outlays and one which seems to provide an opportunity for competition from third parties. Virtually all of the effort of the public participants was directed at either reducing the need for, or providing alternative, new generation sources.

In addition to the general issues addressed in the Advance Plan, the Commission sought input from the public on a number of specific issues:

- 1. Are the customers of Maritime Electric generally satisfied with the level and reliability of service provided? If not, what changes are required?*
- 2. Do the customers of Maritime Electric support the plans to place increasing reliance on imports of electricity from out of Province?*
- 3. Are the customers of Maritime Electric willing to pay a premium for on-Island generation? If so, how should the premium be determined and what is a reasonable amount?*
- 4. Are there viable opportunities for non-utility generation on Prince Edward Island?*
- 5. Are the customers of Maritime Electric familiar with and generally satisfied with the types of programs and the level of effort related to Demand Side Management?*

With the exception of Question 4—which was of direct interest to many of the participants at the hearing—the Commission did not receive responses directly from the customers. The Company, however, presented responses to a number of customer surveys that had been carried out under contract in 1986, 1989, 1991 and 1992. These responses were reviewed by the Commission in evaluating the first three issues which are discussed below. The remaining questions are addressed in the following sections which discuss the Advance Plan issues in the order in which they appear in the report.

2.1.2 Level and Reliability of Service

Maritime Electric's customer surveys indicate that approximately two thirds of the Company's customers have a good or excellent overall opinion of Maritime Electric while less than 10% are dissatisfied with the Company. Overall, customers appear to believe that the Company has continued to improve the reliability of service and are satisfied with the Company's response to power outages; however, customers are divided on their opinion of Maritime Electric's efforts to reduce the cost of electricity. In the Commission's view, given that our electricity prices are among the highest in Canada, the latter is not surprising .

Electricity costs have been the subject of many studies over the past two decades and are generally considered higher because of this Province's lack of low-cost, indigenous resources, small sales base, distributed population and other factors. The Commission has not seen evidence to suggest that this higher cost is a result of inefficiency on the part of Maritime Electric.

2.1.3 Security of Supply and On-Island Generation

The Province has always depended on external supplies of energy to meet its electricity needs—first in the form of imported oil and later in terms of electricity imports following the interconnection with New Brunswick in 1977. While no major disruption has occurred in our electricity supply as a result of either oil

shortages or the severing of the interconnection, the Commission continues to believe that security of supply is important.

Customers have not shown a similar concern with security in Maritime Electric's surveys. Customers have continued to show a strong preference for purchasing from off-Island sources if there is a cost advantage and a reluctance to pay more for on-Island generation. Although we acknowledge the survey results as representative of views of the Company's customers, we believe that these views would change quickly if a disruption in the interconnection caused a major prolonged power outage in the Province. In our view, this issue takes on increasing importance when one considers the evidence emerging that indicates that there may not be a large cost advantage to off-Island generation. In fact, some on-Island options appear to be competitive with some larger out-of-province plants.

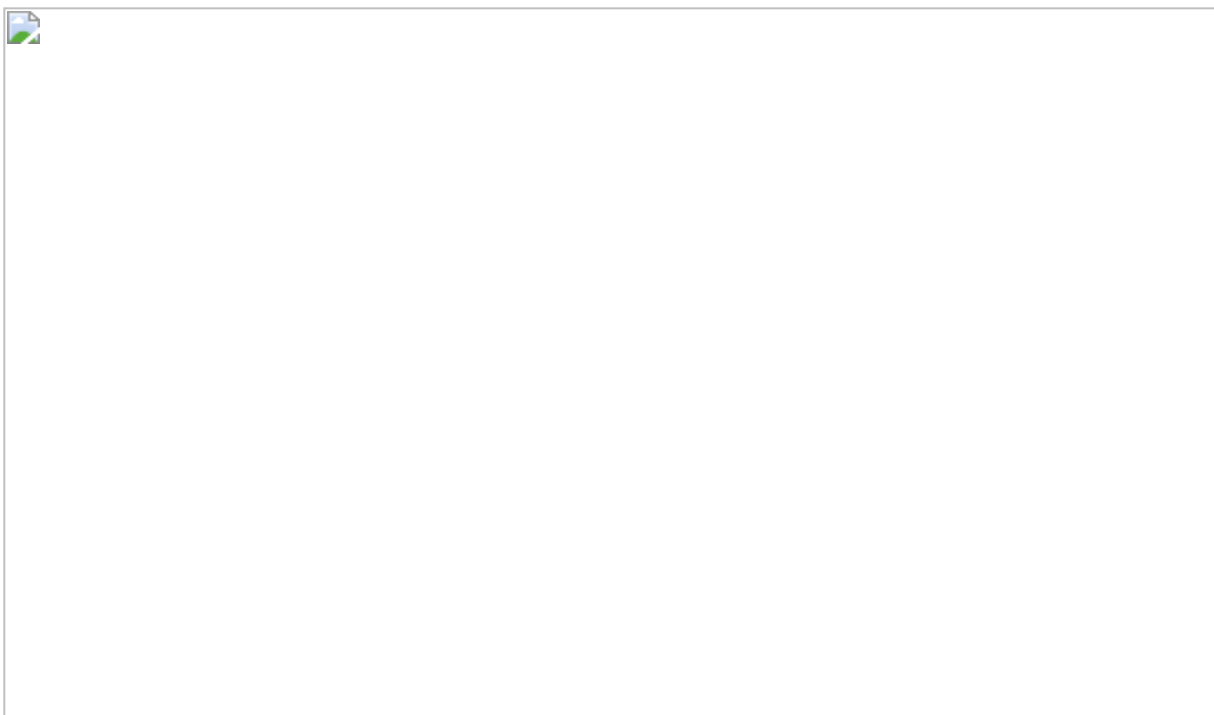
The Commission believes that the issue of security of supply, both in terms of fuel security and in terms of generation capability within the province, needs to be more completely addressed in Maritime Electric's planning. We also believe that the Company should assign some preference to on-Island options and pursue out-of-province options only when there are expected to be demonstrated cost savings or other significant advantages.

1. In future generation planning studies, the Company is to demonstrate that its proposed options achieve a balance between least cost economics and security of supply.

2.2 Energy and Load Forecasts

The sales forecast of Maritime Electric ultimately forms the basis for most of the planning activities of the Company. Long-term sales are forecast using an econometric model based on regression analysis. The model uses forecasts of population, gross domestic product, electricity prices and per capita personal disposable income to forecast sales based on historical relationships. Sales are then adjusted for the estimated impact of the Company's demand side management programs, Company consumption, and transmission and distribution losses. Further adjustments are made to short-term forecasts to reflect the Company's specific knowledge of larger customers and other factors. The result is the net energy required to be produced and purchased annually by the Company. Finally, peak loads are estimated based on forecast load factors.

Figure 2.1 illustrates the sales forecasts that were presented to the Commission in the Advance Planning process in comparison with actual sales. At the last advance plan in 1987, sales growth was forecast to gradually slow until the end of the century. Actual performance showed accelerated growth for a number of years followed by relatively flat sales during the current recession. Sales are currently forecast to increase at an average annual rate of approximately 2% into the next century.



Given the uncertainties in the provincial and regional economy and in forecasting in general, the Commission continues to find the Company's methodology to be acceptable for planning purposes. The major issue raised

by participants was whether the Company evaluated its forecasts after-the-fact to identify potential explanations for deviations between forecast and actual sales. In particular, AWATS was interested in whether there might be a correlation between peak load and wind that might enhance the value of wind generation to the system. Based on the response, the Commission was left with the impression that the Company does not systematically review its actual versus forecast performance to evaluate possible explanations for the differences and improvements in the forecasting methodology. We believe that the Company should do so.

Based on the evidence presented, the Commission finds the Company's sales forecasting methodology to be reasonable but believes that the Company should improve its monitoring of the results with the goal of increasing its forecasting accuracy.

2. The Company shall endeavour to improve its sales forecasting accuracy through the ongoing monitoring of actual results.

The requirements for the Advance Plan (Rule No. U-001) include additional forecasting issues such as the impacts of new construction and other factors on the cost of electricity (rates). During the hearings, the Company referred to its forecasts of revenue requirement and rate impacts on a number of occasions, but was reluctant to disclose any details of forecast electricity rates because of uncertainties in the various assumptions and other factors. While the Commission believes that customers who are making energy-related decisions could benefit from accurate rate forecasts and that the Company is in the best position to provide such forecasts, participants in the hearing did not raise this as a major issue. In addition, events in recent years have shown how unpredictable events such as the Gulf War or changes in the economy can result in sales forecasts being significantly off the mark. As a result, the Commission accepts the Company's submission that its longer-term rate forecasts are too uncertain to be made available to the public at this time.

The Commission, however, wishes to be kept informed of forecast electricity rates for Maritime Electric and, in particular, the magnitude of major increases that are expected. The Commission will then determine when and if such information is of such importance that it should be made available to the public.

3. The Company shall report its five year forecast for revenue requirement and rates to the Commission upon request.

2.3 Generation System

Planning

2.3.1 Introduction

Maritime Electric's requirements for generating capacity are defined by the peak load that is placed on the system, the pattern of energy usage and requirements such as sufficient reserve to ensure that the Company can provide reasonably safe and adequate service. Ongoing planning is required by the Company to replace existing capacity as it reaches the end of its useful life and to supply growing electricity requirements.

Maritime Electric's generating capacity currently consists of the following:

- 6 heavy-oil fired generating units in Charlottetown with a combined capacity of 65.4 MW;
- 2 diesel-oil fired gas turbines located at Borden with a combined rating of 38.7 MW;
- 10% ownership interest in a 200 MW coal/oil-fired plant located in Dalhousie, New Brunswick with a net capacity of 19 MW at the delivery point to P.E.I.;
- Contract to purchase 20 MW from the nuclear power plant at Point Lepreau, New Brunswick providing 19 MW at the delivery point to P.E.I. until October 31, 1994; and,
- Contract for 5 MW of capacity from the New Brunswick Electric Power Commission until October 31, 1994.

The Company therefore has, through ownership or contract, sufficient capacity to generate 147.1 MW until October 31, 1994, when contracts expire for 24 MW (net) of capacity. The minimum requirement for capacity is determined as follows:

- Peak Load - Interruptible Load = Firm Peak Load
- Firm Peak Load + 15% Planning Reserve = Required Capacity

Figure 2.2 illustrates the forecast capacity requirement of Maritime Electric in comparison with its installed and purchased capacity based on the Company's most recent sales forecast for the planning period. Based on the forecast, the Company will require a minimum of 22 MW of new capacity in 1994 and at least an additional 12 MW by the year 2000.



In order to determine the least cost plan for supplying the future load, the Company follows a planning process which can be summarized as follows:

- the Company identifies what it considers to be all feasible options for meeting its future requirements through either construction or purchase;
- the levelized electricity costs are then calculated for the various options and the high cost options are eliminated;
- the remaining options are compared using a generation system planning model which calculates the net present value of energy and new capacity costs under a variety of scenarios; and,
- a financial forecast is prepared using the final option(s) to evaluate the impact on rates.

In a departure from the traditional practice of selecting the plan with the lowest long-term cost, the Company proposes to give preference to the plan or plans which will result in the lowest level of rate shock in the short-term, provided that pursuing such an option does not reduce their long-term flexibility.

At the time of the hearing, the result was a proposed plan by the Company to acquire an equity interest in 10 MW of the circulating fluidized bed ("CFB") coal plant in Point Aconi, Nova Scotia and to negotiate a contract for bridging capacity for the balance of its requirement over the next few years.

The actual costs and other data supporting the Company's proposal were not presented at the hearing. The Company argued that such information should be kept confidential while they were in the process of negotiating the actual contracts. The Commission believed that making such information public at the time could compromise the Company's negotiating position and therefore accepted the request for confidentiality. The Commission only accepts such requests, however, in exceptional circumstances.

2.3.2 Least Cost Planning and Environmental Considerations

Maritime Electric's objective in generation planning is to obtain generation at the "lowest cost consistent with providing reliable service". Least cost planning, while not mandated by legislation, is a generally accepted principle of utility planning. At issue is the question of which costs should be included. The Company generally includes in its analysis the costs for which it is "billed" or for which it expects to be billed in the future ("accounting costs"). The Company does not normally include "externalities" such as the cost to society of emissions from its plants unless such costs are mandated by law. Instead, it attempts to make the

Commission aware of such issues and the potential risk of the external costs becoming costs that must be recovered through rates (internalized).

Two principal participants, ECOPEI and AWATS, promoted including "environmental externalities" in the costs analysis. ECOPEI appeared to suggest that the estimated environmental costs should be added to the accounting costs for all options so that the project with the lowest overall cost could be selected. It submitted that this would not necessarily alter the price paid for electricity.

In the Commission's view, in order for this procedure to have any effect on a utility's purchase decisions, the decision would have to shift from lower accounting cost options to higher cost options. This would ultimately increase customers' bills. In addition, environmental costs are difficult to measure, particularly when there is no agreement on which costs should be measured or how they should be measured. Finally, the Commission does not believe that either we or the Company are necessarily better at valuing environmental externalities than government policy-makers who have not found the remaining externalities important or controllable enough to regulate. As a result, the Commission expects Maritime Electric to continue to evaluate the actual and potential environmental impacts of its activities and to assess foreseeable risks. We believe that it is premature to expect the Company to determine the full costs to society of each or any of its generating options.

AWATS submitted that environmental benefits could be used to justify a premium for generation from sources with low environmental impact. This position is partially supported by a recent survey for Maritime Electric showing that 44% of respondents would support some premium while 39% were opposed (Exhibit M-21). In some other jurisdictions, this has led to the concept of "environmental adders" which are now the subject of much criticism. In the Commission's view, criteria other than lowest accounting cost are important; however, when addressing environmental issues, applying judgment on a case-by-case basis is preferred to rigid criteria.

4. The Company shall continue to make decisions on future generating capacity with the objective of minimizing the long-term costs of electricity to the rate payers of the Province while bringing to the attention of the Commission any potential negative impacts on the environment.

2.3.3 Point Aconi Purchase

Maritime Electric confirmed at the hearing its intention to negotiate a purchase of approximately 10 MW of the CFB coal plant under construction by Nova Scotia Power Inc. (NSP) at Point Aconi, Nova Scotia. The proposed purchase was examined by many participants and specifically opposed by ECOPEI, who considers the plant to be a potential economic and environmental disaster. In addition to being a plant based on a relatively new technology, it is well known that the Government of Nova Scotia specifically excluded this plant from review by the then Nova Scotia Board of Commissioners of Public Utilities and thus avoided the resulting public scrutiny.

The Commission does not, in these Reasons, intend to deal specifically with the evaluation of the proposed Point Aconi purchase which, if pursued by the Company, would be the subject of a specific application. We do, however, believe that the participants raised a number of legitimate concerns with respect to the plant and how it has been evaluated.

One concern is the Company's approach to evaluating the project. With the exception of carrying out an independent review of certain components of the project, Maritime Electric generally appeared to accept the evaluation of NSP who would ultimately be the managing partner in the plant. Based on what we heard, the Commission found Maritime Electric's arguments to be less than compelling when the uncertainties of the plant are considered. We expect the Company to carry out a more critical evaluation when it is attempting to select the most attractive of a number of competing options that are available.

A second, yet related, concern is that the Company will negotiate a final contract and then require relatively rapid approval. The Company was therefore asked at the hearing to prepare a proposed plan which would provide sufficient time for all interested parties to properly evaluate the Point Aconi (or alternative) purchase. In response, the Company filed a document outlining how it had evaluated the risk of the proposed purchase and how issues might be resolved either through correspondence or by reopening the hearing. Responses were received from ECOPEI, ITI and the Minister which generally identified specific questions which each believed needed to be addressed.

The Commission does not believe that it is efficient to further evaluate this or any other specific project when the costs and terms of agreement remain either confidential or incomplete. We believe that the

Company is aware of the various issues and we expect to see them addressed when an application is before us. We also expect the Company to allow for at least four months between the filing of an application and the finalizing of an agreement so that all interested parties can have sufficient time to examine the application and, if appropriate, prepare evidence.

5. In any specific generation plan to be submitted to the Commission for review, the Company shall allow for at least four months from the filing of an application to the date on which a Commission decision may be expected.

2.3.4 Dalhousie Investment

The New Brunswick Electric Power Commission ("NB Power") initiated a project a number of years ago to add flue gas desulphurization equipment ("scrubbers") to the Dalhousie plant and to convert the plant to burn Orimulsion. The cost of this conversion was estimated to be \$340 million which, if Maritime Electric was to pay its proportionate share, would cost the Company in excess of \$20 million.

The Company was questioned at some length on this project, since it could add significantly to its costs and the rates of its customers without providing corresponding benefits. The Company's responses indicated that it had been examining the project and the various options open to it, but had not reached a decision. Recognizing that the project is scheduled to be completed in 1994, the Commission wishes to know the Company's intention with respect to the Dalhousie plant and the anticipated impact on rates.

6. The Company shall file with the Commission, on a priority basis, its intentions with respect to the Dalhousie conversion and the estimated impact on rates of its participation.

2.3.5 Non-Utility Generation

Over the years, Commission staff, and we believe the Company, have been approached by numerous parties proposing to develop electrical generation projects. The Commission believes that one of the barriers to development of such projects is the lack of a comprehensive policy, including terms and pricing, by which Maritime Electric will purchase from independent producers. As a result, the Commission instructed Maritime Electric to update its Power Purchase Policy (for units up to 100 kW) and to propose a policy for purchasing from larger non-utility generators.

A draft proposal has since been filed for review. We believe that establishing such a policy will be of assistance to all parties who propose to generate power, including those who have participated in the Advance Plan.\

2.3.6 Natural Gas Development

Ray Brow and Claude Anger appeared before the Commission in support of their proposal to drill for natural gas in the Souris area and to generate power for sale to Maritime Electric if natural gas is found. Specifically, the Commission was requested to:

- ... keep open the possibility for a producer of gas on the Island to sell it as electricity within the next 24-30 months time period;
- ... reserve an "Energy Window" of 20 Mw for on Island uninterrupted electrical generation;
- ... see that a good collaboration can be established between possible local producers of wind, coal bed methane, and natural gas. And the local electrical utility;
- ... see that a favourable environment is given to investors who could improve the local production of electricity; and,
- ... encourage Maritime Electric to invest in the exploration for gas that will be used to produce electricity.

(Exhibit P-6)

At the hearing, considerable discussion took place between Maritime Electric and Mr. Brow about whether he was asking the Company to change its planning process to accommodate the natural gas prospect. Mr. Brow's response was that he did not wish to see Maritime Electric change its planning process.

This comment eliminates the need for the Commission to address the first two issues. It may be that the Company will have an "Energy Window" open if it negotiates bridging capacity, but it would be premature to

plan for natural gas generation given the uncertainty of discovery of a commercial reserve.

Mr. Brow and Mr. Anger also wish to see a "favourable environment" developed for third party investment in generation. The Commission agrees with this concept and believes that the proposed new Power Purchase Policy that the Company is required to file will help address this issue.

On the last issue, Maritime Electric is not in the gas exploration business and we would not necessarily encourage it to undertake such a high risk venture were it within our mandate to do so. We do appreciate, however, that a significant commercial gas find on Prince Edward Island would be of great benefit to the Province and potentially to electrical consumers. We therefore expect the Company to cooperate with Mr. Brow and Mr. Anger to the extent that it reasonably can within its mandate.

7. Maritime Electric shall continue to cooperate with potential non-utility generators to the extent possible to develop viable, cost effective generating options within the province.

2.3.7 Wind

Wind generation was raised as an option by a number of parties including Mr. Brandon representing AWATS, Mr. Lodge of ITI, and Mr. Stiles of ECOPEI. While the concept of implementing wind systems varied from small distributed facilities proposed by ITI to a larger wind farm (or farms) proposed by AWATS, the above groups all favoured developing wind generation that they believed to be an economic, low environmental impact option.

Maritime Electric submitted that it supports wind generation to the extent that it has allowed experimental units to be connected to its system and purchases power from such units at the avoided cost of purchased energy. Proponents of wind argued that the price paid by Maritime Electric was too low and did not fairly reflect the capacity value of wind generation or the future avoided cost of new generating capacity. The Company initially argued that, from its perspective, wind did not have any capacity value. However, by the end of the hearing, it appeared convinced that it would have to reconsider its position.

The Commission believes that many of the arguments made in support of wind generation—on-Island security, low environmental impact, potential diversity—indicate that the Company should be considering wind as a serious, if small scale, alternative. Specifically, we believe that provision should be made for a small wind farm in the province and that the company should propose rates for a wind farm that appropriately recognize the energy and capacity value. The proposed rate might properly be part of the new Power Purchase Policy of the Company which is currently being reviewed. While the Commission believes that developing such a rate will be useful for valuing wind generation and for potential developers to assess projects, we have no preference for form of ownership so long as electricity is supplied on a least-cost basis.

8. Maritime Electric shall file with the Commission, as part of its revised Power Purchase Policy, proposed pricing for the purchase of capacity and energy from existing and new wind-based generation.

9. The Company shall include in its evaluation of future options provision for a small, on-Island wind farm.

2.3.8 Wood-Fired Cogeneration

The Department of Energy and Forestry (as it was at the time of the hearing) has been attempting to develop a wood-fired cogeneration project on Prince Edward Island for a number of years. Approximately two years ago, the Government announced in the speech from the throne that it intended to build a wood-fired cogeneration plant in the Province if it was found to be environmentally acceptable. At the Advance Plan hearing, neither the Government nor Maritime Electric were promoting wood-fired cogeneration as a viable generation alternative. According to the Government witness, Mr. MacQuarrie, the environmental assessment was ongoing and no decision would be made until it was complete. The Company's position is that it would consider the project if it could obtain satisfactory answers to what it considered to be the major issues:

1. Who will bear the additional cost of the project relative to Maritime Electric's most economic alternative?
2. How does the Company accurately forecast wood prices?
3. How can the Company be certain of a secure supply of fuel?

Specifically, the Company would want a cost subsidy, a guaranteed wood price and a guaranteed wood supply from the Provincial Government or similar party before proceeding with a project.

Mr. Murnaghan of the FTA and Mr. McCallum both spoke in support of the cogeneration project. Both individuals believe that the supply of poor quality wood is more than adequate for the project and that the project is important if the forests of the province are to be improved. However, neither speaker supported significantly higher electricity prices if that should be the result of the project.

The Commission is left with the impression that the Company has continued to invest in evaluating wood-fired cogeneration and in carrying out an environmental assessment of this alternative even though it does not consider it to be a viable option. The Commission does not believe that the Company should incur any further expenditures related to wood-fired cogeneration unless there is a commitment from government or the project economics otherwise warrants.

The Commission wishes, however, to see the economic analysis of the cogeneration plant and of any other alternatives that the Company has examined when the Company files its generation plan in support of the next generation purchase.

10. The Company shall file the economic analysis of all generation options that have been evaluated in support of its future application(s) for generation purchase/construction.

2.4 Transmission System Planning

The Company's system planning is guided by its 10 year transmission planning study which is updated approximately every 5 years. In recent years, the Company's priorities have focused on improving the main lines in the Province and upgrading the interconnection so that the two submarine cables could be operated simultaneously.

With the completion of these major projects, the Company believes that its transmission system is generally adequate to meet its immediate needs. Future projects that have been identified include upgrading transformers and extending existing lines as load growth dictates. No major issues were raised by other participants and the Commission is generally satisfied with the Company's efforts.

2.5 Distribution System Planning

Over the last few years, the Company has continued to improve its distribution planning process. This process has been examined by the Commission in detail at successive capital budget hearings. The Commission has seen improvements over time and hopes that further improvements will be made to ensure that problem areas are addressed in an efficient manner and that system reliability continues to be increased.

2.6 Rate Structures, Conservation and Load Management

2.6.1 Rate Design

The Company's rate design is guided by its long-term rate objectives. These are consistent with generally accepted criteria that rates should be:

- based on cost;
- stable;
- simple and understandable; and,
- designed to provide customers with proper price signals.

Issues related to rates are reviewed on a regular basis during the general rate hearings and many issues have been addressed in recent years. The Commission is generally satisfied with the rate design of the Company but, recognizing that rate design involves a great deal of judgment, will continue to consider new changes that might improve the fairness in charging customers for services.

2.6.2 Demand Side Management

Demand side management is an area of activity which is relatively new to the Company and the electric industry in general. Indeed, most utilities only started implementing major programs in the past few years.

In Commission Order No. E-880331(3)—which followed the first advance planning hearing—the Commission concluded, among other things, that:

4. MECO must do additional analysis on the feasibility of demand-side options.

5. MECO must integrate demand-side and supply-side options.

Since that time, the Company has implemented a number of demand-side management programs with some success. The overall demand side management ("DSM") effort and the individual programs are reviewed annually by the Commission as part of the capital budget review. In Commission Order UE93-6—which followed the 1993 Capital Budget—the Company was ordered to prepare a report of its DSM program covering progress to date and possible future directions, for filing with its 1994 budget proposals. As a result, only the issues raised at the hearing will be discussed here.

A number of participants, in particular ECOPEI, raised the issue of implementing DSM programs that encourage customers to convert from electricity to more efficient fuels, often referred to as fuel switching. Proponents of such programs typically argue that fuel switching reduces the cost to society of energy consumption and is therefore to be encouraged.

The Company views its role as delivering electricity at the lowest possible cost consistent with providing safe and adequate service. The Company believes that fuel switching is inconsistent with this role. In particular, the Company submits that fuel switching can result in higher electricity prices for the remaining consumption, an outcome which the Company does not believe it should encourage.

The Commission has directed the Company to include such issues in its DSM review and we will address these issues at that time.

ECOPEI also raised the issue of third-party delivery of DSM programs and projects. In particular, ECOPEI believed that it may be able to deliver certain components of DSM more effectively than the Company, possibly at lower cost. Such a concept is not new as the Company has some experience with third-party delivery of programs, at least to the extent of its commercial lighting seminars. The Commission believes that the options for third-party delivery of DSM programs should be explored by the Company with the objective of achieving DSM objectives on a least-cost basis. Such options should include the concept of DSM bidding that are being considered or implemented in other jurisdictions and should be included in the DSM review.

11. The Company shall include an analysis of options for third party delivery of programs and DSM bidding in its DSM review.

In terms of the Company's overall planning strategy, the Commission commented in Order E-880331 (3) as follows:

The Commission is concerned, however, that MECO still views these supply-side and demand-side options separately and, to date, has not integrated them to develop a least-cost, long-term generation plan.

While some progress has been made towards what is now referred to as Integrated Resource Planning ("IRP"), the Commission is not yet convinced that the Company places as great an emphasis on DSM as it does on generation planning. The Commission is also aware that efforts are being made in other jurisdictions to move companies beyond IRP towards Customer Focused Planning where, for example, planning begins with looking at the actual energy needs of the customer and then helping the customer meet those needs through a least cost plan for DSM, fuel switching, self-generation and power purchase. The Commission believes that such issues need to be examined and should form part of the DSM review.

2.7 Research and Development

Maritime Electric, as a small company, does not consider it appropriate to engage in major research and development projects, but instead participates primarily as a member of regional and national associations. The Company does provide funding to smaller projects which it considers worthwhile and is now carrying out a larger marginal cost pricing study which was mandated by the Commission. With the exception of issues discussed elsewhere in these Reasons, the Commission generally accepts the Company's level of effort as reasonable.

2.8 Environmental Issues

The Company submits that, in addition to complying with regulations and other requirements, it attempts to anticipate environmental problems and to alleviate those where there is a public concern. Examples of initiatives in recent years have been emission reductions from plant operations, PCB removal and changes in pole treatment practice.

Electromagnetic Fields (EMF) are an additional issue that has attracted public attention in recent years and continues to be the subject of numerous studies. Maritime Electric views this issue as one in which there is not sufficient knowledge to guide either changes in practices or corrective action. The Company therefore considers its role to be to make information available to interested parties.

The Commission agrees that evidence on this matter is inconclusive but expects the Company to continue to monitor findings related to the issue.

With the exception of the environmental issues related to power generation that are discussed earlier in these Reasons, other issues have not been brought to our attention which we feel need to be addressed. The Commission therefore finds the Company's handling of environmental issues to be acceptable.

2.9 Regional Initiatives and Associations

Maritime Electric has been interconnected with other utilities in the region since 1977 when the submarine cable to New Brunswick was commissioned. Prompted by the efforts to create the Maritime Energy Corporation at about the same time, the electric utilities in the Maritimes have continued to coordinate planning and Maritime Electric has been an active participant in the process.

A recent project was the Joint Utility Planning Study prepared for the Council of Maritime Premiers' regional cooperation initiative. The report on this project became an issue at the hearing primarily because the Minister quoted from it in her evidence, yet was unwilling to have it released to the Commission. The Company was also unwilling to release the document as it could not obtain agreement to do so from the other utility presidents. While the report was ultimately submitted, we find it unacceptable that excerpts of a report of this nature should be used in evidence before the Commission while the report itself was withheld.

Having reviewed the Joint Utility Planning report briefly, the Commission tends to agree with Mr. Reynolds, President and Chief Executive Officer of Maritime Electric, that the report is not particularly useful. Given the time and effort that we were led to believe the Company contributed to this effort, we must question the prudence of investing so much in a project which appeared to accomplish so little. The Commission will therefore require the Company to prepare an estimate of costs and expected benefits related to its future participation in the cooperation effort for review by the Commission.

12. The Company shall file with the Commission by July 31, 1993 the estimated costs of its future participation in the Joint Utility Planning project and a summary of expected benefits.

2.10 Other Issues

2.10.1 Intervener Funding

The issue of intervener funding was raised in this hearing by ECOPEI. This intervener believes that it has contributed to the process, but as a volunteer group has no mechanism for funding or recovering costs associated with the participation.

The Commission has reviewed the issue of Intervener funding in the past and concluded that the legislation under which we operate does not allow for financial assistance to third parties. The result is that customers of Maritime Electric pay through rates for the entire effort of the Company while other parties are responsible for their own costs, irrespective of who may benefit. Other jurisdictions have recognized this inequity and have provided for intervener funding using a variety of methods. For example, the funding assistance is often left for the Commission to determine once the value of an intervention has been assessed.

The Commission believes that all electric customers in the province could benefit from a limited form of intervener funding. By these reasons, therefore, **the Commission requests that the Government of Prince Edward Island review the matter of intervener funding and, specifically, whether making provision for an assessment of reasonable costs to the Company in the legislation would be in the best interests of electricity consumers.**

2.10.2 The Next Advance Plan

In Order E-880331(3), the Company was ordered to update and file an Advance Plan on a triennial basis. The Commission continues to believe that this is a reasonable period for planning purposes.

13. The Company shall file its third Advance Plan with the Commission on or before December 31, 1995.

An Order implementing the findings and conclusions contained in these Reasons will therefore issue.

IN THE MATTER of an Advance Plan Report filed by Maritime Electric Company, Limited.

Order

WHEREAS Maritime Electric Company, Limited (the "Company"), filed an Advance Plan Report (the "Advance Plan", "Report") with the Island Regulatory and Appeals Commission (the "Commission") in December, 1991;

AND WHEREAS the Commission heard from the Company and a number of Participants at public hearings conducted in Charlottetown during the period from October 14, 1992 to January 5, 1993, after due public notice;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the *Island Regulatory and Appeals Commission Act* and the *Electric Power and Telephone Act*;

IT IS ORDERED THAT

1. In future generation planning studies, the Company is to demonstrate that its proposed options achieve a balance between least cost economics and security of supply.
2. The Company shall endeavour to improve its sales forecasting accuracy through the ongoing monitoring of actual results.
3. The Company shall report its five year forecast for revenue requirement and rates to the Commission upon request.
4. The Company shall continue to make decisions on future generating capacity with the objective of minimizing the long-term costs of electricity to the rate payers of the Province while bringing to the attention of the Commission any potential negative impacts on the environment.
5. In any specific generation plan to be submitted to the Commission for review, the Company shall allow for at least four months from the filing of an application to the date on which a Commission decision may be expected.
6. The Company shall file with the Commission, on a priority basis, its intentions with respect to the Dalhousie conversion and the estimated impact on rates of its participation.
7. Maritime Electric shall continue to cooperate with potential non-utility generators to the extent possible to develop viable, cost effective generating options within the province.
8. Maritime Electric shall file with the Commission, as part of its revised Power Purchase Policy, proposed pricing for the purchase of capacity and energy from existing and new wind-based generation.

9. The Company shall include in its evaluation of future options provision for a small, on-Island wind farm.

10. The Company shall file the economic analysis of all generation options that have been evaluated in support of its future application(s) for generation purchase/construction.

11. The Company shall include an analysis of options for third party delivery of programs and DSM bidding in its DSM review.

12. The Company shall file with the Commission by July 31, 1993 the estimated costs of its future participation in the Joint Utility Planning project and a summary of expected benefits.

13. The Company shall file its third Advance Plan with the Commission on or before December 31, 1995.

DATED at Charlottetown, Prince Edward Island, this 18th day of June, 1993.

BY THE COMMISSION:

Linda Webber, Chairman

John L. Blakney, Vice-Chairman

Anne McPhee, Commissioner

NOVA SCOTIA COURT OF APPEAL

**Citation: *Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General)*,
2015 NSCA 35**

Date: 20150410

Docket: CA 416544

Registry: Halifax

Between:

Cape Breton Explorations Ltd.

Appellant

v.

The Attorney General of Nova Scotia, Nova
Scotia Power Incorporated, and The Nova Scotia
Utility and Review Board

Respondents

Judge: The Honourable Justice David P.S. Farrar

Appeal Heard: December 10, 2014, in Halifax, Nova Scotia

Subject: **Administrative law. Public Utilities Act**, R.S.N.S. 1989, c. 380; **Utility and Review Board Act**, S.N.S. 1992, c. 11; **Board Regulatory Rules**, N.S. Reg. 235/2005; **Electricity Act**, S.N.S. 2004, c. 25; Renewable Energy Standard Regulations, N.S. Reg. 35/2007; Renewable Energy Regulations, N.S. Reg. 155/2010, as amended; Capital Expenditures by Nova Scotia Power Incorporated Included in the Rate Base.

Summary: In 2012 Nova Scotia Power Inc. (NSPI) entered into agreements to invest in two independent power producing projects known as the South Canoe Wind Project. The arrangement between NSPI, Oxford Frozen Foods Ltd. and Minas Basin Pulp and Paper Co. Ltd. had NSPI owning 49% of the assets in the two projects. NSPI applied to the Utility and Review Board (UARB) to

approve its investment in the IPPs as a Capital Expenditure. This would allow NSPI to include it in the rate base which would entitle it to recover the amount from ratepayers. The UARB allowed NSPI's application and approved the investment in the South Canoe Wind Project as a Capital Expenditure.

Cape Breton Explorations Ltd. (CBEx), an intervenor before the UARB and an unsuccessful bidder on the request for proposals on the South Canoe Wind Project, appealed the decision of the UARB arguing that it erred in its interpretation of the legislative scheme in approving the investment as a Capital Expenditure. It further argued that during the course of the hearing, the UARB erred by treating as confidential, a number of documents NSPI submitted in support of its application as confidential.

Issues:

- (1) Did the UARB err in approving NSPI's investment in the South Canoe Wind Project as Capital Expenditure?
- (2) Did the UARB err in treating as confidential certain documents submitted in support of the application?

Result:

Appeal allowed, in part. The UARB's interpretation of the legislative scheme relating to the procurement of renewable energy by NSPI was unreasonable. It should not have approved the investment in the IPP's as a Capital Expenditure. The UARB decision to treat certain documents filed in support of NSPI's application as confidential was reasonable. As the parties agreed that there would be no costs on the appeal, none were awarded.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 42 pages.

NOVA SCOTIA COURT OF APPEAL

**Citation: *Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General)*,
2015 NSCA 35**

Date: 20150410

Docket: CA 416544
Registry: Halifax

Between:

Cape Breton Explorations Ltd.

Appellant

v.

The Attorney General of Nova Scotia, Nova
Scotia Power Incorporated, and The Nova Scotia
Utility and Review Board

Respondents

Judges: Saunders, Farrar and Bryson, JJ.A.

Appeal Heard: December 10, 2014, in Halifax, Nova Scotia

Held: Appeal allowed, in part, per reasons for judgment of Farrar,
J.A.; Saunders and Bryson, JJ.A. concurring.

Counsel: Richard Stephenson and Michael Fenrick, for the appellant
Daniel M. Campbell, Q.C. and Jack Townsend, for the
respondent, Nova Scotia Power Incorporated
Richard Melanson, for the respondent, Nova Scotia Utility
and Review Board, for the appellant
Edward Gores, Q.C., for the respondent Attorney General of
Nova Scotia

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Reasons for judgment:

Overview

[1] The Nova Scotia Utility and Review Board (UARB) approved Nova Scotia Power Inc.'s (NSPI) application to include in its rate base its \$93M investment in a project known as the South Canoe Wind Project.

[2] Cape Breton Explorations (CBEx), an unsuccessful bidder on the South Canoe Wind Project, and an intervenor before the UARB, appeals the UARB decision. It argues that the UARB erred in allowing the investment to be included in NSPI's rate base. It also argues the UARB erred in treating documents filed by NSPI in support of its application as confidential.

[3] For the reasons that follow, I would allow the appeal, in part, set aside the UARB decision and exclude the NSPI investment in the South Canoe Wind Project from the rate base. I would not interfere with the UARB's confidentiality decision.

Background and Procedural History

[4] In April 2010, in a document entitled "Renewable Energy Plan", the Nova Scotia Department of Energy set out a detailed program to move Nova Scotia away from carbon-based electricity towards "greener, more local resources".

[5] The Plan committed to have 25% renewable electricity by 2015 and set a goal of 40% renewable energy by 2020.

[6] The Plan provides:

Large and medium-sized renewable energy projects will be split evenly between Nova Scotia Power (NSPI) and Independent Power Producers (IPPs). The Utility and Review Board will evaluate and approve NSPI-sponsored projects in the traditional way. Independent producers will compete for projects in a bidding process managed by a new authority, the Renewable Electricity Administrator (Renewable Energy Plan, p. 2). [Emphasis added]

[7] In May 2010, the Nova Scotia Legislature amended the **Electricity Act**, S.N.S. 2004, c. 25, as amended, to provide for the procurement of renewable, low-impact electricity. I will consider the amendments to the **Electricity Act** in more detail when addressing the grounds of appeal.

[8] In October 2010, the **Renewable Energy Regulations**, N.S. Reg. 165/2010, as am. (the **Regulation**) were passed to regulate the procurement of renewable energy and to set mandatory minimum requirements for renewable electricity procurement from independent power producers (IPPs).

[9] On February 2, 2012, the Renewable Energy Administrator issued a “Request for Proposals” (RFP) for 300 gigawatt hours of renewable energy from IPP’s which stated:

This RFP outlines the terms and conditions under which the IPP’s are to develop proposals in response to this process and the evaluation framework which the Renewable Energy Administrator will use to select proponents that will be awarded Power Purchase Agreements (PPA’s).

The Terms of Reference for the Renewable Energy Administrator stated that the Renewable Energy Administrator will be responsible for administering a competitive bid process for a minimum of 300 GWh of renewable energy from IPP’s to reach the 2015 target and to require that the RFP process be conducted in a fair and transparent manner. [Emphasis added]

[10] It was contemplated the winning bidders would execute a Power Purchase Agreement with NSPI.

[11] On June 27, 2012, Oxford Frozen Foods* (“Oxford”), Minas Basin Pulp and Paper* (“Minas”) and NSPI entered into an agreement (the “Term Sheet”). The effective date of the Term Sheet was set out as June 26, 2012. The Term Sheet provides the agreement pursuant to which Oxford and Minas were to submit bids to the Renewable Energy Administrator:

The purpose of the Term Sheet is to summarize the principal terms and conditions upon which OFF will submit a proposal (the “OFF Project Proposal”) to the Renewable Energy Administrator for a 78 MW energy project at South Canoe, Nova Scotia... and MBPP will submit a proposal to the Renewable Energy Administrator for a 24 MW energy project at South Canoe, Nova Scotia... The proposal to be submitted in furtherance of the OFF Project and the MBPP Project (collectively, the “Projects”) are being submitted in response to, and in compliance with, the Request for Proposals for 300 GWh of Renewable Energy from Independent Power Producers as issued by the Renewable Energy Administrator and dated June 6, 2012 (the “RFP”). The Parties acknowledge that

* Oxford and Minas are referred to as OFF and MBPP before the UARB and in the contract documents. I have used their names to avoid the use of too many acronyms.

in order to comply with the RFP each Project must be submitted by a qualified IPP.

[12] The Term Sheet acknowledges the **Electricity Act** and RFP requirement that the renewable electricity be supplied by IPPs. It puts forward Oxford and Minas as bidders. To this end, the Term Sheet further provides that the legal structure of the agreements between the parties with respect to the Projects will be such so as to allow the entirety of the energy output of the Projects to qualify as IPP produced energy:

In the event the Proposals are selected by the Renewable Energy Administrator, MBPP, OFF and NSPI shall negotiate a structure or arrangement mutually acceptable to the Parties that will allow them to carry out the Projects and ensure the full energy output will qualify as RES compliant [under] the Renewable Energy Standards (“RES”) Regulations. ...

[13] The Term Sheet also required (1) that both Oxford and Minas were to be responsible for the preparation of their respective bids; (2) NSPI personnel would not be involved in setting the energy price in the respective bids; (3) if the Proposals were accepted, Oxford and Minas will execute the Power Purchase Agreements within the time prescribed by the RFP (i.e., 10 days); and (4) Oxford and Minas would be solely responsible for the obligations under each of their respective RFPs.

[14] Also on June 27, 2012, Oxford submitted a bid for a 78-megawatt wind farm (“South Canoe 1”). In its bid application, Oxford listed itself as the sole proponent of the project – consistent with the Term Sheet. It listed a “projects team” that included Oxford, NSPI and Minas. Minas submitted a separate application for a 24-megawatt wind farm on adjoining lands (“South Canoe 2”). Minas also listed itself as the sole proponent of the bid. The Minas bid described a project team that included Minas, NSPI and Oxford.

[15] CBEx also submitted a bid in response to the Request for Proposals but was unsuccessful. It does not challenge the Request for Proposals process or its outcomes.

[16] Oxford and Minas succeeded in their bids, as determined by the Renewable Energy Administrator.

[17] Oxford and Minas executed Power Purchase Agreements on July 18, 2012. Under its Power Purchase Agreement, Oxford is listed as the “Seller” of 78 MW

(241,000 MWh/year) of renewable wind generated electricity. This represents the entire output of South Canoe 1. Under the terms of the Oxford Power Purchase Agreement, NSPI is to buy the electricity sold by Oxford.

[18] Minas, under a separate Power Purchase Agreement, is listed as the “Seller” of 24 MW (70,000 MWh/year) of renewable wind generated electricity. This represents the entire output of South Canoe 2. As with the Oxford Power Purchase Agreement, NSPI is to buy the electricity sold by Minas.

[19] The South Canoe Wind Projects were structured such that NSPI has a 49% interest in each. The two projects totalled 34 wind turbines. In return for an investment of \$93M, NSPI would directly own half of the turbines on each project.

[20] On December 10, 2012, NSPI filed an Application for Review and Approval (pursuant to s. 35 of the **Public Utilities Act**) to the UARB seeking approval to include its investment in the South Canoe Wind Project in its rate base.

[21] The matter came on for hearing on February 20, 2013. The participants before the UARB were NSPI, the Consumer Advocate, the Small Business Advocate, and CBEx. Bruce Outhouse Q.C. appeared as the UARB counsel.

[22] The UARB, in a decision dated April 26, 2013 (reported as 2013 NSUARB 92), and by Order dated April 30, 2013, approved the expenditure.

[23] In its initial application, NSPI claimed confidential treatment for certain parts of its application. The UARB agreed, with the exception of two documents. NSPI subsequently refiled its application on December 20, 2012, withdrawing its request for confidentiality with respect to one of the documents and the other being partially redacted.

[24] The UARB in a letter dated January 14, 2013, said:

Therefore, in response to NSPI’s request in its letter of December 20th, 2012, the Board approves the confidential treatment of information in this application as requested at this time. Should an intervenor object to such treatment, however, the Board reserves the right to reconsider this issue pursuant to Board Rule 12.

[25] None of the participants filed an objection in response to the confidentiality request prior to the hearing nor was any objection voiced during the hearing. It was not until its closing arguments that CBEx objected to the confidentiality of certain documents.

[26] The UARB concluded that it would not entertain a request to adjudicate the claim for confidentiality after the hearing was concluded.

[27] By an Amended Notice of Appeal dated June 25, 2013, CBEx appealed the UARB decision.

[28] One of the grounds of appeal alleged that the UARB erred in treating as confidential the large volume of documents submitted by NSPI.

[29] This led to a number of appearances before this Court to address procedural issues relating to the confidentiality of the Appeal Book to be filed.

[30] The issue first arose on June 19th, 2013, at a telechambers motion to set hearing dates. The matter was adjourned to July 17, 2013 for further submissions on the contents of the Appeal Book. On July 18, 2013, the Chambers judge ordered that the issue of confidentiality of the Appeal Book would be heard before a panel of the Court on September 20, 2013. The Court also ordered that two separate Appeal Books were to be filed by July 31, 2013; one with the confidential information redacted and, the other being, an unredacted version to remain confidential.

[31] On August 23, 2013, NSPI formally filed its motion seeking an order for confidentiality of the Appeal Book returnable on September 20th, 2013. On September 9, 2013, Oxford and Minas filed a motion to allow it to present evidence and participate in the September 20, 2013, confidentiality motion.

[32] The Court provisionally accepted the evidence and arguments of Oxford and Minas.

[33] At the conclusion of argument on September 20, the Court reserved its decision.

[34] The panel also requested the parties to make supplementary written submissions on the possibility that the confidentiality issue may be remitted to the UARB. NSPI and CBEx filed supplementary submissions on September 25, 2013. In the meantime, on October 3, 2013, NSPI filed a motion to sever the grounds of appeal dealing with confidentiality from the other three grounds of appeal. That motion was heard on October 10, 2013. By decision dated October 15, 2013 (reported at 2013 NSCA 116), the Chambers judge denied the motion to sever and to abridge the Appeal Book.

[35] On November 26, 2013, this Court released its decision on confidentiality (reported at 2013 NSCA 134). It was determined that the matter of the confidential treatment of the NSPI documents should be remitted to the UARB so that this Court could receive the benefit of its analysis in reaching its confidentiality decision.

[36] In a supplemental decision dated January 14, 2014 (reported as 2014 NSUARB 5), the UARB provided additional reasons for considering the documents confidential.

[37] This led to another motion by NSPI for a confidentiality order with respect to the Appeal Book. That motion was heard on May 20th, 2014, by the same panel hearing the present appeal, and by decision dated June 3, 2014 (reported at 2014 NSCA 53), NSPI's motion was granted and a confidentiality order was issued. The decision provided that the ground of appeal relating to confidentiality would be addressed on the appeal proper.

Issues

[38] In its Notice of Appeal, CBEx raises four grounds. They are as follows:

1. The Board erred in law in finding that s. 35 of the *Public Utilities Act* gave the Board jurisdiction to require the ratepaying public to pay for, and guarantee the profits of, Nova Scotia Power Incorporated's ("NSPI") minority financial investment in a renewable electricity project to be controlled and operated by third party independent power producers (the "South Canoe Wind Project");
2. The Board erred in law in finding no conflict between the inclusion of the costs in the rate base of NSPI's investment in the South Canoe Wind Project and the process established by the *Electricity Act* for procurement of renewable electricity by the Renewable Electricity Administrator and payment for the procured electricity.
3. The Board erred in law in finding that NSPI was legally permitted to directly own some of the assets of the South Canoe Wind Project;
4. The Board erred in law in agreeing to treat as confidential from the public a large volume of documents submitted by NSPI to support its application requesting that the ratepaying public pay for its investment and profits in the South Canoe Wind Project; and
5. Such further and other grounds as may be permitted.

[39] During oral argument, CBEx made one submission on the first two grounds of appeal, and made very brief submissions on the third ground. In my view, the

first three grounds of appeal are really one ground and can be summarized as follows:

1. The UARB erred in determining that NSPI could include in its rate base its investment in the South Canoe Wind Project.

The fourth ground of appeal will remain and will be addressed as the second ground of appeal.

Standard of Review

[40] Although the parties disagree somewhat on the application of the standard of review to the circumstances of this case, they agree that the standard of reasonableness applies to both grounds of appeal. I agree.

[41] The reasonableness standard requires us to read the UARB's reasons, together with the outcome, to determine whether the result falls within the range of possible outcomes (**Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)**, 2011 SCC 62).

Issue 1 The UARB erred in determining that NSPI could include in its rate base its investment in the South Canoe Wind Project.

[42] NSPI made its application for UARB approval pursuant to s. 35 of the **Public Utilities Act** which provides:

35 No public utility shall proceed with any new construction, improvements or betterments in or extensions or additions to its property used or useful in finishing, rendering or supplying any service which requires the expenditure of more than two hundred and fifty thousand dollars without first securing the approval thereof by the Board.

[43] This provision only applies if NSPI wishes to include a capital item in its rate base, upon which it is entitled to earn depreciation and a rate of return (UARB decision, p. 16).

[44] Although CBEx, in its factum, suggests this is a jurisdictional issue, its oral arguments focused on the interpretation of the legislative scheme. In my view, whether the capital expenditure can properly be included in NSPI's rate base is a matter of statutory interpretation, not a question of jurisdiction.

[45] In **Canadian National Railway Co. v. Canada (Attorney General)**, 2014 SCC 40 the Court held:

61 To the extent that questions of true jurisdiction or *vires* have any currency, the Governor in Council's determination of whether a party to a confidential contract can bring a complaint under s. 120.1 does not fall within that category. This is not an issue in which the Governor in Council was required to explicitly determine whether its own statutory grant of power gave it the authority to decide the matter (see *Dunsmuir*, at para. 59). Rather, it is simply a question of statutory interpretation involving the issue of whether the s. 120.1 complaint mechanism is available to certain parties. This could not be a true question of jurisdiction or *vires* of the Governor in Council -- the decision maker under review in this case.

[46] Similarly, the UARB, here, was simply considering a matter of statutory interpretation. That is whether the capital expenditure, under the legislative scheme, could be included in the rate base. There can be little doubt that they have the jurisdiction to make that determination. The question is whether its interpretation of the legislation falls within the range of reasonable outcomes.

[47] For reasons that I will develop, it is my view that the UARB made two errors, the first relates to the interpretation of s. 4B(13) of the **Electricity Act** and the second concerns the interpretation of service in s. 2(f) and s. 35 of the **Public Utilities Act**. I will address each of these in turn.

1. Section 4B(13) of the Electricity Act

[48] It is well-settled that the words of the statute or regulation are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the legislative scheme, its purposes, objects, and, importantly, the intention of the Legislature (see: **Bell ExpressVu Ltd. Partnership v. Rex**, [2002] 2 S.C.R. 559 at ¶26 citing *Driedger's, Construction of Statutes* (2d), 1983).

[49] The **Electricity Act** came into force on February 1, 2007. It was amended in May 2010 [2010, c. 14]. As the then Minister of Energy described, there were three key elements in the 2010 amendments:

These amendments establish the legal foundation for the province's new renewable electricity plan. These will help Nova Scotians gain access to a clean, secure and locally-produced energy at more stable prices over the long run.

These amendments provide for three key elements of the renewable energy plan and I'd like to highlight those three now, if I could, Mr. Speaker. Firstly, the appointment of a renewable electricity administrator who will have the

responsibility of awarding contracts for large- and medium-scale energy purchases by independent power producers. This renewable electricity administrator is an important position and will ensure fairness in competition among producers who wish to sell renewable electricity to Nova Scotia Power.

Secondly, the establishment of feed-in tariffs or fixed prices for community-based renewable energy projects, and I emphasize community-based renewable projects, developed and operated by co-ops, First Nations, municipalities or community development groups. [...].

Third, and finally, an enhanced net-metering component that will credit consumers for renewable energy that they produce.

(Nova Scotia, House of Assembly, Official Report of Debates (Hansard), 61th Assembly, 2d Sess. No. 10-29 (May 6, 2010) at 2100-2101 (Hon. William Estabrooks)

[50] Section 4B of the amended **Electricity Act** is entitled “Procurement of Renewable Low-Impact Electricity.” As the Minister described, s. 4B provides for the appointment of the Renewable Electricity Administrator and the process by which the Renewable Energy Administrator would award contracts to IPPs to ensure fairness in competition among producers who wish to sell renewable electricity to NSPI.

[51] For the purpose of this appeal, the critical provision is s. 4B(13). It states:

(13) The Board shall allow a public utility to recover from its ratebase the costs of the public utility’s contracts referred to in subsection (12) on the basis approved by the Board under the Public Utilities Act.

[52] In its reasons, the UARB concludes:

[79] The provisions of s. 4B(13) of the **Electricity Act** state that the public utility is to recover “...from its rate base...” its costs “...on the basis approved by the Board under the [**Public Utilities Act**]”. The Board does not consider that NSPI could participate, as permitted, in an IPP, and at the same time, be unregulated by the Board. Allowing NSPI to do so would mean that it could earn unregulated profits on investments in IPPs. Those profits would be paid by NSPI customers and, potentially, could exceed NSPI’s allowed rate of return. In the Board’s view, this would substantially erode a fundamental principle of public utility regulation. As already stated, the Board does not interpret the **Electricity Act** as requiring such a result. [Emphasis added]

[53] In fact, s. 4B(13) allows a public utility to recover from its rate base “the costs of the public utility’s contracts referred to in subsection (12) on the basis approved by the Board under the **Public Utilities Act**”. The UARB omitted the words “of the public utilities contracts referred to in subsection (12)”. The omission of these words completely alters the meaning of the subsection.

[54] Section 4B(12) is critical to the interpretation of s. 4B(13). Section 4B(12) states:

(12) Where a renewable electricity administrator has selected one or more independent power producers for the supply of renewable low-impact electricity to a public utility, the public utility shall enter into the agreements necessary to evidence the procurement. [Emphasis added]

[55] Section 4B(12) is clear that a public utility must enter into the agreements necessary to evidence the procurement. What does “necessary to evidence the procurement” mean? To fully appreciate this phrase, it is helpful to examine the following provisions of s. 4B of the **Electricity Act**:

4B (1) Where

- (a) a public utility intends to procure renewable low-impact electricity, from one or more independent power producers with generation facilities located in the Province, under a long-term power-purchase agreement; or
- (b) the Governor in Council directs a procurement of renewable low-impact electricity from one or more independent power producers with generation facilities located in the Province under a long-term power-purchase agreement,

the Governor in Council may appoint a person to act as a renewable electricity administrator to conduct the procurement.

* * *

(7) Where the Governor in Council appoints a renewable electricity administrator for a procurement under subsection (1), the administrator, instead of the public utility, shall issue a request for proposals and award the contract or contracts for the procurement.

* * *

(9) A public utility shall procure all renewable low-impact electricity under a request for proposals that contains the requirements set out in the regulations.

(10) A renewable electricity administrator shall evaluate and choose successful independent power producers and provide a written decision to the public utility and to each bidder in the manner and within the time prescribed by the regulations.

[56] These subsections shed considerable light on the procurement process. The Governor in Council may appoint a renewable electricity administrator; the government appointed Power Advisory LLC to serve as the Renewable Energy Administrator in July 2011. Pursuant to s. 4B(7), the Renewable Energy Administrator issued a RFP in February 2012. The RFP process is established pursuant to s. 35B of the **Regulations**. The Renewable Energy Administrator then awarded the contract for procurement to three IPPs, including Oxford and Minas in accordance with s. 4B(7) and (10) of the **Electricity Act** as well as ss. 35C and 35D of the **Regulations**. Under s. 4B(9) of the **Electricity Act**, NSPI, defined as a public utility under s. 2(1)(ab) of the **Electricity Act**, is obliged to procure all renewable low-impact electricity from the IPPs.

[57] Section 37 of the **Regulations** specifies that the Renewable Energy Administrator must prepare a standard form power purchase agreement “to be used for procuring renewable low-impact electricity”. The Power Purchase Agreement represents the agreement between the purchaser of power, NSPI and the sellers of power, the IPPs. The UARB must first approve the Power Purchase Agreement which it did on May 3, 2012 (see 2012 NSURB 49). In addition, the Renewable Energy Administrator is under a duty, pursuant to s. 35A of the **Regulations**, to ensure that the “power purchase agreement executed by the bidder with the public utility is consistent with the request for proposals.” The public utility shall enter into the agreements necessary to evidence the procurement in accordance with s. 4B(12) of the **Electricity Act** which means that the public utility, NSPI, and the IPPs determine the price that NSPI will pay for the electricity supplied by the IPP to the utility.

[58] In summary, the procurement process deals only with the selection of the IPP and NSPI’s requirement to enter into a Power Purchase Agreement to procure the electricity from the IPP at a fixed price. A plain language interpretation of s. 4B(13) leads only to the conclusion; namely, that “the costs of the public utility’s contracts referred to in subsection (12)” refers only to the public utility’s ability to include in its rate base the cost of all renewable low-impact electricity procured from the IPPs. Put another way, the reference to subsection (12) in s. 4B(13) means that the public utility can only recover from its rate base its costs for procuring the electricity from the IPPs under the PPA. There is absolutely no

suggestion that s. 4B(13) enables NSPI to recover any costs in its rate base other than the costs of procuring renewable energy, and it certainly does not permit NSPI to recover its capital costs for any investment it makes in an IPP. With respect, the UARB's interpretation that the public utility may recover "...from its rate base..." its costs "...on the basis approved by the Board under the [**Public Utilities Act**]" is unreasonable.

2. Section 2(f) and Section 35 of the Public Utilities Act

[59] NSPI argues that the Board did not err in its interpretation of s. 4B(13) of the **Electricity Act**. In the alternative or perhaps in addition, NSPI submits that it is a public utility providing a service and so it must apply to the UARB under s. 35 of the **Public Utilities Act** to approve the capital expenditures of its investment in the IPPs. NSPI contemplates that approved capital expenditures will be added to NSPI's rate base and recovered through its regulated revenue requirement in accordance with ss. 42 and 45 of the **Public Utilities Act**. With respect, I disagree with this submission. To address it, it is necessary to outline a number of defined terms in the **Electricity Act** and the **Regulations**.

[60] NSPI must meet the Renewable Energy Standard in the **Regulations**. Sections 6(1) and (2) of the **Regulations** state:

6 (1) Each year beginning with the calendar year 2015 until 2020, each load-serving entity must supply its customers with renewable electricity in an amount equal to or greater than 25% of the total amount of electricity supplied to its customers as measured at the customers' meters for that year.

(2) To meet the renewable electricity standard in subsection (1), NSPI must

(a) continue to supply at least 5% of its total annual sales from independent power producers; and

(b) acquire at least 300 GWh from independent power producers in addition to the renewable low-impact electricity required to meet the requirements of Sections 4 and 5.

[61] NSPI partnered with both Oxford and Minas on the South Canoe Project to try to meet the requirement in s. 6(2)(b).

[62] IPP is defined in s. 3(1) of the **Regulations**, which states:

(1) In the Act and these regulations,

..

“independent power producer” means a renewable low-impact electricity generator

(i) of which no more than 49% of the securities entitling the holders to vote for the election of its directors are held by a public utility in combination with any affiliate of the public utility, and

(ii) that sells electricity

(A) in the Province to public utilities for retail sales to the utilities’ customers, or

(B) for export outside of the Province.

[63] As the appellant pointed out before the UARB, there are three elements to this definition. First, a supplier of renewable energy must be “a renewable low-impact electricity generator” defined in s. 2 of the **Regulations** as “a person” – i.e. an individual or corporation – “who owns or operates a renewable low-impact electricity generation facility in the Province.” Second, a public utility is only permitted to own 49% of the voting shares of the corporation. Third, the generator must “sell” its electricity to public utilities for “retail sales to the utilities’ customers,” or sell electricity for export, which is not relevant in this case.

[64] Under s. 4B(10) of the **Electricity Act**, the Renewable Energy Administrator “shall evaluate and choose successful independent power producers” and the Renewable Energy Administrator selected two IPPs in July 2012, one led by Oxford and the other led by Minas*. NSPI has a 49% investment in both of these IPPs. Furthermore, the Minister of Energy, under s. 13 and 14 of the **Regulations**, sent letters to Oxford and Minas approving South Canoe in November 2013 as a renewable energy generation facility “owned and operated by an independent power producer”. I will discuss the Minister’s role and the aforementioned letters in greater detail below.

[65] With this background, I return to the UARB’s error.

[66] In my view, the UARB erred in its interpretation of service in s. 2(f) of the **Public Utilities Act**. As a result, s. 35 of the **Public Utilities Act** should not have been triggered in this case. There are three separate components to this error:

* The REA actually selected three IPP’s in total, but the third IPP, the Sable Wind Project proposed by the Municipality of the District of Guysborough is not relevant to this appeal.

- a) The UARB erred by concluding that it is “immaterial” whether the power is generated by the IPP or the public utility; it cannot be both IPP power for the purpose of the **Electricity Act** and utility power for the purpose of the **Public Utilities Act**.
- b) The UARB did not read the **Electricity Act**, the Regulations and the **Public Utilities Act** harmoniously but adopted an unreasonable interpretation of the **Public Utilities Act** by ignoring the Legislature’s intentions under the 2010 amendments.
- c) The UARB erred by finding that electricity producing assets cannot be held outside of rate base.

[67] Before discussing each of these errors, I will examine s. 35 of the **Public Utilities Act**.

[68] Section 35 of the **Public Utilities Act** states:

35 No public utility shall proceed with any new construction, improvements or betterments in or extensions or additions to its property used or useful in furnishing, rendering or supplying any service which requires the expenditure of more than two hundred and fifty thousand dollars without first securing the approval thereof by the Board.

[69] As the appellant pointed out before the UARB, s. 35 has four components: (1) there must be new construction, improvements or betterments, (2) by a public utility, (3) which requires the expenditure of more than \$250,000, and (4) the new construction must be used or useful in supplying a service.

[70] There is no doubt that the first and third components of the test are fulfilled by the South Canoe project. NSPI is constructing wind turbines and the expenditure is far in excess of \$250,000. It is also common ground that NSPI falls within the definition of public utility in s. 2(e) of the **Public Utilities Act**:

2(e) "public utility" includes any person that may now or hereafter own, operate, manage or control

...

(iv) any plant or equipment for the production, transmission, delivery or furnishing of electric power or energy, water or steam heat either directly or indirectly to or for the public

[71] The key provision is the fourth component and revolves around the definition of service, which is defined in s. 2(f) of the **Public Utilities Act**:

2(f) "service" includes

...

(iii) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of electrical energy for purposes of heat, light and power, [Emphasis added]

[72] NSPI states that there is no distinction in law between electrical power produced as a public utility and power produced as a minority participant in an IPP. Conversely, the appellant argues that s. 35 of the **Public Utilities Act** is not triggered because the definition of service includes the phrase “by a public utility” and NSPI is not acting as a public utility in the South Canoe project, but as part of an IPP. This leads to its second submission which is that NSPI was under no obligation to make an application under s. 35 because it is possible for NSPI to hold assets outside of rate base.

[73] The UARB agreed with NSPI’s interpretation. It reasoned:

[89] It is clear that if this Application is approved, and the Project proceeds as planned, the electricity generated will be provided as a service “to or for the public by a public utility”. A public utility may “own, operate, manage or control” plant or equipment which provides electric power “either directly or indirectly to or for the public”. The fact that the electricity is generated by an IPP, or that OFF manages or controls the project as a whole is, in the view of the Board, immaterial. [Emphasis added]

[74] The UARB therefore adopted NSPI’s submission that there is “no distinction between the production of electrical energy as a public utility or as a minority participant in an IPP; all such electricity is produced, transmitted, delivered or furnished to or for the public.” (¶84)

a) Is it “immaterial” how the electricity was generated?

[75] As noted above, s. 35 of the **Public Utilities Act** has four components, but the only element at issue on this appeal is whether the new capital improvement is used or useful in supplying a service. To repeat, s. 2(f) of the **Public Utilities Act** defines service as including “the production, transmission, delivery or furnishing to

or for the public by a public utility for compensation of electrical energy for purposes of heat, light and power”.

[76] For NSPI’s interpretation of s. 35 to be sustainable, the power generated at South Canoe must be “production ... to or for the public by a public utility for compensation of electrical energy”. With respect, a plain reading of the provision, the overall legislative scheme and the supporting documents all point to the opposite conclusion; the IPP, rather than NSPI, is providing a service so that NSPI’s application does not fall within the scope of s. 35 of the **Public Utilities Act**.

[77] In adopting NSPI’s interpretation, the UARB failed to address a number of issues.

[78] NSPI’s argument – and the one that the UARB appears to have adopted – puts an emphasis on the definition of public utility in the **Public Utilities Act**. As set out above, public utility is defined as “any person that may ... own, operate, manage or control any plant or equipment for the production, transmission, delivery or furnishing of electric power or energy, water or steam heat either directly or indirectly to or for the public.” NSPI submits that since it is a public utility and its assets at South Canoe will produce electricity for the public indirectly through an IPP, the generation of such power is a service.

(i) NSPI wants it both ways

[79] NSPI is wearing two hats in this process. It requires the power produced by the wind turbines at South Canoe to be defined as IPP power so that it can meet the 2015 Renewable Energy Standard and the 300 GW/h renewable energy target under the **Regulations**. On the other hand, it is a 49% investor in the project and wants to be able to “rate base” the assets it owns in this project under s. 35 of the **Public Utilities Act**.

[80] As the appellant points out, NSPI wants it both ways. NSPI maintains that the assets it owns at South Canoe means that the electricity generated by those assets is a service to or for the public by a public utility under s. 2 of the **Public Utilities Act**. NSPI is therefore arguing that 49% of the output is public utility produced, which NSPI (not the IPP) is supplying indirectly to the public. Conversely, for the purpose of the **Electricity Act** and the **Regulations**, NSPI says that the electricity generated by South Canoe is IPP power that counts towards the 300 GW/h requirement under s. 6(2)(b) of the **Regulations** to enable NSPI to meet

the 2015 Renewable Energy Standard. In a response to an undertaking, NSPI noted:

Pursuant to the definitions under section 3(1)(i) of the RES, an IPP means “a low impact generator” “of which no more than 49% of the securities of the holders to vote for the election of its directors is held by a public utility in combination with any affiliate of the public utility.” As such, an IPP with up to a 49 percent interest held by a public utility qualifies as an IPP. Energy produced by such an IPP is not considered to be in part produced by the utility for the purpose of interpretation under the regulations. All energy produced by an IPP eligible under the definition qualifies for meeting the RES target of acquiring 300 GWh annually from IPPs. [Emphasis added]

[81] I agree with the appellant’s submission that “having deliberately structured its participation in the IPP to ensure that all of the project’s production is IPP production and none is utility production, NSPI cannot simultaneously assert that these are utility assets providing a utility service.” If the power generated by South Canoe is produced by a public utility, NSPI should have submitted an application under s. 48(3) of the **Public Utilities Act** “to increase its capacity to produce power”. It has not done so. In addition, as the appellant points out, whether the power is utility produced or IPP produced is not “immaterial” but is critical to the Renewable Energy Standard. If the power produced at South Canoe is not IPP power, NSPI would not meet the 2015 Renewable Energy Standard.

[82] Furthermore, NSPI faces a more practical difficulty in maintaining before this Court that the 17 wind turbines that it owns out of a total of 34 are utility assets providing a utility service. This is caused by the structure of its Project Construction and Operating Agreement (PCOA) with Oxford and Minas. The appellant makes this point clearly:

It is not just a function of the regulatory definition of renewable targets that South Canoe electricity output is 100% IPP produced. That is also an accurate reflection of the contractual and commercial structure of the project. Under the provisions of the PCOA, the production from the NSPI-owned turbines is not metered and delivered to the South Canoe project, and then on-sold to NSPI as transmitter. To the contrary, the entire project output is pooled, and each participant is paid based on its percentage ownership of the project. As a result, the actual output of the turbines owned by a particular participant is irrelevant to the economic model governing the project. NSPI gets paid for 49% of the South Canoe output, whether or not any turbine actually owned by NSPI generates a single KWh of power. (Appellant’s Factum, ¶99)

[83] A closer look at the structure of the PCOA reveals additional difficulties. The commencement of the agreement shows the challenge that NSPI faces in wearing two hats since it states that the PCOA is between NSPI “in its capacity as a participant in the Project pursuant to this Agreement, not in its capacity as a purchaser of power under the [Power Purchase Agreements] PPAs”. Although NSPI retains title to its 17 wind turbines, the PCOA reveals that NSPI made the following covenants:

4.1 Obligations and Covenants of NSPI

NSPI covenants and agrees to and with OFF and MBPP as follows:

* * *

- (a) to make the NSPI Assets available for this Project;
- (b) to grant OFF the exclusive right to manage and operate the Project and the NSPI Assets in accordance with the terms of this Agreement and to manage the revenues from the NSPI Generators during the Term pursuant to the provisions of the PPAs;
- (c) to make available and grant access to the NSPI Assets to OFF in order for OFF to perform the Services;

[84] Oxford’s covenants in the PCOA reveal a similar story:

5.1 Obligations and Covenants of OFF

OFF covenants and agrees to and with NSPI and MBPP as follows:

* * *

(g) to operate and maintain the Facilities and to provide financial and management services for the Project and the other services described in Article 7 [...]

(l) to generate and sell Energy from the Facilities in order to meet its obligations under the PPAs provided, however, that OFF does not guarantee the production of energy as contemplated by the PPAs and any shortfall in such production shall be shared by the Parties as contemplated by Section 9.1;

[85] Clauses 6 and 7 of the PCOA highlight Oxford’s full power and authority to manage the project and to perform a list of management services.

[86] In addition, the Power Purchase Agreement (which governs in the event of a conflict with the PCOA) between Oxford and NSPI clearly states:

3.1 (a) During the Interim Period and the Term, the Seller [OFF] shall have, through ownership, leasehold interest, easement or right of way, all land tenure or land tenure agreements in respect of the Site which are required to carry out its obligations under the Agreement.

(b) Subject to the Seller's rights to divest the Facility and any restrictions thereon provided in the Agreement, during the Interim Period and the Term, the Seller shall own the Facility and shall ensure that the Facility is operated and maintained in a manner consistent with the Electricity Standard Approval, using Good Utility Practice, and in compliance with Laws and Regulations and the applicable provisions of the Agreement (including the Project Description).

[87] Thus, while NSPI may own seventeen wind turbines, it has delegated management, control and operating authority over the South Canoe project to Oxford. Even if NSPI hoped to leave the impression that 49% of the South Canoe Wind Project owned by it supplied a service, this is impossible for the reasons set out above. As well, the Power Purchase Agreement specifically provides that NSPI measures the amount of energy at the "Delivery Point" where it "take[s] delivery [of] ... the entire Net Output of the Facility". Thus, there is no possibility of measuring the energy generated by NSPI's wind turbines.

(ii) NSPI can only make an application under s. 35 because of its tortured interpretation of an IPP.

[88] The ownership structure contemplated by the definition of IPP in s. 3(1) of the **Regulations** that allows public utility involvement only permits the public utility to own 49% of the voting shares of the corporation. As I will explain below, NSPI relied upon the old definition of IPP in the **Electricity Act** and the interpretation of that old definition by the Administrator to establish a precedent of 49% ownership of assets that it used when bidding for the IPP process in 2012. It appears that 49% ownership of assets has, at least, two significant advantages for NSPI rather than 49% ownership of shares. First, there are significant tax benefits to installing and owning the wind turbines, as the UARB outlines in its decision. Second, and more importantly, it permits NSPI to argue that its ownership of the assets necessarily triggers an application under s. 35 of the **Public Utilities Act** since the construction of the wind turbines is used or useful in supplying a service.

[89] If NSPI had invested in the IPP in the manner that the definition of IPP envisaged (e.g. up to 49% of the voting shares of the IPP), it would be impossible for NSPI to apply to the UARB under s. 35 of the **Public Utilities Act**. Unlike tangible assets such as wind turbines, voting shares in a corporation can never be included in rate base and NSPI could not apply to the UARB under s. 35. I agree with the appellant's position that there can be no public policy justification for an entirely different outcome based upon how NSPI has legally structured the IPP:

The flaw in the UARB's reasoning can be laid bare by changing one small fact in the case at bar. Assume that NSPI's involvement in the project had been by way of a 49% share ownership in South Canoe. Indeed, this is the structure that is expressly contemplated by s. 3(1) of the *RES Regulations*. In that scenario, for the purposes of the definition of "service", NSPI would not be "owning", "operating", "managing" or "controlling" anything, other than its share ownership. In that scenario, none of the output of the project could be said to be "generated" by a public utility, allegedly qualifying the capital investment for inclusion in rate base.

However, NSPI has structured its participation in the IPP by way of direct ownership of 49% of the assets of the IPP. The fundamental question is: Can there be any public policy justification for an entirely different outcome based upon minor differences in the legal structure? There is no justification, particularly in circumstances where for the purposes of the renewable energy targets, NSPI insists that 100% of the power produced from South Canoe will be IPP produced. (Appellant's Factum, ¶¶97-98)

[90] NSPI stressed on numerous occasions in its written and oral submissions before this Court that the Minister approved these IPPs in letters dated November 2013 and that this Court has no jurisdiction to challenge either the Minister or the Renewable Energy Administrator's view that the IPPs are in accordance with the law.

[91] I will make two points about this submission. First, the Minister does not determine what is or is not an IPP. The Renewable Energy Administrator selects the IPPs and the Minister's role is prescribed in ss. 9 and 11-16 of the **Regulations**. Other than calculating the total amounts of electricity for the purpose of the Renewable Energy Standard under s. 9, the Minister's role appears limited to receiving and approving applications for an "electricity standard approval". Section 13 of the **Regulations** provides that the Minister must approve an application if the generation facility is located in Nova Scotia and it will produce renewable low-impact electricity. Electricity standard approval is defined in s. 2 of the Regulations as "an approval issued under Section 14 to approve a generation

facility as a renewable low-impact electricity generation facility for the purposes of the renewable electricity standards.” As noted above, “renewable low-impact electricity generation facility” is defined as “a facility in the Province that generates renewable low-impact electricity and has received all approvals and permits required under these regulations or any other applicable enactment.” One of these approvals would be the electricity standard approval so we come full circle as South Canoe requires the Minister’s approval. Thus, with respect, while the Minister’s letters (which were not before the UARB) may purport to confirm that both South Canoe projects are “owned and operated by an independent power producer”, the Minister has no authority to make that determination.

[92] The fact that the Minister does not determine what is or what is not an IPP represents a change from the **Renewable Energy Standard Regulations (“RES Regulations”)**, which were in force from 2007 until their repeal in October 2010. Under s. 7 of the *RES Regulations*, a renewable energy generator or its designated representative applied to the Administrator for certification of a facility as a renewable energy generation facility. The Administrator is defined in s. 2 as “a person designated by the Minister under Section 4 of these regulations and includes an acting administrator”; thus, the Administrator used to be a public servant. Pursuant to s. 7(2), the Administrator must certify a facility if five conditions are met, including, in subsection (b), that “the facility is owned or operated by an independent power producer”. Thus, until 2010, the Administrator designated by the Minister determined what constituted an IPP, but for the reasons expressed above, this is not the case under the new **Regulations**.

[93] Second, although I accept that this Court has no jurisdiction to change the Renewable Energy Administrator’s decision, this does not mean that the Renewable Energy Administrator’s decision is completely shielded from scrutiny. The arrangement between Oxford/Minas and NSPI certainly stretches the definition of IPP to a breaking point.

[94] To recall, the definition of IPP in s. 3(1) of the **Regulations** includes the requirement that “no more than 49% of the securities entitling the holders to vote for the election of its directors are held by a public utility in combination with any affiliate of the public utility”. Instead, NSPI and Oxford/Minas construed the definition of IPP to enable NSPI to hold no more than 49% of the assets of the IPPs with Oxford and Minas. There are no securities involved at all in their joint ventures. As the appellant pointed out, the definition of IPP is silent on the percentage ownership of assets that a public utility may hold and therefore, there is

actually nothing to prevent NSPI from owning 99% of the assets as long as it does not own more than 49% of the securities of the IPP. To justify a 49% ownership in the IPPs, NSPI points to the fact that the Administrator approved the same ownership structure for the Point Tupper wind farm project:

The South Canoe ownership structure is based upon the same ownership structure as the Point Tupper Wind Farm. As described in the Point Tupper wind farm capital application and as documented by the information provided in Appendix D of that application, this structure was confirmed by the RES Administrator to be consistent with the facility being owned by an independent power producer.

[95] With respect, NSPI's reliance on the Point Tupper example is flawed for two reasons. NSPI relies upon the Administrator's January 2010 decision about what constituted an IPP whereas the Renewable Energy Administrator now makes this decision. In addition, the Administrator assessed whether NSPI's ownership interest in Point Tupper constituted an IPP based on the definition of IPP under the **RES Regulations**, which is completely different to the current definition of IPP under the **Regulations**.

[96] The UARB appropriately found that it had no jurisdiction to review the Renewable Energy Administrator's decision that selected Oxford/NSPI and Minas/NSPI as IPPs. Nor does this Court. This does not mean though that the Renewable Energy Administrator's decision is immune from any type of review. The Renewable Energy Administrator's report does not explain how it concluded that NSPI's ownership of 49% of the assets met the definition of IPP under s. 3(1) of the **Regulations** and I have already explained why the Minister's stamp of IPP approval, which was not before the UARB, adds no weight to NSPI's position.

[97] In summary, NSPI's explanation for how a 49% ownership stake of the assets in South Canoe satisfies the current definition of IPP in s. 3(1) of the **Regulations** is that a) the Renewable Energy Administrator approved it; (b) the Minister approved it; and (c) an administrator, appointed by the Minister under the **RES Regulations** and whose position no longer exists, determined that the structure satisfied the former definition of IPP under the **RES Regulations** which have since been repealed.

[98] While the UARB had no jurisdiction to review the Renewable Energy Administrator's decision, it could – and perhaps should – have reviewed NSPI's request under s. 35 based on the legal structure of the IPP approved by the Renewable Energy Administrator versus the legal structure of the IPP

contemplated by the **Regulations**. Had it done so, it would have necessarily reached the conclusion that had NSPI held 49% share ownership of the IPP, a s. 35 application to the UARB would have been unsuccessful. What contributed to this error was interpreting the **Public Utilities Act** in a vacuum rather than harmoniously with the **Electricity Act** and the **Regulations**. This is discussed further below.

(iii) A closer look at the Definitions of Public Utility and Service

[99] NSPI's interpretation of these provisions is relatively simple. NSPI says that it is undoubtedly a public utility as defined in s. 2(e) of the **Public Utilities Act**, that it is providing a service to the public under s. 2(f) and so that it falls within the scope of s. 35. I have concerns with NSPI's interpretation of service and public utility.

[100] My first set of concerns relate to the definition of service, which, to repeat, is defined as "the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of electrical energy for purposes of heat, light and power."

[101] It is clearly the IPP rather than the public utility that is providing the service. If one examines the definition of IPP in s. 3(1) of the **Regulations**, "independent power producer" means a renewable low-impact electricity generator ... that sells electricity ... in the Province to public utilities for retail sales to the utilities' customers". Thus, it is the IPP which provides electricity to the public utility for compensation (under the price agreed pursuant to the Power Purchase Agreement) and the public utility subsequently delivers this energy to the public for compensation. Through a series of contortions, NSPI attempts to bring itself within the definition of service under s. 2(f) of the **Public Utilities Act**, but the **Public Utilities Act** does not contemplate an intervening event, namely the energy will first be bought from the IPP before being sold by the public utility to the public. Put another way, the **Public Utilities Act** is based on the utility cost of service model where the public utility produces the electricity from its assets, not a competitively procured model where the public utility is required to purchase the electricity from the IPP and then sell that energy to customers.

[102] NSPI says it does not matter whether the energy is produced by the IPP rather than NSPI, because these are NSPI's assets or because the definition of public utility permits the production of electric power either directly or indirectly.

I have already explained above in the context of NSPI wanting to have it both ways, why the first argument cannot be sustained.

[103] I agree with NSPI that the words “directly or indirectly” in the definition of public utility can only refer to the direct or indirect production, transmission, delivery or furnishing of electric power or energy. However, my concern with the definition of public utility refers to the first part of the definition: “public utility” includes any person that may now or hereafter own, operate, manage or control ... any plant or equipment”. With respect to South Canoe, as I have outlined above, the PCOA clearly contemplates that Oxford operates, manages and controls the South Canoe project. Counsel for NSPI was asked during oral submissions what does “independent” mean in “independent power producer?” His answer was “not controlled by”. Thus, NSPI is relying upon the fact that it owns equipment (49% of the wind turbines) at South Canoe to bring itself within the definition of public utility. This leads to three points.

[104] First, if NSPI falls within the definition of public utility because it owns 49% of the wind turbines, does this mean that it is only providing a service with respect to the energy produced by the equipment that it owns? NSPI has to say no because, as pointed out above, the Power Purchase Agreement does not permit calculation of the energy produced by each wind turbine but only the cumulative energy generated by all the wind turbines at South Canoe. But how can the public utility be providing a utility service if there is no evidence whether the public utility’s asset generated the electricity?

[105] Second, it is clear that the definition of public utility in the **Public Utilities Act** does not contemplate bifurcated ownership of a plant or equipment. Public utility is defined as “any person”, which means one person or corporation. What does the Court do when the public utility may own equipment but does not own the facility since article 3.1(b) of the PPA gives ownership to Oxford?

[106] This leads to my final point, which is whether the IPPs fall within the definition of public utility under the **Public Utilities Act**. The IPPs in this case operate, manage and control a plant and equipment for the production, transmission, delivery or furnishing of electric power or energy indirectly to or for the public.

[107] Section 2(1)(ab) of the **Electricity Act** defines public utility and the IPPs would not fall within that definition because an IPP would fall under the definition of “retail supplier” which is expressly excluded. Thus, an IPP would fall within

the definition of public utility under the **Public Utilities Act** but would not under the **Electricity Act** and s. 2A of the **Electricity Act** states that the **Electricity Act** definition governs in the case of a conflict between the **Electricity Act** and the **Public Utilities Act**. This brings us full circle, it is the IPP which produces the energy, and although NSPI may own assets as part of the IPP, the IPP is excluded from the definition of public utility. Therefore, it cannot be regulated under the **Public Utilities Act**.

[108] It should also be noted that no party is suggesting the IPPs needed to make an application to the UARB; the parties appear to agree that an entity that is an IPP under the **Electricity Act** and the **Regulations** is not subject to rate regulation by the UARB on a cost of service basis under the **Public Utilities Act** because this would defeat the entire object and purpose of the scheme established under the **Electricity Act**.

b) **The UARB adopted an unreasonable interpretation of the *Public Utilities Act* by ignoring the Legislature's intentions under the 2010 amendments.**

(i) **Ignoring the 2010 Amendments**

[109] The parties went to great lengths to persuade this Court about the effect of the 2010 amendments on the **Electricity Act** and the **Regulations** and whether these represented a radical change to the legislative scheme.

[110] The appellant's submissions on the 2010 amendments are two-fold. First, it suggests that the amendments created two distinct tracks for renewable electrical power: (1) the traditional utility-owned cost of service regulated model and (2) a non-monopolistic competitive activity model. It states that s. 4B of the **Electricity Act** constitutes a complete code for the second model. In a succinct summary of its position before the UARB, CBEx submitted:

As a result of the May 2010 amendments, there are now two distinct Acts (the **Public Utilities Act** and the **Electricity Act**) governing two distinct processes (self-supply vs. third-party procurement), administered by two distinct authorities (the UARB and the Administrator), for the supply of renewable electricity by two distinct generators – NSPI and IPPs.

[111] Conversely, NSPI suggests that the 2010 amendments did not represent a radical change and were simply “a refinement” of the scheme established when the **Electricity Act** and the **RES Regulations** came into effect in 2007.

[112] With respect, the 2010 amendments were far more than a “refinement”. I have already described the three goals of the 2010 amendments: the appointment of a Renewable Energy Administrator, the establishment of feed-in tariffs or fixed prices for community-based renewable energy projects and an enhanced net-metering component that will credit consumers for renewable energy that they produce. It is only necessary to concentrate on the first goal.

[113] There are clearly significant differences between the pre-2010 amendments and the post-2010 amendments. The selection of IPPs through the Request for Proposals is now done by an independent Renewable Energy Administrator. Prior to 2010, NSPI negotiated with IPPs directly and an Administrator appointed by the Minister certified whether the project met the definition of a renewable energy generation facility. The **Electricity Act** and **Regulations** now prescribe an entire code in s. 4B about how the Renewable Energy Administrator should select the successful IPPs. Prior to 2010, the **Electricity Act** and the **RES Regulations** were silent on how IPPs were chosen. Finally, as noted above, the government amended the definition of IPP in 2010 and prescribed, in 2010 and 2013, amendments detailing how a public utility could recover its costs in rate base. Prior to 2010, the definition of IPP was different and there was no guidance about rate base.

[114] NSPI’s position is that the UARB’s direction to include its revenue from South Canoe in its service revenues and offset it against its operating and capital costs is a matter governed solely by the **Public Utilities Act** and not the **Electricity Act**. With respect, this cannot be the case for several reasons.

[115] First, the **Public Utilities Act** is silent on renewable energy. The **Electricity Act** and the **Regulations** provide guidance to the UARB about what may or may not be included in rate base. There are several relevant provisions. In the first question above, I have already reviewed the UARB’s error at para. 79 of its reasons regarding its interpretation of ss. 4B(13) of the **Electricity Act** which omitted the reference to s. 4B(12). Section 4B(13) states “the Board shall allow a public utility to recover from its rate base the costs of the public utility’s contracts referred to in subsection (12) on the basis approved by the Board under the *Public Utilities Act*.” Thus, it would clearly be an error, in determining NSPI’s application under s. 35 of the **Public Utilities Act**, to ignore s. 4B(13), which

mandates that the UARB should allow NSPI to recover the PPA price in the utility's rate base but which nevertheless gives a residual discretion to the UARB "under the *Public Utilities Act*".

[116] In oral submissions, the appellant suggests that this residual discretion would be limited to cost allocation or the timing of the recovery of costs. This would appear to be a reference to s. 7(3) of the **Regulations**, which came into effect in January 2013 and which was in force when the UARB made its decision. Section 7(3) certainly restricts the UARB's discretion under the **Public Utilities Act**. It states:

(3) The Board must allow a public utility to recover the costs of the public utility's own renewable generation assets on the basis approved by the Board under the *Public Utilities Act*, together with the recovery of the costs of tariffs allowed under subsection 4A(6) of the Act and the costs of the public utility's contracts allowed under subsection 4B(13) of the Act, to a maximum of costs in relation to a supply of renewable low-impact electricity of no more than the following:

- (a) 133% of the minimum renewable electricity standard in Section 5;
- (b) 125% of the renewable electricity standard in Section 6.

[117] Thus, the **Regulations** provide that the public utility can recover the costs of its own renewable generation assets, but prescribes that the public utility can only recover up to a maximum of 125% of the costs of the renewable energy that it obtains pursuant to s. 6 of the **Regulations**. Put another way, the Renewable Energy Standard in s. 6(1) of the **Regulations** imposes an obligation on NSPI to supply its customers with renewable electricity in an amount equal to or greater than 25% of the total electricity supplied. There is no limit or cap on the percentage of renewable energy that it can supply above the 25%, but s. 7(3) restricts the recovery of costs under PPAs with IPPs to 125% of the standard.

[118] While the parties made submissions to the UARB about the effect of s. 7(3), and the UARB commented on these submissions, neither party raised s. 7(3) in its submissions before this Court. Section 7(3) confirms that NSPI's own renewable generation assets can be recovered in rate base but refers back to s. 4B(13) to suggest that IPP electricity can only be paid for through a fixed price Power Purchase Agreement, the cost of which may be included in its rate base. One could speculate that the legislature could have easily (slightly) altered the wording of s. 7(3) had it intended for NSPI to be able to recover the costs of assets that it held in IPPs as well as its own renewable generation assets. Instead, the Legislature only

permitted the recovery of the costs of the PPA in accordance with s. 4B(13) of the **Electricity Act**.

[119] In summary, my point here is simple. In exercising its discretion under the **Public Utilities Act** pursuant to s. 4B(13) of the **Electricity Act**, it would be an error for the Board not to take into account both s. 4B(12) of the **Electricity Act** and s. 7(3) of the **Regulations**. Equally, given the guidance in these sections about what can be included in the rate base, it is difficult to agree with NSPI's submission that the **Public Utilities Act** exclusively governs what can be included in the rate base.

[120] Finally, the definition of IPP itself in the **Regulations** points away from NSPI's interpretation. Under s. 3(1), an IPP must sell electricity ... to public utilities for retail sales to the utilities' customers. As the appellant points out, "the very definition of an IPP incorporates the requirement that its electricity must be sold to utilities for resale to the public rather than paid by the public through inclusion of the capital costs of producing the electricity in the rate base". This, again, contradicts the UARB's conclusion that it is "immaterial" whether the public utility or the IPP is supplying the service. The definition of IPP envisages that IPP electricity will be supplied to NSPI for resale to the public rather than any circuitous route that may permit an interpretation that this electricity is supplied by a public utility.

(ii) Ignoring the Supporting Documents

[121] The appellant's submissions that the amendments to the **Electricity Act** and the **Regulations** constitute a two-track approach for electricity generation in Nova Scotia, one based on the traditional cost of service model and the other based on the competitively procured model, are also supported by several government documents that outline the province's renewable electricity approach and provide background to the 2010 legislative amendments. The appellant referred to the following documents.

The Nova Scotia Department of Energy Renewable Electricity Plan

[122] Published in April 2010, this document states:

Most of the new renewable energy needed to meet 2015 and 2020 goals will come from industrial-scale projects. The Renewable Electricity Plan calls for a minimum of 600 GWh of new medium to large-scale renewable electricity, produced in equal parts by NSPI and independent power producers. The UARB will evaluate, approve, and regulate projects proposed by NSPI in the traditional manner. Independent producers will compete for projects under their allocation. To promote fairness and efficiency, projects will be secured through competitive bidding in response to requests for proposals (RFPs). Most of the new renewable energy projects now under development or in operation resulted from competitive RFPs issued in 2007. Financing problems stalled several of these projects, but it's clear that some of the troubles stemmed from the world financial crisis rather than a shortcoming of the RFP model itself. Using the two methods – UARB regulation and competitive bidding – in parallel will help determine which model gives best value for ratepayers for future policy development. [Emphasis added]

[123] The emphasized sentence is a key point that the appellant stressed throughout its submissions; one of the drivers to the dual model approach for renewable energy introduced by the 2010 amendments was to determine which gives better value for ratepayers. NSPI rejects that this was one of the government's goals, but the emphasized sentence, plus the following quote from the same Plan, suggests the opposite:

Government has decided not to let independent power producers build all the medium and large-scale renewable energy projects. In essence, there are two competing models for selecting new power projects: UARB regulation of an integrated utility and competitive bids by independent producers. However, Nova Scotia's lack of a robust connection to the North American grid limits competition. Without that element, competitive bids may not be the best model – that was the judgment in 2001. This plan allows the two models to operate in parallel. The results will allow government to determine the best way to balance the development projects in the future. [Emphasis added]

Update and Preliminary Guide on Renewable Electricity in Nova Scotia

[124] This December 2010 document provides an update on the government's Renewable Electricity Plan. The **Regulations** went out to consultation in May 2010 and the government held 15 public consultation sessions across the province. With respect to medium and large-scale projects, the document again notes the importance of testing both models:

A number of proponents suggested the [300 GWh] cap be lifted or the share allocated to NSPI also be part of a competitive bid process. The division and limit was specifically designed to test the proposition of which system delivered best value. After seeing the results, the Province will decide which model to follow in the future.

[125] More recently, s. 4C of the **Electricity Act**, introduced in March 2014, provides for public consultation on future policy, which also lends weight to the suggestion that the government intended to review the new approach that it had introduced courtesy of the 2010 amendments.

(iii) Ignoring other sections of the Public Utilities Act

[126] NSPI made an application to the UARB under s. 35 of the **Public Utilities Act**. A public utility must obtain the UARB approval for capital expenditures that are “used or useful in supplying any service” over \$250,000 under s. 35. The UARB submits that s. 35 “applies if the utility wishes to have the capital item included in its rate base, on which it is entitled to earn depreciation and a rate of return.” Indeed, s. 42(1) mandates that the UARB “shall fix and determine a separate rate base for each type or kind of service furnished, rendered or supplied to the public by a public utility.” Further, s. 45(1) of the **Public Utilities Act** states “every public utility shall be entitled to earn annually such return as the Board deems just and reasonable on the rate base as fixed and determined by the Board for each type or kind of service furnished, rendered or supplied by such public utility.”

[127] The UARB quoted these paragraphs in its decision but did not analyze them. Just as s. 35 requires the UARB to contemplate whether the capital expenditures are used or useful in supplying any service, the necessity of the UARB fixing and determining a rate base and permitting the return under ss. 42 and 45 only applies where “each type or kind of service [is] furnished, rendered or supplied to the public by a public utility”.

[128] The UARB had no difficulty in concluding that “It is clear that if this Application is approved, and the Project proceeds as planned, the electricity generated will be provided as a service “to or for the public by a public utility”. But, respectfully, it made this determination without an examination of the **Electricity Act** and the **Regulations**, which clearly contemplate that the service is being provided by the IPP.

c) **Owning Assets Outside of the Rate Base**

[129] The parties disagree vehemently about whether NSPI can own assets outside of rate base. NSPI argues that it cannot and that it is obliged, under s. 35 of the **Public Utilities Act**, to seek the UARB's approval for capital expenditures in excess of \$250,000 and then to include these expenditures in rate base pursuant to ss. 42 and 45. NSPI relies upon the UARB's previous decision in **Point Tupper #2** (reported as **Nova Scotia Power Incorporated (Re)**, 2010 NSUARB 128).

[130] Conversely, CBEx contends that there is nothing that prevents NSPI from owning assets outside of its rate base. It gives the example of a corporate jet and points out that assets not in the rate base are not paid for by ratepayers and so, as a result, if regulated ratepayers are not exposed to the costs and risks of the non-rate based asset, the asset is of no concern to the ratepayers or the UARB. CBEx relies upon two earlier decisions of the UARB, **Nova Scotia Power Inc. (Re)**, 2006 NSUARB 23, (General Rate Application (GRA) decision), and another Point Tupper case (**Point Tupper #1** – reported as **Nova Scotia Power Inc. (Re)**, 2008 NSUARB 74).

[131] I will review these cases in some detail to illustrate they do not support NSPI's position, nor the UARB's conclusion that NSPI cannot own assets outside the rate base.

[132] In **Point Tupper #2**, NSPI entered into a PPA with Renewable Energy Services Limited (RESL) in 2008 to supply renewable energy by November 2009. RESL was unable to meet this deadline and the project was in danger of failing financially. NSPI therefore executed a Project Operating Agreement (POA) with RESL to purchase and install 49% of the capital costs of the facility and applied for Board approval under s. 35 of the **Public Utilities Act** for the \$27.8million capital expenditure. It was approved. In its factum, NSPI submits that the UARB's decision in this case is consistent with the UARB's decision in **Point Tupper #2** that revenue from services, which are not price regulated, must nevertheless be included in regulated revenues:

NSPI's interest in the project was identical to its interest in the Projects in this case, in that it owned a portion of the physical assets representing 49% of its value. The UARB approved the investment by NSPI and directed that it be accounted for as in this case: the PPA price is included as a purchased power expense, and NSPI's revenue from the project is credited to the revenue requirement. NSPI's actual operating and capital costs are included in the

revenue requirement with the effect that NSPI earns no more than its regulated rate-of-return on investment. (NSPI Factum, ¶63)

[133] The relevant sections of the **Point Tupper #2** decision are the following:

[34] NSPI is proposing to charge the full cost of renewable energy as per the original PPA through the FAM. However, the revenues realized by NSPI are proposed to be part of its general revenues. NSPI has argued that the reason for this treatment of revenues is to cover the cost of NSPI's investment in this Project.

[35] The Intervenor has objected to the treatment of revenues proposed by NSPI. It is their view that NSPI's share of the revenues from the 11 wind turbines should be included in the FAM. This is because all costs of the Facility, including investment costs for the 11 wind turbines (before NSPI's participation in the Facility) are included in the PPA price, and the full cost of the PPA is to be charged to the FAM.

[36] The FAM currently allows NSPI to recover fuel costs and power purchase costs, but not capital costs. Capital costs are currently recovered under customer rates approved by the Board in a rate hearing. In order to meet the 2011 RES, NSPI is charging the full cost of the PPA, which includes capital costs, to the FAM. However, NSPI is proposing to include the revenues generated from the Project in its general revenues to cover its capital costs of the Project. The FAM model does not contemplate recovery of capital costs because it did not contemplate joint ownership involving NSPI.

[37] The Board has considered the evidence and agrees with the Intervenor that NSPI's revenues from the Project should be included in the FAM to provide a clear picture of the expenses and costs. However, the Board shares NSPI's concerns and agrees that NSPI's capital cost of the Project should be specifically recovered from the revenues generated by the Project which will be credited to the FAM. The Board directs that NSPI and Board staff, by September 1, 2010, develop a mechanism to pay for NSPI's capital costs from the Project revenues credited to FAM, for approval by the Board.

[134] In this case, the UARB agreed with NSPI's submission that revenues and expenses should be treated in the same fashion as the UARB approved in **Point Tupper #2**:

[122] NSPI has proposed that the revenues and expenses from the Project be treated similar to that of the Point Tupper Wind Farm project in which it has a 49% interest.

[123] The Board accepts and approves NSPI's proposal, as amended by this Decision, for this Project.

[135] **Point Tupper #2** was an NSPI initiated procurement approved under the old **RES Regulations** where NSPI made requests for proposals and negotiated with prospective IPPs. The 2010 amendments were not in effect when the UARB made its decision. Consequently, the UARB did not consider the new competitive activity model and the UARB has erred by following this precedent in this case.

[136] As noted earlier, the appellant references another Point Tupper decision which it says demonstrate that the UARB has previously held that NSPI can hold assets outside of its rate base. In its 2006 GRA Decision, the UARB addresses, in part, the Point Tupper Marine Terminal, a coal facility that NSPI built in 2004. NSPI constructed this asset outside of its rate base; the UARB explained NSPI's reasons for doing so as follows:

[151] NSPI advertised for parties interested in providing terminal services and/or bidding to develop a terminal at Point Tupper. NSPI determined the least cost strategy to be a terminal at Point Tupper, and selected a third party to own and operate it.

As the Board is aware, NSPI's plan for the terminal faced certain challenges when it was not able to consummate an agreement with the selected third party. NSPI, following discussions with the Board, decided to go forward with the terminal outside of the traditional capital approval process in order for the terminal to be completed in a timely manner. NSPI estimated that it would incur \$3 to \$4 million in additional costs in 2005 if it delayed development of the facility. At the time, NSPI committed to attempt to divest the terminal once it was operational or return to the Board to ask that the cost of the facility be put into rate base.

The Board, in a letter dated January 22, 2004 noted that "the Board has no objection to NSPI constructing the terminal outside rate base. At such time as NSPI applies to the Board to have the terminal included as part of rate base, or applies to the Board to have the terminal sold and leased back to NSPI the Board will determine whether or not the proposed transaction, and its related costs, is appropriate after performing its normal review procedures." NSPI proceeded with the terminal and completed construction in a timely manner such that the unloading of vessels destined for Trenton and Point Tupper was accommodated by PTMT upon the expiration of the Martin Marietta agreement.

[137] NSPI applied to the UARB in its GRA to permit a \$2.3million fuel expense, which represents a recovery to NSPI for its capital related expenses in carrying the facility, despite not applying to the UARB for the asset to be approved to be put into the rate base. The UARB rejected this submission, reasoning:

[170] To the Board's knowledge, NSPI's request for a capital recovery charge in relation to a non-rate base asset is extremely unusual and perhaps unprecedented. The

Public Utilities Act clearly contemplates that all assets of a utility which are used and useful in supplying a regulated service shall be included in the rate base fixed by the Board with respect to that particular service. Furthermore, s. 45 of the **Act** provides that a public utility is entitled to earn a just and reasonable return on the rate base fixed by the Board, and to recover reasonable and prudent operating expenses. There is nothing in s. 45 or elsewhere in the **Act** which entitles a public utility to recover capital-related charges in relation to assets which it owns outside of its approved rate base. Accordingly, in the Board's view, it would be improper to allow the recovery of the \$2.3 million in fuel expense. Otherwise, a utility could hold assets outside its rate base even though those assets were being used to provide a regulated service. It could recover the capital-related charges through rates even though the Board had never approved the value of the asset for inclusion in rate base, or for depreciation purposes. Having proceeded in this fashion, the utility could then sell the asset without having to allocate to its customers any of the profits realized on the sale. This would be an intolerable situation which, in the Board's view, is simply not compatible with the intent or express provisions of the **Act**.

[171] The Board hastens to add that it is not suggesting any improper motive on the part of NSPI. The evidence clearly indicates that NSPI built the PTMT with the intention of selling it. In the meantime, it has entered into a contract with a third party to operate the terminal and the Board is satisfied that NSPI's customers are benefitting from the arrangement. Moreover, despite the evidence of Ms. Hennings, the Board is not persuaded that the terminal was designed to have excess capacity, although this question need not be definitively addressed unless and until NSPI applies to have the PTMT included in rate base. Should NSPI make such an application, the Board is prepared to consider at that time whether, in determining the amount to be included in rate base, an allowance should be made for deferred capital charges having regard to the fact that the terminal has, since the commencement of its operation, been devoted exclusively to the receiving and unloading of coal for NSPI's Trenton and Point Tupper generating plants.

[138] The appellant contends that paragraphs 170-171 demonstrate that NSPI can hold assets outside of the rate base:

NSPI had no obligation to seek to put the assets into its rate base. However, unless and until it sought and obtained the UARB's permission to do so, it could not recover the costs associated with those assets from its regulated ratepayers, either directly, or indirectly. Notably, the UARB did not direct NSPI to bring such an application, but merely observed that should NSPI make such an application, it would have to determine what amount is properly within rate base. Moreover, while the UARB expresses concern about NSPI owning assets outside its approved rate base, it is clear that this concern is limited to assets (a) which are being used to provide a regulated service; and (b) for which NSPI is seeking payment, directly or indirectly, from ratepayers. That is not this case. (AF, ¶82)

[139] On the other hand, NSPI claims that the appellant has misapprehended paragraphs 170-171:

CBEx misunderstands the effect of the 2006 GRA decision, which made findings with respect to the Point Tupper Marine Terminal. The UARB accepted that this facility had not been built as “an addition to its property”, but was rather built for resale and that was later brought into use. The UARB did not indicate in this decision that prior approval of investments in property of this nature was unnecessary. On the contrary, it clearly emphasized that such approval was necessary, with the consequence that unless and until approval was sought and granted, no return would be allowed on the investment. The operative portion of the decision is as follows:

[170] To the Board’s knowledge, NSPI’s request for a capital recovery charge in relation to a non-rate base asset is extremely unusual and perhaps unprecedented. The *Public Utilities Act* clearly contemplates that all assets of a utility which are used and useful in supplying a regulated service shall be included in the rate base fixed by the Board with respect to that particular service... (emphasis added). (NSPI Factum, ¶48 [emphasis added in original])

[140] With respect, the sentence that NSPI emphasized is taken out of context. The context was whether the UARB should approve capital-related charges on assets outside of the rate base. NSPI submits that “the UARB accepted that this facility had not been built as ‘an addition to its property’ but was rather built for resale and that was later brought into use.” The UARB did find that NSPI’s intention was to build the terminal and sell it to a third party but it was brought into use immediately after it was constructed in 2005. In effect, the parties are arguing slightly different things; the appellant is pointing out that the UARB did not object when NSPI built an asset without a s. 35 ***Public Utilities Act*** application that was used or useful in supplying a service, whereas NSPI is insisting that the Board still has to approve the investment.

[141] A closer examination of **Point Tupper #1**, which the appellant relied upon in oral submissions, is necessary. This is the decision in which the UARB ultimately approved the inclusion of the Point Tupper Marine Terminal in NSPI’s rate base. With respect, it demonstrates the UARB’s lack of objection to NSPI constructing unregulated assets outside of the rate base. In its written submissions to the UARB, NSPI stated in part:

NSPI’s correspondence of January 8, 2004 to the Board advises that if the terminal could not be divested, NSPI would apply to the Board to have it included in rate base on a cost

recovery basis. The Board accepted this approach to the construction of PTMT reserving the right to establish the valuation for inclusion into rate base at the time of NSPI's application. This approach was reinforced by the Board in its Decision in the 2006 general rate application. The Company now makes such a request. (¶34)

[142] The UARB allowed the Point Tupper Marine Terminal to be included in the rate base but made it clear its lack of opposition was not synonymous with its approval:

The Board finds that it is appropriate to include PTMT in rate base. In coming to this conclusion, the Board wishes to make it very clear that it in no way considers its January 22, 2004 letter to NSPI regarding its plan to construct the PTMT as a 'precedent' for this approval, despite the apparent reference to that assumption in NSPI's May 16, 2008 written response, as noted earlier in this decision. In the Board's view, no acceptance or approval for the construction of PTMT by NSPI as an unregulated asset was given by the Board, either explicitly or implicitly, in its letter of January 22, 2004. The Board had no authority to approve actions undertaken by the unregulated component of NSPI. It indicated it did not "oppose" the project, but that can hardly be viewed as a future endorsement of same. (¶41) [Emphasis added]

[143] The emphasized sentence is key. The UARB understood that NSPI was willing to build an asset out of the rate base that it intended to sell in the future and that NSPI's shareholders were responsible for that risk. The UARB goes on to reject NSPI's attempt to have the fair market value of the PTMT (\$42million) included in its rate base as well as the carrying costs since its construction five years previously. Its reasoning is very interesting, and is compelling:

In the Board's view, the decision of NSPI to undertake this project can fairly be described as one which was a 'business venture' outside the ordinary scope of its business as a public utility. NSPI constructed a marine terminal for resale, built on a scale that could accommodate NSPI's fuel supply importation needs in addition to providing other possible business opportunities for a new owner, all without the approval of the Board that would be required under s. 35A of the **Public Utilities Act** for a capital expenditure of this magnitude by a public utility.

The Board's clear understanding at that time was that it was NSPI's intention, not just a 'possible outcome' or 'option', to build the terminal and sell it to a third party who would then operate it and enter into a contract with NSPI to provide for its continued use of the facility. In the Board's view, NSPI must have believed it could realize a profit on the sale of PTMT, as it is unlikely that any reasonable

person would construct and sell a multi-million dollar facility on any other basis. That plan, as has been pointed out, was unsuccessful. NSPI issued a Request for Proposals in mid-2004 seeking possible buyers but no sale occurred. As a result, NSPI continues to own PTMT as an unregulated asset. It has entered into an agreement with an unaffiliated third party to operate the terminal and, at present, NSPI is the sole user of the facility.

As set out above, NSPI's decision to construct PTMT was a business venture. As is the norm with business ventures, shareholders bear the risk when making such decisions. There was no guaranteed fall-back position that if the project did not work out as planned, ratepayers would assume all of the costs associated with the risk taken by shareholders. The Board made it clear in its January 22, 2004 letter that the appropriateness of including PTMT in rate base in future would only be considered if and when an application was made.

As noted earlier in this decision, NSPI, in large part, has justified its valuation of PTMT on the basis that the original project cost, and carrying costs, have been borne by shareholders since the terminal began operation in 2005. NSPI believes that since the ratepayers have benefited from this arrangement, all of the costs which have been borne by shareholders should now be included in rate base.

The Board disagrees. It is not in keeping with long-established regulatory principles, or common sense for that matter, that ratepayers should 'pick up the tab' when a business venture undertaken by shareholders does not work out as originally intended. In the Board's view, this logic is clearly demonstrable by considering what would have occurred if the asset had been sold at a profit. Shareholders would have realized a financial benefit from the profitable sale of an unregulated asset owned by NSPI. None of these profits would have been shared with ratepayers as the shareholders would have had no responsibility to do so. If ratepayers are not entitled to a share of the profits from the sale of an asset, they should have no responsibility or obligation to bear the risk that the asset may not be sold, or to compensate shareholders for costs or losses which may have been incurred. As a result, the Board can see no justification in retroactively burdening ratepayers with inclusion of the 2005 original cost to construct PTMT, along with the corresponding carrying charges since then—totalling \$42.13 million—in rate base. (¶47-51)

[144] With respect, despite the UARB's protestations, it is clear that it "did not object" when NSPI built an asset outside of the rate base. As the UARB pointed out, had NSPI sold the Point Tupper Marine Terminal when it was constructed outside of the rate base, shareholders, having borne the risk of constructing the facility, would have realized a profit. The UARB found in 2008 that the construction of a facility for unloading solid fuel supply destined for the Point Tupper and Trenton generating plants constituted a reasonable and justifiable addition to NSPI's assets and was used and useful in supplying a service, but

characterized the 2004 decision to build the Point Tupper Marine Terminal outside of rate base as “a business venture outside the ordinary scope of its business as a public utility”. With respect, although not included in the rate base, the Point Tupper Marine Terminal had been used and useful in providing a service since its construction five years earlier. It is not clear why the fact that NSPI was unable to resell Point Tupper Marine Terminal to a third party somehow made the construction of the asset to be outside the ordinary scope of NSPI’s business.

[145] Applying the same logic to this case, it is difficult to see why the UARB did not consider whether NSPI’s investment in an IPP would also not qualify as a “business venture outside the ordinary scope of its business as a public utility” or why NSPI could not continue to own the wind turbines as unregulated assets.

[146] Finally, I return to a point that the appellant stressed in oral submissions to the Court with respect to paragraph 79 of the UARB’s decision:

[79] The provisions of s. 4B(13) of the **Electricity Act** state that the public utility is to recover “...from its rate base...” its costs “...on the basis approved by the Board under the [**Public Utilities Act**]”. The Board does not consider that NSPI could participate, as permitted, in an IPP, and at the same time, be unregulated by the Board. Allowing NSPI to do so would mean that it could earn unregulated profits on investments in IPPs. Those profits would be paid by NSPI customers and, potentially, could exceed NSPI’s allowed rate of return. In the Board’s view, this would substantially erode a fundamental principle of public utility regulation. As already stated, the Board does not interpret the **Electricity Act** as requiring such a result.

[147] CBEx pointed out that there was nothing wrong with allowing NSPI to earn unregulated profits on its investment in IPPs on the basis that it is not the ratepayer’s money at stake; the ratepayers do not bear the risk of loss so they do not receive the benefit of any gains.

[148] The “fundamental principle” that the UARB refers to is presumably that a public utility operates on a cost of service basis, where the costs of providing electrical service are assessed and scrutinized by the UARB before any approval in relation to significant capital expenditures is granted. The difficulty with the UARB’s interpretation is threefold; it requires an erroneous interpretation of s. 4B(13) of the **Electricity Act**; it ignores the previous occasion where the UARB did not object to NSPI’s investment in a venture; and, it ignores a more harmonious interpretation of the **Electricity Act**, the **Regulations** and the **Public**

Utilities Act that service, under ss. 35 and 2(g) of the **Public Utilities Act**, does not include competitively procured renewable energy and that this type of power is not subject to cost of service regulation by the UARB, regardless of who produces it.

[149] The legislative scheme envisions two methods of acquiring renewable energy, NSPI and independent power producers. The amendments to the **Electricity Act** were intended to set forth the scheme upon which IPPs would operate. IPPs are overseen by the renewable energy administrator and not the UARB.

[150] For all of these reasons, the UARB's conclusion that NSPI's investment in the South Canoe Wind Project is properly included in the rate base is unreasonable. It does not fall within the range of possible outcomes.

[151] I would allow this ground of appeal.

Issue 2 The UARB did not err in law in deciding to treat as confidential from the public a large volume of documents submitted by NSPI to support its application requesting that the ratepaying public pay for its investment and profits in the South Canoe Wind Project. On this issue its decision was reasonable.

[152] I am substantially in agreement with the submissions of NSPI under this ground of appeal.

[153] CBEx's argument fails for two reasons:

1. CBEx's objection was not made in a timely manner; and
2. The UARB's decision to allow NSPI's motion for confidentiality was reasonable.

[154] I will address each of these separately.

Timeliness of the Objection

[155] Section 12 of the **Utility and Review Board Act**, S.N.S. 1992, c. 11 provides:

12 The Board may make rules respecting practice and procedure in relation to matters coming before it.

[156] Section 12 is a reflection of the legislative intent to make the UARB the master of its own procedure and to give it considerable latitude and authority to develop procedures as it deems fit. It has done so in this circumstance by adopting the **Board Regulatory Rules**, N.S. Reg. 235/2005 (Dec. 23, 2005) as amended. The Rules establish a detailed framework for consideration of confidentiality requests. In particular, Rule 12 establishes the following procedure for objecting to a request for confidentiality:

(6) A party may object to a request for confidentiality by filing an objection and serving the objection on the parties.

(7) The objection shall state the reasons (a) why the party requires disclosure of the documents and (b) why disclosure would be in the public interest.

[157] CBEx did not file an objection under Rules 12(6) and (7) nor did it suggest at any point before or during the hearing that NSPI's confidentiality request was improper or in any way impeded its ability to respond to the application. Its objection to the confidentiality of certain documents was not raised until its post-hearing submissions.

[158] Finally, CBEx did not suggest that the UARB's consideration of the request was an error. In fact, CBEx counsel obtained access to the confidential information by signing an approved confidentiality undertaking.

[159] In these circumstances, it was reasonable for the UARB to conclude, as it did, that it should not entertain a request to adjudicate the claim for confidentiality once the hearing had concluded. (¶44).

[160] For this reason alone, I would dismiss this ground of appeal.

The Board's Decision was Reasonable

[161] I am also of the view that the UARB decision to allow NSPI's confidentiality motion was reasonable.

[162] In its supplemental decision (reported 2014 NSUARB 5) the UARB sets out in detail its reasons for granting the confidentiality order (see ¶27-41 and ¶45-46).

[163] The UARB accepted that the information filed in confidence consisted of third party commercially sensitive information and that the UARB was concerned that disclosure and public discussion of that information could:

- Undermine its confidentiality obligation to third parties;
- Result in third parties being less willing to contract with NSPI in the future;
- Put NSPI at a competitive disadvantage during future courses of negotiations; and
- Generally harm (by resulting in higher costs) to NSPI's ratepayers.

[164] It is not for this Court to reweigh the policy considerations of the UARB or engage in our own analytical process or undertake our own page by page assessment of thousands of pages of documents, in considering this ground of appeal. It is sufficient for us to say, having reviewed the record and the UARB's reasons, that its conclusion falls within a range of acceptable outcomes.

[165] I would dismiss this ground of appeal.

[166] In light of my conclusion on this ground of appeal, it is not necessary to have regard to the evidence of Oxford and Minas or to resort to their arguments.

Conclusion

[167] The appeal is allowed, in part and (by agreement of the parties), without costs. The decision and Order of the UARB approving NSPI's Capital Expenditure in the South Canoe Wind Project is set aside.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Bryson, J.A.

Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Canadian Association of Refugee Lawyers, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration and First Nations Child & Family Caring Society of Canada *Interveners*

Parkdale Community Legal Services, Cambridge Comparative Administrative Law Forum, Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko, Association du Barreau canadien, Association canadienne des avocats et avocates en droit des réfugiés, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration et Société de soutien à l'enfance et à la famille des Premières Nations du Canada *Intervenants*

INDEXED AS: CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) v. VAVILOV
2019 SCC 65

File No.: 37748.

2018: December 4, 5, 6; 2019: December 19.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Proper approach to judicial review of administrative decisions — Proper approach to reasonableness review.

Citizenship — Canadian citizens — Registrar of Citizenship cancelling certificate of Canadian citizenship issued to Canadian-born son of parents later revealed to be Russian spies — Decision of Registrar based on interpretation of statutory exception to general rule that person born in Canada is Canadian citizen — Exception stating that Canadian-born child is not citizen if either parent was representative or employee in Canada of foreign government at time of child's birth — Whether Registrar's decision to cancel certificate of citizenship was reasonable — Citizenship Act, R.S.C. 1985, c. C-29, s. 3(2)(a).

RÉPERTORIÉ : CANADA (MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION) c. VAVILOV
2019 CSC 65

N° du greffe : 37748.

2018 : 4, 5, 6 décembre; 2019 : 19 décembre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et Martin.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Contrôle judiciaire — Norme de contrôle — Démarche appropriée pour le contrôle judiciaire des décisions administratives — Démarche appropriée pour l'application de la norme de la décision raisonnable.

Citoyenneté — Citoyens canadiens — Annulation par la greffière de la citoyenneté du certificat de citoyenneté canadienne délivré au fils né au Canada de parents qui se sont plus tard révélés être des espions russes — Décision rendue par la greffière sur son interprétation de l'exception prévue par la loi à l'égard de la règle générale suivant laquelle les personnes nées au Canada ont la citoyenneté canadienne — Exception précisant qu'un enfant né au Canada n'est pas citoyen canadien si, au moment de sa naissance, son père ou sa mère était représentant ou au service au Canada d'un gouvernement étranger — La décision de la greffière d'annuler le certificat de citoyenneté était-elle raisonnable? — Loi sur la citoyenneté, L.R.C. 1985, c. C-29, art. 3(2)a).

V was born in Toronto in 1994. At the time of his birth, his parents were posing as Canadians under assumed names. In reality, they were foreign nationals working on assignment for the Russian foreign intelligence service. V did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, he lived and identified as a Canadian, and he held a Canadian passport. In 2010, V's parents were arrested in the United States and charged with espionage. They pled guilty and were returned to Russia. Following their arrest, V's attempts to renew his Canadian passport proved unsuccessful. However, in 2013, he was issued a certificate of Canadian citizenship.

Then, in 2014, the Canadian Registrar of Citizenship cancelled V's certificate on the basis of her interpretation of s. 3(2)(a) of the *Citizenship Act*. This provision exempts children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" from the general rule that individuals born in Canada acquire Canadian citizenship by birth. The Registrar concluded that because V's parents were employees or representatives of Russia at the time of V's birth, the exception to the rule of citizenship by birth in s. 3(2)(a), as she interpreted it, applied to V, who therefore was not, and had never been, entitled to citizenship. V's application for judicial review of the Registrar's decision was dismissed by the Federal Court. The Court of Appeal allowed V's appeal and quashed the Registrar's decision because it was unreasonable. The Minister of Citizenship and Immigration appeals.

Held: The appeal should be dismissed.

Per Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin J.J.: The Registrar's decision to cancel V's certificate of citizenship was unreasonable, and the Court of Appeal's decision to quash it should be upheld. It was not reasonable for the Registrar to interpret s. 3(2)(a) of the *Citizenship Act* as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

More generally, this appeal and its companion cases (*Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, [2019] 4 S.C.R. 845) provide an opportunity to consider and clarify the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and subsequent cases. The submissions presented to the Court

V est né à Toronto en 1994. Au moment de sa naissance, ses parents se font passer pour des Canadiens en utilisant des noms d'emprunt. En fait, ils sont des étrangers en mission pour le service des renseignements étrangers de la Russie. V ne sait pas que ses parents ne sont pas ceux qu'ils prétendent être. Il croit être citoyen canadien de naissance, il vit et s'identifie comme un Canadien, et il détient un passeport canadien. En 2010, les parents de V sont arrêtés aux États-Unis et accusés d'espionnage. Ils plaident coupables et sont renvoyés en Russie. Après leur arrestation, V tente en vain de renouveler son passeport canadien. On lui décerne toutefois en 2013 un certificat de citoyenneté canadienne.

Puis, en 2014, la greffière de la citoyenneté canadienne annule le certificat de V en se fondant sur son interprétation de l'al. 3(2)a) de la *Loi sur la citoyenneté*. Cette disposition exempte les enfants d'un « agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger » de l'application de la règle générale selon laquelle les personnes nées au Canada ont la citoyenneté canadienne de naissance. La greffière conclut que, comme les parents de V étaient des employés ou représentants de la Russie au moment de la naissance de V, et selon l'interprétation qu'elle donne de l'exception prévue à l'al. 3(2)a) à l'égard de la règle de citoyenneté par la naissance, cette exception s'applique à V, qui n'a donc pas droit à la citoyenneté et n'y a jamais eu droit. La demande de contrôle judiciaire présentée par V à l'encontre de la décision de la greffière est rejetée par la Cour fédérale. La Cour d'appel accueille l'appel interjeté par V et casse la décision de la greffière parce qu'elle était déraisonnable. Le ministre de la Citoyenneté et de l'Immigration se pourvoit en appel.

Arrêt : Le pourvoi est rejeté.

Le juge en chef Wagner et les juges Moldaver, Gascon, Côté, Brown, Rowe et Martin : La décision de la greffière d'annuler le certificat de citoyenneté de V était déraisonnable, et il y a lieu de confirmer l'arrêt par lequel la Cour d'appel fédérale l'a cassée. La greffière ne pouvait raisonnablement interpréter l'al. 3(2)a) de la *Loi sur la citoyenneté* comme s'appliquant à un enfant dont les parents, au moment de sa naissance, ne s'étaient pas vu accorder des privilèges et immunités diplomatiques.

De façon plus générale, le présent pourvoi et les pourvois connexes (*Bell Canada c. Canada (Procureur général)*, 2019 CSC 66, [2019] 4 R.C.S. 845) donnent l'occasion d'analyser et de clarifier le droit applicable au contrôle judiciaire des décisions administratives tel que traité dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts subséquents. Les

have highlighted two aspects of the current framework which need clarification. The first aspect is the analysis for determining the standard of review. The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard.

It has become clear that *Dunsmuir*'s promise of simplicity and predictability has not been fully realized. Certain aspects of the current standard of review framework are unclear and unduly complex. The former contextual analysis has proven to be unwieldy and offers limited practical guidance for courts attempting to determine the standard of review. The practical effect is that courts struggle in conducting the analysis, and debates surrounding the appropriate standard and its application continue to overshadow the review on the merits, thereby undermining access to justice. A reconsideration of the Court's approach is therefore necessary in order to bring greater coherence and predictability to this area of law. A revised framework to determine the standard of review where a court reviews the merits of an administrative decision is needed.

In setting out a revised framework, this decision departs from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration of past precedents can be justified only by compelling circumstances and requires carefully weighing the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty. In such circumstances, following a prior decision would be contrary to the underlying values of clarity and certainty in the law.

The revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to fulfill its mandate and interpret the law applicable to all issues that come before it. Where a legislature has not explicitly provided that a court is to have a more involved role in reviewing the decisions of that decision maker, it can safely

observations présentées à la Cour ont mis en relief deux aspects du cadre d'analyse actuel qu'il est nécessaire de clarifier. Le premier aspect concerne l'analyse visant à déterminer la norme de contrôle applicable. Le deuxième aspect concerne la nécessité d'indications plus précises de la Cour sur l'application appropriée de la norme de contrôle de la décision raisonnable.

Il est devenu évident que la promesse de simplicité et de prévisibilité formulée à cet égard dans l'arrêt *Dunsmuir* ne s'est pas pleinement réalisée. Certains aspects du cadre d'analyse actuel de la norme de contrôle ne sont pas clairs et sont indûment complexes. L'ancienne analyse contextuelle s'est révélée complexe et d'utilité limitée pour donner une orientation pratique aux cours de justice qui tentent de déterminer la norme de contrôle applicable. Ce manque de clarté a pour effet pratique que les cours de justice ont parfois de la difficulté à effectuer l'analyse relative à la norme de contrôle, et des débats entourant la norme appropriée et son application continuent d'éclipser le contrôle sur le fond, ce qui mine l'accès à la justice. Il est donc nécessaire de revoir l'approche de la Cour afin d'apporter une cohérence et une prévisibilité accrues à ce domaine du droit. Un cadre d'analyse révisé servant à déterminer la norme de contrôle applicable lorsqu'une cour de justice se penche sur le fond d'une décision administrative s'impose.

En exposant un cadre d'analyse révisé, la présente décision s'écarte à certains égards de la jurisprudence actuelle de la Cour sur la norme de contrôle. Seules des circonstances convaincantes peuvent justifier un réexamen des précédents antérieurs et il faut soupeser soigneusement l'incidence de ce réexamen sur la certitude et la prévisibilité juridiques par rapport aux coûts liés au fait de continuer à souscrire à une approche erronée. Si le respect de la jurisprudence établie favorise généralement la certitude et la prévisibilité, dans certains cas, ce respect crée ou perpétue l'incertitude du droit. Dans ces circonstances, en suivant l'arrêt antérieur, on se trouve à aller à l'encontre des valeurs fondamentales de la clarté et de la certitude du droit.

Le cadre d'analyse révisé de la norme de contrôle repose sur la présomption voulant que la norme de la décision raisonnable soit la norme applicable dans tous les cas. Si le législateur a constitué un décideur administratif dans le but précis d'administrer un régime législatif, il faut présumer que le législateur a également voulu que ce décideur soit en mesure d'accomplir son mandat et d'interpréter la loi qui s'applique à toutes les questions qui lui sont soumises. Si le législateur n'a pas prescrit expressément que les cours de justice ont un rôle plus actif à jouer dans

be assumed that the legislature intended a minimum of judicial interference. Respect for these institutional design choices requires a reviewing court to adopt a posture of restraint. Thus, whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. As a result, it is no longer necessary for courts to engage in a contextual inquiry in order to identify the appropriate standard. Conclusively closing the door on the application of a contextual analysis to determine the applicable standard streamlines and simplifies the standard of review framework. As well, with the presumptive application of the reasonableness standard, the relative expertise of administrative decision makers is no longer relevant to a determination of the standard of review. It is simply folded into the new starting point. Relative expertise remains, however, a relevant consideration in conducting reasonableness review.

The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply. This will be the case where it has explicitly prescribed the applicable standard of review. Any framework rooted in legislative intent must respect clear statutory language. The legislature may also direct that derogation from the presumption is appropriate by providing for a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. Where a legislature has provided a statutory appeal mechanism, it has subjected the administrative regime to appellate oversight and it expects the court to scrutinize such administrative decisions on an appellate basis. The applicable standard is therefore to be determined with reference to the nature of the question and to the jurisprudence on appellate standards of review. Where, for example, a court hears an appeal from an administrative decision, it would apply the standard of correctness to questions of law, including on statutory interpretation and the scope of a decision maker's authority. Where the scope of the statutory appeal includes questions of fact or questions of mixed fact and law, the standard is palpable and overriding error for such questions.

le contrôle des décisions de ce décideur, on peut aisément présumer que le législateur a voulu que celui-ci puisse fonctionner en faisant le moins possible l'objet d'une intervention judiciaire. Le respect de ces choix d'organisation institutionnelle oblige la cour de révision à adopter une attitude de retenue. Donc, chaque fois qu'une cour examine une décision administrative, elle doit partir de la présomption que la norme de contrôle applicable à l'égard de tous les aspects de cette décision est celle de la décision raisonnable. En conséquence, les cours de justice ne sont plus tenues de recourir à une analyse contextuelle pour établir la norme de contrôle appropriée. Fermer de manière définitive la porte au recours à l'analyse contextuelle pour déterminer la norme de contrôle applicable a pour effet d'alléger et de simplifier le cadre d'analyse applicable à la norme de contrôle. De plus, étant donné la présomption d'application de la norme de la décision raisonnable, l'expertise relative des décideurs administratifs n'est plus pertinente pour déterminer la norme de contrôle applicable. Elle est tout simplement incorporée au nouveau point de départ. L'expertise relative demeure cependant pertinente lors de l'exercice du contrôle judiciaire selon la norme de la décision raisonnable.

La présomption d'application de la norme de la décision raisonnable peut être réfutée dans deux types de situations. La première est celle où le législateur a indiqué qu'il souhaite l'application d'une norme différente. C'est le cas lorsque le législateur a prescrit expressément la norme de contrôle applicable. Tout cadre d'analyse fondé sur l'intention du législateur doit respecter les dispositions législatives claires. Le législateur peut également indiquer qu'une dérogation à la présomption est de mise en prévoyant un mécanisme d'appel à l'encontre d'une décision administrative devant une cour de justice, indiquant ainsi son intention que les cours de justice recourent, en matière de contrôle, aux normes applicables en appel. Lorsqu'il prévoit dans la loi un mécanisme d'appel, le législateur assujettit le régime administratif à une compétence d'appel et indique qu'il s'attend à ce que la cour vérifie attentivement une telle décision administrative par voie d'appel. La norme de contrôle applicable doit donc être déterminée eu égard à la nature de la question et à la jurisprudence sur les normes de contrôle applicables en appel. Par exemple, lorsqu'une cour de justice entend l'appel d'une décision administrative, elle appliquera la norme de la décision correcte aux questions de droit, touchant notamment à l'interprétation législative et à la portée de la compétence du décideur. Si l'appel prévu par la loi porte notamment sur des questions de fait ou des questions mixtes de fait et de droit, la norme de contrôle applicable à ces questions sera celle de l'erreur manifeste et déterminante.

Giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. This shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by weighing the values of certainty and correctness. First, there has been significant and valid judicial and academic criticism of the Court's recent approach to statutory appeal rights and of the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. Second, there is no satisfactory justification for the recent trend in the Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis, absent exceptional wording. More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute. Accepting that the legislature intends an appellate standard of review to be applied also helps to explain why many statutes provide for both appeal and judicial review mechanisms, thereby indicating two roles for reviewing courts. Finally, because the presumption of reasonableness review is no longer premised upon notions of relative expertise and is now based on respect for the legislature's institutional design choice, departing from the presumption of reasonableness review in the context of a statutory appeal respects this legislative choice.

The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. First, questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Second, the rule of law requires courts to have the final word with regard to general questions of law that are of central importance to the legal system as a whole because they require uniform and consistent answers. Third, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another since the rule of law cannot

Donner un tel sens aux mécanismes d'appel prévus par la loi s'écarter de la jurisprudence récente de la Cour. Ce virage s'impose afin d'apporter uniformité et équilibre conceptuel à l'analyse relative à la norme de contrôle et il se justifie par la mise en balance des valeurs de la certitude et de la justesse. D'abord, d'importantes et valables critiques judiciaires et doctrinales ont été formulées au sujet de la conception que la Cour s'est faite des droits d'appel prévus par la loi et de l'incohérence inhérente à un cadre d'analyse de la norme de contrôle fondé sur l'intention du législateur qui refuse par ailleurs de donner un sens à un droit d'appel conféré expressément par la loi. Ensuite, rien ne justifie de façon satisfaisante la tendance récente de la Cour de ne pas tenir compte des droits d'appels conférés par la loi sauf en présence d'un libellé exceptionnel. De façon plus générale, il n'y a aucune raison convaincante de présumer que le législateur voulait que le mot « appel » revête un sens tout à fait différent dans une loi à caractère administratif. Accepter que le législateur souhaite le recours à une norme de contrôle applicable en appel permet également d'expliquer pourquoi bon nombre de textes législatifs prévoient à la fois des mécanismes d'appel et de contrôle judiciaire, conférant ainsi deux rôles possibles aux cours de révision. Enfin, puisque la présomption d'application de la norme de la décision raisonnable en cas de contrôle judiciaire n'est plus fondée sur la notion d'expertise relative et repose maintenant sur le respect du choix d'organisation institutionnelle de la part du législateur, la dérogation à la présomption de contrôle selon la décision raisonnable dans le cas d'un appel prévu par la loi respecte ce choix du législateur.

La deuxième situation où la présomption d'application de la norme de la décision raisonnable est réfutée est celle où la primauté du droit commande l'application de la norme de la décision correcte. C'est le cas pour certaines catégories de questions de droit, soit les questions constitutionnelles, les questions de droit générales d'importance capitale pour le système juridique dans son ensemble et les questions liées aux délimitations des compétences respectives d'organismes administratifs. Premièrement, les questions touchant au partage des compétences entre le Parlement et les provinces, au rapport entre le législateur et les autres organes de l'État, et à la portée des droits ancestraux et issus de traités reconnus à l'art. 35 de la *Loi constitutionnelle de 1982*, et d'autres questions de droit constitutionnel nécessitent une réponse décisive et définitive des cours de justice. Deuxièmement, la primauté du droit exige que les cours de justice tranchent de manière définitive les questions de droit générales qui sont d'importance capitale pour le système juridique dans son ensemble parce qu'elles requièrent des réponses uniformes et cohérentes. Troisièmement, la primauté du droit

tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies. The application of the correctness standard for such questions therefore respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.

The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. The possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case is not definitively foreclosed. However, any new basis for correctness review would be exceptional and would need to be consistent with this framework and the overarching principles set out in this decision. Any new correctness category based on legislative intent would require a signal of legislative intent as strong and compelling as a legislated standard of review or a statutory appeal mechanism. Similarly, a new correctness category based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in this decision.

For example, the Court is not persuaded that it should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. A lack of unanimity within an administrative tribunal is the price to pay for decision-making freedom and independence. While discord can lead to legal incoherence, a more robust form of reasonableness review is capable of guarding against such threats to the rule of law. As well, jurisdictional questions should no longer be recognized as a distinct category subject to correctness review; there are no clear markers to distinguish such questions from other questions related to interpreting an administrative

commande l'intervention des cours de justice lorsqu'un organisme administratif interprète l'étendue de ses pouvoirs d'une manière qui est incompatible avec la compétence d'un autre organisme administratif, car la primauté du droit ne saurait tolérer des ordonnances et des procédures qui entraînent un véritable conflit opérationnel entre deux organismes administratifs. L'application de la norme de la décision correcte à l'égard de ces questions s'accorde donc avec le rôle unique du pouvoir judiciaire dans l'interprétation de la Constitution, et fait en sorte que les cours de justice puissent avoir le dernier mot sur des questions à l'égard desquelles la primauté du droit exige une cohérence et une réponse décisive et définitive s'impose.

Conjuguée à ces exceptions limitées, la règle générale qui prévoit l'application de la norme de la décision raisonnable met en place une méthode complète pour déterminer la norme de contrôle applicable. On ne ferme pas définitivement la porte à la possibilité qu'une autre catégorie puisse ultérieurement être reconnue comme appelant une dérogation à la présomption de contrôle selon la norme de la décision raisonnable. Cependant, la reconnaissance de tout nouveau fondement pour l'application de la norme de la décision correcte devrait revêtir un caractère exceptionnel et devrait respecter ce cadre d'analyse et les principes prépondérants énoncés dans la présente décision. Toute nouvelle catégorie de questions qui commandent l'application de la norme de la décision correcte sur le fondement de l'intention du législateur devrait comporter une indication de cette volonté tout aussi solide et convaincante qu'une norme de contrôle établie par voie législative ou un mécanisme d'appel prévu par la loi. De la même manière, la reconnaissance d'une nouvelle catégorie de questions appelant la norme de la décision correcte sur le fondement de la primauté du droit ne serait justifiée que dans le cas où le défaut d'appliquer la norme de la décision correcte risquerait d'ébranler la primauté du droit et mettrait en péril le bon fonctionnement du système de justice d'une façon analogue aux trois situations décrites dans la présente décision.

Par exemple, la Cour n'est pas convaincue qu'elle devrait reconnaître l'existence d'une catégorie distincte de questions de droit qui appellent la norme de la décision correcte dans le cas où ces questions sèment constamment la discorde au sein d'un organisme administratif. L'absence d'unanimité parmi les membres d'un tribunal administratif est le prix à payer pour la liberté et l'indépendance décisionnelle. Bien que la discorde puisse mener à l'incohérence du droit, un cadre d'application plus rigoureux de la norme de la décision raisonnable permet de se prémunir face à ces menaces à la primauté du droit. En outre, les questions de compétence ne devraient plus

decision maker's enabling statute. A proper application of the reasonableness standard will enable courts to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment on jurisdictional issues and without having to apply the correctness standard.

Going forward, a court seeking to determine what standard of review is appropriate should look to this decision first in order to determine how the general framework applies. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance and will continue to apply essentially without modification, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between administrative bodies. On other issues, such as the effect of statutory appeal mechanisms, true questions of jurisdiction or the former contextual analysis, certain cases will necessarily have less precedential force.

There is also a need for better guidance from the Court on the proper application of the reasonableness standard, what that standard entails and how it should be applied in practice. Reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. Its starting point lies in the principle of judicial restraint and in demonstrating respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering decision makers from accountability. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified. In conducting reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, to ensure that the decision as a whole is transparent, intelligible and justified. Judicial review is concerned with both the outcome of the decision and the reasoning process that led to that outcome. To accept otherwise would undermine, rather than demonstrate respect

être reconnues comme une catégorie distincte devant faire l'objet d'un contrôle selon la norme de la décision correcte; il n'existe aucune balise claire qui permet de distinguer ces questions de celles touchant à l'interprétation de sa loi habilitante par un décideur administratif. En appliquant adéquatement la norme de la décision raisonnable, les cours de justice sont en mesure de veiller à ce que les organismes administratifs agissent dans les limites des pouvoirs qui leur sont conférés sans qu'il soit nécessaire de procéder à un examen préliminaire des questions de compétence et sans avoir à recourir à la norme de la décision correcte.

À l'avenir, la cour de justice qui cherche à arrêter la norme de contrôle applicable devrait d'abord s'en remettre à la présente décision pour savoir comment s'applique le cadre général. Il est ainsi possible que la cour soit appelée à trancher des questions subsidiaires à l'égard desquelles la jurisprudence continue de donner des indications utiles et continue de s'appliquer essentiellement telle quelle, comme les affaires portant sur des questions de droit générales d'importance capitale pour le système de justice dans son ensemble ou sur des questions liées aux délimitations des compétences respectives d'organismes administratifs. Pour d'autres catégories de questions, certains arrêts, dont ceux portant sur l'effet des mécanismes d'appel prévus par la loi, sur des questions touchant véritablement à la compétence ou sur l'ancienne analyse contextuelle, auront forcément une valeur de précédent moindre.

En outre, la Cour doit donner des indications plus précises sur l'application appropriée de la norme de contrôle de la décision raisonnable, ce que signifie cette norme et comment elle devrait être appliquée en pratique. Le contrôle selon la norme de la décision raisonnable est une approche visant à faire en sorte que les cours de justice interviennent dans les affaires administratives uniquement lorsque cela est vraiment nécessaire pour préserver la légitimité, la rationalité et l'équité du processus administratif. Il tire son origine du principe de la retenue judiciaire et témoigne d'un respect envers le rôle distinct des décideurs administratifs. Toutefois, il ne s'agit pas d'une « simple formalité » ni d'un moyen visant à soustraire les décideurs administratifs à leur obligation de rendre des comptes. Bien que les cours de justice doivent reconnaître la légitimité et la compétence des décideurs administratifs et adopter une attitude de respect, les décideurs administratifs doivent adhérer à une culture de la justification et démontrer que l'exercice du pouvoir public qui leur est délégué peut être justifié. Lorsqu'elle effectue un contrôle selon la norme de la décision raisonnable, la cour de révision doit tenir compte du résultat de la décision administrative eu égard au raisonnement sous-jacent à celle-ci afin de

toward, the institutional role of the administrative decision maker.

Reasonableness review is methodologically distinct from correctness review. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable.

In cases where reasons are required, they are the starting point for reasonableness review, as they are the primary mechanism by which decision makers show that their decisions are reasonable. Reasons are the means by which the decision maker communicates the rationale for its decision: they explain how and why a decision was made, help to show affected parties that their arguments have been considered and that the decision was made in a fair and lawful manner, and shield against arbitrariness. A principled approach to reasonableness review is therefore one which puts those reasons first. This enables a reviewing court to assess whether the decision as a whole is reasonable. Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process.

In many cases, formal reasons for a decision will not be given or required. Even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason. There will nonetheless be situations in which neither the record nor the larger context sheds light on the basis for the decision. In such cases, the reviewing court must still examine the decision in light of the relevant

s'assurer que la décision dans son ensemble est transparente, intelligible et justifiée. Le contrôle judiciaire porte à la fois sur le résultat et sur le raisonnement à l'origine de ce résultat. Une approche différente compromettrait le rôle institutionnel du décideur administratif plutôt que de le respecter.

Le contrôle selon la norme de la décision raisonnable est méthodologiquement distinct du contrôle selon la norme de la décision correcte. La cour de justice effectuant un contrôle selon la norme de la décision raisonnable doit centrer son attention sur la décision même qu'a rendue le décideur administratif, notamment sur sa justification. Une cour de justice qui applique la norme de contrôle de la décision raisonnable ne se demande donc pas quelle décision elle aurait rendue à la place du décideur administratif, ne tente pas de prendre en compte l'éventail des conclusions qu'aurait pu tirer le décideur, ne se livre pas à une analyse *de novo*, et ne cherche pas à déterminer la solution correcte au problème. La cour de révision n'est plutôt appelée qu'à décider du caractère raisonnable de la décision rendue par le décideur administratif — ce qui inclut à la fois le raisonnement suivi et le résultat obtenu.

Dans les cas où des motifs sont requis, ceux-ci constituent le point de départ du contrôle selon la norme de la décision raisonnable, car ils sont le mécanisme principal par lequel les décideurs administratifs démontrent le caractère raisonnable de leurs décisions. Les motifs sont le moyen par lequel le décideur communique la justification de sa décision : ils servent à expliquer le processus décisionnel et la raison d'être de la décision en cause, permettent de montrer aux parties concernées que leurs arguments ont été pris en compte et démontrent que la décision a été rendue de manière équitable et licite, en plus de servir de bouclier contre l'arbitraire. Toute méthode raisonnée de contrôle selon la norme de la décision raisonnable s'intéresse donc avant tout aux motifs de la décision. Cela permet à la cour de révision de déterminer si la décision dans son ensemble est raisonnable. L'attention accordée aux motifs formulés par le décideur est une manifestation de l'attitude de respect dont font preuve les cours de justice envers le processus décisionnel.

Dans de nombreux cas, les motifs écrits d'une décision ne sont ni présentés, ni nécessaires. Même en l'absence de motifs, il se peut que le dossier et le contexte révèlent qu'une décision repose sur un mobile irrégulier ou sur un autre motif inacceptable. Il existe néanmoins des situations dans lesquelles ni le dossier ni le contexte général ne permettent de discerner le fondement de la décision en cause. En pareil cas, la cour de révision doit tout de même

factual and legal constraints on the decision maker in order to determine whether the decision is reasonable.

It is conceptually useful to consider two types of fundamental flaws that tend to render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. To be reasonable, a decision must be based on an internally coherent reasoning that is both rational and logical. A failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a line-by-line treasure hunt for error. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic. Because formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point. Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies.

The second type of fundamental flaw arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. Although reasonableness is a single standard that already accounts for context, and elements of a decision's context should not modulate the standard or the degree of scrutiny by the reviewing court, what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts of which the decision maker may take notice, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies, are all elements that will generally be relevant in evaluating whether a given decision is reasonable. Such elements are not a checklist; they may vary in significance

examiner la décision à la lumière des contraintes factuelles et juridiques imposées au décideur afin de déterminer s'il s'agit d'une décision raisonnable.

Il est utile, d'un point de vue conceptuel, de s'arrêter à deux catégories de lacunes fondamentales qui tendent à rendre une décision déraisonnable. La première est le manque de logique interne du raisonnement. Pour être raisonnable, une décision doit être fondée sur un raisonnement intrinsèquement cohérent qui est à la fois rationnel et logique. Un manquement à cet égard peut amener la cour de révision à conclure qu'il y a lieu d'infirmer la décision. Le contrôle selon la norme de la décision raisonnable n'est pas une chasse au trésor, phrase par phrase, à la recherche d'une erreur. Cependant, la cour de révision doit être en mesure de suivre le raisonnement du décideur sans buter sur une faille décisive dans la logique globale. Puisqu'il faut interpréter les motifs écrits eu égard au dossier et en tenant dûment compte du régime administratif dans lequel ils sont donnés, une décision sera déraisonnable lorsque, lus dans leur ensemble, les motifs ne font pas état d'une analyse rationnelle ou montrent que la décision est fondée sur une analyse irrationnelle. Une décision sera également déraisonnable si la conclusion tirée ne peut prendre sa source dans l'analyse effectuée ou qu'il est impossible de comprendre, lorsqu'on lit les motifs en corrélation avec le dossier, le raisonnement du décideur sur un point central. De même, la logique interne d'une décision peut également être remise en question lorsque les motifs sont entachés d'erreurs manifestes sur le plan rationnel.

La seconde catégorie de lacune fondamentale se présente dans le cas d'une décision indéfendable sous certains rapports compte tenu des contraintes factuelles et juridiques pertinentes qui ont une incidence sur la décision. Même si la norme de la décision raisonnable est une norme unique qui tient déjà compte du contexte, et les éléments du contexte entourant une décision ne doivent pas altérer cette norme ou le degré d'examen que doit appliquer une cour de révision, ce qui est raisonnable dans un cas donné dépend toujours des contraintes juridiques et factuelles propres au contexte de la décision particulière sous examen. Ces contraintes d'ordre contextuel cernent les limites et les contours de l'espace à l'intérieur duquel le décideur peut agir, ainsi que les types de solution qu'il peut retenir. Le régime législatif applicable, tout autre principe législatif ou principe de common law pertinent, les principes d'interprétation des lois, la preuve portée à la connaissance du décideur et les faits dont le décideur peut prendre connaissance d'office, les observations des parties, les pratiques et décisions antérieures de l'organisme administratif et

depending on the context and will necessarily interact with one another.

Accordingly, a reviewing court may find that a decision is unreasonable when examined against these contextual considerations. Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. A proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority.

Both statutory and common law will also impose constraints on how and what an administrative decision maker can lawfully decide. Any precedents on the issue before the administrative decision maker or on a similar issue, as well as international law in some administrative decision making contexts, will act as a constraint on what the decision maker can reasonably decide. Whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Where this is the applicable standard, the reviewing court does not undertake a *de novo* analysis of the question or ask itself what the correct decision would have been. But an approach to reasonableness review that respects legislative intent must assume that those who interpret the law, whether courts or administrative decision makers, will do so in a manner consistent with the modern principle of statutory interpretation. Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.

l'impact potentiel de la décision sur l'individu qui en fait l'objet sont tous des éléments qui sont généralement utiles pour déterminer si une décision est raisonnable. Ces éléments ne doivent pas servir de liste de vérification; leur importance peut varier selon le contexte et ils interagissent forcément entre eux.

En conséquence, il se peut que la cour de révision estime qu'une décision est déraisonnable au regard de ces considérations contextuelles. Comme les décideurs administratifs tiennent leurs pouvoirs d'une loi, le régime législatif applicable est probablement l'aspect le plus important du contexte juridique d'une décision donnée. L'application appropriée de la norme de la décision raisonnable permet de dissiper la crainte que le décideur administratif puisse interpréter la portée de sa propre compétence de manière à étendre ses pouvoirs au-delà de ce que voulait le législateur. La question de savoir si une interprétation est justifiée dépendra du contexte, notamment des mots choisis par le législateur pour décrire les limites et les contours du pouvoir du décideur.

Le droit — tant la loi que la common law — limitera lui aussi l'éventail des options qui s'offrent légalement au décideur administratif chargé de trancher un cas particulier. Tout précédent sur la question soumise au décideur administratif ou sur une question semblable, ainsi que le droit international dans certains domaines du processus décisionnel administratif, aura pour effet de circonscrire l'éventail des issues raisonnables. La question de savoir si le décideur administratif a agi raisonnablement en adaptant une règle de droit ou d'équité appelle un examen fondé dans une très large mesure sur le contexte.

Les questions d'interprétation de la loi ne reçoivent pas un traitement exceptionnel. Comme toute autre question de droit, on peut les évaluer en appliquant la norme de la décision raisonnable. S'il s'agit de la norme applicable, la cour de révision ne procède pas à une analyse *de novo* de la question soulevée ni ne se demande ce qu'aurait été la décision correcte. Mais une méthode de contrôle selon la norme de la décision raisonnable qui respecte l'intention du législateur doit tenir pour acquis que les instances chargées d'interpréter la loi — qu'il s'agisse des cours de justice ou des décideurs administratifs — effectueront cet exercice conformément au principe moderne en matière d'interprétation des lois. Les décideurs administratifs ne sont pas tenus dans tous les cas de procéder à une interprétation formaliste de la loi. Or, quelle que soit la forme que prend l'opération d'interprétation d'une disposition législative, le fond de l'interprétation de celle-ci par le décideur administratif doit être conforme à son texte, à son contexte et à son objet.

Furthermore, the decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. The reasons must also meaningfully account for the central issues and concerns raised by the parties, even though reviewing courts cannot expect administrative decision makers to respond to every argument or line of possible analysis.

While administrative decision makers are not bound by their previous decisions, they must be concerned with the general consistency of administrative decisions. Therefore, whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Finally, individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

The question of the appropriate remedy — specifically, whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons — is multi-faceted. The choice of remedy must be guided by the rationale for applying the reasonableness standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, concerns related to the proper administration of the justice system, the need to ensure access to justice and the goal of expedient and cost-efficient decision making. Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons. However, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended. An intention that the administrative

Qui plus est, le décideur doit prendre en considération la preuve versée au dossier et la trame factuelle générale qui a une incidence sur sa décision et celle-ci doit être raisonnable au regard de ces éléments. Le caractère raisonnable d'une décision peut être compromis si le décideur s'est fondamentalement mépris sur la preuve qui lui a été soumise ou n'en a pas tenu compte. Les motifs doivent aussi tenir valablement compte des questions et préoccupations centrales soulevées par les parties, même si les cours de révision ne peuvent s'attendre à ce que les décideurs administratifs répondent à tous les arguments ou modes possibles d'analyse.

Bien que les décideurs administratifs ne soient pas liés par leurs décisions antérieures, ils doivent se soucier de l'uniformité générale des décisions administratives. La question de savoir si une décision en particulier est conforme à la jurisprudence de l'organisme administratif est donc elle aussi une contrainte dont devrait tenir compte la cour de révision au moment de décider si cette décision est raisonnable. Enfin, les individus ont droit à une plus grande protection procédurale lorsque la décision sous examen est susceptible d'avoir des répercussions personnelles importantes ou de leur causer un grave préjudice. Lorsque la décision a des répercussions sévères sur les droits et intérêts de l'individu visé, les motifs fournis à ce dernier doivent refléter ces enjeux. Le principe de la justification adaptée aux questions et préoccupations soulevées veut que, si les conséquences sont particulièrement graves pour l'individu concerné, le décideur explique pourquoi sa décision reflète le mieux l'intention du législateur.

La question de la réparation qu'il convient d'accorder — en l'occurrence celle de savoir si la cour qui casse une décision déraisonnable devrait exercer son pouvoir discrétionnaire de renvoyer l'affaire pour réexamen à la lumière des motifs donnés par la cour — revêt de multiples facettes. Le choix de la réparation doit être guidé par la raison d'être de l'application de cette norme, y compris le fait pour la cour de révision de reconnaître que le législateur a confié le règlement de l'affaire à un décideur administratif, et non à une cour, les préoccupations liées à la bonne administration du système de justice, à la nécessité d'assurer l'accès à la justice et à la volonté de mettre sur pied un processus décisionnel à la fois rapide et économique. Donner effet à ces principes dans le contexte de la réparation signifie que, lorsque la décision contrôlée selon la norme de la décision raisonnable ne peut être confirmée, il conviendra le plus souvent de renvoyer l'affaire au décideur pour réexamen à la lumière des motifs donnés par la cour. Cependant, il y a des situations limitées dans lesquelles le renvoi de l'affaire pour nouvel examen fait échec au souci de résolution rapide et efficace d'une

decision maker decide the matter at first instance cannot give rise to endless judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and efficient use of public resources may also influence the exercise of a court's discretion to remit the matter.

In the case at bar, there is no basis for departing from the presumption of reasonableness review. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. Given that Parliament has not prescribed the standard to be applied, there is no indication that the legislature intended a standard of review other than reasonableness. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between administrative bodies. As a result, the standard to be applied in reviewing the Registrar's decision is reasonableness.

The Registrar's decision was unreasonable. She failed to justify her interpretation of s. 3(2)(a) in light of the constraints imposed by s. 3 considered as a whole, by international treaties that inform its purpose, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though V had raised many of these considerations, the Registrar failed to address those submissions in her reasons and did not do more than conduct a cursory review of the legislative history of s. 3(2)(a) and conclude that her interpretation was not explicitly precluded by its text.

First, the Registrar failed to address the immediate statutory context of s. 3(2)(a), which provides clear support

manière telle qu'aucune législature n'aurait pu souhaiter. L'intention que le décideur administratif tranche l'affaire en première instance ne saurait donner lieu à un va-et-vient interminable de contrôles judiciaires et de nouveaux examens. Le refus de renvoyer l'affaire au décideur peut s'avérer indiqué lorsqu'il devient évident qu'un résultat donné est inévitable, si bien que le renvoi de l'affaire ne servirait à rien. Les préoccupations concernant les délais, l'équité envers les parties, le besoin urgent de régler le différend, la nature du régime de réglementation donné, la possibilité réelle ou non pour le décideur administratif de se pencher sur la question en litige, les coûts pour les parties et l'utilisation efficace des ressources publiques peuvent aussi influencer sur l'exercice par la cour de son pouvoir discrétionnaire de renvoyer l'affaire.

Rien ne permet de s'écarter de la présomption de contrôle selon la norme de la décision raisonnable en l'espèce. La décision de la greffière a été soumise aux cours de justice par voie de contrôle judiciaire et non par voie d'appel prévu par la loi. Étant donné que le Parlement n'a pas prescrit la norme à appliquer, rien n'indique que le législateur voulait qu'une autre norme que celle de la décision raisonnable soit appliquée. La décision de la greffière ne soulève pas de questions constitutionnelles, de questions de droit générales d'importance capitale pour le système juridique dans son ensemble ou de questions liées aux délimitations des compétences respectives d'organismes administratifs. En conséquence, la décision de la greffière doit être examinée selon la norme de la décision raisonnable.

La décision de la greffière est déraisonnable. Elle n'a pas justifié son interprétation de l'al. 3(2)a) à la lumière des contraintes qu'imposent l'art. 3 pris dans son ensemble, les traités internationaux qui éclairent l'objet de cette disposition, la jurisprudence relative à l'interprétation de l'al. 3(2)a), et les conséquences possibles de son interprétation. Chacun de ces éléments — pris individuellement ainsi que dans leur ensemble — appuie fortement la conclusion selon laquelle l'al. 3(2)a) n'est pas censé s'appliquer aux enfants de représentants ou d'employés au service d'un gouvernement étranger à qui on n'avait pas accordé de privilèges et d'immunités diplomatiques. Bien que V ait soulevé bon nombre de ces considérations, la greffière n'a pas traité de ces arguments dans ses motifs et n'a pas fait davantage que se livrer à un examen superficiel de l'historique législatif de l'al. 3(2)a) et conclure que le libellé de celui-ci n'excluait pas explicitement son interprétation.

En premier lieu, la greffière n'a pas examiné le contexte législatif qui entoure l'al. 3(2)a), lequel étaye clairement la

for the conclusion that all of the persons contemplated by s. 3(2)(a) must have been granted diplomatic privileges and immunities in some form for the exception to apply. Second, the Registrar disregarded compelling submissions that s. 3(2) is a narrow exception consistent with established principles of international law and with the leading international treaties that extend diplomatic privileges and immunities to employees and representatives of foreign governments. Third, it was a significant omission to ignore the relevant cases that were before the Registrar which suggest that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities. Finally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include all individuals who have not been granted diplomatic privileges and immunities. Rules concerning citizenship require a high degree of interpretive consistency in order to shield against arbitrariness. The Registrar's interpretation cannot be limited to the children of spies — its logic would be equally applicable to other scenarios. As well, provisions such as s. 3(2)(a) must be given a narrow interpretation because they potentially take away rights which otherwise benefit from a liberal and broad interpretation. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation, or whether, in light of those potential consequences, Parliament would have intended s. 3(2)(a) to apply in this manner. Although the Registrar knew her interpretation was novel, she failed to provide a rationale for her expanded interpretation.

It was therefore unreasonable for the Registrar to find that s. 3(2)(a) can apply to individuals whose parents have not been granted diplomatic privileges and immunities in Canada. It is undisputed that V's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar. Given that V was born in Canada, his status is governed only by the general rule of citizenship by birth. He is a Canadian citizen.

Per Abella and Karakatsanis JJ.: There is agreement with the majority that the appeal should be dismissed. The Registrar's decision to cancel V's citizenship certificate was unreasonable and was properly quashed by the Court of Appeal.

conclusion selon laquelle toutes les personnes visées par l'al. 3(2)a doivent s'être vu accorder certains privilèges et immunités diplomatiques pour que l'exception trouve application. En deuxième lieu, la greffière a fait fi des observations convaincantes voulant que la raison d'être du par. 3(2) consiste à instituer une exception étroite conformément aux principes établis du droit international et aux traités internationaux d'importance en vertu desquels les employés et représentants au service d'un gouvernement étranger bénéficient de privilèges et immunités diplomatiques. En troisième lieu, il s'agissait d'une omission importante que d'ignorer les décisions pertinentes portées à la connaissance de la greffière qui tendent à indiquer que l'al. 3(2)a n'est censé s'appliquer qu'aux personnes dont les parents se sont vu accorder des privilèges et immunités diplomatiques. En dernier lieu, rien n'établit que la greffière a tenu compte des conséquences que peut avoir le fait d'étendre son interprétation de l'al. 3(2)a à l'ensemble des personnes à qui on n'a pas accordé de privilèges et d'immunités diplomatiques. Les règles concernant la citoyenneté commandent une grande uniformité en matière d'interprétation pour se prémunir contre la perception d'arbitraire. L'interprétation de la greffière ne saurait se limiter aux enfants d'espions; sa logique vaudrait tout autant dans d'autres cas. En outre, il faut donner aux dispositions telles que l'al. 3(2)a une interprétation étroite puisqu'elles refusent ou risquent d'enlever des droits qui autrement recevraient une interprétation large et libérale. Néanmoins, rien n'indique que la greffière a pris en compte les possibles conséquences sévères de son interprétation ou que, compte tenu de ces conséquences éventuelles, elle s'est demandée si le Parlement aurait voulu que l'al. 3(2)a s'applique de cette manière. Même si la greffière était au fait du caractère inédit de son interprétation, elle n'a pas motivé cette interprétation élargie.

Il était donc déraisonnable de la part de la greffière de décider que l'al. 3(2)a peut s'appliquer aux personnes dont les parents ne se sont pas vu accorder de privilèges et immunités diplomatiques au Canada. Nul ne conteste que les parents de V ne s'étaient pas vu accorder pareils privilèges et immunités. En conséquence, il ne servirait à rien de renvoyer l'affaire à la greffière. En tant que personne née au Canada, V dispose d'un statut régi uniquement par la règle générale de la citoyenneté de naissance. Il est citoyen canadien.

Les juges Abella et Karakatsanis : Il y a accord avec les juges majoritaires pour rejeter le pourvoi. La décision de la greffière d'annuler le certificat de citoyenneté de V était déraisonnable et la Cour d'appel a eu raison de la casser.

There is also agreement with the majority that there should be a presumption of reasonableness in judicial review. The contextual factors analysis should be eliminated from the standard of review framework, and “true questions of jurisdiction” should be abolished as a separate category of issues subject to correctness review. However, the elimination of these elements does not support the foundational changes to judicial review outlined in the majority’s framework that result in expanded correctness review. Rather than confirming a meaningful presumption of deference for administrative decision-makers, the majority strips away deference from hundreds of administrative actors, based on a formalistic approach that ignores the legislature’s intention to leave certain legal and policy questions to administrative decision-makers. The majority’s presumption of reasonableness review rests on a totally new understanding of legislative intent and the rule of law and prohibits any consideration of well-established foundations for deference. By dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis, the majority’s framework fundamentally reorients the relationship between administrative actors and the judiciary, thus advocating a profoundly different philosophy of administrative law.

The majority’s framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers and reads out the foundations of the modern understanding of legislative intent. Instead of understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely. In so doing, the majority disregards the historically accepted reason why the legislature intended to delegate authority to an administrative actor. In particular, such an approach ignores the possibility that specialization and expertise are embedded into this legislative choice. Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the interpretative upper hand on questions of law. Specialized expertise has become the core

Il y a également accord avec la majorité pour dire qu’il doit y avoir présomption d’application de la norme de la décision raisonnable en cas de contrôle judiciaire. L’analyse contextuelle doit être éliminée du cadre d’analyse applicable à la norme de contrôle, et la catégorie des « questions touchant vraiment à la compétence » doit être abolie en tant que catégorie distincte de questions assujetties à la norme de la décision correcte. Toutefois, l’élimination de ces éléments ne justifie pas les modifications fondamentales apportées au contrôle judiciaire qui sont décrites dans le cadre proposé par la majorité et qui entraînent un élargissement du contrôle judiciaire fondé sur la norme de la décision correcte. Au lieu de confirmer l’existence d’une présomption significative de déférence en faveur des décideurs administratifs, la majorité prive de déférence des centaines d’acteurs administratifs, en appliquant une approche formaliste qui néglige la volonté du législateur de laisser à des décideurs administratifs le soin de trancher certaines questions de droit et de politique. La présomption d’application de la norme de la décision raisonnable qu’énonce la majorité repose sur une compréhension totalement nouvelle de l’intention du législateur et de la primauté du droit et interdit toute prise en compte des postulats bien établis du principe de la déférence. En élargissant considérablement les circonstances dans lesquelles les juges généralistes pourront substituer leur propre opinion à celle des décideurs spécialisés qui exercent leur mandat au quotidien, le cadre proposé par la majorité réoriente complètement le rapport entre les acteurs administratifs et la magistrature, et préconise du même coup une philosophie du droit administratif profondément différente.

Le cadre établi par la majorité repose sur une conception du contrôle judiciaire qui est à la fois erronée et incomplète et qui néglige sans raison valable l’expertise spécialisée des décideurs administratifs et fait fi des fondements de la conception moderne de l’intention du législateur. Au lieu de considérer que la volonté du législateur est de confier à des décideurs spécialisés possédant une expertise en la matière le soin de trancher les questions de droit relevant de leur mandat, la majorité fait table rase de l’expertise de ces décideurs. Ce faisant, la majorité ne tient pas compte de la raison historiquement reconnue pour laquelle le législateur souhaitait déléguer des pouvoirs à des acteurs administratifs. En particulier, cette approche ne tient pas compte de la possibilité que la spécialisation et l’expertise fassent partie intégrante de ce choix du législateur. Depuis l’arrêt *Dunsmuir*, la Cour n’a cessé de confirmer le rôle central que jouent la spécialisation et l’expertise, de confirmer le lien entre celles-ci et l’intention du législateur et de reconnaître

rationale for deference. Giving proper effect to the legislature's choice to delegate authority to an administrative decision-maker requires understanding the advantages that the decision-maker may enjoy in exercising its mandate. Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. In interpreting their enabling statutes, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations, of statutory context, of the purposes that a provision or legislative scheme are meant to serve, and of specialized terminology. The advantages stemming from specialization and expertise provide a robust foundation for deference. The majority's approach accords no weight to such institutional advantages and banishes expertise from the standard of review analysis entirely. The removal of the current conceptual basis for deference opens the gates to expanded correctness review.

In the majority's framework, deference gives way whenever the rule of law demands it. This approach, however, flows from a court-centric conception of the rule of law. The rule of law means that administrative decision-makers make legal determinations within their mandate; it does not mean that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review. The majority's approach not only erodes the presumption of deference; it erodes confidence in the fact that law-making and legal interpretation are shared enterprises between courts and administrative decision-makers. Moreover, access to justice is at the heart of the legislative choice to establish a robust system of administrative law. This goal is compromised when a narrow conception of the rule of law is invoked to impose judicial hegemony over administrative decision-makers, which adds unnecessary expense and complexity. Authorizing more incursions into the administrative system by judges and permitting *de novo* review of every legal decision adds to the delay and cost of obtaining a final decision.

The majority's reformulation of "legislative intent" invites courts to apply an irrebuttable presumption of correctness review whenever an administrative scheme

qu'elles confèrent aux décideurs administratifs un privilège en matière d'interprétation sur les questions de droit. L'expertise spécialisée est devenue la principale raison invoquée pour justifier la déférence. Pour donner l'effet voulu à la volonté du législateur de déléguer des pouvoirs aux décideurs administratifs, il faut comprendre les avantages que peut comporter l'exercice, par ces décideurs, de leur mandat. Parmi ces avantages se trouvent, au premier chef, l'expertise institutionnelle et la spécialisation inhérentes à l'exécution quotidienne d'un mandat particulier. Lorsqu'ils interprètent leur loi habilitante, les acteurs administratifs sont particulièrement bien placés pour saisir avec justesse les conséquences concrètes d'interprétations juridiques particulières, le contexte législatif, les objectifs qu'une disposition ou un régime législatifs sont censés viser et la terminologie spécialisée. Les avantages conférés par la spécialisation et l'expertise constituent une raison convaincante de faire preuve de déférence. L'approche préconisée par la majorité n'accorde aucun poids à de tels avantages institutionnels et évacue totalement l'expertise de l'analyse relative à la norme de contrôle. La suppression du fondement conceptuel qui justifie actuellement la déférence ouvre les portes à un contrôle judiciaire élargi fondé sur la norme de la décision correcte.

Selon le cadre proposé par la majorité, la déférence est éclipsée chaque fois que la primauté du droit l'exige. Cette approche découle toutefois d'une conception judiciaire de la primauté du droit. La primauté du droit signifie que les décideurs administratifs prennent des décisions juridiques dans le cadre de leur mandat; elle ne signifie pas que seuls les juges peuvent trancher des questions de droit et ont carte blanche pour substituer leur opinion à celle des acteurs administratifs par le biais d'un contrôle selon la norme de la décision correcte. L'approche de la majorité à la fois affaiblit la présomption de déférence, et mine la confiance dans le fait que l'élaboration et l'interprétation du droit relèvent de la participation commune des tribunaux judiciaires et des décideurs administratifs. De plus, l'accès à la justice est au cœur du choix du législateur d'instaurer un système de droit administratif solide. Cet objectif est compromis lorsqu'on invoque une conception étroite de la primauté du droit pour imposer l'hégémonie judiciaire aux décideurs administratifs, ce qui augmente inutilement les coûts et la complexité. Permettre aux juges de s'immiscer encore plus dans la justice administrative et permettre un examen *de novo* de chaque décision juridique allonge les délais et augmente les frais engagés pour obtenir une décision définitive.

La reformulation de la notion de « l'intention du législateur » proposée par la majorité invite les cours à appliquer une présomption irréfragable d'application de la

includes a right of appeal. Elevating appeal clauses to indicators of correctness review creates a two-tier system that defers to the expertise of administrative decision-makers only where there is no appeal clause. Yet appeal rights do not represent a different institutional structure that requires a more searching form of review. The mere fact that a statute contemplates an appeal says nothing about the degree of deference required in the review process. The majority's position hinges almost entirely on a textualist argument — i.e., that the presence of the word “appeal” indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence. This disregards long-accepted institutional distinctions between courts and administrative decision-makers. The continued use by legislatures of the term “appeal” cannot be imbued with the intent that the majority ascribes to it. The idea that appellate standards of review must be applied to every right of appeal is entirely unsupported by the jurisprudence. For at least 25 years, the Court has not treated statutory rights of appeal as a determinative reflection of legislative intent, and such clauses have played little or no role in the standard of review analysis. Moreover, pre-*Dunsmuir*, statutory rights of appeal were still seen as only one factor and not as unequivocal indicators of correctness review. Absent exceptional circumstances, a statutory right of appeal does not displace the presumption of reasonableness.

The majority's disregard for precedent and *stare decisis* has the potential to undermine both the integrity of the Court's decisions, and public confidence in the stability of the law. *Stare decisis* places significant limits on the Court's ability to overturn its precedents. The doctrine promotes the predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process. Respect for precedent also safeguards the Court's institutional legitimacy. The precedential value of a judgment does not expire with the tenure of the panel of judges that decided it. When the Court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations

norme de la décision correcte lorsqu'un régime administratif prévoit un droit d'appel. En élevant des dispositions créant un droit d'appel au rang d'indicateurs d'un contrôle assujéti à la norme de la décision correcte, on crée un système de droit administratif à deux vitesses dans lequel les juges s'en remettent à l'expertise des décideurs administratifs seulement lorsqu'il n'existe pas de disposition d'appel. Cependant, l'existence de droits d'appel ne crée pas un régime institutionnel différent qui commanderait un contrôle plus fouillé. Le simple fait qu'une loi envisage la possibilité d'un appel ne permet pas de tirer de conclusions quant au degré de déférence requis lors du contrôle en question. La position de la majorité repose presque exclusivement sur un argument textuel suivant lequel la présence du mot « appel » indique que le législateur voulait que les cours de révision appliquent les mêmes normes de contrôle que celles que les cours d'appel appliquent dans leurs arrêts en matière civile. Cela néglige les distinctions institutionnelles qui sont reconnues depuis longtemps entre les tribunaux judiciaires et les décideurs administratifs. L'emploi systématique du terme « appel » par les législatures ne saurait s'expliquer par l'intention que la majorité lui prête. L'idée selon laquelle il faut appliquer les normes de contrôle d'appel à tous les droits d'appel ne trouve aucun appui dans la jurisprudence. Depuis au moins 25 ans, la Cour ne considère pas les droits d'appel accordés par une loi comme une expression déterminante de l'intention du législateur, et de telles dispositions ne sont presque pas ou pas du tout entrées en ligne de compte dans l'analyse relative à la norme de contrôle. De surcroît, avant l'arrêt *Dunsmuir*, les droits d'appel conférés par la loi n'étaient encore perçus que comme un facteur parmi d'autres et non comme des indices sans équivoque d'un contrôle selon la norme de la décision correcte. Sauf en présence de circonstances exceptionnelles, un droit d'appel conféré par la loi n'écarter pas la présomption d'application de la norme de la décision raisonnable.

Le mépris de la majorité pour les précédents et la règle du *stare decisis* risque de compromettre l'intégrité des décisions de la Cour et d'ébranler la confiance du public à l'égard de la stabilité du droit. La règle du *stare decisis* limite considérablement la capacité de la Cour d'infirmer ses propres précédents. La doctrine favorise le développement prévisible et cohérent des principes de droit, favorise la confiance envers les décisions judiciaires et contribue à l'intégrité du processus judiciaire. Le respect des précédents préserve également la légitimité institutionnelle de la Cour. Les décisions de la Cour ne perdent pas leur valeur de précédent avec le départ des juges qui y ont participé. Lorsque la Cour choisit d'écarter ses propres précédents, elle doit le faire avec prudence et modération

that undergird the doctrine of *stare decisis*. A nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law.

There is no principled justification for departing from the existing jurisprudence and abandoning the Court's long-standing view of how statutory appeal clauses impact the standard of review analysis. In doing so, the majority disregards the high threshold required to overturn the Court's decisions. The unprecedented wholesale rejection of an entire body of jurisprudence is particularly unsettling. The affected cases are numerous and include many decisions conducting deferential review even in the face of a statutory right of appeal and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis. Overruling these judgments flouts *stare decisis*, which prohibits courts from overturning past decisions that simply represent a choice with which the current bench does not agree. The majority's approach also has the potential to disturb settled interpretations of many statutes that contain a right of appeal; every existing interpretation of such statutes that has been affirmed under a reasonableness standard will be open to fresh challenge. Moreover, if the Court, in its past decisions, misconstrued the purpose of statutory appeal clauses, legislatures were free to clarify this interpretation through legislative amendment. In the absence of legislative correction, the case for overturning decisions is even less compelling.

The Court should offer additional direction on reasonableness review so that judges can provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers. However, rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the Court's prior jurisprudence. The majority's multi-factored, open-ended list of constraints on administrative decision making will encourage reviewing courts to dissect administrative reasons in a line-by-line hunt for error. These constraints may function in practice as a wide-ranging catalogue of hypothetical errors to justify

et en tenant dûment compte de toutes les considérations importantes qui sous-tendent la doctrine du *stare decisis*. On doit trouver un équilibre subtil entre le maintien de la stabilité de la common law et l'assurance que le droit est suffisamment souple et réceptif pour s'adapter à de nouvelles réalités et à l'évolution des normes sociales. La règle du *stare decisis* joue un rôle essentiel pour maintenir cet équilibre et assurer le respect de la primauté du droit.

Il n'existe aucune raison logique justifiant de rompre avec la jurisprudence existante et d'abandonner la conception bien établie de la Cour quant à l'effet des dispositions législatives créant un droit d'appel sur l'analyse de la norme de contrôle. Ce faisant, la majorité ne tient pas compte du critère rigoureux auquel il faut satisfaire pour pouvoir écarter l'une des décisions de la Cour. Le rejet en bloc sans précédent de tout un arsenal jurisprudentiel est particulièrement troublant. Les arrêts touchés sont nombreux et comprennent maintes décisions rendues aux termes d'un contrôle fondé sur la déférence en dépit de l'existence d'un droit d'appel conféré par la loi ainsi que des arrêts fondamentaux confirmant la pertinence de l'expertise administrative pour l'analyse de la norme de contrôle. L'abandon de ces jugements bafoue la règle du *stare decisis* qui interdit aux tribunaux d'écarter des décisions antérieures qui représentent simplement une solution à laquelle la formation actuelle ne souscrit pas. L'approche de la majorité risque également de bousculer les interprétations établies de nombreuses lois prévoyant un droit d'appel; chaque interprétation existante de ces lois qui a été confirmée en appliquant la norme de contrôle de la décision raisonnable sera susceptible d'être remise en question. Par ailleurs, si la Cour s'était, dans ses décisions antérieures, méprise sur l'objet des dispositions d'appel prévues par la loi, il aurait alors été loisible aux législateurs de clarifier cette interprétation au moyen d'une modification législative. En l'absence d'intervention du législateur, les arguments militant en faveur du renversement des décisions antérieures sont encore moins convaincants.

La Cour devrait fournir des balises supplémentaires quant à la façon de procéder à un contrôle judiciaire fondé sur la norme de la décision raisonnable afin que les juges puissent assurer une surveillance minutieuse et concrète du système de justice administrative tout en respectant la légitimité de celui-ci et le point de vue des décideurs spécialisés de première ligne. Toutefois, plutôt que de clarifier le rôle que jouent les motifs et de préciser comment on doit les contrôler, la majorité ressuscite la démarche axée sur la recherche d'erreurs qui occupait une place prépondérante dans l'ancienne jurisprudence de la Cour. La liste multi-factorielle et non limitative des contraintes à la prise de décisions administratives dressée par la majorité incitera

quashing an administrative decision. Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than on trial judges. Such an approach undercuts deference. Reasonableness review should instead focus on the concept of deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Curial deference is the hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under correctness.

Deference imposes three requirements on courts conducting reasonableness review. First, deference is the attitude a reviewing court must adopt towards an administrative decision-maker. Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, for the important role that administrative decision-makers play, and for their specialized expertise and the institutional setting in which they operate. Reviewing courts must pay respectful attention to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction. Second, deference affects how a court frames the question it must answer and the nature of its analysis. A reviewing court does not ask how it would have resolved an issue, but rather whether the answer provided by the decision-maker was unreasonable. Ultimately, whether an administrative decision is reasonable depends on the context, and a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised, among other factors. Third, deferential review impacts how a reviewing court evaluates challenges to a decision. The party seeking judicial review bears the onus of showing that the decision was unreasonable; the decision-maker does not have to persuade the court that its decision is reasonable.

les cours de révision à disséquer les motifs administratifs et à se lancer dans une chasse au trésor, phrase par phrase, à la recherche d'une erreur. En pratique, ces contraintes risquent de se transformer en un vaste catalogue d'erreurs hypothétiques qui peuvent servir à justifier l'annulation d'une décision administrative. Cette façon de structurer le contrôle selon la norme de la décision raisonnable astreint effectivement les décideurs administratifs à une norme de justification plus exigeante que celle qui s'applique aux juges de première instance. Cette approche sape la déférence. Le contrôle judiciaire selon la norme de la décision raisonnable devrait plutôt être centré sur le principe de la déférence à l'égard des décideurs administratifs et de l'intention du législateur de leur confier un mandat. La retenue judiciaire est la marque distinctive du contrôle selon la norme de la décision raisonnable et ce qui le distingue de la norme de la décision correcte, laquelle permet à la cour de substituer son opinion à celle du décideur administratif.

Le principe de la déférence soumet à trois exigences les tribunaux qui procèdent à un contrôle selon la norme de la décision raisonnable. D'abord, la déférence est l'attitude que la cour de révision doit adopter à l'égard du décideur administratif. Le principe de la déférence commande le respect du choix du législateur de confier à des acteurs administratifs plutôt qu'aux cours de justice le soin de rendre certaines décisions et la reconnaissance du rôle important que jouent les décideurs administratifs, ainsi que de leur expertise spécialisée et du cadre institutionnel dans lequel ils évoluent. Les cours de révision doivent également accorder une attention respectueuse aux motifs donnés à l'appui d'une décision administrative, s'efforcer sincèrement de comprendre la décision et interpréter la décision de façon équitable et généreuse. En deuxième lieu, le principe de la déférence influe sur la façon dont un tribunal formule la question à laquelle il doit répondre et la nature de l'analyse qu'il mènera. La cour de révision ne cherche pas à savoir comment elle aurait résolu la question, mais plutôt si la réponse donnée par le décideur administratif était déraisonnable. En fin de compte, la question de savoir si une décision administrative est raisonnable dépend du contexte, et la cour de révision doit tenir compte de toutes les circonstances pertinentes, y compris les motifs invoqués au soutien de la décision, le dossier, le régime législatif et les questions particulières soulevées par le demandeur, parmi d'autres facteurs. Troisièmement, le contrôle fondé sur le principe de la déférence influence la façon dont la cour de révision évalue la contestation dont fait l'objet la décision. Il incombe à la partie réclamant le contrôle judiciaire de démontrer que la décision en cause est déraisonnable; le décideur n'a pas à convaincre la cour de justice que sa décision est raisonnable.

The administrative decision itself is the focal point of the review exercise. In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable. Where reasons are neither required nor available, reasonableness may be justified by past decisions of the administrative body or in light of the procedural context. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably. By beginning with the reasons, read in light of the surrounding context and the grounds raised, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making. Reviewing courts should approach the reasons with respect for the specialized decision-makers, their significant role and the institutional context chosen by the legislator. Reviewing courts should not second-guess operational implications, practical challenges and on-the-ground knowledge and must remain alert to specialized concepts or language. Further, a reviewing court is not restricted to the four corners of the written reasons and should, if faced with a gap in the reasons, look to other materials to see if they shed light on the decision, including: the record of any formal proceedings and the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review. These materials may assist a court in understanding the outcome. In these ways, reviewing courts may legitimately supplement written reasons without supplanting the analysis. Reasons must be read together with the outcome to determine whether the result falls within a range of possible outcomes. This approach puts substance over form where the basis for a decision is evident on the record, but not clearly expressed in written reasons.

As well, a court conducting deferential review must view claims of error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised to ensure they go to the reasonableness of the decision rather than representing a

La décision administrative est en soi le point de mire du contrôle judiciaire. Dans tous les cas, la question à trancher demeure celle de savoir si la partie qui conteste la décision a démontré que celle-ci est déraisonnable. Lorsque le décideur n'est pas tenu de motiver sa décision ou qu'il est impossible d'obtenir les motifs de la décision, le caractère raisonnable de la décision peut être démontré à l'aide de décisions antérieures de l'organisme administratif ou à la lumière du contexte procédural. Pour déterminer si le décideur a agi raisonnablement, la cour de révision doit d'abord, cela va de soi, examiner les motifs, s'il en est, qui ont été exposés. En se penchant d'abord sur les motifs de la décision, à la lumière du contexte qui l'entoure et des arguments invoqués pour la contester, la cour de révision procède à un véritable contrôle tout en respectant la légitimité du processus décisionnel des autorités administratives spécialisées. Les cours de révision devraient aborder les motifs dans un esprit de respect envers les décideurs spécialisés, le rôle important qui leur a été confié et le contexte institutionnel choisi par le législateur. Elles devraient se garder de reconsidérer les incidences concrètes, les difficultés d'ordre pratique de même que les connaissances de terrain, et demeurer attentives aux concepts ou termes spécialisés. De plus, l'examen qu'effectue la cour de révision ne se limite pas à la teneur même des motifs écrits de la décision; lorsqu'elle constate l'existence d'une lacune dans les motifs, la cour doit examiner d'autres documents pour savoir s'ils permettent de mieux comprendre la décision, y compris : le dossier des actes de procédure officiels, les documents portés à l'attention du décideur, les décisions antérieures de l'organisme administratif, ainsi que les politiques ou lignes directrices élaborées pour l'aider dans sa démarche. Ces documents pourraient aider un tribunal à comprendre le résultat. Voilà comment les cours de révision peuvent légitimement compléter les motifs écrits sans supplanter l'analyse. Les motifs doivent être examinés en corrélation avec le résultat afin de savoir si celui-ci fait partie des issues possibles. Cette approche privilégie le fond plutôt que la forme dans les situations où le fondement de la décision est évident au vu du dossier, mais n'est pas exposé clairement dans les motifs écrits.

De plus, lors d'un contrôle fondé sur le principe de la déférence, la cour doit examiner les allégations d'erreur avec prudence, en tenant compte du contexte et de la nécessité d'éviter de substituer son opinion à celle des personnes qui sont habilitées à répondre aux questions en litige et mieux outillées qu'elle pour le faire. Étant donné que le principe de la déférence lui interdit de substituer son opinion à celle du décideur, la cour de révision doit

mere difference of opinion. Courts must also consider the materiality of any alleged errors. An error that is peripheral to the reasoning process is not sufficient to justify quashing a decision. The same deferential approach must apply with equal force to statutory interpretation cases. In such cases, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach imperils deference. A *de novo* interpretation of a statute necessarily omits the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question. By placing that perspective at the heart of the judicial review inquiry, courts display respect for specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies. Conversely, by imposing their own interpretation of a statute, courts undermine legislative intent.

In the instant case, there is agreement with the majority that the standard of review is reasonableness. The Registrar's reasons failed to respond to V's submission that the objectives of s. 3(2)(a) of the *Citizenship Act* require its terms to be read narrowly. Instead, the Registrar interpreted s. 3(2)(a) broadly, based on a purely textual assessment. This reading was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Furthermore, the judicial treatment of this provision also points to the need for a narrow interpretation. In addition, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation of s. 3(2)(a), because the former denies citizenship to children born to individuals who enjoy diplomatic privileges and immunities equivalent to those granted to persons referred to in the latter. This suggests that s. 3(2)(a) covers only those employees in Canada of a foreign government who have such privileges and immunities, in contrast with V's parents. By ignoring the objectives of s. 3 as a whole, the Registrar's decision was unreasonable.

évaluer avec circonspection les arguments que le demandeur invoque pour contester une décision administrative afin de s'assurer qu'ils concernent le caractère raisonnable de celle-ci et ne relèvent pas d'une simple divergence d'opinions. Les tribunaux doivent également tenir compte de la gravité des erreurs reprochées. Une erreur secondaire au regard du raisonnement ne suffit pas à justifier l'annulation d'une décision. Ils doivent conserver la même attitude de déférence lorsqu'ils interprètent une disposition législative. Dans ce genre de cas, la cour de révision ne devrait pas évaluer la décision en tentant de déterminer l'interprétation qui, à son avis, serait raisonnable. Pareille approche met en péril la déférence. Une interprétation *de novo* d'une loi occulte nécessairement le point de vue de l'organisme administratif spécialisé qui applique régulièrement le régime législatif en question. En plaçant ce point de vue au cœur de leur analyse, les cours de justice témoignent de leur respect à l'endroit des compétences et connaissances spécialisées des organismes administratifs ainsi qu'à l'égard du choix du législateur de déléguer le traitement de certaines questions à des organismes non judiciaires. À l'inverse, en imposant leur propre interprétation d'une loi, les cours de justice dénaturent l'intention du législateur.

En l'espèce, il y a accord avec la majorité sur le fait que la norme de contrôle applicable est celle de la décision raisonnable. La greffière n'a pas répondu à l'argument de V voulant que les objectifs de l'al. 3(2)a) de la *Loi sur la citoyenneté* exigent une interprétation restrictive de ses termes. Au contraire, la greffière a donné une interprétation large à l'al. 3(2)a) en se fondant sur une analyse purement textuelle. Cette interprétation n'était raisonnable que si l'on examinait le texte en faisant abstraction de son objectif. L'historique de la disposition n'indique nullement que le législateur fédéral avait l'intention d'en élargir le champ d'application. De plus, la façon dont les tribunaux ont interprété cette disposition indique elle aussi qu'il faut lui donner une interprétation restrictive. Qui plus est, le texte de l'al. 3(2)c) peut être perçu comme sapant l'interprétation que la greffière donne de l'al. 3(2)a), puisque l'al. 3(2)c) nie le droit à la citoyenneté aux enfants nés de personnes bénéficiant de privilèges et immunités diplomatiques équivalents à ceux dont jouissent les personnes visées par l'al. 3(2)a). Ce texte laisse croire que l'al. 3(2)a) ne vise donc que les personnes au service au Canada d'un gouvernement étranger qui jouissent de tels privilèges et immunités, ce qui n'est pas le cas des parents de V. La décision de la greffière était déraisonnable, vu qu'elle fait fi des objectifs de l'art. 3 dans son ensemble.

to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

(f) *Past Practices and Past Decisions*

[129] Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, “a lack of unanimity is the price to pay for the decision-making freedom and independence” given to administrative decision makers, and the mere fact that some conflict exists among an administrative body’s decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

[130] Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other’s work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal’s members can be an effective tool to “foster coherence” and “avoid . . . conflicting results”: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies

ont été prises en considération, le simple fait de rédiger des motifs avec soin et attention permet au décideur d’éviter que son raisonnement soit entaché de lacunes et d’autres failles involontaires : *Baker*, par. 39.

f) *Les pratiques et décisions antérieures*

[129] Les décideurs administratifs ne sont pas liés par leurs décisions antérieures au même titre que le sont les cours de justice suivant la règle du *stare decisis*. Comme l’a fait remarquer la Cour dans l’arrêt *Domtar*, « l’absence d’unanimité est [. . .] le prix à payer pour la liberté et l’indépendance décisionnelle » accordées aux décideurs administratifs, et la simple existence d’un certain conflit dans la jurisprudence d’un organisme administratif ne menace pas la primauté du droit : p. 800. Les décideurs administratifs et les cours de révision doivent toutefois se soucier de l’uniformité générale des décisions administratives. Les personnes visées par les décisions administratives sont en droit de s’attendre à ce que les affaires semblables soient généralement tranchées de la même façon et que les résultats ne dépendent pas seulement de l’identité du décideur — des attentes qui ne s’évaporent pas du simple fait que les parties ne comparaissent pas devant un juge.

[130] Heureusement, les organismes administratifs disposent généralement d’un éventail de ressources pour répondre à ce genre de préoccupations. La consultation des motifs antérieurs et de leurs résumés permet aux multiples décideurs au sein d’une même organisation (tels les membres d’un tribunal administratif) d’apprendre les uns des autres et de contribuer à l’édification d’une culture décisionnelle harmonisée. Les institutions se fient elles aussi régulièrement à des normes, à des directives stratégiques, ainsi qu’à des avis juridiques internes pour favoriser une plus grande uniformité et pour orienter le travail des décideurs de première ligne. La Cour a également conclu que les réunions plénières des membres d’un tribunal peuvent constituer un moyen efficace de « favoriser la cohérence » et d’« éviter [les] solutions incompatibles » : *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, p. 324-328. Lorsque des désaccords



Docket UE20908
Order UE93-11

IN THE MATTER of an application of Maritime Electric Company, Limited for confirmation of its rate base, revision in the allowed rate of return on rate base, approval of revised rates of depreciation, and approval of revised rates and charges for services to customers.

BEFORE THE COMMISSION

on Thursday, the 24th day of June, 1993.

Linda Webber, Chair
John L. Blakney, Vice-Chair
Anne McPhee, Commissioner

Order

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Appearances & Witnesses

1. For Maritime Electric Company, Limited:

Counsel:
William G. Lea

Witnesses:
John H. Reynolds, President and Chief Executive Officer
Philip G. Hughes, Vice President, Finance and Administration and Chief Financial Officer
Paul H. Newcombe, Vice-President, Production and Energy Supply
James A. Lea, Vice-President, Corporate Planning
James K. Landrigan, Director, Customer Service
D. Paul Smith, Internal Audit Manager

2. For the Town of Summerside:

Counsel:
Benjamin B. Taylor

Witness:
Thomas E. Richardson, Consultant

3. For the Minister of Energy and Forestry, Government of Prince Edward Island:

Counsel:
J. Gordon MacKay

4. For Cavendish Farms:

Witnesses:
Gary Aiken, Director of Operations
Bill Drost, Project Engineer

5. For the Island Regulatory and Appeals Commission:

Counsel:
Thomas A. Matheson

Staff:
Donald G. Sutherland, Director, Utilities Division
George W. Mason, Senior Analyst, Utilities Division
Gloria Dalziel, Recording Secretary

Reasons for Order

Part One

The Application

1.1 Introduction

This is an application under the *Electric Power and Telephone Act*, R.S.P.E.I. 1988, Cap. E-4 (the "*Act*"), by Maritime Electric Company, Limited (the "Applicant", "Maritime Electric", the "Company") seeking an order or orders of The Island Regulatory and Appeals Commission (the "Commission") approving a number of amendments to the Company's General Tariff.

The application was initially filed in September 1992 and revised in November. Public hearings into the application commenced on November 18, 1992, continued on November 19, 26 and 27, 1992 and then adjourned pending further evidence to be filed in early 1993. Following the filing of an amended application in February, 1993, the hearing recommenced on April 15, 1993 and continued on April 16, 22, 28, 29 and 30. A closed hearing was also held on June 11 and 18, 1993.

Interventions in this case were filed by the Town of Summerside (the "Town", "Summerside"), the Government of Prince Edward Island ("Government") and Cavendish Farms.

The evidence on the matter of return on common equity concluded on November 27, 1992 and is the subject of a separate decision issued by the Commission on December 21, 1992 with reasons following on March 25, 1993. The Commission determined at that time that a maximum rate of return on average common equity of 13.0% was just and reasonable.

The balance of the matters set forth in the application are addressed in this order and reasons for order. Included are the Commission's findings with respect to the sales forecast, the operating expenses budgeted for 1993, financial policy, the financial forecast, the proposed rates and other related matters.

As in all proceedings of this nature, the Commission benefits from the efforts of the interveners. We acknowledge their contributions.

1.2 Details of the Application

In this application, Maritime Electric seeks an order of the Commission:

- Confirming Maritime Electric's rate base at \$93,860,000 for the year ended December 31, 1990, at \$103,445,000 for the year ended December 31, 1991, and at \$113,187,000 for the year ended December 31, 1992;
- Setting the rate of return on rate base allowed to Maritime Electric for 1993 at 10.94% to reflect the embedded and expected costs of capital for 1993, the cost of common equity being 13.0%—down from the previously approved range of 13.25% to 13.75%;
- Approving, effective January 1, 1993, rates of depreciation to be charged with respect to the various assets used by Maritime Electric in the conduct of its business;
- Approving an overall revenue requirement of \$84,422,597 for 1993; and,
- Approving an increase in basic rates averaging 1.9% effective May 1, 1993.

Part 2 of these reasons reviews the revenue-requirement aspects of the Company's proposals. Part 3 discusses the Tariff revisions and related matters. Part 4 addresses other issues.

Part Two

Revenue Requirement

2.1 Introduction

The revenue requirement is the total revenue forecast to be required by the Company from rates and other sources to provide safe and adequate electric service to its customers while at the same time providing a fair and reasonable return to its shareholders. The revenue requirement forms the basis for all rates and charges of the Company.

Maritime Electric's revenue requirement is generally made up of operating costs and costs associated with capital investment such as interest, depreciation, income taxes and net income. The costs of fuel and purchased energy, which make up approximately one third of the revenue requirement are estimated using a base cost of 4.043 cents per kilowatt hour. Any deviation from this cost is passed on to customers automatically through the Energy Cost Adjustment Mechanism (ECAM).

In the following sections, the Commission will discuss the sales forecast, the budgeted operating expenses and other issues related to revenue requirement.

2.2 Sales Forecast

The sales forecast is critical in determining many of the Company's operating expenses as well as the increase (or decrease) in rates required to meet the revenue requirement. A sales forecast that underestimates growth can, for example, result in rates that are higher than necessary and revenue surplus to the needs of the utility. Maritime Electric has, in fact, generated surplus revenues consistently for a number of years and has refunded the amount to customers in the following year. Conversely, overestimated sales can affect the Company's earnings and result, if sustained over time, in difficulties attracting investment.

In recent years, the Company's sales forecast was based on an economic model using historical sales, customer data, population statistics, provincial economic indicators and other related data. The forecast results were then adjusted for the estimated impacts of Demand Side Management programs. Table 2.1 summarizes the recent forecasting accuracy of the Company by comparing the budgeted annual sales with the actual sales for the year. In Order E91-7, the Public Utilities Commission reviewed the sales forecasting methodology of the Company based on a concern that sales had been underestimated and a pattern of surplus revenues had appeared to evolve. The Commission concluded at that time that there was a positive trend in forecasting accuracy that could be attributed, at least in part, to refinements in the Company's forecasting technique.

Table 2.1				
Maritime Electric Sales Forecast History				
Year	Forecast	Actual	Actual/Forecast	Sales Growth
1987	552,000	579,800	+5.0%	7.6%
1988	600,000	618,700	+3.1%	6.7%
1989	642,900	651,700	+1.4%	5.3%
1990	679,400	676,300	(0.5%)	3.8%
1991	701,258	685,700	(2.2%)	1.4%
1992	688,965	696,700	+1.1%	1.6%
1993	711,000			Forecast 2.1%

In 1990 and 1991, the Company overestimated its sales growth which—given the downwards trend in growth—might be viewed as underestimating the impact of the recession on the Province. While sales were lower than forecast, particularly in 1991, the Company continued to generate revenues surplus to its needs throughout the period.

In the current case, the Company believes that the econometric model produces sales which are lower than indicated by recent, short-term trends. As a result, the Company initially adjusted the 1993 sales forecast upwards from 695,774 MWh to 700,000 MWh in September 1992. The 1993 forecast was subsequently increased to 708,000 MWh in November 1992 and 711,000 MWh in April 1993. The final increase was attributed largely to higher than forecast sales as a result of a colder than normal winter. The Company, however, does not believe the trend is indicative of accelerating sales growth.

In reviewing the forecast the Commission finds that the projected growth appears to be low in an historical context if one considers that the national and provincial economy are beginning to recover from the recession. At the same time, however, recent indicators are that governments are beginning to actively cut spending. This can have a significant impact on the Prince Edward Island economy which is highly dependent on government expenditures. On balance, the Commission will therefore accept the Company's sales forecast as reasonable in the current economic environment.

1. The Commission accepts the Company's sales forecast of 711,000 MWh for 1993.

2.3 Operating Expenses

2.3.1 Introduction

The operating expenses of Maritime Electric are made up of production, transmission, distribution and administrative costs. Production costs are separated into costs such as fuel and purchased energy for which fluctuating costs are passed on to customers on a deferred basis through the Energy Cost Adjustment Mechanism (ECAM). Other costs, such as labour, supplies and maintenance, are generally fixed in nature. An

exception is the cost of the Point Lepreau plant which has been phased into basic rates through the ECAM over a three year period. For 1993, approximately one third of the total cost of Point Lepreau is included as an ECAM cost.

The Operating Expense budget of Maritime Electric is summarized in Table 2.2. According to Mr. Reynolds, Company President, a budget objective of the Company is to keep controllable operating expenses for 1993 at the same level as incurred in 1992. Mr. Reynolds believes that, while certain price components are rising, holding the controllable budget at 1992 levels is appropriate to minimize rate increases in the current economic environment. The Company uses Non-ECAM costs less Pt. Lepreau and Amortization costs as their reference for controllable costs. The respective costs for 1991, 1992 and 1993 are \$21,239,488, \$20,643,703 and \$20,628,900.

The operating expenses of the Company were reviewed by the Commission in detail during the past two rate hearings and are also monitored on a regular basis. With the Company holding its budgeted expenses at previously approved levels, we did not find it necessary to repeat this review. Instead, we have focused primarily on the specific budget items discussed in the sections that follow.

Table 2.2			
Summary of Actual and Budgeted Operating Expenses			
	1991	1992	1993
	Actual	Actual	Budget
ECAM			
Power Purchases	19,587,809	19,733,646	18,991,000
Point Lepreau	1,458,918	6,400,879	3,384,000
Dalhousie	3,764,620	4,060,567	4,562,000
Charlottetown & Borden	4,333,464	1,854,612	2,285,000
	29,144,811	32,049,704	29,222,000
NON-ECAM			
Point Lepreau	0	2,967,494	5,735,000
Other Production	8,734,695	7,758,692	7,710,000
Transmission	309,238	307,644	307,000
Distribution	3,175,617	2,834,605	2,841,000
General & Administration	9,019,938	9,710,084	9,631,900
DSM Amortization	37,205	120,342	182,000
Load Research Amortization	0	32,678	139,000
Generation Plan Amortiz.	90,443	90,443	90,000
	21,367,136	23,821,982	26,635,900
TOTAL OPERATING EXPENSES	50,511,947	55,871,686	55,857,900

2.3.2 Point Lepreau Budget

The cost of the Company's participation in Point Lepreau is determined, in part, by the exchange rates related to financing in foreign currency. Between its original application and the February filing, Maritime Electric adjusted the cost estimates from New Brunswick Power to reflect the Company's own estimates of exchange rates. The impact was an increase in operating expenses of approximately \$376,000. The various estimates as well as recent published data are summarized in Table 2.3.

Table 2.3		
Exchange Rate Estimates Related to Point Lepreau for 1993		
	\$Can./\$U.S.	\$Can./SFR
New Brunswick Power Budget: Jan.-Mar.	1.2500	0.8200
: Apr.-Dec.	1.2195	n/a
Maritime Electric Estimate: Jan.-Dec.	1.2760	0.8800
1993 Average (1)	1.2656	n/a
Spot Rate (1)	1.2608	0.8642
Average Year to Date and Forward (1)	1.2660	n/a
Royal Bank Econoscope (April, 1993) (2)	1.2642	0.8078
Conference Board of Canada (Spring 1993)	1.2390	n/a

(1) Globe and Mail, May 26, 1993

(2) SFR Reported in Royal Bank Econoscope, Feb. 1993.

Maritime Electric's exchange rate estimates appear to be high in comparison with other forecasts. This has the effect of overestimating the costs of Point Lepreau. In addition, the costs for the January to May, 1993 period are \$217,520 below budget which indicates that lower costs are being realized. In the view of the Commission, the Company's adjustment to the Point Lepreau budget is higher than we consider reasonable. We will, therefore, reduce operating expenses by \$100,000—slightly more than 25% of the adjustment made by the Company—to reflect what appears to be a somewhat high estimate made by Maritime Electric.

2. The amount allowed in Operating Expenses for the Point Lepreau contract is reduced by \$100,000 from the budget proposed by the Company.

2.3.3 Dalhousie Costs

The Dalhousie plant has been the subject of some concern in recent years because fuel prices for the plant have escalated rapidly at a time when world coal prices and other energy prices have stabilized or declined. Table 2.4 summarizes fuel costs at the plant for the past few years. For comparison, coal is available on world markets for less than \$40.00/ton delivered to the new plant at Belledune, New Brunswick.

Table 2.4		
Dalhousie Fuel Costs		
	\$/ton	% Increase
1988	\$69.93	
1989	\$70.11	0.3
1990	\$78.07	11.4
1991	\$76.28	(2.3)
1992	\$86.18	13.0
1993 Budget	\$96.44	11.9

The Company was questioned at some length during both the Advance Plan hearing and the current hearing with respect to the fuel price the Company is paying for Dalhousie. Their comments are summarized as follows:

- Maritime Electric is required by contract to pay its share of the costs of operating the Dalhousie plant;
- At the time Dalhousie was purchased, it was understood that the Minto mine in New Brunswick would be the source of coal for the plant;
- The cost paid for coal at Dalhousie reasonably represents the full cost of production from the Minto mine;
- The increase in prices in recent years results, in part, from a decrease in volume which results in a higher allocation of fixed costs per ton;
- In 1994, the plant conversion to burn Orimulsion at a significantly lower (fuel) cost will be completed and the plant will neither burn nor be suitable for burning coal.

At issue is whether the budgeted expenditures for fuel at Dalhousie are prudent and reasonable. The Company's position, in summary, is that it is committed to paying its share of the costs incurred by the New Brunswick Electric Power Commission (NB Power) who operates the plant.

Our concern in this case is solely with the consumption of coal costing approximately 200% of world market prices. The fuel purchaser, in this case the New Brunswick Electric Power Commission (NB Power), would normally be expected to obtain fuel at the lowest cost in accordance with good utility practice—a strategy which is complicated when NB Power effectively owns New Brunswick Coal and the Minto mine. While we remain concerned about the high cost of coal consumed at Dalhousie, we will accept that Maritime Electric is paying only its share of the fully allocated costs of coal supplied to the plant. We will expect the Company to strive to incorporate fuel price protection into future contracts.

2.3.4 Salaries and Wages

The Commission has, in recent decisions related to the utilities that it regulates, expressed a belief that salary and wage increases should reflect restraint. We do not believe that regulated utilities should be immune to the pressures placed on the private and public sectors of the economy during the current recessionary period. For comparison, the general increases in the Company's recent salary settlements and the Consumer Price Index (CPI) for Canada are summarized in Table 2.5.

Table 2.5			
General July/July Increases in Wages and Salaries			
	Union (1)	Management	CPI (Canada)
1991/90	8.8%	6.6%	5.6%
1992/91	0.0%	0.0%	1.5%
1993/92	3.0%	2.5%	Est. 2.5%

(1) Based on the Journeyman-Lineman Scale.

For 1991, the Journeyman-Lineman reflects additional negotiated changes intended to increase productive hours. According to the Company, the more representative general increase would be 5.75%, which excludes the additional adjustment.

The Commission believes that the Company has exercised some restraint by generally holding wages constant throughout 1992. The 1993 increases, while appearing to be somewhat high in comparison with other settlements in the Province, are not considered unreasonable. The Commission will therefore accept the Company's budgeted expenditures for labour.

2.3.5 Executive Compensation

The Company filed information on overall executive compensation in response to Commission Staff interrogatories, but requested that the details be examined on a confidential basis. The Commission reviewed these expenses and held an in-camera hearing with Company President John Reynolds following the adjournment of the public hearings. Based on this review, we accept the amounts budgeted by the Company for 1993.

2.3.6 Material, Transportation, and Other Costs

Based on the Company's application, the escalation factors forecast for increases in non-ECAM operating expenses, excluding labour, are summarized in Table 2.6.

Table 2.6		
Forecast Escalation Factors		
Non-ECAM Operating Expense	Escalation Factor	Budget Amount
Material	2.9%	\$ 987,800
Transportation	3.0%	604,600
Consulting	2.9%	558,300
Other-Excluding Power Purchases, Dalhousie, Pt. Lepreau and Amortization	2.9%	6,278,300
TOTAL		\$ 8,429,000

The Commission considers the escalation factors used by the Company to be high based on the evidence before us and other published forecasts which are summarized in Table 2.7. The estimates in Table 2.7 fall within a band from 2.3% to 2.6% which is approximately 0.5% lower than the estimates of the Company. In our view, the price-related component of the budget should therefore be based on 1993 price escalation of closer to 2.4-2.5%. Applied to the above costs, this would result in a reduction in revenue requirement of \$42,145.

In recognition that escalation does not necessarily apply to all of these costs, the revenue requirement will be reduced by \$30,000.

Table 2.7		
Forecast Consumer Price Index		
Source	Applies to	Forecast 1993 CPI
Mr. Morrison, Company Witness	Canada	2.5%
Conference Board Economic Forecast, Spring 1993	Canada	2.4%
Conference Board Economic Forecast, Winter 1993	P.E.I.	2.3%
Royal Bank Econoscope, February 1993	Canada	2.6%

3. The general allowance for price escalation in 1993 will be reduced from 2.9-3.0% to 2.4-2.5%, respectively, and the allowance for non-ECAM operating expenses will be reduced by \$30,000 to reflect this change.

2.3.7 Charitable Donations

The 1993 budget of Maritime Electric includes \$70,000 for donations. According to the Company, the donations are targeted at 0.5% of pre-tax income and are made in accordance with their Policy for Charitable Donations which was filed along with draft revisions. The Commission has traditionally allowed the Company to include Charitable Donations in its operating expenses but considers this allowance open to periodic review.

During this proceeding, the Commission felt that the treatment of charitable donations was in need of further review. The focus of the review was on whether the customers of a monopoly should be required to support, through their electricity rates, the various organizations selected by the Company. The position of the Company can be summarized as follows:

- the expenditures are reasonable and prudent;
- the expenditures are consistent with those that Maritime Electric would make if it were operating in a competitive environment; and,
- the expenditures enhance the ability of the Company and its employees to communicate with the Company's customers by contributing to the standing of the Company as a "good corporate citizen".

The Commission does not consider the amount budgeted for donations to be either extravagant or unreasonable for a Company the size of Maritime Electric. Our concern is primarily with whether donations should be included in operating expenses. If the Company were operating in a competitive environment, we believe that the public would view donations as being made by the owners—that is the shareholders—of the Company. We believe this is also the public's view in the case of Maritime Electric when, in fact, each customer is effectively donating, through his electricity charges, to the causes Maritime Electric chooses to support. The Commission does not, therefore, consider the situation to be the same as if the Company were operating in a competitive environment.

In terms of corporate image, the Company's arguments regarding benefits to customers also apply to the owners of the Company, yet the costs are paid by the customers. In the Commission's view, it is not reasonable for the customers to pay all of the costs through operating expenses for donations which also benefit the shareholders—who do not share in the cost. We will therefore, as an interim measure, reduce operating expenses by \$35,000—half of the donations budget—on the basis that the shareholders are expected to share at least equally in the cost. The treatment of donations will be reviewed again when the Company is next before us for a general rate review.

To the extent that charitable donations made out of earnings result in tax benefits, these benefits will also be considered to accrue to the shareholders of the Company.

4. The budget for donations shall be reduced by \$35,000 to reflect the expectation that the shareholders of Maritime Electric should share at least equally in the cost of donations made to support charitable causes.

2.4 Capital Charges

2.4.1 General

Capital charges generally include depreciation and financing costs which include interest, preferred dividends, return on common equity and the associated income taxes. Each cost is discussed briefly in the following sections.

2.4.2 Depreciation

The depreciation rates of the Company are reviewed periodically through a detailed depreciation study. The study involves examination of the most current data available on the useful life of assets, the appropriate salvage values and other parameters. The result is a periodic evaluation of whether fixed assets are being appropriately charged to the customers who benefit from their use.

As part of its application, the Company filed its 1991 Depreciation Study based on its plant-in-service at December 31, 1990. The proposed changes in Rates of Depreciation are summarized in Table 2.8.

Table 2.8 Existing and Proposed Depreciation Rates		
	Existing Rate %	Proposed Rate %
Charlottetown Steam Plant	2.8	3.0
Borden Gas Turbines	3.8	3.8
Dalhousie Thermal Plant	3.8	3.6
Maritime Interconnection	2.9	2.8
Substation	3.7	3.3
Transmission	2.3	2.3
City Distribution	3.5	3.2
Rural Distribution	3.8	3.9
Transportation	9.0	7.5
Communications & Control	6.4	5.8
Supervisory System	10.0	8.3
Buildings	2.9	3.2
Computer Hardware & Software	7.9	13.8
Other General Property	7.9	3.9
Canelco Acquisition Adjustment	3.8	n/a

The corresponding composite rates of depreciation using 1993 data are 3.63% under existing rates and 3.59% under the proposed rates.

During the hearing, some concern was expressed over the increase in negative salvage value on the rural poles and fixtures from negative (-) 20% in 1985 to negative (-) 40% in the current study which has the effect of increasing depreciation by approximately \$100,000. While a downwards trend in salvage value is clearly indicated, it is unclear whether this is an indicator of future expectations or, for example, a result of a distribution system built up largely in the 1950's and 1960's reaching the end of its useful life, a decade of historically high inflation or other related factors. In the absence of evidence to the contrary, however, the Company's estimates are accepted.

The depreciation study also indicates that the accumulated depreciation accounts are \$611,694 lower than indicated by the theoretical or estimated amounts. The Company plans to recover this difference by charging \$203,898 per year to revenue requirement over three years in a manner consistent with previous Orders of the Commission. The Company further proposes that the difference **not** be collected on the basis that the estimates are within one percent which is acceptable since the depreciation study is judgmental and therefore imprecise. Company witness Mr. O'Reilly did not believe that any adjustment should be made as long as the study estimate was within 5% of the book value.

The allowable range of $\pm 5\%$ would imply that no adjustment is made until the difference between theoretical and book value is approximately \$3 million. The Commission believes that allowing the difference to accumulate to such a level is clearly unnecessary and would result in a significant impact on rates. If the current difference of 1% is accepted, then it is possible that future estimates will narrow the difference; however, it is also possible that the difference will continue to widen, which ultimately would result in an even greater adjustment. The Commission believes that, when the Company prepares revised estimates—as it has in this case—it should aim to move towards those new estimates. We believe that this will result in greater stability of rates.

The Commission also believes that the adjustment should be made over a reasonable period. In this case, an appropriate period would appear to be the time between depreciation studies—when the estimates are reviewed—or approximately 5 years.

The Commission further believes that the issue of adjusting book to theoretical values may be better resolved in the future by adopting a straight line-remaining life method of depreciation in which the objective is to depreciate the remaining net book value of the assets over their estimated remaining life. This should have the effect of adjusting for changes in estimates over the remaining life of the assets and could be viewed as further improving rate stability. This alternative is to be considered when the next depreciation study is prepared.

5. The revised rates of depreciation proposed by the Company are approved as filed.

6. The Company shall amortize the \$611,694 difference between the estimated and book value of accumulated depreciation on a straight line basis over five years.

7. The Company shall prepare its next comprehensive depreciation study for filing with the Commission no later than December 31, 1996.

8. As part of its next depreciation study, the Company shall evaluate whether adopting a straight line-remaining life approach to depreciation would be appropriate as an alternative to continuing to amortize excess or shortfall depreciation.

2.4.3 Interest Expense

Interest expense on long-term and bank debt is typically flowed through, in the case of long-term debt, as a cost which is effectively approved when the debt issue is approved. The interest and related costs of financing included in revenue requirement are summarized in Table 2.9.

The Company reported an error of \$49,050 in the calculation of interest on long-term debt. This results in a reduction of \$49,402 in revenue requirement, based on Company estimates. Interest on long-term debt also includes estimated interest on a new \$10 million, 10.25% bond issue proposed for November, 1993. Based on published yields of current Canadian corporate bonds in the range of 7.5-9.4% (The Globe and Mail, Wednesday, May 26, 1993), the estimated yield for Maritime Electric appears to be somewhat high; however, no adjustment is considered warranted given the uncertainty in interest rates and the relatively small impact on the 1993 revenue requirement.

The Company forecasts its short term borrowing costs based on a prime rate of 7.25%. Current rates are closer to 6% and forecasts for 1993 by the Conference Board and the Royal Bank are closer to 6.5%. According

to Company witness Mr. Hughes, a 100 basis point change in prime rate equates to an \$18,000 change in revenue requirement. Given the overall operating expenses of the Company, the interest expense budgeted by the Company is considered to be within a range that can be considered reasonable.

Table 2.9			
Interest and Related Charges			
	As Filed	Adjustments	Approved by Commission
	April 19, 1993		
Interest on Long-Term Debt	\$ 5,558,888	(\$ 49,050)	\$ 5,509,838
Interest on Bank Loan	140,347	(352)	139,995
Interest During Construction	(650,000)		(650,000)
Amortization of Financing Costs	68,029		68,029
Discount on Bonds & Shares	(3,000)		(3,000)
Total	\$ 5,114,264	(\$ 49,402)	\$ 5,064,862

2.4.4 Income Tax

Income taxes have historically been included in revenue requirement using the deferral method which results in the collection through rates of both actual taxes due and deferred income taxes. For 1993, the budgeted amounts are \$6,105,402 and \$569,422, respectively.

Deferred taxes represent an amount which is theoretically due to government out of accounting income, but which is not payable to government in the base year because of differences between accounting income and income for taxation purposes. In a regulated company, the result is collection of revenues from customers in excess of those necessary to meet current and past expenditures. In effect, the rate payers "contribute" funds to the Company which are used to finance capital programs in place of debt and preferred and common shares.

The tax policy used by Maritime Electric has been in place for many years. The Commission believes that it is in need of review to ensure that the policy is still in the best interests of the Company and its customers. We prefer, however, to carry out a preliminary review to identify the major issues and the potential impact of a change in policy on customers before initiating a process which could be very costly to all parties. We welcome the Company's suggestions on how such a review might be conducted to be both effective and economical.

9. The Company shall propose, for review by the Commission, a procedure for reviewing Maritime Electric's policy for recording deferred income taxes.

2.4.5 Preferred Dividends

Preferred dividends, like interest, are effectively approved at the time of issue. There being no attractive opportunity to refinance at a lower cost or plans for new issues at the time of the hearing, the budgeted dividends on preferred shares outstanding in 1993 of \$1,271,400 will be approved.

2.4.6 Return on Common Equity

In Order UE92-17, the Commission approved a maximum return on common equity of 13.0% for Maritime Electric. No new evidence was presented at the hearing nor have economic or other conditions changed to make the Commission believe that this maximum is unreasonable.

At issue in this hearing is whether rates should be set to yield exactly 13.0% or, for example, at a lower level to provide an incentive to the Company to improve efficiency. For most of the past decade, the Company's rate of return has been based on a range with rates set at the midpoint of the range or 1/4-1/2% below the allowed maximum. In fact, at the last General Rate Hearing, the Company proposed a range of 13.5%-14.25% with rates set at 13.75% to

limit the increase in rates to customers to a minimum consistent with the Company's need to collect its revenue requirement ... [and to provide] ... an even greater incentive for the Company to make productivity gains through the efforts of management and continued improvements in cost control.

The Company now proposes that the range, at least for the current application, be eliminated and that rates be set at the 13.0% level based on the following principal arguments:

1. The Company has implemented a bare-bones budget and does not have the same opportunities to reduce costs as in previous years; and,
2. The Company is going into a year (1994) of unusually high capital expenditures and setting its rates at a level below that forecast to yield the maximum return could increase the risk of earning below an acceptable level during a period when its financing requirements are high.

The Company's reference to a "bare-bones" budget refers to its holding "controllable" operating expenses to approximately the same level as in 1992. It appears that these expenses would also be approximately equal to 1991 levels, despite inflationary pressures on certain costs. Given the pressures on all sectors of the economy to deliver improved services using the same or fewer resources, the Commission believes that this effort should be regarded as the norm and not the extraordinary measure suggested by the Company. Nor do we believe that the Company's efforts eliminate its budget flexibility. Indeed, Company President and Chief Executive Officer, Mr. Reynolds indicated that there were likely further efficiency improvements that could be identified and implemented even with what the Company considers to be a tight budget. Finally, the Commission believes that there is flexibility in certain of the costs discussed herein.

The Commission has been aware of the Company's anticipated financing requirements for some time. We do not, however, believe that high financing requirements provide justification for setting rates higher than necessary to provide a reasonable return. Nor do we believe that setting rates to provide management with an incentive to further improve efficiencies subjects the Company to unreasonable risks. The Commission has never believed that allowing a rate of return above that at which rates were set should guarantee that the Company will earn such a return, yet the Company has consistently earned the maximum and had excess revenues for a number of years, even when sales were somewhat below target. We do not believe that maintaining a range for rate of return consistent with past practice is unreasonable or places the Company at significant risk.

In conclusion, the Commission believes that a range of rate of return of 12.5-13.0% is just and reasonable and that rates should be set to yield the mid-point of the range, 12.75%. In the view of the Commission, this will result in rates as low as possible while allowing the Company to earn up to a maximum of 13.0% if it can demonstrate further efficiency improvements.

10. For the purpose of determining a just and reasonable rate of return on rate base, a return on average common equity in the range of 12.5% to 13.0% is established as just and reasonable.

11. Rates shall be determined based on a revenue requirement projected to yield the mid-point of the range or 12.75%.

2.4.7 Rate Base

The Company requests approval of its rate bases for the years ending December 31, 1990, 1991 and 1992 as summarized in Appendix 1. The Company's filing differs from their financial statements as follows:

1. Deferred income taxes in the rate base calculation are \$524,171 lower than reported on the financial statements. This balance relates to the Fredericton, New Brunswick assets which were disposed of in 1969 and, according to the Company, represents a permanent exclusion from rate base. No adjustment is necessary.
2. Deferred income in 1990 was recorded on a net-of-tax basis which appears to be inconsistent with other years. Based on correspondence with the Company, this amount has been adjusted to correspond with the financial statement balances.
3. The component of working capital related to income taxes also differs in 1990 and 1991 from calculations made directly from the financial statements as a result of refunds of taxes from prior years. While the Company does not consider it necessary to make the adjustment which is relatively minor, we believe that the adjustment should be made to provide consistency with the Company's financial statements. The rate base has been adjusted accordingly based on the information provided by the Company.

The rate base calculation reflecting these adjustments is included in Appendix 2.

In responding to questions related to the last adjustment above, the Company made the following comment:

In view of the fact that the effect on the Rate Base is not material and the fact that we are regulated on return on average common equity we do not feel that it is necessary to adjust the Rate Base calculations for these refunds.

(Correspondence of May 10, 1993)

The Company appears to be indicating by this comment and by other references that have been made over the years that the Rate Base calculation is a residual calculation and not of primary importance. While the approach of the Commission on rate of return has, for practical purposes, moved away from an emphasis on Rate Base, we remain aware of our statutory responsibility to determine a rate of return on Rate Base and so disagree with the Company's position. At the same time, we believe the method for determining the Rate Base could be improved. For example, working capital is now determined based on a hypothetical calculation rather than the actual needs of the Company. In addition, the Company has certain fixed assets—deferred charges for example—which are not included in Rate Base or approved by the Commission but which the Company must finance. The Company is therefore implicitly earning a rate of return (interest, dividends, etc.) associated with these assets.

The Commission wishes to review the implications of modifying the Rate Base calculation to more accurately reflect the actual capitalization of the Company and therefore the capital on which the Company is entitled to earn a rate of return. An example of the calculation of the rate base which might achieve this goal is given in Appendix 3. We are open to the Company's comments on the proposed modifications to the Rate Base calculation. We plan, if appropriate, to have changes implemented for future Rate Base confirmations.

12. The average Rate Bases are approved in the adjusted amounts of \$94,003,623 for 1990, \$103,604,055 for 1991 and \$113,186,910 for 1992.

13. The Company shall submit to the Commission its comments on the proposed modifications to the Rate Base calculation for review prior to its next request for Rate Base confirmation.

2.4.8 Return on Rate Base

Table 2.10 summarizes the forecast capitalization and rate of return for 1993 as determined and adopted herein.

Table 2.10			
Forecast Capitalization and Rate of Return for 1993			
	Ratio	Average Cost	Weighted Cost
Long-term Debt	43.7%	10.87%	4.75%
Preferred Equity	12.5%	8.48%	1.06%
Common Equity	43.8%	12.5-13.0%	5.48-5.69%
	100.0%		11.29-11.50%

These returns equate to a rate of return on average forecast rate base for 1993 of 10.74% to 10.94%.

14. A just and reasonable rate of return on average rate base is established at a range of 10.74% to 10.94% for 1993.

2.5 Summary

The adjustments to revenue requirement ordered herein are shown in Appendix 4 and summarized in Table 2.11 which follows:

15. The Revenue Requirement for 1993 is approved at \$83,887,164 plus adjustments necessary to the Interest-Bank Loan estimate which result from the adjustments made herein.

Table 2.11

Revenue Requirement Summary, 1993			
	As Per	Commission	Approved
	Application	Adjustments	
OPERATING EXPENSES			
ECAM	29,222,000	0	29,222,000
Non-ECAM	26,635,900	(165,000)	26,470,900
	55,857,900	(165,000)	55,692,900
CAPITAL RELATED CHARGES			
Depreciation	6,656,719	0	6,656,719
Depreciation-Adjustment	203,898	(81,559)	122,339
Interest-Long Term Debt	5,558,888	(49,050)	5,509,838
Interest-Bank Loan	140,347	(352)	139,995
Interest-AFUDC	(650,000)	0	(650,000)
Interest-Amort. of Financing Costs	68,029	0	68,029
Interest-Disc. on Bonds and Shares	(3,000)	0	(3,000)
Income Tax-Current	6,105,402	(108,207)	5,997,195
Income Tax-Deferred	569,422	0	569,422
Preferred Dividends	1,271,400	0	1,271,400
Return on Common Equity	6,825,792	(131,265)	6,694,527
	26,746,897	(370,433)	26,376,464
REVENUE REQUIREMENT	82,604,797	(535,433)	82,069,364
Fuel Clause Revenue	(244,981)	0	(244,981)
Deferred ECAM	2,570,781	0	2,570,781
Other Revenue	(508,000)	0	(508,000)
BASIC RATE REVENUE	84,422,597	(535,433)	83,887,164

Part Three

Tariff Revisions

3.1 Introduction

The Tariff of Maritime Electric establishes the rates to be charged to each customer class and effectively determines the amount of the Company's total costs that are to be recovered from each customer group. The allocation of costs is determined largely by a detailed rate calculation for the Town of Summerside, Transmission Voltage and Large General Service (Interruptible) rates and from the forecast Cost Allocation Study for the remaining classes. Historically, rate movements have been limited to prevent "rate shock" or "rate instability" to any customer class.

In the current application, the Company proposes only one major change to its established rate methodology which is a change to the calculation of the interruptible credit discussed in Section 3.3. Interveners raised a number of issues which are discussed in Section 3.4.

3.2 Cost Allocation Study

The Cost Allocation Study (the "Study") provides a detailed estimate of the fully allocated cost of serving each customer class in comparison with the revenues received from that class. In recent years, the Company has been required to file a forecast Study for the target year. The current Study includes a modification to forecast revenues based on the rates proposed by the Company in contrast to past years when the existing rates were used (with necessary adjustments). In order to fully understand the proposals of the Company, the Commission has found it useful to adjust the Study results to estimated 1993 revenues prior to the adjustments to move the revenue/cost ratio towards unity. The resulting changes are shown in Table 3.1.

Table 3.1 indicates that the Company, through its rate proposals, is attempting to move most rate classes towards a revenue-cost ratio of unity. While this complies with directions given by the Commission, the movement is in certain cases at a slower rate than we consider appropriate. We will comment further in the sections that follow.

The Large General Service (Int.) class is the only class that is moving significantly away from a revenue-cost ratio of one. According to the Company, this apparent discrepancy results from a difference in methodologies

which will be eliminated when Rate Areas are phased out. The Commission accepts the detailed rate calculation as being the more appropriate for this customer class.

Table 3.1			
Revenue to Cost Ratios Based on the Average and Excess Demand Methodology			
	Revenue as	Proposed	Revenue
	% of Cost	Rate	as % of
	Before Rate	Increase	Cost
	Adjustments (1)	(Ex. M-24)	(Ex. M-22)
Residential	97.1%	2.5%	97.3%
Small General Service	100.6%	2.0%	100.5%
Street and Yard Lights	106.9%	1.0%	106.2%
	98.3%		98.4%
Large General Service (Firm)	104.3%	1.6%	104.0%
Large General Service (Int.)	105.2%	3.1%	106.0%
All Electric General Service	100.4%	2.3%	100.5%
Industrial	98.1%	2.8%	98.6%
Flat Rate	104.5%	1.0%	103.4%
Transmission Voltage	105.6%	1.0%	104.8%
Town of Summerside	106.1%	1.0%	105.3%
	104.3%		103.9%
	100.1%		100.0%

(1) Adjusted to reflect rate increase of 2.1% effective May 1, 1993 for each class.

3.3 Detailed Rate Design

The detailed rate design of the Company has attracted a fair degree of scrutiny over the years, particularly with respect to how rates are established for interruptible customers. The Company has proposed only one significant change to the established methodology which involves a shift in the calculation of the interruptible credit from the transmission output level to the transmission input level. According to the Company, this change equates interruptible capacity with generation and has the overall effect of reducing the interruptible credit from \$1,442,196 to \$1,367,177. The interveners did not comment on this change and it appears to the Commission to be consistent with the intent of the approved methodology.

The Town of Summerside claimed that there was an inconsistency in the calculation of their rate related to the impact of the new Goods and Services Tax Centre on their demand. The Company subsequently filed a letter addressing the Town's concern and undertaking to adjust the calculation when final rates are determined. We believe this should address the issue raised by Summerside.

No other issues with respect to the detailed rate design were brought to the attention of the Commission.

3.4 Interventions

The focus of the interventions of the Town of Summerside and Cavendish Farms were on issues related primarily to rates.

The Town's intervention focused on the Commission's requirement that the movement in rates for any class of customers be limited to within the range from 0.5 to 1.5 times the general rate increase: in this application a range from 1.0% to 3.1%. The impact of this rule on the Town is to limit the movement in their estimated total bill from \$5,135,987 under their existing rates to \$5,188,452 (the lower limit). For comparison, the detailed rate calculation indicates a total bill of \$4,863,387. The Town therefore believes that it is paying too high a proportion of Maritime Electric's costs.

The Town proposed a number of mechanisms for determining what it believes to be a more equitable rate. The effect of all of the proposals would be to modify or eliminate the restriction on downward movement of rates. The Town submits that while there may be good reason to have an upper limit on rates to alleviate rate shock, a lower limit is not necessary.

After reviewing all of the evidence and arguments, the Commission continues to believe that limiting rate movement using the 0.5 to 1.5 times rule is an appropriate method for achieving rate stability and avoiding rate shock. It is clear that, where upwards movement is to be limited, there must also be a limit on rates targeted for a reduction, albeit the limits may be different depending on the sizes of the various customer classes. We also believe that a revenue-cost ratio of one for each rate class is a reasonable target but not a target that is defined with precision. As with any target whose derivation is based on a large degree of judgment, it is prudent to use it as a guide to directional rather than absolute movement. To do otherwise could increase both rate instability and rate shock if the target moves as new estimates are made.

The Commission does, however, on a case by case basis deviate from the 0.5 to 1.5 times rule in order to adjust rates which appear to be unreasonably high or low. In this case, the detailed rate calculation indicates that the Street Lighting, Transmission Voltage and Town of Summerside rates should all be reduced, yet the 0.5 times limit results in them being increased. We believe that this effect occurs, in part, because we are looking at a relatively small rate increase and therefore a narrow band within which to adjust rates. We therefore believe that it is reasonable to deviate from our general rule limiting rates and to determine the rates for the above classes based on a 0% increase. This will, we believe, move them closer to the cost of service while not unduly affecting other customer classes.

16. The Company shall, for the current rate proposal, determine rates for the Street Lighting, Transmission Voltage and Town of Summerside classes that result in a 0% increase in Basic Rates.

Cavendish Farms submitted the following proposals:

1. That Cavendish Farms be served under a separate and unique customer class;
2. That the existing demand charge of \$7.62 per kVa be maintained and the proposed usage charge be reduced to 4.639 cents per kWh (the new rate proposed);
3. That an upper limit be placed on the ECAM to stabilize rates;
4. That Maritime Electric contribute to the Demand Side Management activities of Cavendish Farms.

Cavendish Farms is currently served under the Transmission Voltage rate. This class includes a small number of large customers who, according to Maritime Electric, have load characteristics similar to Cavendish Farms. New customer classes are normally established only when the load characteristics of one or more customers are sufficiently distinct from those in existing classes. We have not seen evidence to indicate that this is the case for Cavendish Farms and do not, therefore, consider a new class to be justified.

The rate proposal of Cavendish Farms in effect proposes that they be charged the lowest of the existing and proposed energy and demand charges. The fact that one charge is increasing while the other is decreasing results from the Company rebalancing the energy and demand charges of its customers to more closely match costs. It is not possible to select the more favourable of each and still cover the cost of service. We cannot, therefore, accept Cavendish Farm's proposal.

Placing a cap on the ECAM might be acceptable in the short-term only if the Company remained able to recover its cost of service in the long-term. The Commission did not understand Cavendish Farms to be objecting to paying its cost of service but rather to prefer rates that were more predictable. The Commission does not see any reason why Cavendish Farms could not pursue with the Company a mechanism similar to a level billing mechanism to stabilize rates. Should Cavendish Farms wish to pursue such an option, it should approach the Company.

The Commission has already directed the Company to review its Demand Side Management programs and file a report with the Commission later this year. We believe that the DSM proposals of Cavendish Farms might best be incorporated into that process.

3.5 Rates

3.5.1 General

In the February application, the Company proposed a 2.1% increase in basic rates to be effective May 1, 1993. This was subsequently revised to 1.9% based on first quarter sales and 1.8% to adjust for an inconsistency in the calculation of interest expense. The effect of the final increase is to increase revenues from Basic Rates by \$960,586 over the last eight months of 1993. Based on the adjustments made herein, the objective for the

rates to be effective July 1, 1993 is to recover approximately an additional \$474,555 over the second half of 1993 for a rate increase of approximately 1.1%. The actual increase in rates to individual customer classes will also reflect movements towards the cost of service and uniform rates.

3.5.2 Phase-Out of City/Town/Rural Rates

The next step in the movement towards uniform City/Town/Rural rates is scheduled for rates effective August 1, 1993. The Company proposes to incorporate this adjustment in the new rates to be effective July 1, 1992 and the Commission agrees with this proposal.

17. The Company shall incorporate the next step in the phase-in of uniform City/Town/Rural rates into its Tariff proposal for rates to take effect July 1, 1993.

Part Four

Other Issues

4.1 Productivity Study

The Company has, for a number of years, filed a summary of productivity studies with the Commission and commented that they show *an irregular but generally downward trend in total corporate input costs*. The supporting evidence indicates that the Energy Source and Transmission costs have declined from more than \$0.09/kWh (1991\$) in the 1970's to slightly more than \$0.07/kWh in recent years. These costs are, in many respects, beyond the control of the Company and are based in large part on oil and other energy prices.

The costs which are more directly controllable by management, Distribution and General & Administration, show little if any improvement since the early 1970's. The Commission therefore finds it difficult to conclude from the study that productivity gains have been made. Indeed, the fact that the Company is distributing power today for the same cost (after adjusting for inflation) that it was 20 years ago might be viewed as poor performance in comparison with other sectors of our economy. While it is possible that the province is now supplied with more reliable power at the same price, the Commission believes the Productivity Study needs some modification if it is to provide an indicator for improved performance as the Company suggests.

4.2 Incentive Regulation

During the hearing, Mr. Reynolds expressed the Company's interest in carrying out a study to evaluate Demand Side Management (DSM) incentives. Such incentives might be viewed as a mechanism to reduce the perceived risk of investing in sales reduction activities or to increase the Company's emphasis on DSM. The Company did not, however, wish to commence such a study without first having some direction from the Commission.

The current literature on DSM incentives tends to focus on two general areas: mechanisms to provide an investment incentive and mechanisms to recover revenues lost as a result of DSM programs. Maritime Electric is currently allowed an investment incentive to the extent that DSM costs are included in rate base and therefore earn a return comparable to any other investment made by the Company. Whether this return should be higher (lower), for example through a bonus (penalty) mechanism, is a complex issue and should possibly be viewed from the perspective of providing different returns for all investments (generation, transmission, distribution, etc.) based on their risk and other characteristics. In terms of revenue recovery, Maritime Electric also effectively receives some adjustment through the setting of rates based on sales net of estimated DSM effects.

With the treatment of DSM costs now in effect, the Commission is of the view that further incentives would be of limited benefit to the Company or its customers. We also believe that it would be premature to study incentives further at this time when the Company is in the process of evaluating its overall DSM program. Once this evaluation is complete and the full potential for load reduction through DSM is identified, we may wish to reevaluate our position.

The Commission is open to considering other forms of incentive regulation. We have continued to encourage the Company to improve the level, quality and value of service that it provides and believe that continuing improvements can be encouraged through appropriate incentives. Our reservations occur, in part, because we have not had reasonable indicators with which to assess the performance of the Company. In the absence of such indicators, it is difficult to judge, first, whether service has actually improved and, then, whether the improvement will continue to be realized on a long-term basis. It is our view that such indicators must be established to provide a baseline before we can reasonably assess whether the Company has achieved improved performance. This might then permit us to allow, as prudent and reasonable, costs associated with

performance incentives. We are, however, open to considering proposals that the Company might wish to make in this area.

4.3 Tariff Implementation and

Disposition

18. The Company shall forthwith prepare and file with the Commission for its review and approval, a Tariff for effect on July 1, 1993 that reflects the findings and conclusions contained in these reasons.

19. A copy of the proposed Tariff shall be circulated to each intervener of record who shall, within five (5) days of receipt, file with the Commission any comments the intervener may have on the proposed Tariff.

If the proposed Tariff is acceptable to the Commission, a further Order will be issued approving and declaring the Tariff effective on July 1, 1993.

An Order will therefore issue.

IN THE MATTER of an application of Maritime Electric Company, Limited for confirmation of its rate base, revision in the allowed rate of return on rate base, approval of revised rates of depreciation, and approval of revised rates and charges for services to customers.

Order

WHEREAS Maritime Electric Company, Limited (the "Company") by application dated September 14, 1992, applied to the Commission for an order or orders of the Commission approving a number of amendments to the Company's *General Tariff*;

AND WHEREAS the Commission issued Order UE92-17, dated herein December 21, 1992, establishing a maximum rate of return on average common equity;

AND WHEREAS the Company filed an amended application on February 16, 1993 revising its budget for operating expenses and other components of the application;

AND WHEREAS the Commission has heard and considered the evidence of the Company and the submissions of the interveners at public hearings conducted in Charlottetown during November 1992, and April 1993 after due public notice;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the *Island Regulatory and Appeals Commission Act* and the *Electric Power and Telephone Act*

IT IS ORDERED THAT

1. The Commission accepts the Company's sales forecast of 711,000 MWh for 1993.
2. The amount allowed in Operating Expenses for the Point Lepreau contract is reduced by \$100,000 from the budget proposed by the Company.
3. The general allowance for price escalation in 1993 will be reduced from 2.9-3.0% to 2.4-2.5%, respectively, and the allowance for non-ECAM operating expenses will be reduced by \$30,000 to reflect this change.

4. The budget for donations shall be reduced by \$35,000 to reflect the expectation that the shareholders of Maritime Electric should share at least equally in the cost of donations made to support charitable causes.
5. The revised rates of depreciation proposed by the Company are approved as filed.
6. The Company shall amortize the \$611,694 difference between the estimated and book value of accumulated depreciation on a straight line basis over five years.
7. The Company shall prepare its next comprehensive depreciation study for filing with the Commission no later than December 31, 1996.
8. As part of its next depreciation study, the Company shall evaluate whether adopting a straight line-remaining life approach to depreciation would be appropriate as an alternative to continuing to amortize excess or shortfall depreciation.
9. The Company shall propose, for review by the Commission, a procedure for reviewing Maritime Electric's policy for recording deferred income taxes.
10. For the purpose of determining a just and reasonable rate of return on rate base, a return on average common equity in the range of 12.5% to 13.0% is established as just and reasonable.
11. Rates shall be determined based on a revenue requirement projected to yield the mid-point of the range or 12.75%.
12. The average Rate Bases are approved in the adjusted amounts of \$94,003,623 for 1990, \$103,604,055 for 1991 and \$113,186,910 for 1992.
13. The Company shall submit to the Commission its comments on the proposed modifications to the Rate Base calculation for review prior to its next request for Rate Base confirmation.
14. A just and reasonable rate of return on average rate base is established at a range of 10.74% to 10.94% for 1993.
15. The Revenue Requirement for 1993 is approved at \$83,887,164 plus adjustments necessary to the Interest-Bank Loan estimate which result from the adjustments made herein.
16. The Company shall, for the current rate proposal, determine rates for the Street Lighting, Transmission Voltage and Town of Summerside classes that result in a 0% increase in Basic Rates.
17. The Company shall incorporate the next step in the phase-in of uniform City/Town/Rural rates into its Tariff proposal for rates to take effect July 1, 1993.
18. The Company shall forthwith prepare and file with the Commission for its review and approval, a Tariff for effect on July 1, 1993 that reflects the findings and conclusions contained in these reasons.
19. A copy of the proposed Tariff shall be circulated to each intervener of record who shall, within five (5) days of receipt, file with the Commission any comments the intervener may have on the proposed Tariff.

DATED at Charlottetown, Prince Edward Island, this 24th day of June, 1993.

BY THE COMMISSION:

Linda Webber, Chair

John L. Blakney, Vice-Chair

Anne McPhee, Commissioner

Appendix 1					
Rate Base Calculation as Proposed by Maritime Electric.					
	1989	1990	1991	1992	1993
	\$	\$	\$	\$	\$
Plant in Service					
Plant in Service - Closing Balance	146,434,000	155,664,236	176,384,713	187,276,596	201,761,667
Less: Accumulated Depreciation	(49,373,500)	(53,469,539)	(58,433,545)	(63,746,339)	(69,630,425)
	97,060,500	102,194,697	117,951,168	123,530,257	132,131,242
Plus: Unamortized DSM	0	214,593	540,827	779,863	1,294,863
Less: Unamortized Contributions	(7,543,497)	(7,987,424)	(8,578,238)	(8,791,457)	(8,564,487)
Less: Deferred Income Tax	(7,640,186)	(8,743,582)	(9,128,046)	(10,324,975)	(10,894,397)
	81,876,817	85,678,284	100,785,711	105,193,688	113,967,221
Plus: Working Capital					
Material and Supplies at Cost	3,276,829	4,087,528	3,013,019	3,092,648	3,659,000
12.5% of Operating Expenses	5,745,998	6,402,262	6,310,763	6,983,961	6,982,238
12.5% of Income Taxes Paid	391,517	665,505	597,522	688,415	685,867
Deferred Income	(845,687)	441,087	(1,092,664)	800,757	(1,770,024)
	8,568,657	11,596,382	8,828,640	11,565,781	9,557,081
Rate Base - Year End	90,445,474	97,274,666	109,614,351	116,759,469	123,524,302
Rate Base - Average	85,110,000	93,860,070	103,444,509	113,186,910	120,141,886
Appendix 2					
Rate Base Calculation as Adjusted and Approved by the Commission.					
	1989	1990	1991	1992	1993
	\$	\$	\$	\$	\$
Plant in Service					
Plant in Service - Closing Balance	146,434,000	155,664,236	176,384,713	187,276,596	201,761,667
Less: Accumulated Depreciation	(49,373,500)	(53,469,539)	(58,433,545)	(63,746,339)	(69,630,425)
	97,060,500	102,194,697	117,951,168	123,530,257	132,131,242
Plus: Unamortized DSM	0	214,593	540,827	779,863	1,294,863
Less: Unamortized Contributions	(7,543,497)	(7,987,424)	(8,578,238)	(8,791,457)	(8,564,487)
Less: Deferred Income Tax	(7,640,186)	(8,743,582)	(9,128,046)	(10,324,975)	(10,894,397)
	81,876,817	85,678,284	100,785,711	105,193,688	113,967,221
Plus: Working Capital					
Material and Supplies at Cost	3,276,829	4,087,528	3,013,019	3,092,648	3,659,000
12.5% of Operating Expenses	5,745,998	6,402,262	6,310,763	6,983,961	6,982,238
12.5% of Income Taxes Paid	359,530	640,274	597,522	688,415	685,867
Deferred Income	(845,687)	785,411	(1,092,664)	800,757	(1,770,024)
	8,536,670	11,915,475	8,828,640	11,565,781	9,557,081
Rate Base - Year End	90,413,487	97,593,759	109,614,351	116,759,469	123,524,302
Rate Base - Average		94,003,623	103,604,055	113,186,910	120,141,886
Appendix 3					
Proposed Revision of Rate Base Calculation.					
	1989	1990	1991	1992	1993
	\$	\$	\$	\$	\$
Plant in Service					
Plant in Service - Closing Balance	146,434,000	155,664,236	176,384,713	187,276,596	201,761,667
Less: Accumulated Depreciation	(49,373,500)	(53,469,539)	(58,433,545)	(63,746,339)	(69,630,425)
	97,060,500	102,194,697	117,951,168	123,530,257	132,131,242

Plus:					
Property Under Construction	3,419,005	10,482,338	5,035,351	6,398,071	3,000,000
Unamortized DSM	0	214,593	540,827	779,863	1,294,863
Unamortized Financing Costs	241,071	445,271	698,771	702,896	774,868
Unamortized Load Research Study	0	0	59,025	541,417	982,056
Unamortized Generation Studies	361,771	281,328	190,885	100,443	"
Unamortized Engineering Studies	492,277	251,919	318,563	364,828	"
Less:					
Unamortized Contributions	(7,543,497)	(7,987,424)	(8,578,238)	(8,791,457)	(8,564,487)
Deferred Income Tax	(8,164,357)	(9,267,753)	(9,652,217)	(10,849,146)	(11,418,568)
	85,866,770	96,614,969	106,564,135	112,777,172	118,199,974
Plus: Working Capital					
Current Assets	8,841,831	11,873,395	14,961,341	11,851,100	18,243,111
Less: Current Liabilities (Excl. LTD)	(22,603,153)	(14,875,487)	(11,184,850)	(10,834,805)	(11,030,397)
	(13,761,322)	(3,002,092)	3,776,491	1,016,295	7,212,714
Rate Base - Year End	72,105,448	93,612,877	110,340,626	113,793,467	125,412,688
Rate Base - Average		82,859,163	101,976,752	112,067,047	119,603,078
Common Equity and Retained Earnings	36,540,387	39,424,877	46,212,627	50,390,468	54,624,688
Preferred Shares	10,300,000	17,600,000	15,600,000	15,000,000	15,000,000
Long-term Debt	27,418,000	36,588,000	48,528,000	48,403,000	55,788,000
Property Pending Approval	(2,152,940)	0	0	0	0
	74,258,387	93,612,877	110,340,627	113,793,468	125,412,688

Appendix 4

Maritime Electric Revenue Requirement

1993

Account	As Per Application Sept. 1992	As Amended In Course of Hearing	As Revised by Application Feb. 1993	As Adjusted By Commission	Commission Approved
Sales (MWh)	708,000		711,000		711,000
ECAM					
Power Purchases (M-1, M-24)	18,638,000	353,000	18,991,000	0	18,991,000
Point Lepreau Entitlement (M-1, M-24)	3,262,000	122,000	3,384,000	0	3,384,000
Dalhousie Plant (M-1, M-24)	4,628,000	(66,000)	4,562,000	0	4,562,000
Charlottetown Plant (M-1, M-24)	2,371,000	(301,000)	2,070,000	0	2,070,000
Borden Plant (M-1, M-24)	296,000	(81,000)	215,000	0	215,000
NON-ECAM					
Production	13,550,000	(105,000)	13,445,000	(100,000)	13,345,000
Distribution	3,030,000	(189,000)	2,841,000	0	2,841,000
Transmission	343,000	(36,000)	307,000	0	307,000
General					
Amortization	312,000	99,000	411,000	0	411,000
Donations	73,000	(3,000)	70,000	(35,000)	35,000
Other	9,740,000	(178,100)	9,561,900	(30,000)	9,531,900
	27,048,000	(412,100)	26,635,900	(165,000)	26,470,900
	56,243,000	(385,100)	55,857,900	(165,000)	55,692,900
CAPITAL RELATED CHARGES					
Depreciation	6,755,487	(98,768)	6,656,719	0	6,656,719
Depreciation - Adjustment	203,898	0	203,898	(81,559)	122,339
Interest - Long-Term Debt	5,388,055	170,833	5,558,888	(49,050)	5,509,838
Interest - Bank Loan	335,318	(194,971)	140,347	(352)	139,995

Interest - AFUDC	(650,000)	0	(650,000)	0	(650,000)
Interest - Amortization of Financing Costs	63,230	4,799	68,029	0	68,029
Interest - Discount on Bonds and Shares	(3,000)	0	(3,000)	0	(3,000)
Income Tax - Current	6,028,969	76,433	6,105,402	(108,207)	5,997,195
Income Tax - Deferred	428,973	140,449	569,422	0	569,422
Preferred Dividends	1,271,400	0	1,271,400	0	1,271,400
Return on Common Equity	6,771,275	54,517	6,825,792	(131,265)	6,694,527
	26,593,605	153,292	26,746,897	(370,433)	26,376,464
TOTAL REVENUE REQUIREMENT	82,836,605	(231,808)	82,604,797	(535,433)	82,069,364
Fuel Clause Revenue	(226,688)	(18,293)	(244,981)	0	(244,981)
Deferred ECAM	2,049,889	520,892	2,570,781	0	2,570,781
Other Revenue	(485,000)	(23,000)	(508,000)	0	(508,000)
REVENUE FROM BASIC RATES	84,174,806	247,791	84,422,597	(535,433)	83,887,164

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Docket: UT01101
Order UT02-01

IN THE MATTER OF an appeal by MR&S Management Inc. against a decision of the Provincial Tax Commissioner, dated December 21, 2000.

BEFORE THE COMMISSION

on Wednesday, the 16th day of January, 2002.

Ginger Breedon, Chair
Maurice Rodgeron, Vice-Chair
James Carragher, Commissioner

Order

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Appearances & Witnesses

1. For the Appellant, MR&S Management Inc.

Counsel:
Ronald J. Keefe

Witness:
Darren Noonan, Partner
MacPherson Roche Smith & Noonan

2. For the Respondent, Provincial Tax Commissioner

Counsel:
Ruth M. DeMone

Witnesses:
Shelly Rector, Tax Auditor

Lorne Bay, Audit Supervisor

3. For the Island Regulatory and Appeals Commission

Counsel:
Thomas A. Matheson, Q.C.

Staff:
Donald G. Sutherland
Director, Technical & Regulatory Services

Donna Chandler
Recording Secretary

Reasons for Order

1. Background

(1) This is an appeal by MR&S Management Inc. ("MR&S" or "Appellant") against a decision of the Provincial Tax Commissioner ("Tax Commissioner" or "Respondent"), dated December 21, 2000. The appeal relates to tax assessed on purchases associated with the transfer of assets from a partnership to the Appellant as well as tax on services provided by the Appellant to a number of clients.

(2) The taxes at issue in this appeal were assessed pursuant to Notice of Assessment No. 1186, which was issued on August 31, 2000 by the Province of P.E.I. following an audit of the Appellant. On October 30, 2000, MR&S filed a Notice of Objection with the Provincial Tax Commissioner pursuant to Section 9 of the *Revenue Administration Act*, which reads as follows:

9. (1) Where a person considers that he is not liable to taxation under a Revenue Act or disputes liability for the amount assessed against him, he may, within sixty days of the date of service or mailing of the notice of assessment serve on the [Provincial Tax] Commissioner a notice of objection setting out the reasons for the objection and all relevant facts.

(2) A notice of objection is sufficiently served if delivered to the office of the Commissioner or sent by registered mail addressed to the Commissioner.

(3) The Commissioner shall, within sixty days of receipt of the notice of objection, reconsider the assessment or estimate and vacate, confirm or vary it, and he shall thereupon notify the objector of his decision by registered mail.

(3) The Tax Commissioner issued his decision on the objection on December 21, 2000. In his decision, the Commissioner confirmed the taxes assessed.

(4) On January 19, 2001, MR&S appealed the above decision pursuant to Section 10 of the Revenue Administration Act, which reads as follows:

10. (1) If the taxpayer or collector is dissatisfied with the decision of the Commissioner under subsection 9(3), he may, within thirty days from the date of mailing of the decision, appeal to the Island Regulatory and Appeals Commission hereafter referred to as the 'Commission'.

(2) Any appeal shall be commenced by serving upon the Commission a notice of appeal in writing setting out the grounds of the appeal and stating briefly the facts relative thereto.

(3) A notice of appeal is sufficiently served if delivered to the office of the Commission or sent by registered mail addressed to the Commission.

(4) On the hearing of the appeal both the appellant and the Commissioner are entitled to be heard and to submit further evidence.

(5) The Commission may, in writing, designate a person on its behalf to hear an appeal under this section and any reference in this section...to the Commission includes a person so designated.

(6) Upon any appeal, the Commission may affirm, vary or reverse the decision of the Commissioner and shall give the appellant written notice of its decision by registered mail.

(5) Following receipt of the written evidence and suitable scheduling for the involved parties, the appeal was heard by the Commission on September the 19th and 20th, 2001. Final briefs were filed on October 19, 2001 and reply briefs were filed on November 2, 2001.

(6) In order to protect the identity of the Appellant's clients, the Commission agreed to maintain the hearing record in this appeal as well as third party client names in confidence. For the purpose of these reasons, reference to specific client invoices will be referred to as client invoice "A", "B" et cetera.

2. Discussion & Findings

2.1 Introduction

(7) The appeal deals with:

- tax on certain services provided by the Appellant to eight specific clients;
- tax on services provided to a ninth client; and
- tax on the transfer of office equipment and furniture from a partnership to the Appellant and tax on plant care services.

(8) The last issue—office equipment and furniture transfer as well plant care services—resulted in an objection on the part of the Respondent to the effect that MR&S was raising issues not set out in the Notice of Appeal—something the Respondent argues is not permitted. The parties submitted written briefs dealing with the objection in their final argument.

(9) In interpreting legislation, the Commission must determine what the Legislature intended in enacting the section or sections of the *Act* (or *Regulations*) in question.

[W]ords in an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the intention of [the Legislature].

(See, e.g. Columbia House v. Prince Edward Island (Minister of Finance)(1991), 96 Nfld. & P.E.I.R. at 348.)

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(Stubart Investments Ltd. v. The Queen(1984), 10 D.L.R. (4th) 1 (S.C.C.), p.32)

(10) The Commission has carefully considered the evidence of the witnesses as well as the submissions of counsel on each of the issues in this appeal. Bearing in mind the scheme, object and context of the relevant legislation and regulations, the Commission hereby renders its decision.

(11) The Commission acknowledges the contributions of counsel and the witnesses in this proceeding.

2.2 Matters Not Raised in the Notice of Appeal

2.2.1 May an Appellant raise issues in its appeal that were not specifically set out in its Notice of Appeal to the Commission?

(12) This issue arose as a result of the evidence filed by Mr. Noonan on behalf of MR&S and relates to the acquisition of office furniture and equipment from an accounting partnership in Charlottetown as well as the purchase of plant care services. These two items were not set out in the Notice of Appeal filed with the Commission.

(13) The Tax Commissioner submits that an appellant is precluded from raising issues in an appeal to the Commission that were not set out in the Notice of Appeal. The Respondent contends that Section 10 of the **Revenue Administration Act** specifically requires that a Notice of Appeal be in writing and that it contain grounds for the appeal. According to the Tax Commissioner, the Commission has, in other cases, clearly stated that it has no ability to waive the provisions of the Act. The Respondent cited the Commission's decision in **Island Construction**, (Commission Order UT99-1, dated March 25, 1999), wherein the Commission stated, in part, as follows (at p.2):

As a creature of statute, the Commission only has the authority expressly conferred upon it by the legislature. In this case, the legislature, through the Revenue Administration Act, has clearly stipulated a time limitation for the filing of an appeal. The Commission has no ability to waive the provisions of the Act.

(14) The Tax Commissioner further submits that, in the course of the audit process, a taxpayer is provided with a significant amount of information prior to an assessment being issued and is aware of the issues involved in the audit. According to the Respondent, the rules of fairness and natural justice are therefore not compromised. In any event, the Respondent contends that the common law principles of fairness and natural justice can be *ousted* by statute.

(15) Finally, the Tax Commissioner referred the Commission to the following comments of McQuaid, J. in *Prince Edward Island (Tax Commissioner) v. Maritime Dredging Ltd* (1997), 157 Nfld. & P.E.I.R. 80 (P.E.I.S.C.A.D.);

The appeal to the Commission is clearly one by way of hearing de novo, and there is no reason why an appellant should be restricted to only those issues raised before the Provincial Tax Commissioner, nor should the Commission be precluded from adjudicating upon those issues provided any new issues are raised by the appellant in the Notice of Appeal from the Commissioner's decision.

(16) According to the Respondent, the comments of McQuaid, J., are relevant to the matters at issue here. To allow new issues to be raised would, in the Respondent's view, effectively render the time limitation period for appeals meaningless.

(17) The Appellant argues that Section 10 of the *Revenue Administration Act* is procedural rather than substantive in nature in that it does not go to the jurisdiction of the Commission. The Appellant further submits that, if a taxpayer is limited to those issues raised in the Notice of Appeal, the principles of fairness and natural justice could be circumvented. Finally, the Appellant submits that the comments of McQuaid, J. in *Maritime Dredging* were *obiter dictum* and not binding upon the Commission.

(18) In the matter at issue here, it is acknowledged by the parties that an appeal hearing before the Commission is a *hearing de novo* and that an appellant may raise issues before the Commission that were not raised before the Provincial Tax Commissioner. However, the Respondent contends that an appellant may only do so if the issues are set out in the Notice of Appeal. The Appellant, MR&S, contends otherwise.

(19) A significant amount of argument and reply argument were devoted to this issue. However, the issue seems to hinge, in large part, on the court's interpretation of the appeal provisions of the *Revenue Administration Act* as set out in *Maritime Dredging*. For ease of reference, the comments of the court at issue here are repeated below:

The appeal to the Commission is clearly one by way of hearing de novo, and there is no reason why an appellant should be restricted to only those issues raised before the Provincial Tax Commissioner, nor should the Commission be precluded from adjudicating upon those issues provided any new issues are raised by the appellant in the Notice of Appeal from the Commissioner's decision. (emphasis added)

(20) Having fully considered the submissions of counsel on this issue and the applicable law, the Commission is of the view that the comments of the court in *Maritime Dredging* were merely intended to indicate that new issues not raised before the Tax Commissioner must be set out in the Notice of Appeal to the Commission. We do not view the comments of the court as intending to restrict an appellant's access to the appeal process where the matters at issue are known to the Respondent. In this case, the principal matter at issue— the acquisition of office furniture and equipment—was raised in the initial objection to the Tax Commissioner and dealt with in his decision. The issue was thus known to the Tax Commissioner. In our view, the matter at issue here is not *new* within the context in which the Court is speaking. The interpretation the Respondent has placed on these comments is, in our view, too restrictive.

(21) The Commission therefore finds and concludes that an appellant may raise issues in its appeal that were not specifically set out in its Notice of Appeal to the Commission provided the issues were raised in the appellant's initial objection to the Tax Commissioner.

(22) Since the issue of tax on plant care services does not appear to have been raised in the Notice of Objection to the Tax Commissioner—and was not raised in the Notice of Appeal to the Commission—it will not be considered here.

2.3 Asset Transfer

2.3.1 Is the transfer of assets from Deloitte & Touche to MR&S exempt from tax pursuant to Section 20 of the Revenue Tax Act Regulations?

2.3.2 Even if the transfer of assets is not exempt, did the transfer fall within the four-year limitation period set out in Section 38 of the Revenue Tax Act Regulations?

(23) This issue involves tax on the transfer of assets from Deloitte and Touche to MR&S. A secondary issue relates to whether the audit period involving the transfer was within the four-year limitation period set out in Section 38 of the *Revenue Tax Act Regulations*.

(24) Sections 20 and 38 of the **Revenue Tax Act Regulations** read as follows:

20.(1) In this section "wholly owns" in relation to a corporation, means having the beneficial ownership of not less than 95 per cent of the total issued and outstanding, share capital of the corporation, exclusive of directors' qualifying shares in the hands of a person or of a person and members of his family.

Application of section

(2) This section does not apply to a transfer of goods if any tax imposed by the Act on any purchaser who acquired the goods in any prior transfer or purchase has not been paid.

Purchase by corporation from owner of corporation

(3) No tax is payable by a corporation on its purchase of goods from a person who wholly owns, either directly or through another wholly-owned corporation, the purchasing corporation.

. . .

38. In making an assessment pursuant to the Act, the Commissioner shall not consider a period prior to the four fiscal years immediately preceding the date of assessment unless there is a reasonable appearance to him of willful default or fraud.

(25) The Appellant takes the position that the transfer is exempt from tax pursuant to Section 20 of the **Revenue Tax Act Regulations**. In the alternative, the Appellant submits that the transfer occurred beyond the time limitation set out in Section 38 of the **Revenue Tax Act Regulations**.

(26) The Respondent submits that the transfer does not fall within the exemption provisions of Section 20 of the **Revenue Tax Act Regulations** and that the transfer occurred within the time limitation set out in Section 38 of the **Revenue Tax Act Regulations**.

(27) The record in this proceeding discloses that the Tax Commissioner assessed revenue tax on the value of the office furniture and equipment transferred from Deloitte & Touche on the sale of its accounting practice in Charlottetown P.E.I. to MR&S.

(28) The record also discloses that:

1. MR&S was incorporated August 31, 1995 by Stanley H. MacPherson, a partner in Deloitte and Touche, who had made arrangements with Deloitte and Touche to have MR&S buy the firm's accounting practice in P.E.I.;
2. the transfer took place on August 31, 1995, although there is some evidence the transfer was not recorded in the accounts of MR&S until September of 1995;
3. although there were suggestions at the hearing that Deloitte and Touche transferred the assets to Mr. MacPherson—who in turn transferred them to MR&S—the written agreement [part of Exhibit R-1] clearly indicates that the transfer was to go directly from Deloitte and Touche to MR&S;
4. at the time of the transfer, Stanley MacPherson was the sole shareholder of MR&S; and
5. there were a substantial number of partners in Deloitte and Touche at the time of the transfer. Mr. Noonan, appearing for the Appellant, placed the number at approximately 1,000.

(29) As noted above, the Appellant argues that the transfer to MR&S was not a taxable transaction. The Appellant states that:

a partnership is not a legal entity separate from its partners as is, for example, a Corporation separate from its shareholders. Each partner has a limited liability for the debts and obligations of the partnership. Each partner has a joint and undivided ownership interest in the property of the partnership.

(Appellant's Closing Argument, pp. 17-18)

(30) The Appellant therefore concludes that Mr. MacPherson was **the owner** of the goods because of his partnership interest in Deloitte and Touche.

(31) The Appellant submits that Subsection 20(3), of the *Revenue Tax Act Regulations* applies to the transaction. That subsection reads as follows:

No tax is payable by a Corporation on its purchase of goods from a person who wholly owns, either directly or through another wholly owned Corporation, the purchasing Corporation.

(32) Mr. Noonan's evidence established that, on August 31, 1995, Mr. MacPherson wholly owned MR&S, the purchasing corporation. The Appellant concludes that, as Mr. MacPherson was the owner of the goods, Subsection 20(3) creates an exemption from tax.

(33) The Tax Commissioner submits that the definition of *person* in Subsection 1(k) of the *Revenue Tax Act* includes the meanings assigned to *person* in the *Interpretation Act*—a natural person and corporation—and also the extended meanings included in the *Revenue Tax Act*—*municipal corporations, regional school boards, and other boards, commissions, and committees*. The Tax Commissioner therefore concludes that, as the word *partnership* is not included within the definition of a person in the *Interpretation Act* or contained as a definition in the *Revenue Tax Act*, the intent of Section 20 of the *Revenue Tax Act Regulations* is to exclude, from the exemption provision, transfers between partnerships and corporations.

(34) The essence of the Tax Commissioner's argument in this respect is set out below:

In a partnership, particularly one with upward of 1,000 partners, the Commissioner submits that no one partner owns all of the partnership property or has individually paid the tax on the acquisition of that partnership property to enable a transfer to take place on a tax-exempt basis to a Corporation which is wholly-owned by that partner. Each partner would have 'paid' a proportionate share of the tax based on their (sic) share of the partnership.

(Respondent's Brief in Response, p.11)

(35) Counsel for both parties appear to be in agreement that partnership property is owned equally among the partners to the firm. No evidence was introduced at the hearing that would indicate that Deloitte and Touche did not pay tax at the time of its original acquisition of the assets. If Deloitte and Touche had paid tax on the acquisition of the assets at the time of original purchase, then each partner was responsible for a share of the tax.

(36) The Commission accepts the analysis by counsel for the Tax Commissioner that the transfer to MR&S was a transfer from all of the partners of Deloitte and Touche. Mr. MacPherson, as a partner in Deloitte and Touche, had an undivided interest in the partnership property. However, he was not the only person transferring the assets to MR&S.

(37) It would appear to the Commission that the purpose of Section 20 of the *Revenue Tax Act Regulations* is to prevent double taxation:

1. where a person is transferring goods—upon which tax has been paid—to a corporation owned or controlled by him; or,
2. where a transfer of goods—upon which tax has been paid—is taking place among or between corporations owned or controlled by the same person.

(38) The Commission recognizes that Section 20 does not specifically identify partnership arrangements. However, the Commission does believe that the fundamental principle underlying this section—the prevention of double taxation—does extend to this type of common business arrangement to the extent of the individual partner's ownership of goods.

(39) In this situation, the parties who originally paid tax on the acquisition were all of the 1,000 or so partners of Deloitte and Touche. In our view, the goods are now being transferred to MR&S from a firm in which Mr. MacPherson, as a partner, has paid $1/1000^{\text{th}}$ of the tax on those goods.

(40) The Commission is of the view that Section 20 of the *Revenue Tax Act Regulations* is intended to apply to partnerships to the extent that the individual partner or partners had actually paid tax. In this respect, reference is made to Subsection 20(6) of the *Regulations*, which reads as follows:

No tax is payable by a person who purchases goods from a corporation he does not wholly own on that portion of the actual value of the goods equal to the proportion of the shares owned by the purchaser of the total issued and outstanding share capital of the Corporation.

(41) This Subsection indicates that the regulation is intended to eliminate double taxation only on the portion of the company's goods attributable to the person to whom the transfer is being made. While this Subsection is not directly applicable to the transfer involved here, it does provide a guide as to the extent of the intended exemption. In this case, the intended exemption would only be Mr. MacPherson's proportionate share of the tax paid on the value of the goods transferred to MR&S.

(42) For all of these reasons, the Commission finds that the overall transfer of assets from Deloitte & Touche to MR&S is not exempt from tax pursuant to Section 20 of the **Revenue Tax Act Regulations**. The exemption would, however, apply to Mr. MacPherson's proportionate share of the tax paid on the value of the goods transferred to MR&S.

(43) We turn our attention, then, to the issue of whether the transfer falls within the four-year limitation period set out in Section 38 of the **Revenue Tax Act Regulations**. For ease of reference, Section 38 is repeated below:

38. In making an assessment pursuant to the Act, the Commissioner shall not consider a period prior to the four fiscal years immediately preceding the date of assessment unless there is a reasonable appearance to him of willful default or fraud.

(44) There is no suggestion here of willful default or fraud. The issue therefore centers on the question of what constitutes four fiscal years immediately preceding the date of assessment.

(45) The date of assessment is August 31, 2000. The Tax Commissioner contends that the transfer was recorded on September 1, 1995. MR&S contends that the transfer occurred on August 31, 1995 pursuant to the terms of a purchase agreement. It is acknowledged by both parties that the fiscal year-end of the Appellant is August 31.

(46) Based on the evidence before us, the relevant fiscal years of the Appellant would appear to be as follows:

Fiscal Year	Number of Fiscal Years
Sep 1, 1999 - Aug 31, 2000	-
Sep 1, 1998 - Aug 31, 1999	1
Sep 1, 1997 - Aug 31, 1998	2
Sep 1, 1996 - Aug 31, 1997	3
Sep 1, 1995 - Aug 31, 1996	4

(47) Section 38 of the **Revenue Tax Act Regulations** allows for an assessment to be made for the four fiscal years immediately preceding the assessment date. The words *fiscal years* are, in our view, to be read as the fiscal years of the firm being assessed. Provided, then, that the assessment date is sometime within the fiscal period September 1, 1999 to August 31, 2000, the allowable assessment period would, in our view, begin on September 1, 1995.

(48) As noted above, the assessment date at issue in this case is August 31, 2000. Since the date falls within the fiscal year of MR&S ending August 31, 2000, the Tax Commissioner cannot, in our view, consider any period prior to September 1, 1995.

(49) The Commissions finds that the transfer of assets occurred on August 31, 1995 and that the transfer was subsequently recorded in the accounts of the Appellant on September 1, 1995. In order to be taxable, the provisions of Section 4 of the **Revenue Tax Act** must also be satisfied:

4. Subject to section 4.2, every consumer of goods consumed in the province shall, at the time of taking delivery, pay to the Minister for the raising of revenue for provincial purposes, a tax at the rate of ten per cent of the fair value of the goods.

(50) Based on the evidence and submissions before us, it would appear that delivery occurred on August 31, 1995 notwithstanding the date in which the transfer was recorded in the accounts of the Appellant. In our view, delivery must occur within the four-year period described above in order for the goods to be taxable. The fact that delivery may be recorded in the accounts of a taxpayer during some other accounting period is not, given the language of **Revenue Tax Act and Regulations**, relevant.

(51) For the reasons stated above, the Commission finds that the transfer of assets did not fall within the four-year limitation period set out in Section 38 of the **Revenue Tax Act Regulations**. The tax associated with the transfer of assets from Deloitte and Touche to MR&S Management Inc. is therefore reversed.

2.4 Tax on Services

2.4.1 Introduction

(52) This issue involves tax on professional services provided by MR&S to a number of clients under separate invoices. The relevant sections of the *Revenue Tax Act* read as follows:

4. *Every consumer of goods consumed in the province shall, at the time of taking delivery, pay to the Minister for the raising of revenue for provincial purposes a tax at the rate of ten percent of the fair value of the goods.*

1(e) "goods" includes

...

(iv) *legal services, accounting services and consulting services, engineering services and architectural services, each as defined in the regulations;*

Subsection 1(3) of the *Revenue Tax Act Regulations* provides as follows:

(3) *For the purpose of subclause 1(e)(iv) of the Act, the following expressions are defined:*

(a) *"accounting services" means those services that are in the nature of the investigation or audit of accounting records, or the preparation of or reporting on balance sheets, profit and loss amounts, and other similar services including bookkeeping (including payroll preparation and billing), cost accounting, and tax return preparation, but does not include services provided by a person to that person's employer in the course of employment;*

...

(c) *"consulting services" means those services that are in the nature of advice or opinions provided for fee, gain or reward, other than in the areas of*

- (i) *agriculture,*
- (ii) *day care,*
- (iii) *education,*
- (iv) *financial services (other than accounting services),*
- (v) *fisheries,*
- (vi) *health care,*
- (vii) *human and veterinary medicine,*
- (viii) *insurance,*
- (ix) *pharmaceutical dispensing,*
- (x) *real estate,*
- (xi) *tourism,*

but does not include services incidental to the conduct of a trade designated under the Apprenticeship and Trades Qualification Act R.S.P.E.I. 1988, Cap. A-15;

2.4.2 Client "A"

Fees on which tax assessed: \$1,284.00

(53) This issue involves cost accounting and tax-related services provided to the client. The Appellant's position on this issue is that the majority of the services provided were tax planning. According to the Appellant, tax preparation is an accounting service while tax planning or consulting is a financial service that is exempt.

(54) The Respondent's position is that the services provided were cost accounting and tax planning and that both of these services fall under the definition of *accounting* and are therefore taxable.

(55) During the hearing, Mr. Noonan testified that the services were provided prior to August 31, 1995. The invoice to this client is dated November 8, 1995 and states that it is for *Professional services rendered relating to the period ending August 31, 1995*. There is no evidence before us to suggest that the services were not provided during the time period indicated on the invoice.

(56) Given our findings in 2.3 above, the Commission finds that delivery occurred beyond the time limitation set out in Section 38 of the *Revenue Tax Act Regulations*. A finding on whether the item at issue is a taxable professional service is therefore unnecessary.

(57) The Tax Commissioner's decision in this respect is reversed.

2.4.3 Client "B"

Fees on which tax assessed: \$936.25

(58) This item relates to taxation services. The Appellant submits that the services are not taxable accounting services. The Respondent contends that the services are taxable accounting services.

(59) Mr. Noonan testified that MR&S provided financial services relating to taxation matters but that the services were not in the nature of, nor did they include, tax return preparation. According to Mr. Noonan, MR&S provided advice concerning discussions with Revenue Canada as well as the refinancing of business operations. Mr. Noonan noted that these latter services were not found by the Respondent to be taxable.

(60) Ms. Rector testified that the amount billed and the description of services were broken into two parts on the invoice. The first part dealt with Revenue Canada matters, including meetings, correspondence and discussions concerning the settlement of tax arrears, capital asset tax balances, and the reviewing of a Notice of Assessment. The second part was for refinancing and building insurance, mortgages, real estate appraisals, and property shortfall and re-financing. According to the witness, the amount relating to the Revenue Canada Taxation matters was taxable under either accounting services or consulting services in the area of accounting services.

(61) Mr. Bay testified that the services relating to Revenue Canada fall within the income tax area. In his view, such services are considered taxable as either accounting services or a consulting services in the area of accounting services.

(62) The Commission notes that the definition of accounting services under Subsection 1(3)(a) of the **Revenue Tax Act Regulations** includes the words *and other similar services...* In our view, these words are intended to capture a broad range of services beyond *tax return preparation*. Moreover, the services are not, in our view, exempt financial services as set out in subclause 1(3)(c)(iv) of the **Regulations**. Such services would likely include services provided by financial institutions, such as lending institutions and brokerage houses, but not services such as those provided here.

(63) The Commission therefore finds that services are either taxable accounting or non-exempt consulting services within the meaning of **Revenue Tax Act Regulations**.

(64) The Tax Commissioner's decision in this respect is affirmed.

2.4.4 Client "C"

Fees on which tax assessed: \$1,542.00

(65) This issue involves human-resource related services provided to a firm in Charlottetown.

(66) The Appellant submits the services were consulting financial services. The Respondent submits that the services were consulting services in the area of human resources and not consulting in the area of financial services.

(67) Mr. Noonan testified that MR&S assisted the client in finding a financial controller. The witness is of the view that the provision of this advice is a financial service and not an accounting service as defined in the **Regulations**.

(68) Ms. Rector testified that the amount on the invoice was for professional services relating to a *Financial Controller Executive Search* and included discussions regarding needs, position responsibilities and candidate criteria. The invoice also was for preparation and placement of an ad; receipt and perusal of resumes; preparation of a summary of resumes including recommendations for interview; the contacting of individuals to arrange for interviews; discussions on making an offer; and preparation of response letters. According to the witness, it was determined that the invoice was for consulting services in the area of human resources.

(69) Mr. Bay testified that the services were consulting services in the area of human resources. According to the witness, such services are not exempt from tax.

(70) The Commission accepts the evidence and the submissions of the Respondent on this issue and finds that services are non-exempt consulting services within the meaning of **Revenue Tax Act Regulations**.

(71) The Tax Commissioner's decision in this respect is affirmed.

2.4.5 Client "D"

Fees on which tax assessed: \$4,500.00

(72) This issue involves services provided to a provincial crown corporation in the area of business development.

(73) The Appellant submits that the services at issue were financial in nature and dealt with business development in the area of tourism. The Respondent submits that the services are consulting in the area of economic development.

(74) Mr. Noonan testified that MR&S provided advice on the development of a program to assist in the upgrading of golf courses. According to the witness, the activity is not an accounting service but rather a financial service or a consulting service in the area of tourism. The witness noted that MR&S provided advice on the establishment of a program to provide financial assistance in a tourism-related activity.

(75) Ms. Rector testified that the invoice was for *Preparation of Report on a Potential Golf Course Upgrading Assistance Program*. According to the witness, she was advised by Mr. Bay that this service was either an accounting service or a consulting service in a taxable area.

(76) Mr. Bay testified that the invoice contained minimal detail and that it was assumed that the report associated with the service likely involved the preparation of financial projections. As such, the witness concluded that the service was a taxable accounting service. According to the witness, to the extent that the invoice may be for consulting services, it would be in the area of sports and recreation and therefore taxable.

(77) Having considered the evidence and submissions of counsel on this issue, the Commission finds that services are either taxable accounting or non-exempt consulting services within the meaning of **Revenue Tax Act Regulations**. For the reasons set out in 2.4.3 above, the services are not exempt financial services. In our view, the services are also not exempt tourism services as set out in subclause 1(3)(c)(xi) of the **Regulations** as the services were not provided directly to the tourism sector.

(78) The Tax Commissioner's decision in this respect is affirmed.

2.4.6 Client "E"

Fees on which tax assessed: \$1,250.00

(79) This issue involves tax on services provided to a firm involved in agricultural soil assessment.

(80) The Appellant takes the position that the services at issue involved assistance to the client in the area of financing. In the Appellant's view, the services are exempt financial services.

(81) The Respondent's position is that, even though this client was not an accounting client of MR&S, the financial projections were taxable *accounting* services.

(82) Mr. Noonan testified that the client provides services to farmers. MR&S was retained to assist in obtaining financing. According to the witness, MR&S provided a financial service directly related to agriculture, both of which are exempt services.

(83) Ms. Rector testified that the invoice describes the services as professional services including the compilation of financial projections for inclusion in a business plan. According to the witness, the work-in-progress ledger indicated that time was spent on cash flows and projections. In Ms. Rector's view, financial projections and cash flow statements are future-oriented financial statements and fall under the definition of accounting services.

(84) Mr. Bay testified that the invoice was for *Professional services rendered, including: Compilation of financial projections for [Client "E"] for the years to end December 31, 1996, 1997, 1998 and 1999*. According to Mr. Bay, the definition of accounting services includes the preparation of *...balance sheets, profit and loss amounts, and other similar services ...* and, on this, basis, the invoice was considered to be accounting services and taxable.

(85) Having considered the evidence and submissions of counsel on this issue, the Commission finds that services are taxable accounting services within the meaning of **Revenue Tax Act Regulations**. In our view, the services are not exempt financial services as set out in subclause 1(3)(c)(iv) of the **Regulations**. As noted above, such services would likely include services provided by financial institutions, such as lending institutions and brokerage houses, but not services such as those provided here.

(86) The Commission finds, as well, that the services are not consulting services in the area of agriculture as the services were not provided directly to the agricultural sector. The client herein provides services to the agricultural sector but is not directly involved in agriculture.

(87) The Tax Commissioner's decision in this respect is affirmed.

2.4.7 Client "F"

Fees on which tax assessed:

Invoice 0409 - \$792.00

Invoice 0410 - \$6,607.00

Invoice 2856 - \$1,926.00

(88) This issue involves a variety of services provided to a developer. The appellant submits that the services were primarily financial in nature in the area of income tax and financial consulting. In the alternative, the Appellant submits that they are consulting in the area of tourism.

(89) The Respondent submits that the invoices are not exempt consulting services in the area of tourism but rather consulting services in the areas of gambling or entertainment.

(90) In the case of invoices 0409 and 0410, Mr. Noonan testified that the client engaged MR&S to assist in the establishment of a tourism-related activity in the province and provided advice in the area of financial services and tourism. According to the witness, MR&S met with a number of government officials and researched and advised the client on the income tax implications of a proposed business structure. MR&S views income tax advice as an exempt financial service. According to the witness, the accounting service definition clearly indicates that only services in the nature of tax return preparation should be considered taxable.

(91) In the case of invoice 2856, Mr. Noonan testified that the client acquired a partially completed development and engaged MR&S to obtain financial and other support for the project. This included research on the tax implications of business ownership. The Appellant views these services as financial in the area of tourism.

(92) In the case of invoice 0410, Ms. Rector testified that the invoice was based on professional services for meetings, telephone conferences and discussions on casino and resort issues. Issues included background information, file research as well as regulatory and political issues, employment potential, licensing requirements, the mapping out of a strategy, support for the project, outlining history and current status, post-meeting analysis, tour of the region and consultations with various parties. According to the witness, the invoice covered a variety of services, some of which are accounting and some of which are consulting. Ms. Rector noted that other consulting services were services in the area of gambling or entertainment—which are not exempt—and not in the area of financial services or tourism.

(93) In the case of invoices 0409 and 2856, the witness testified that the invoices specified professional services provided with respect to a proposed resort complex, including consulting on property management, income tax and the acquisition of a casino license. A second invoice—0409—relates to income tax services to an individual. In her view, the variety of services falls in the areas of accounting services and gambling or entertainment and are thus taxable.

(94) Mr. Bay testified that, in the case of invoice 0410, the invoice was for services in the development of a casino and resort. According to the witness, the services were a combination of accounting services and taxable consulting services in the area of gambling and entertainment.

(95) In the case of invoices 0409 and 2856 relating to the resort, Mr. Bay noted that the invoices involved income tax consulting, the selection of a property manager and consulting in the area of a casino license. According to the witness, tax advisory services are either accounting services or consulting in the area of accounting services. The services relating to a casino license would, in Mr. Bay's view, be consulting in the area of gambling and entertainment.

(96) In the case of invoice 0409 issued to an individual, Mr. Bay testified that the invoice was for income tax advice and income tax preparation. According to the witness, tax advisory services are considered either accounting services or consulting in the area of accounting services, and are taxable. (97) The Commission is of the view that the activities covered by all of the invoices discussed above constitute consulting services in the area of tourism and are thus exempt from tax pursuant to subclause 1(3)(c)(xi) of the **Regulations**, which reads as follows:

(c) "consulting services" means those services that are in the nature of advice or opinions provided for fee, gain or reward, other than in the areas of

. . .

(xi) tourism,

(98) In the Commission's view, each of the services at issue relates to tourism to the extent it is defined in the **Regulations**. Given the vague language in the above regulation, the Commission is of the opinion that tourism must be read to include advice or opinions provided to the whole of the tourism industry. Absent a definition that would assist us in this respect, we find that the services at issue here are precisely those that were intended to be exempt from tax.

(99) The Tax Commissioner's decision in this respect is reversed.

2.4.8 Client "G"

Fees on which tax assessed: \$1,059.00

(100) This issue involves tax-related advice provided to a firm headquartered in Charlottetown. The Appellant submits that the tax advisory services provided to this client are exempt financial services. The Respondent submits that tax advisory services are taxable accounting services.

(101) As noted in Section 2.4.3 of these reasons, the definition of accounting services under Section 1(3)(a) of the **Revenue Tax Act Regulations** includes the words *and other similar services...* We have concluded that these words are intended to capture a broad range of services beyond *tax return preparation*. Similarly, we have concluded that the services at issue here are not exempt financial services as set out in subclause 1(3)(c)(iv) of the **Regulations**.

(102) The Commission finds that services are either taxable accounting or non-exempt consulting services within the meaning of **Revenue Tax Act Regulations**.

(103) The Tax Commissioner's decision on this issue is affirmed.

2.4.9 Client "H"

Fees on which tax assessed: \$428.00

(104) This issue involves services in the area of advice on the potential acquisition of certain franchise rights. The Appellant submits that the services were exempt financial services. According to the Appellant, the services required financial analysis but that such analysis was a secondary function.

(105) The Respondent submits that the calculation of a break-even point is cost accounting and is taxable.

(106) Mr. Noonan testified that the services involved financial analysis on the acquisition of the rights. However, MR&S considers such services to be exempt financial services and not taxable accounting services.

(107) Ms. Rector testified that the invoice was for the recalculation of the break-even point in terms of units sold and sales revenue. According to the witness, the analysis involved calculations to determine the number of units that must be sold to break even or cover expenses. In her view, this is cost accounting and a taxable accounting service.

(108) Mr. Bay gave evidence to the effect that the invoice was for the calculation of the break-even point for the business. In his view, this an accounting service as it is in the nature of cost accounting.

(109) Based on the evidence and submissions on this issue, the Commission accepts the submission of the Respondent and finds that the services are either taxable accounting or non-exempt consulting services within the meaning of **Revenue Tax Act Regulations**.

(110) The Tax Commissioner's decision on this issue is affirmed.

2.4.10 Client "I"

Invoices:

MRS-001

MRS-001A

MRS-002

MRS-0078

(111) This issue involves services provided over a period of time to a group of associated companies. It is contended that the services were provided under a pre-existing written contract entered into before the introduction of tax on professional services and that the existence of such a contract effectively exempts the services from tax. It is also contended that the services were provided outside of the time limitation period set forth in Section 38 of the **Regulations**.

(112) The Appellant's takes the position that a client letter of July 23, 2001 (Exhibit A-3) confirms the existence of a written contract between the client and Deloitte & Touche. The Appellant further submits that the work provided under invoices 001, 001A, and 002 were for services performed prior to September 1, 1995. Finally, the Appellant submits that Invoice 0078 is an invoice dealing with relieving work in progress and is therefore not taxable.

(113) The Tax Commissioner takes the position that, although the initial invoices were issued in August 1995 and are therefore beyond the time-limitation period, the invoices were listed in MR&S' September 1995 billing summary and are therefore within the audit period. The Tax Commissioner notes that the revenue associated with the invoices was included in the fiscal year-end financial statements dated August 31, 1996.

(114) The Tax Commissioner submits that Revenue Tax Guide ("RTG 137") 137 has no application to this matter. RTG 137 states that fixed price, lump sum contracts signed prior to September 1, 1993 will be honored as written and will be exempt of sales tax ... According to the Respondent, there is no evidence of the existence of such a contract. The Tax Commissioner also submits that the evidence introduced at the hearing does not support the Appellant's contention that the bill MRS-0078 was merely one to relieve work in progress.

(115) Mr. Noonan testified that the invoices in question were issued on behalf of Deloitte & Touche but were recorded with the prefix **MRS** for administrative convenience. *The witness stated that, if tax is payable, it should be in the name of Deloitte & Touche.*

(116) Mr. Noonan also testified that all bills associated with these services were negotiated with the client prior to the implementation of tax on professional services. The witness stated that the November 30, 1995 invoice (MRS-0078) was a dummy bill generated to relieve work in progress.

(117) Ms. Rector testified that the Appellant did not provide any information to the effect that revenue tax should not be charged or that tax had been remitted. The witness also testified that the total sales associated with these invoices were recorded on MR&S' return for September 1995 and that the invoice totals correspond with the amounts recorded on the return.

(118) According to the Ms. Rector, under articles 2 and 3 of the purchase agreement between MR&S and Deloitte and Touche, MR&S purchased the assets including the accounts receivable and unbilled receivables. Finally, Ms. Rector testified that a signed contract with the client was never provided to the Respondent, despite attempts to obtain the contract.

(119) Mr. Bay testified that, when MR&S purchased the assets of Deloitte & Touche, MR&S also purchased the work in progress, including work in progress respecting this client's accounts. According to the witness, a signed contract relating to the client's accounts was never provided,

(120) The Commission has considered the evidence and the submissions of counsel on this issue. In our view, with the exception of invoice 0078 discussed below, we find that the transfer of assets does not fall within the four-year limitation period set out in Section 38 of the **Revenue Tax Act Regulations**.

(121) As noted in section 2.3 of these reasons, delivery must occur within the four-year limitation period in order for the goods to be taxable. The fact that delivery may be recorded or booked in the accounts of a taxpayer during some other accounting period is not, given the language of in Section 38 of the **Revenue Tax Act Regulations**, relevant. In this case, the invoices clearly show that the work was performed prior to September 1, 1995.

(122) The tax on invoices MRS-001, MRS-001A and MRS-002 is therefore reversed.

(123) In the case of invoice MRS-078, the Commission heard extensive evidence on MR&S' use of dummy invoices to relieve work in progress. As we understand it, the process is an internal one that involves the issuance of a simulated invoice that has the effect of recording—for accounting purposes—work that has been carried out but not actually billed. MR&S claims that MRS-0078 is such an invoice.

(124) While the evidence presented by the Appellant on this issue was credible, the Commission believes that considerable confusion existed at the time of the business transfer to MR&S. MRS-0078 bears the date of November 30, 1995 and states that it is to relieve all September WIP from the client. While the Appellant suggests that the amount of the of the invoice shows a direct association with invoice MRS-001—issued to the same client—we believe the services carried out under MRS-0078 constitute separate taxable accounting or non-

exempt consulting services. In making this finding, the Commission notes that the work periods set forth in the two invoices are different.

(125) The tax on Invoice MRS-0078 is affirmed.

3. Other Matters

(126) Testimony at the hearing reflected very different interpretations of the **Regulations** as they relate to some of the matters appealed. Witnesses for the Respondent freely admitted that some parts of the Regulations were open to a reasonable, yet different interpretation than the one advanced and used by the auditors and the Tax Commissioner.

(127) In preparing this decision and reviewing the **Regulations** relating to some aspects of the case, the Commission also found that the opportunity exists to reach widely varying interpretations because of the lack of clarity in the wording of the **Regulations**.

(128) The Commission believes that the taxpayer, tax collector, auditor and Tax Commissioner would all benefit from greater clarity in the **Regulations** and a more proactive approach in providing interpretations before tax is collected, rather than at the time of audit.

4. Disposition

(129) An order incorporating the above findings will therefore be issued.

Order

UPON the appeal of MR&S Management Inc. against a decision of the Provincial Tax Commissioner, dated December 21, 2000;

AND UPON hearing the evidence adduced and the submissions of counsel at hearings conducted in Charlottetown on September the 19th and 20th, 2001;

NOW THEREFORE, for the reasons given in the annexed Reasons for Order;

IT IS ORDERED THAT

1. the tax associated with the transfer of assets from Deloitte and Touche to MR&S Management Inc. is reversed;
2. the tax on services provided to client "A" is reversed;
3. the tax on all services provided to client "F" is reversed;
4. the tax on services provided to client "I" under invoices MRS-001, MRS-001A and MRS-002 is reversed; and
5. the tax on all other services determined in the annexed reasons for order to be taxable is affirmed.

DATED at Charlottetown, Prince Edward Island, this 16th day of January, 2002.

BY THE COMMISSION:

Ginger Breedon, Chair

Maurice Rodgeron, Vice-Chair

James Carragher, Commissioner

NOTICE

Section 12 of the Island Regulatory and Appeals Commission Act reads as follows:

12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written Request for Review, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13.(1) and 13(2) of the *Act* provide as follows:

13.(1) An appeal lies from a decision or order of the Commission to the Appeal Division of the Supreme Court upon a question of law or jurisdiction.

(2) The appeal shall be made by filing a notice of appeal in the Supreme Court within twenty days after the decision or order appealed from and the Civil Procedure Rules respecting appeals apply with the necessary changes.

[Click here for a PDF version of this Order.](#)



Docket UE20723
Order UE13-03

IN THE MATTER of the application by Maritime Electric Company, Limited for approval of the 30 Megawatt Renewable Energy Purchase Agreement.

BEFORE THE COMMISSION

on Tuesday, the 6th day of August, 2013.

Maurice Rodgeron, Chair
John Broderick, Vice-Chair (Acting)
Mike Campbell, Commissioner

Order

WHEREAS Maritime Electric Company Limited ("MECL") has made application for approval of the 30 Megawatt Renewable Energy Purchase Agreement ("REPA") between the PEI Energy Corporation ("PEIEC"), Maritime Electric Company Limited ("MECL") and the Government of Prince Edward Island ("the Province"),

AND WHEREAS the Application by MECL requests approval of the REPA and recovery of associated costs from MECL customers through the Energy Cost Adjustment Mechanism ("ECAM"),

AND UPON accepting that the REPA, as filed in confidence with the Commission, contains proprietary information,

AND UPON accepting the evidence filed by MECL that the REPA will result in costs over its 20-year term that will be lower than the cost of purchasing energy on the open market, and will result in approximately \$6 million in present value savings to MECL customers,

AND UPON noting that the ECAM provides a reasonable mechanism for the recovery of the costs associated with the REPA,

AND UPON noting that the estimated pricing under the REPA is consistent with the *Minimum Price Regulations*, pursuant to the *Renewable Energy Act*;

AND UPON accepting MECL's evidence that the purchase of supply from the Hermanville/Clearspring wind farm will increase the portion of MECL electricity sales that are supplied by wind power to approximately 25 percent of total sales,

AND UPON concluding that the REPA reflects a fair and balanced agreement between the parties and will result in rate costs that are just and reasonable;

NOW THEREFORE, pursuant to the *Electric Power Act* and the *Island Regulatory and Appeals Commission Act*;

IT IS ORDERED THAT

1. The REPA, as submitted by MECL on July 25, 2013, be approved; and
2. The costs of the REPA be recovered through the ECAM.

DATED at Charlottetown, Prince Edward Island, this 6th day of August, 2013.

BY THE COMMISSION:

Maurice Rodgeron, Chair

John Broderick, Vice-Chair (Acting)

Michael Campbell, Commissioner

Notice:

Section 12 of the *Island Regulatory and Appeals Commission Act* reads as follows:

12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it, or rehear any application before deciding it.

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written Request for Review, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13.(1), 13(2), 13(3), and 13(4) of the *Act* provide as follows:

13.(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.

(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.

NOTE:

In accordance with IRAC's *Records Retention and Disposition Schedule*, the material contained in the official file regarding this matter will be retained by the Commission for a period of 5 years.

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Docket: UE41400
Order UE19-03

IN THE MATTER of an application by the Prince Edward Island Energy Corporation for approval of a 2018-2021 Demand Side Management Resource Plan, pursuant to Section 16.1 of the *Electric Power Act*.

BEFORE THE COMMISSION ON Friday, May, 17, 2019.

J. Scott MacKenzie, Q.C., Chair

M. Douglas Clow, Vice-Chair

John Broderick, Commissioner

Order

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1 INTRODUCTION

On June 29, 2018, the Prince Edward Island Energy Corporation ("PEIEC") submitted an application to the Island Regulatory and Appeals Commission ("IRAC" or the "Commission") seeking approval of an electricity efficiency and conservation plan (the "EE&C Plan" or the "Plan") for a three year term from 2018 to 2021. The application and proposed EE&C Plan were submitted voluntarily by PEIEC, in accordance with subsection 16.1(2.1) of the *Electric Power Act*, R.S.P.E.I. 1988, c. E-4 (the "*Act*").

The EE&C Plan consists of electricity efficiency and conservation programs that have the primary objective of reducing electricity usage from what would have occurred absent energy savings measures. The EE&C Plan, if approved, will be administered by efficiencyPEI ("ePEI"). ePEI is a service agency that already provides energy efficiency services for PEIEC.

1.1 The Applicant

PEIEC is a Crown corporation created pursuant to the *Energy Corporation Act*, R.S.P.E.I. 1988, c. E-7. It is generally excluded from the definition of a "public utility" contained in section 1 of the *Act*, and is therefore generally exempt from regulation by the Commission (see *Act*, s. 1(3); see also *Energy Corporation Act*, s. 2(6)).

PEIEC is, however, a public utility for the purpose of section 16.1 of the *Act* (see *Act*, s. 1(4)). This means that PEIEC may be ordered by the Commission to submit a DSM plan for review and approval, or that PEIEC may voluntarily submit a DSM plan to the Commission (see *Act*, ss. 16.1(2), (2.1)).

In the present application, the EE&C Plan was submitted voluntarily by PEIEC, in the absence of a Commission order.

1.2 Approvals Sought

PEIEC is seeking approval of the EE&C Plan as filed with the Commission. Specifically, PEIEC seeks approval of the proposed EE&C programs, the proposed annual investment for each year of the Plan, and certain approvals relating to cost effectiveness testing and the evaluation of the proposed programs.

A comprehensive list of the regulatory approvals requested is set forth in Section 10 of the EE&C Plan and are discussed herein.

1.3 Regulatory Process and Participants

The EE&C Plan was filed with the Commission on June 29, 2018. A Notice of Application was posted on the Commission website on July 6, 2018, and also published in local newspapers.

The Notice of Application invited members of the public to comment on the EE&C Plan by submitting written comments to the Commission on or before September 7, 2018. The Notice also advised that a public hearing would not be held unless it was deemed necessary by the Commission. In the absence of a public hearing, the Notice stated that the Commission would finalize its review of the Application in the form of a written Order.

Following publication of the Notice, the Commission received written comments from four interested members of the public. Mr. Roger King also submitted written questions to PEIEC. All comments, questions and responses were posted on the Commission website and provided to PEIEC.

Upon receipt of the EE&C Plan, Commission staff retained the services of Synapse Energy Economics, Inc. ("Synapse") to assist in the review of the Plan.

Between August and November 2018, Synapse and Commission staff submitted a number of written questions to PEIEC in the form of interrogatories. All interrogatories and PEIEC's responses were posted on the Commission website.

In February 2019, Synapse completed its expert report which included a detailed assessment of the proposed EE&C Plan. The Synapse report also included a number of recommendations relating primarily to the evaluation of program performance and reporting requirements.

The Synapse report was provided to PEIEC for review and comment. PEIEC provided written comments to the Commission and was generally agreeable to the recommendations made by Synapse.

Upon review of the record and, in particular, the Synapse report and the response of PEIEC, the Commission determined that the outstanding issues were narrow and could be resolved without an oral hearing.

2 BACKGROUND

2.1 Previous DSM Initiatives

In 2015, Maritime Electric Company, Limited ("Maritime Electric") filed a proposed DSM plan with the Commission (Commission Docket UE21406). In November 2015, the Commission issued Order UE15-02 with respect to the proposed DSM plan. The Commission approved only the public outreach and education components of the DSM plan for the years 2015 to 2020 inclusive, with an annual cost of \$167,500. The Commission did not accept the balance of the DSM plan as filed.

2.2 Overview of Legislative Framework

PEIEC is a "public utility" for the purposes of energy efficiency and demand-side resource measures. As a result, PEIEC is subject to Commission regulation on matters of energy efficiency and demand-side management.

Section 16.1 of the *Act* governs the Commission process to review and approve a proposed energy efficiency and demand-side resource plan. As the EE&C Plan was voluntarily submitted by PEIEC, it must meet the requirements set forth in subsection 16.1(5.1) of the *Act*. Subsection 16.1(5.1) provides:

An energy efficiency and demand-side resources plan that is submitted to the Commission by a public utility under subsection (2.1) shall

- (a) be for a term that is consistent with industry standards;*
- (b) satisfy the Commission that the particular energy efficiency and demand-side resource measures contained in the plan are reasonably likely, on implementation, to achieve the results forecast in the plan;*
- (c) contain a reasonable estimate of*
 - (i) the financial costs, for each public utility named in the plan and its customers, to be incurred on implementing the plan and over the course of its term, and*
 - (ii) the financial benefits, for each public utility named in the plan and its customers, to be achieved on implementing the plan and over the course of its term; and*
- (d) contain a plan for apportioning the costs and benefits referred to in clause (c) between the public utilities named in the plan.*

[emphasis added]

If the Commission is satisfied that the EE&C Plan submitted by PEIEC meets these requirements, then the Plan may be approved by the Commission. Section 16.1(6) of the *Act* provides:

On receipt of an energy efficiency and demand-side resources plan from a public utility, the Commission may approve the plan if the Commission is satisfied that

- (a) in the case of a plan submitted pursuant to an order under subsection (1), the plan has been submitted for approval within such time as the Commission required in the order made under subsection (1) directing the submission of the plan; and*
- (b) the plan meets the requirements of subsection (5) or (5.1), as the case may be.*

[emphasis added]

As a result, the Commission may only approve the EE&C Plan if it is satisfied that each of the following requirements is satisfied:

- (a) The proposed EE&C Plan is for a term that is consistent with industry standards;
- (b) The particular energy efficiency and demand-side resource measures contained in the EE&C Plan are reasonably likely, on implementation, to achieve the results forecast in the Plan;
- (c) The EE&C Plan contains a reasonable estimate of the financial costs and financial benefits for each public utility named in the Plan and its customers; and
- (d) The EE&C Plan contains a plan for apportioning the financial costs and benefits between the public utilities named in the Plan and the apportionment is reasonable.

If the EE&C Plan is approved, the Commission is required to issue an Order to each public utility named in the Plan requiring the public utility to pay the costs as set out in the Plan (see *Act*, s. 16.1(8.1)).

The evaluation of program performance is an integral part of any DSM plan. As a result, if the EE&C Plan is approved, PEIEC will be required to report annually to the Commission on matters such as program implementation, the results achieved, and other information that may be required by the Commission. Such annual reporting is legislatively required by subsection 16.1(13) of the *Act*, which provides:

After the approval of the energy efficiency and demand-side resources plan of a public utility, the public utility shall, within three months after the end of the public utility's fiscal year in each calendar year or part of a calendar year occurring during the term of the approved plan, prepare and submit to the Commission a report for that calendar year, or part of a calendar year, as the case may be, that contains such information respecting the implementation of the plan, including the results achieved, as may be required by the Commission.

3 EE&C PLAN

The proposed EE&C Plan has a three-year term, from 2018/19 to 2020/21. The Plan as filed with the Commission deals only with electricity savings, as the *Act* is concerned only with the reduction or modification of electricity consumption (see *Act*, s. 1(1)(e)).

3.1 Plan Participants

The EE&C Plan, if approved, will be available to customers of both Maritime Electric and Summerside Electric. Although Maritime Electric is a "public utility" and is subject to regulation by the Commission, Summerside Electric is not subject to regulation by the Commission. As a result, the Commission does not have jurisdiction to issue an Order to Summerside Electric requiring the utility to participate in the Plan or to pay any portion of the costs associated with the Plan.

Although Summerside Electric is not subject to Commission regulation, PEIEC and Summerside Electric have entered into a Service Delivery Agreement, a copy of which has been filed with the Commission on a confidential basis. In accordance with the Service Delivery Agreement, PEIEC agrees to provide energy efficiency and conservation services to Summerside Electric, and Summerside Electric agrees to contribute proportionately to the EE&C Plan expenditures approved by the Commission. The Service Delivery Agreement is conditional on IRAC approval of the EE&C Plan.

PEIEC states in the Application that there may be some variation in programs offered to Summerside Electric customers, particularly during the first year or two of the EE&C Plan. PEIEC does not state what these variations may be.

3.2 Overview of Programs

The EE&C Plan has savings initiatives in two sectors: residential programs and business programs.

Residential programs specifically target energy use within the home, and include:

- **Energy Efficient Equipment Rebates:** The program offers incentives on electric space heating and/or water heating systems. This includes rebates on mini-split heat pumps, which are expected to account for approximately 45% of the anticipated energy savings.

In an effort to assist low and modest-income Islanders, the program will offer a special incentive tier with rebates approximately 1.8 times higher for low-income participants.
- **Home Insulation Rebates:** The program offers a subsidy on home energy assessments. Although the energy assessment subsidy has been offered for quite some time, the subsidy will increase so that the participant cost for an energy assessment is reduced from \$150 to \$99.

Participants who heat their home primarily with electricity will also have access to rebates for building envelope upgrades.
- **New Home Construction:** The program offers a rebate for new home construction which achieves an ENERGY STAR/R2000 rating and/or an EnerGuide rating that demonstrates improved performance compared to code-built homes.
- **Winter Warming:** The program will be offered to low-income Islanders and includes the installation of low-cost residential energy efficient upgrades at no cost to participants.
- **Instant Energy Savings:** The program provides in-store rebates on energy efficient products. Rebates will be offered on both larger appliances and smaller purchases, such as light bulbs and thermostats.

PEIEC notes in the Application that additional programs may be added to the residential sector beyond the timeline of this Plan to address gaps in program offerings, such as appliance retirement and changing behavior.

Business programs take a diversified approach to energy savings and incentives that could lead to small or large savings opportunities. The business programs include:

- **Business Energy Rebates:** The program offers rebates to businesses that purchase qualifying energy efficient equipment. There are several mechanisms through which to offer rebates, including mail-in rebates and instant point-of-sale rebates (or discounts). The product mix will include lighting, HVAC, refrigeration, motors, and more, but will initially limit the number of eligible products to allow ePEI to manage the program budget and gage uptake of the products.
- **Business Energy Solutions:** The program offers subsidies for energy assessments for eligible businesses, and substantial rebates for completing eligible energy efficiency improvements.
- **Custom Energy Solutions:** The program offers incentives for both new construction and large retrofits in existing facilities. Unlike the Business Energy Rebates and Business Energy Solutions programs, the Customer Energy Solutions program is intended to offer a more customized approach and program for larger businesses with unique energy usage. The program will specifically target high electricity users.

3.3 Forecast Savings and Budget

The EE&C Plan proposes an expenditure of \$2.77 million for 2018/2019 with forecast first year electricity savings of 5.4 GWh of energy and 1.4 MW of demand. The Plan includes an investment of \$4.66 million in 2019/2020 with forecast savings of 10.8 GWh of energy and 2.6 MW of demand, and an investment of \$5.88 million in 2020/2021 with forecast savings of 13.1 GWh of energy and 2.9 MW of demand.

In April 2021, at the conclusion of the three-year term, PEIEC projects that the total annual electricity savings resulting from implementation of the Plan will be 29.3 GWh of energy and 6.9 MW of demand.

Table 1 shows the proposed savings broken out by program for each year of the three-year plan. Table 2 shows the proposed budget by program for the three-year term.

Table 1 – Planned Savings by Program

Program	Planned Net MWh				Planned Capacity (MW)			
	2018/19	2019/20	2020/21	Total	2018/19	2019/20	2020/21	Total
Energy Efficient Equipment Rebates	2,054	2,841	3,126	8,022	0.71	0.99	1.10	2.80
Home Insulation Rebates	525	1,300	1,843	3,668	0.15	0.37	0.53	1.05
Winter Warming	348	348	348	1,044	0.08	0.08	0.08	0.24
New Home Construction	139	164	287	590	0.04	0.05	0.08	0.17
Instant Energy Savings	1,104	3,744	2,399	7,247	0.24	0.81	0.47	1.52
Business Energy Rebates	874	1,114	1,507	3,495	0.12	0.15	0.21	0.48
Business Energy Solutions	392	534	722	1,648	0.05	0.07	0.10	0.23
Custom Energy Solutions	-	726	2,905	3,632	n/a	0.08	0.32	0.40
Total	5,437	10,770	13,138	29,346	1.39	2.61	2.89	6.89

Source – SYN IR-01 Attachment 1, Summary Programs tab (Table: 2018 – 2020 Programs for ePEI).

Table 2 – Budget by Program

	Budget			Total Costs
	2018/19	2019/20	2020/21	
Energy Efficient Equipment Rebates	803,150	1,186,150	1,449,050	3,438,350
Home Insulation Rebates	302,254	687,903	1,001,201	1,991,358
Winter Warming	257,356	257,356	257,356	772,068
New Home Construction	129,529	142,588	180,493	452,610
Instant Energy Savings	373,014	732,353	645,674	1,751,041
Business Energy Rebates	381,326	441,941	552,038	1,375,304
Business Energy Solutions	267,568	392,493	520,726	1,180,787
Custom Energy Solutions	30,000	260,882	641,028	931,910
Enabling Strategies	75,000	334,946	410,000	819,946
Evaluation	150,000	224,173	225,500	599,673
Total	\$2,769,198	\$4,660,785	\$5,883,064	\$13,313,048

Source – SYN IR-01 Attachment 1, Summary Programs tab (Table: 2018 – 2020 Programs for ePEI).

PEIEC proposes that the funding for 2018/2019, in the total amount of \$2.77 million, be shared as follows:

- \$600,000 contribution by Maritime Electric and Summerside Electric;
- \$1,149,500 contribution by ePEI; and
- \$1,019,500 contribution from the federal government.

It is proposed that, of the EE&C Plan costs recoverable from electricity customers, Summerside Electric would contribute approximately 10 percent of the total recoverable Plan costs, and Maritime Electric would contribute approximately 90 percent. This estimate is based on the percentage of sales of electricity in the Province.

PEIEC has advised that the proposed federal funding is available to ePEI via the Low Carbon Economy Leadership Fund. Provincial government funding is required to access the federal Low Carbon Economy Leadership Funds.

According to the Application, federal funding from the Low Carbon Economy Leadership Fund is available until March 31, 2022. PEIEC expects that Provincial funding will also be available until March 2022, as it is required to obtain federal funding.

3.4 Cost Effectiveness Testing

Cost effectiveness testing directly informs EE&C planning and decision-making processes. The cost effectiveness test provides an analytical framework to ensure that the use of ratepayer funds for EE&C results in sufficient benefits.

There are three common tests used to determine cost effectiveness. These tests are the Total Resource Cost Test, the Societal Cost Test and the Program Administrator Cost Test ("PAC Test"). PEIEC proposes that the PAC Test be used to determine cost effectiveness of the EE&C Plan.

The PAC Test compares the utility's value of energy savings (the present value of long-run avoided energy and capacity costs) to the utility's EE&C expenditures. The test is fully symmetrical, comparing only the program administrator's costs to its benefits, with all of the costs and benefits identified monetarily. PEIEC proposes that the cost effectiveness be assessed at the portfolio - rather than the program - level.

PEIEC recommends that the cost effectiveness testing use the Government of Prince Edward Island's long-term cost of borrowing for the discount rate. At the time of the Application, the long-term cost of borrowing was 3.2%.

3.5 Evaluation and Verification

The purpose of the evaluation and verification process is to assess the impacts of energy efficiency programs and suggest opportunities for improvement.

PEIEC proposes to file evaluations with the Commission on an annual basis. The evaluations will be conducted by an independent evaluation consultant obtained through an RFP process. The evaluator will be contracted for a three-year period to perform evaluations during the term of the EE&C Plan.

During the term of the EE&C Plan, PEIEC proposes to focus on impact evaluations, rather than market and/or process evaluations. An impact evaluation determines the impact of the program, typically in terms of energy and demand savings.

4 SYNAPSE REPORT

Synapse was retained on behalf of Commission staff to assist in the review of the EE&C Plan. Synapse was asked to review the proposed EE&C Plan and provide an opinion as to whether the Plan satisfies the requirements in subsection 16.1(5.1) of the *Act*. In particular, Synapse was asked to opine on each of the following issues:

1. Is the proposed EE&C Plan for a term that is consistent with industry standards?
2. Are the particular energy efficiency and demand-side resource measures contained in the EE&C Plan reasonably likely, on implementation, to achieve the results forecast in the Plan?
3. Does the EE&C Plan contain a reasonable estimate of the financial costs and financial benefits for each public utility named in the plan and its customers?
4. Does the EE&C Plan contain a plan for apportioning the costs and benefits referred to above between the public utilities named in the plan and is the apportionment reasonable?

Between August and October 2018, Synapse posed fifty-one (51) written interrogatories to PEIEC for the purpose of gathering additional information with respect to the Application. PEIEC responded to the interrogatories in a timely manner and to the best of its abilities.

Three of the interrogatories posed by Synapse related specifically to Maritime Electric's general rate application, performance incentive mechanisms, and earnings adjustment mechanism. As PEIEC did not have the information necessary to respond to these questions, Maritime Electric voluntarily submitted the requested information.

Synapse thereafter finalized its report and filed a copy with the Commission. Its findings are summarized below.

4.1 Consistency of Term with Industry Standards

Synapse concluded that the proposed three-year term is reasonably consistent with industry standards. It noted that a three-year term is common for EE&C programs, and that except for single-year plans in 2015 and 2018, Nova Scotia has used three-year plans.

According to Synapse, a multi-year term can foster confidence and continuity in the marketplace. In this way, it may provide a better environment for market transformation than plans with shorter terms. Also, a plan with a longer term can more easily take on large projects or comprehensive measures that require multi-year support.

In PEI, annual reporting on the results of plan implementation is required, in accordance with the *Act*. Since this is a new portfolio, reporting within the three-year term of the Plan will be important. Synapse recommends that the types and formats of information to be reported should be discussed with stakeholders and established early on, so that consistently defined results can be monitored over time.

4.2 Reasonableness of Projected Savings and Participation

In determining whether the EE&C Plan is reasonably likely, on implementation, to achieve the results forecast in the Plan, Synapse considered both the forecasted savings and forecasted customer participation.

Savings

Synapse noted that its assessment of the reasonableness of the savings estimates depends in part on the soundness of the load forecasts. However, information on the load forecasts for the utilities have not been provided or are not available. Instead, PEIEC provided 2018-2022 sales forecasts for Maritime Electric and Summerside Electric in response to an information request.

PEIEC plans to attain a large amount of savings as a percent of sales (0.41 percent) in 2018/19, the first year of the plan. In the following year, savings increase by a smaller increment (0.33 percent) to 0.74 percent of sales. From 2019/20 to 2020/21, savings under the Plan level out relative to sales at 0.74 percent. Table 3 shows the savings as a percent of sales for the three-year term based on the sales forecasts.

Table 3 – Projected Savings, Projected Sales, and Savings as a Percent of Sales

Year	2018/19	2019/20	2020/21
Projected savings (GWh)			
Residential	5.6	10.2	10.3
Business	1.5	2.8	5.9
Total	7.1	13.0	16.2
Projected sales (GWh)			
MECL	1,229	1,236	1,246
Summerside	137	140	142
Total	1,366	1,376	1,388
Projected savings as a percent of sales (%)			
All PEI	0.41%	0.74%	0.74%

Sources: SYN IR-01 Attachment 1, Summary Programs tab (Table: 2018 – 2020 Programs for ePEI), Elec Use, d Savings tab (Table: Sales Forecast for PEI (GWh)).

Synapse recommends that PEIEC consider increasing savings targets as a percent of sales in the third year, as many jurisdictions have recently achieved savings above two percent of sales.

Participation

PEIEC's estimates of participation are based on several factors: participation results for Nova Scotia's mature programs, the eligible PEI population, ramp-up time needed to develop/expand a program, and potential upcoming appliance/equipment standards.

Synapse concludes that this approach appears to be reasonable for PEI, depending on the specific methodology and assumptions about ramp-up rates. Table 4 summarizes the anticipated participant uptake and the eligible customers by program.

Table 4 – Estimated Participation by Year

Program	Sector	Metric	All Customers (Or units)			Eligible Customers
			2018/19	2019/20	2020/21	
Energy Efficient Equipment Rebates	Residential	Customers	548	815	980	15,663
Home Insulation Rebates	Residential	Customers	75	213	313	15,663
Winter Warming	Residential	Customers	350	350	350	15,663
New Home Construction	Residential	Customers	24	41	46	243
Instant Energy Savings	Residential	Units	28,291	95,901	48,334	Not provided
Business Energy Rebates	Business	Units	4,135	5,272	7,132	7,231
Business Energy Solutions	Business	Units	8,370	10,958	14,825	7,231
Custom Energy Solutions	Business	Customers	0	5	20	Not provided

Synapse recommends that PEIEC establish processes and data collection mechanisms to understand who is participating. The unit of participation (e.g., a customer, an account, a measure installed, a rebate) should be clearly defined at least at the level of the program, if not more granularly (e.g. by measure).

Further, it is important to establish whether participation will be tracked separately by year or over the term of the EE&C Plan. If the number of customers is not tracked for a program, PEIEC should plan on periodic analysis of participation of the sector to ensure that the portfolio is reaching a significant share of customers across all rate classes and a representative share of customers who are typically less likely to participate in EE&C, such as low-income and small commercial customers.

4.3 Estimate of Financial Costs and Benefits to Customers

Savings

A commonly referenced benchmark for assessing a jurisdictions' commitment to energy efficiency is the amount of EE&C spending as a percent of utility revenue. Synapse estimates that the total EE&C budget as a percent of revenue starts at 1.2 percent in 2018/19, rises to 2 percent in 2019/20, and reaches 2.4 percent in the final year of the Plan. On average, states in the United States spend 1.7 percent of total electric revenue on electric efficiency programs, according to the 2018 ACEEE scorecard analysis.

Relative to overall EE&C spending, Maritime Electric and Summerside Electric ratepayer contributions are much lower than utility spending in other jurisdictions because of financial support from the provincial and federal governments. The total proposed utility funding is just 0.3 to 0.4 percent of projected total revenues for all Plan years. This suggests that costs are not the primary constraint on the portfolio for the term of the Plan, and that a more aggressive ramp-up of savings from 2019/20 to 2020/21 could be considered.

Synapse recommends that PEIEC increase the targeted savings in the third year to be more in line with higher achieving states in the United States. In 2017, the top 15 states in the United States averaged spending as a percent of electric revenue of 3.8 percent, with the top three states spending over 6.5 percent.

Synapse also recommends that Summerside Electric develop a revenue forecast, preferably by rate class, to inform current and future EE&C efforts.

Cost Effectiveness

Synapse notes that the Plan does not provide information on MECL's methodology for developing avoided costs. Further, Summerside Electric's avoided costs are not available. Synapse is therefore unable to determine whether the avoided costs are reasonable.

Assuming the avoided costs are reasonable, Synapse concludes that the proposed EE&C Plan is cost-effective at the portfolio level. All programs are cost-effective based on the Program Administrator Cost Test (PAC), which PEIEC recommends as the primary cost-effectiveness test. The results of the PAC and Total Resource Cost (TRC) tests are displayed in Table 5.

Table 5 – PAC and TRC Results

2018/2019	Program Administrator Cost Test (PAC)	Total Resource Cost Test (TRC)
Residential Programs		
Energy Efficient Equipment Rebates	5.8	3.0
Home Insulation Rebates	4.5	0.8
Winter Warming	2.1	2.2
New Home Construction	3.1	1.2
Instant Energy Savings	4.9	2.4
Business Programs		
Business Energy Rebates	2.6	1.1
Business Energy Solutions	1.7	1.6
Custom Energy Solutions	N/A	N/A
Enabling Strategies		
Total	3.9	1.8

Source: SYN IR-01 Attachment 1, Plan Tables tab.

Based on the TRC Test, the only program which is not cost-effective is the Home Insulation Rebates program, with a TRC ratio of 0.8. Nevertheless, Synapse suggests that this program is likely to provide benefits that are not reflected in this score. For one, the Home Insulation Rebates program will likely provide significant non-energy benefits (such as reduced arrearages and improved comfort), which have not been included in PEIEC's analysis. Also, the results of the audit performed through the insulation program can be used to encourage participation in other programs. As a result, Synapse suggests it is reasonable to include the insulation program in the portfolio even with its low TRC score.

4.4 Plan for Apportioning Costs and Benefits

According to the Application, the majority of the funding for the EE&C Plan (79 percent) is intended to come from the provincial and federal governments. Ratepayers will contribute the balance of approximately 21 percent.

Synapse notes that there appears to be adequate assurance that the federal funding will continue throughout the term of the Plan, and beyond. Federal funding is available through March 31, 2022. Provincial funding is required to obtain the federal funding and is included in PEI's operating budget. Because cutting provincial funding would jeopardize federal funding, it is unlikely that the province would cut funding for the program.

Synapse notes that the long-term viability of the programs will depend on ongoing funding sources. An abrupt shift to a greater percentage of expenses being recovered from ratepayers at the end of the Plan term could lead to a noticeable increase in rates.

Recovery through Separate Line Item

To recover the ratepayers' portion of costs of the EE&C programs, PEIEC recommends recovery through a separate line item on electricity bills. Synapse recommends against this approach.

According to Synapse, energy efficiency is an electricity resource, just as generation, transmission, and distribution facilities are electricity resources. There is no need to separately present the costs for energy efficiency resources to customers, any more than there is a need to break out all the costs necessary to pay for generation, transmission, or distribution.

Further, Synapse submits that presenting the energy efficiency charge separately on customers' bills can be misleading. This is because the charge would include the costs of the efficiency resources but it would provide no indication of the benefits that they offer in terms of reduced generation, transmission, and distribution costs.

Amortization of Expenses

PEIEC recommends that program costs be expensed as incurred (rather than amortized over several years). Synapse agrees with this approach, especially since the ratepayer contribution is relatively small over the term of the Plan.

Tracking of Costs and Benefits

PEIEC recommends tracking expenditures and electricity savings separately by utility and by rate class. As noted in the Application, allocating and recovering costs by rate class may lead to significant variations in the charge from year-to-year. Thus, PEIEC

recommends that riders be set and held for the three-year term and that there be a true-up by rate class at the reset of the EE&C rate rider. Synapse agrees that this approach is reasonable.

The allocation of costs between Maritime Electric and Summerside Electric (90 percent and 10 percent respectively) is based on sales. Synapse notes that PEIEC does not appear to have a plan for monitoring savings and costs by utility to ensure that customers get benefits commensurate with their contributions. The *Act* requires that the EE&C Plan contain a plan for apportioning costs and benefits between the public utilities and their customers, and thus appears to require an accounting of costs and benefits by utility. Synapse recommends that PEIEC track the costs and benefits for each utility.

4.5 Other Issues

Synapse notes that the proposed EE&C Plan provides more savings from residential programs than business programs, especially in the first year. This contrasts to sales, which are evenly split between the residential and commercial sectors. Synapse recommends that the EE&C budget be allocated proportionately across residential and commercial sectors as soon as possible.

Synapse also notes that the EE&C Plan is not designed to target peak load, even though peak demand is projected to grow. This concern was also raised by interested members of the public. Synapse recommends that the EE&C Plan should place a much higher priority on programs targeting measures that reduce peak load growth, and also suggests that PEIEC revise the Plan for years two and three to better incorporate peak load considerations.

Synapse further notes that utilities that are dependent on electricity sales for revenue may not support EE&C measures. Instead, the reduction in revenue creates a disincentive for utilities to support energy efficiency. To address this problem, many jurisdictions introduce some form of decoupling. Decoupling allows a utility to recover fixed revenue requirements through an annual rate adjustment mechanism and breaks the link between revenue and sales. Synapse therefore recommends reconciling Maritime Electric's forecast revenues with actual revenues on an annual basis.

4.6 Comments from PEIEC

A copy of the Synapse report was provided to PEIEC for their review. PEIEC was specifically asked to provide any comments they may have with respect to the recommendations made by Synapse.

PEIEC filed written comments in response to the recommendations made by Synapse. PEIEC was generally agreeable to the recommendations, subject to the following exceptions:

- PEIEC does not agree with the recommendation that it should consider modifying the Plan in the second and third years, and specifically does not agree that it should consider increasing savings as a percent of sales in the third year. In response, PEIEC notes that this is an initial three-year plan and that the targets set out in the Plan are reasonable and achievable. PEIEC advises that the Plan as proposed is intended to balance *"the appropriate considerations of achieving ambitious electricity efficiency and conservation targets with a focus on affordability."*
- Although PEIEC recommends that the ratepayer portion of EE&C costs should be shown as a separate line item on electricity bills, Synapse disagrees with this approach. In response, PEIEC notes that this was a recommendation received from a stakeholder during the consultation process. However, PEIEC is prepared to support the recommendation made by Synapse.
- Synapse recommends that the EE&C Plan should place a much higher priority on programs targeting measures that reduce peak load growth. In response, PEIEC recognizes the need and value of programs to reduce peak load. However, the EE&C Plan focuses on load reduction (rather than peak load reduction), for several reasons. PEIEC notes, for example, that although thermal storage can be an effective measure of load reduction, customer uptake is unlikely without a corresponding rate incentive, such as a time-of-use rate. PEIEC also notes that load control, such as direct control of electric water heaters, requires substantial management by the utilities. Instead, PEIEC has proposed to initiate programs it can primarily manage itself with cooperation from the utilities.
- Synapse recommends the provision of further information by both Summerside Electric and Maritime Electric. While PEIEC agrees that the provision of this information would be of assistance in administering the EE&C Plan, it notes that it is not in a position to require either utility to provide the suggested information.

5 COMMISSION FINDINGS

The Commission is satisfied that the EE&C Plan as filed meets the requirements set forth in subsection 16.1(5.1) of the *Act*. In particular, the Commission is satisfied that:

- The EE&C Plan is for a term that is consistent with industry standards;
- The particular energy efficiency and demand-side resource measures contained in the EE&C Plan are reasonably likely, on implementation, to achieve the results forecast in the Plan;
- The EE&C Plan contains a reasonable estimate of the financial costs and financial benefits for each public utility named in the plan and its customers; and
- The EE&C Plan contains a plan for apportioning the financial costs and benefits between the public utilities and the apportionment is reasonable.

The EE&C Plan is therefore approved as filed for the three-year period from 2018/2019 to 2020/2021.

Synapse has made several recommendations which are intended to result in increased energy and demand savings if implemented. Although the Commission encourages increased savings, it accepts that the targets established by PEIEC are reasonable in the

circumstances and represent an appropriate balance between forecast savings and customer cost, particularly for an initial EE&C Plan.

As noted by PEIEC in the Application, to meet the PEI Energy Strategy's target for an annual electricity reduction of two percent in 2020/2021 would require an annual investment of approximately \$10 million to \$11 million. This amount is almost double the budget proposed by PEIEC in the third year of the Plan. Although the Commission encourages PEIEC to consider programs that may increase savings for subsequent EE&C plans, the Commission is satisfied that the initial EE&C Plan reaches an appropriate balance between DSM measures and affordability.

Synapse and interested members of the public expressed concern over the lack of EE&C programs that are aimed specifically at addressing peak load demand. The Commission shares these concerns. As peak load is anticipated to grow annually, it is imperative that steps are taken to reduce peak demand. The Commission directs PEIEC to consider targeted programs that may reduce peak load as part of the DSM Potential Study, and expects that such programs will form part of PEIEC's subsequent EE&C plans.

The Commission recognizes that a reduction in peak demand may require coordination and cooperation between PEIEC, Maritime Electric, and Summerside Electric, and encourages PEIEC and the utilities to begin working on EE&C programs that will reduce peak load demand for inclusion in the next EE&C plan.

The evaluation of program performance is an integral part of any EE&C plan. As this is the first comprehensive EE&C plan to be implemented in the Province, it is critical that a clearly defined evaluation framework be defined at the outset so that program performance can be monitored over the term of the Plan.

As noted by Synapse, performance evaluation should be ongoing and should not be performed only at year-end. As a result, the Commission directs PEIEC to develop a comprehensive evaluation framework to be filed with the Commission on or before October 31, 2019. The evaluation framework should incorporate the recommendations made by Synapse and, in particular, should:

- track program performance on a quarterly and annual basis;
- clearly define the financial costs and financial benefits by utility and sector; and
- establish processes and data collection mechanisms to understand who is participating, including clearly defined units of participation (e.g. a customer, an account, a measure installed, a rebate).

This list is not exhaustive.

In the event the evaluation framework identifies programs that are not performing as expected, either in terms of savings or participation, the Commission expects that PEIEC will seek to address the issues during the term of the EE&C Plan. This may include applying to the Commission to amend or modify the approved Plan to ensure that customers receive benefits commensurate with their contributions.

The Commission accepts the proposal by PEIEC that it shall establish a rate rider for each of Maritime Electric's rate classes and that the rate riders shall be set for the term of the Plan. In the event a "true-up" is required for any of the rate classes at the end of the term, it can be considered by the Commission as part of subsequent EE&C plans.

The Commission directs that the rate rider shall be included in the rates for electrical service charged by Maritime Electric, and shall not be identified as a separate line item on customers' bills. Although the Commission does not have jurisdiction over Summerside Electric, it would encourage it to also follow this practice for the reasons set out by Synapse.

Upon approval of the EE&C Plan, PEIEC is required to report annually to the Commission. This requirement is set forth in subsection 16.1(13) of the *Act*, which provides:

After the approval of the energy efficiency and demand-side resources plan of a public utility, the public utility shall, within three months after the end of the public utility's fiscal year in each calendar year or part of a calendar year occurring during the term of the approved plan, prepare and submit to the Commission a report for that calendar year, or part of a calendar year, as the case may be, that contains such information respecting the implementation of the plan, including the results achieved, as may be required by the Commission.

Synapse has developed a comprehensive framework for triannual, annual and quarterly reporting. A copy of the framework is attached as Appendix "A" to the Synapse report. The Commission directs PEIEC to use the framework in preparing its annual report to the Commission, and to include with its annual report all (or substantially all) of the information suggested by Synapse.

Order

WHEREAS on or about June 29, 2018, the Prince Edward Island Energy Corporation ("PEIEC") submitted an application to the Island Regulatory and Appeals Commission (the "Commission") pursuant to subsection 16.1(2.1) of the *Electric Power Act*, R.S.P.E.I. 1988, Cap. E-4 (the "*Act*"), seeking approval of an electricity efficiency and conservation plan (the "EE&C Plan" or the "Plan") for a three-year term from 2018 to 2021 (the "Application");

AND WHEREAS a Notice of Application was published on the Commission website and in local newspapers;

AND WHEREAS interested members of the public were invited to comment on the Application;

AND WHEREAS Commission staff retained the services of Synapse Energy Economics, Inc. ("Synapse") to assist in the review and evaluation of the EE&C Plan;

AND WHEREAS PEIEC is generally agreeable to the recommendations made by Synapse in relation to the EE&C Plan;

AND WHEREAS the Commission has determined that the outstanding issues are narrow and can reasonably be addressed without an oral hearing;

AND WHEREAS upon approval of the EE&C Plan, the Commission is required to issue an Order to each public utility named in the Plan requiring the public utility to pay the costs as set out in the EE&C Plan;

AND WHEREAS the only public utilities named in the EE&C Plan are PEIEC and Maritime Electric Company, Limited ("Maritime Electric");

AND WHEREAS Summerside Electric is not a "public utility" as defined in the *Act*, and is therefore not subject to regulation by the Commission;

AND WHEREAS the Commission has considered all of the evidence filed in relation to the Application;

AND WHEREAS the Commission is satisfied that the EE&C Plan meets the requirements set forth in subsection 16.1(5.1) of the *Act*;

NOW THEREFORE, pursuant to subsection 16.1(6) of the *Act*, the Commission orders as follows:

1. The EE&C Plan as filed by PEIEC on June 29, 2018 is hereby approved effective as of the date of this Order.
2. The EE&C Plan shall remain in effect until March 31, 2021.

Apportionment of Costs

3. PEIEC shall recover the costs of the EE&C Plan as follows:

Year 1 (2018/2019)	
Maritime Electric Funding	\$ 600,000
Summerside Electric Funding	\$1,149,500
Province of PEI Funding	\$1,019,500
Federal Government Funding	\$2,769,000
Total Funding	
Year 2 (2019/2020)	
Maritime Electric Funding	\$ 970,000
Summerside Electric Funding	\$1,916,000
Province of PEI Funding	\$1,774,000
Federal Government Funding	\$4,660,000
Total Funding	
Year 3 (2020/2021)	
Maritime Electric Funding	\$1,200,000
Summerside Electric Funding	\$2,431,500
Province of PEI Funding	\$2,251,500
Federal Government Funding	\$5,883,000
Total Funding	

4. The funding to be provided by Maritime Electric and Summerside Electric shall be shared proportionately between the utilities based on the percentage of sales of electricity in the Province.

5. In the event that Summerside Electric fails or refuses to pay its proportionate share of the funding in any given year, its share shall not be collected or collectable from Maritime Electric or its ratepayers.

6. Maritime Electric shall be required to recover its proportionate share of the funding from its ratepayers and shall remit this amount to PEIEC/efficiencyPEI on a monthly basis.
7. PEIEC shall establish the appropriate rate rider for each of Maritime Electric's rate classes, which rate riders shall be set for the term of the Plan.
8. The rate rider shall be incorporated into Maritime Electric's rates for electrical service and shall not be identified as a separate line item on customers' bills.
9. The costs of the EE&C Plan shall be treated as an expense as incurred rather than amortized over the life of the EE&C measures.

Cost Effectiveness

10. PEIEC shall use the Program Administrator Cost test to determine the cost effectiveness of the EE&C Plan.
11. The Program Administrator Cost test shall be applied at the portfolio level.
12. PEIEC shall use the Government of Prince Edward Island's long term borrowing rate in the calculation of cost effectiveness testing.

Evaluation and Verification

13. PEIEC shall establish a Demand Side Management advisory group within ninety days from the date of this Order to address issues with implementation over the term of the EE&C Plan.
14. PEIEC shall work with the Demand Side Management advisory group and stakeholders to develop a comprehensive evaluation framework.
15. The comprehensive evaluation framework shall be submitted to the Commission for review on or before October 31, 2019.
16. The comprehensive evaluation framework shall include, among other things:
 - i. processes and data collection mechanisms on program participation;
 - ii. the financial costs for each public utility named in the EE&C Plan and its customers, to be incurred on implementing the Plan and over the course of its term;
 - iii. the financial benefits for each public utility named in the EE&C Plan and its customers, to be achieved on implementing the Plan and over the course of its term; and
 - iv. program performance on a quarterly and annual basis.
17. PEIEC shall retain the services of an independent evaluation consultant, within ninety days from the date of this Order, to evaluate the EE&C Plan on an ongoing basis.
18. The independent evaluation consultant shall be contracted over the term of the EE&C Plan to perform ongoing evaluations of the EE&C Plan and programs.

Annual Reporting

19. In each calendar year during the term of the EE&C Plan, PEIEC shall prepare and submit a report to the Commission, which report shall include substantially all of the information set forth in Appendix "A" hereto.
20. In each calendar year during the term of the EE&C Plan, PEIEC shall reconcile Maritime Electric's forecast revenues with actual revenues, on an annual basis, and shall file the reconciliation with the Commission as part of its annual report.
21. The annual report shall be filed within three months after the end of PEIEC's fiscal year in each calendar year, or part of a calendar year, occurring during the term of the EE&C Plan.

Other Matters

22. PEIEC shall undertake a DSM Potential Study in 2019/2020 to inform the next EE&C Plan, which study shall include (among other things) measures to reduce peak load demand and the proportionate allocation of EE&C costs across residential and commercial sectors.
23. PEIEC shall not make any material changes to the EE&C Plan as approved herein without the prior approval of the Commission.

DATED at Charlottetown, Prince Edward Island, on Friday, May 17, 2019.

BY THE COMMISSION:

J. Scott MacKenzie, Q.C., Chair

M. Douglas Clow, Vice-Chair

John Broderick, Commissioner

Notice:

Section 12 of the *Island Regulatory and Appeals Commission Act* reads as follows:

12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it, or rehear any application before deciding it.

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written Request for Review, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13.(1) and 13(2) of the *Act* provide as follows:

13.(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.

(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.

NOTE:

In accordance with IRAC's *Records Retention and Disposition Schedule*, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

APPENDIX A - REPORTING REQUIREMENTS



Board Regulatory Rules, NS Reg 235/2005

This regulation replaces NS Reg 25/99.

Current version: as posted on Jun 18, 2021

Link to the latest
version : <https://canlii.ca/t/862j>

Stable link to this
version : <https://canlii.ca/t/553kl>

Citation to this
version: Board Regulatory Rules, NS Reg 235/2005, <<https://canlii.ca/t/553kl>>
retrieved on 2022-10-28

Currency: Last updated from The Nova Scotia [Registry of Regulations](#) website on
2022-10-21

This consolidation is unofficial and is for reference only. For the official version of the regulations, consult the original documents on file with the Office of the Registrar of Regulations, or refer to the Royal Gazette Part II. Regulations are amended frequently. Please check the list of Regulations by Act to see if there are any recent amendments to these regulations filed with our office that are not yet included in this consolidation.

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**Board Regulatory Rules
made under Section 12 of the
Utility and Review Board Act
[S.N.S. 1992, c. 11](#)**

**N.S. Reg. 235/2005 (December 23, 2005)
amended to N.S. Reg. 90/2021 (effective May 31, 2021)**

Application of rules

- 1** These rules are made pursuant to [Section 12](#) of the *Utility and Review Board Act* and apply to proceeding[s] under the *Public Utilities Act*, the *Gas Distribution Act*, the *Pipeline Act*, the *Underground Hydrocarbons Storage Act*, the *Petroleum Products Pricing Act*, the *Consumer Protection Act* and the *Motor Carrier Act*.

Short title

- 2** These rules may be cited as the *Board Regulatory Rules*.

Object

- 3** The object of these rules is to secure the just, speedy and economic determination of every application.

Definitions

- 4** In these rules, unless the context otherwise requires,
- (a) “applicant” shall include a complainant pursuant to [Sections 79](#) and [83](#) of the *Public Utilities Act* and any person or corporation applying to the Board to hear and determine any matter or thing;
 - (b) “application” shall include a complaint pursuant to [Sections 79](#) and [83](#) of the *Public Utilities Act* and any other proceeding, matter or thing which the Board can determine;
 - (c) “Board” means the Nova Scotia Utility and Review Board;
 - (d) “Clerk” means the Clerk of the Board;
 - (e) “intervenor” means a person who establishes an interest in an application pursuant to [Rule 11](#);
 - (f) “party” means, in respect of an application, an applicant, a respondent or a intervenor;
 - (g) “respondent” shall include any person or corporation adverse in interest to an applicant or entitled to be heard in opposition to any application.

General

- 5** **(1)** Where procedures are not provided for in these rules or in an enactment, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.
- (2)** The Board may dispense with, amend, vary or supplement, with or without a hearing, all or part of these rules at any time by making a procedural order, if it is satisfied that the special circumstances of the application so require, or it is in the public interest to do so.
- (3)** The Board may make directions on procedure and procedural orders which shall govern the conduct of a specific application.
- (4)** The Board may extend or abridge the time fixed by these rules or otherwise fixed by the Board, and may do so on its own initiative or in response to a motion by any party whether or not the motion to

extend or abridge the time is made after the time so fixed has expired.

- (5) Unless otherwise specified, where these rules or a Board order make reference to the number of days between two events, not expressed to be clear days, the number of days shall be calculated by excluding the day on which the first event happens and including the day on which the second event happens. If the last day falls on a day the Board offices are closed, the time shall automatically be extended to the next business day.
- (6) No application before the Board shall be defeated or affected by any technical objection or by any objection based upon defects in form or procedure.

Applications

6 Every application shall

- (a) contain a proposed title of the application;
- (b) contain a clear and concise statement of the facts;
- (c) set forth the reasons for the application;
- (d) contain the statutory provision(s) under which it is made;
- (e) set forth the nature of the order or decision applied for;
- (f) be divided into consecutively numbered paragraphs, each of which is confined as nearly as possible to a distinct portion of the subject of the application;
- (g) be signed by the applicant or the applicant's representative;
- (h) provide the full name, address and the telephone, fax and electronic access numbers of the applicant and the applicant's representative; and
- (i) provide any other information that may be useful in explaining or supporting the application.

Filing

- 7 (1) Any document to be filed with the Board shall be filed with the Clerk.
- (2) A document may be filed with the Clerk by any of the following methods:
- (a) delivering a copy to the Clerk at the Board's office;
 - (b) mailing a copy to the Clerk;
 - (c) transmitting a copy to the Clerk via fax or e-mail; or

(d) such other manner as the Board may determine.

- (3) All documents filed shall be date stamped by the Board and any document filed with the Board after 2:00 p.m. or on a Saturday, Sunday or holiday shall be considered filed on the next working day.
- (4) When a document is filed with or served on the Board by e-mail transmission, a hard copy or fax of the document shall be provided to the Board within one day thereafter. No hard copy or fax is required to be filed with respect to a complaint filed by email by a ratepayer in relation to a utility.
- (5) When a document is filed with or served on the Board by e-mail transmission or fax, the sender shall obtain an acknowledgment from the Clerk of its receipt.
- (6) In all cases where documentary evidence is offered, the Board, in lieu of requiring the originals thereof to be filed, may accept true copies of such evidence or such parts of the same as may be relevant, or may require such evidence to be transcribed as part of the record.
- (7) The Board may reject requests for intervenor status, submissions of evidence and information requests and any other documents which are not filed in accordance with the schedule set by the Board in an application.

7A (1) In cases where pre-filed documentary evidence is to be filed in a proceeding, including in responses to Information Requests, electronic hyperlinks to, or within, such evidence may be used, subject to the following conditions:

- (a) where the filing party intends to rely on such evidence as part of its direct evidence in the matter, a PDF copy of the document, or of the relevant excerpt (if appropriate), and the purpose of such excerpt, shall also be provided to the Board and to the other parties, as part of the evidentiary record in the matter.
 - (b) where the electronic hyperlink in ~~subsection~~ [clause] (a) is to a video or audio recording, the party must file an MPEG or MP3 file or other authorized form of video or audio recording that can be accessed through the Board's electronic case management system. The filing must also be accompanied by a brief statement setting out the portion of the video or audio recording which is being relied on and the purpose of the evidence.
 - (c) where the filing party has provided electronic hyperlink evidence and intends to rely on such hyperlink evidence during cross-examination at a hearing, a hard copy of the hyperlinked document does not need to be pre-filed, but a PDF and/or hard copy of any excerpt being used in cross-examination shall be available for reference during the hearing.
- (2)** Notwithstanding ~~subsection~~ [clause] (1)(a), no copy of the document is required to be filed where:
- (a) the evidence filed by a party is in response to an Information Request, unless a copy of the document is requested by the Board or another party; or

- (b) the reference is to prior Board or Court decisions, to statutes or regulations, to filings of regulated utilities or other parties with the Board in other matters, or where used in referencing testimony or reports of an expert witness in other matters not directly being relied upon in the present matter.
- (3) Nothing in this rule waives the requirements upon a party where opinion evidence or an expert's report is filed in a proceeding.

Service

- 8 (1) Where any document is required to be served on a party, service shall be effected by any of the following methods:
- (a) personal service;
 - (b) delivering a copy to the party's proper address;
 - (c) sending a copy by ordinary mail addressed to the party at his or her proper address;
 - (d) transmitting a copy to the party via fax or e-mail, where the party has provided a fax number or e-mail address; or
 - (e) such other manner as the Board may determine.
- (2) Where the party is represented, service of a document shall be effected on the party's representative and any of the methods of service set out in [Rule 8\(1\)](#) may be used for this purpose.
- (3) Service of a document may be proved by affidavit, oral testimony or both.
- (4) When a document is served on a party by e-mail transmission, a hard copy or fax of the document shall be provided within a reasonable period thereafter if requested by the recipient.

Oral or written hearings

- 9 (1) Subject to anything to the contrary in any enactment, the Board may, on its own motion or at the request of the parties, determine that an application be disposed of by an oral or a written hearing and may invite submissions from interested persons in order to make that determination.
- (2) Notwithstanding [Rule 9\(1\)](#), where the Board deems it necessary at any time during an application, the Board may order that the application be disposed of by an oral hearing in substitution for a written hearing.

Hearing orders

- 10 (1) Within thirty days of an application being filed, the Board shall, if a public hearing is required, issue a hearing order containing the procedural details applicable to the hearing, accompanied by a notice of public hearing.

- (2) Where the Board issues a notice of public hearing in accordance with [Rule 10\(1\)](#), the applicant shall, within such time limit as the Board may direct,
- (a) publish the notice in such publications as the Board may direct; and
 - (b) serve a copy of the notice on such persons as the Board may direct.
- (3) An applicant referred to in [Rule 10\(2\)](#) shall file with the Board an affidavit that sets out the title and date of each publication in which the notice of public hearing was published pursuant to [Rule 10\(2\)\(a\)](#) and the means taken to effect service pursuant to [Rule 10\(2\)\(b\)](#).
- (4) Where the Board issues a hearing order, it may direct that
- (a) the applicant shall keep available at the applicant's business address, for public inspection during regular business hours, a copy of the application;
 - (b) the Board shall keep available for public inspection at the offices of the Board a copy of the application and all non-confidential documents related thereto.
- (5) Where the Board does not issue a hearing order, it shall notify interested persons of the hearing and the procedure to be followed in respect thereof.

Intervenors

- 11 (1) Where a hearing order has been issued pursuant to [Rule 10\(1\)](#), any interested person may apply to intervene by filing with the Board and serving on the applicant, if any, on or before the date set out in the order, a written request to intervene that
- (a) in the case of an oral hearing, states whether the person intends to appear at the hearing;
 - (b) sets out the name of the person and any authorized representative of the person and the mailing address, address for personal service, telephone number and any other telecommunications numbers of the person or the person's authorized representative;
 - (c) sets out the facts and reasons why the person has an interest in the application; and
 - (d) states the issues that the person intends to address at the hearing.
- (2) The Board may accept or disallow an intervention and in either case the Board shall notify the applicant, if any, and the person who filed the request to intervene of its decision in respect of the intervention.
- (3) An intervenor, on being advised by the Board of the name and mailing address of any other intervenor, shall serve a copy of the written intervention on every other intervenor.
- (4) A party may, within 15 days after the date of service of a written intervention, serve an objection to the intervention on the person who has filed the intervention and shall file with the Board and serve on all

other parties a copy of the objection.

(5) Unless the Board otherwise directs, an applicant who is notified that an intervention has been accepted by the Board in accordance with [Rule 11\(2\)](#) shall, within such time limit as the Board may fix, serve on the intervenor

- (a) a copy of the application;
- (b) subject to Rule 12, any information, particulars or documents relevant to the application that have been filed with the Board; and
- (c) any hearing order issued by the Board.

(6) Where a hearing order has been issued pursuant to [Rule 10\(1\)](#), any interested person who does not wish to intervene in the application but who wishes to make comments to the Board regarding the application shall file with the Board and serve on the applicant, if any, on or before the date set out in the order, a letter of comment that

- (a) comments on the application;
- (b) describes the nature of the person's interest in the application; and
- (c) provides any relevant information that the person considers will explain or support the person's comments.

(7) The Board shall provide all parties with a copy of any letter filed pursuant to [Rule 11\(6\)](#).

(8) A party may, within 15 days after receipt of a letter filed pursuant to [Rule 11\(6\)](#), serve a reply on the person who has filed the letter and shall file with the Board and serve on all other parties a copy of the reply.

(9) A person who files a letter pursuant to [Rule 11\(6\)](#)

- (a) does not thereby acquire status as an intervenor;
- (b) loses intervenor status if that person is an intervenor; and
- (c) subject to [Rule 11\(8\)](#), is not entitled to any further notice in the application.

Confidential documents

12 (1) Subject to [Rule 12\(2\)](#), all documents filed in respect of an application shall be placed on the public record.

(2) A party may request that all or any part of the document be held in confidence by the Board, which request shall be placed on the public record.

(3) The burden of satisfying the Board that a document should be held in confidence is on the party claiming confidentiality.

(4) Any request for confidentiality shall

(a) include a summary of the nature of the information in the document;

(b) state

(i) the reasons for the request, including the details of the nature and extent of the specific harm that would result if the document were publicly disclosed, and

(ii) any objection to placing an abridged version of the document on the public record, and the reasons for such an objection; and

(c) be filed with the Board and served on the parties.

(5) Where a party has made a request under Rule 12(2), the document shall be held in confidence unless the Board orders otherwise.

(6) A party may object to a request for confidentiality by filing an objection and serving the objection on the parties.

(7) An objection shall state the reasons

(a) why the party requires disclosure of the document; and

(b) why disclosure would be in the public interest.

(8) The party claiming confidentiality will have an opportunity to reply to any objection.

(9) The Board may decide the issue with or without a hearing. Where the Board holds a hearing, the Board may direct that the hearing be held in the absence of the public.

(10) In ruling on a request for confidentiality the Board shall consider

(a) whether the document may disclose matters involving public security;

(b) whether the document may disclose sensitive financial, commercial or personal matters in relation to which the desirability of avoiding disclosure in the interest of any person affected outweighs the desirability of adhering to the principle that documents be available to the public; or

(c) such other matters as the Board deems appropriate.

(11) The Board may

- (a) order that the document be held in confidence by the Board;
- (b) order that the document be placed on the public record;
- (c) order that an abridged version of the document be placed on the public record;
- (d) order that the document be made available to a party to the proceeding, who has a good faith interest in accessing the confidential information and who would not otherwise be in conflict of interest, on such terms as the Board considers appropriate, including the signing of a confidentiality undertaking in a form approved by the Board;
- (e) order that the document be withdrawn; and
- (f) make any other order the Board may deem to be in the public interest.

(12) Where the Board rejects a claim for confidentiality, the party claiming confidentiality may, within seven (7) days of receiving the Board's decision, or such other time as the Board may allow, notify the Board in writing that

- (a) if the party is an applicant, the application is withdrawn; or
- (b) if the party is an intervenor, the intervention is withdrawn.

(13) Where a party provides written notice to the Board pursuant to [Rule 12\(12\)](#), if the document is on file with the Board, the Board shall immediately return the documents for which confidentiality was claimed.

Amendment

13 A filed document may be amended at any time with leave of the Board.

Admission of facts

- 14** (1) The parties to any application before the Board may, by admission in writing filed with the Board, agree upon the facts or any of the facts involved therein, which admission, if filed, shall be regarded and used as evidence at such hearing, investigation or other proceeding.
- (2) The Board may require such additional evidence as it may deem necessary.

Information requests

- 15** (1) The Board may provide for Information Requests necessary to
- (a) clarify evidence filed by a party;
 - (b) simplify the issues;
 - (c) permit a full and satisfactory understanding of the matters to be considered; or

(d) expedite the application.

(2) An Information Request shall be in accordance with Form A and shall

(a) be directed to the party from whom the response is sought;

(b) number the questions consecutively, or as otherwise directed by the Board, in respect of each item of information requested;

(c) list the name, address and telephone and fax numbers of persons who may be contacted in case clarification of questions is required;

(d) be forwarded to the party from whom a response is sought, with copies being sent simultaneously to the Board and all other parties.

(3) An Information Request shall not be directed to any party upon whose behalf no evidence has been filed, without leave of the Board or consent of the party from whom a response is sought.

(4) A party seeking leave under [Rule 15\(3\)](#) shall, within any time limit fixed by the Board, file with the Board and serve on the party to whom the Information Request is directed, the proposed Information Request and the reasons therefor.

(5) The Board shall not grant leave pursuant to [Rule 15\(3\)](#) unless the party to whom the Information Request is directed has been given an opportunity to comment on the proposed Information Request.

16 (1) Subject to [Rule 16\(3\)](#), where an Information Request has been directed to a party that party shall file a Response to Information Request within the time fixed by the Board.

(2) A Response to Information Request shall be in accordance with Form B and shall

(a) provide a full and adequate response to each question;

(b) state the question at the beginning of each response;

(c) begin each response on a new page;

(d) number each response to correspond with each item of the Information Request;

(e) specify which witness or which member of a witness panel prepared the response;

(f) file and serve the Response to Information Request as directed by the Board; and

(g) set out the date on which the Response to Information Request is filed and served.

- (3) A party who is unable or unwilling to provide a full and adequate response to a question in an Information Request shall file and serve a response
- (a) where the party contends that the information requested is not relevant, setting out specific reasons in support of that contention;
 - (b) where the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, setting out the reasons why the information is unavailable and providing any alternative available information that the party considers would be of assistance to the party directing the Information Request;
 - (c) where the party contends that the information sought is of a privileged nature, setting out the reasons why it is considered privileged;
 - (d) where the party contends that the information sought is of a confidential nature, requesting that it be held in confidence, or not filed, pursuant to [Rule 12](#); and
 - (e) otherwise explaining why such a response cannot be given.
- (4) Where a party is not satisfied with the response provided or objects to a claim of privilege, the party may apply to the Board for directions.

Preliminary hearings

- 17 (1) The Board may, on its own initiative or at the request of any party, hold a preliminary hearing to deal with any matter that may aid in the disposition of the hearing, including to
- (a) determine any relevant question as to the Board's jurisdiction to hear the application;
 - (b) consider an application for an order dismissing the application on the grounds that no application lies to the Board;
 - (c) determine any question as to the admissibility of any evidence;
 - (d) clarify or simplify the issues;
 - (e) consider the necessity or desirability of an amendment to the application;
 - (f) consider the participation by interested persons;
 - (g) consider a request for access to information in the custody or control of any party;
 - (h) fix dates for the hearing and for any procedural steps to be completed by the parties;
 - (i) make any directions for the pre-filing of witness lists or expert witness statements and reports (except as otherwise provided for in these rules), or direct further disclosure where necessary; and

- (j) determine issues of confidentiality, including any need to hold a part of the hearing in camera, or to seal documents.

- (2) Unless otherwise ordered by the Board, it shall not be necessary to give notice of a preliminary hearing by advertisement in a newspaper.

18 The Board member who presides at a preliminary hearing shall not be deemed to be seized of the application, and any subsequent hearing related to the application may be heard by that member or any other member.

Issues

19 (1) The Board may formulate issues to be considered in an application and shall notify parties in respect thereof if, in the opinion of the Board,

- (a) the formulation of issues would assist the Board in the conduct of the application; and

- (b) the formulation of issues would assist the parties in participating more effectively in the application.

- (2) To assist the Board in formulating issues in accordance with [Rule 19\(1\)](#), the Board may invite parties to propose issues or to suggest amendments to any formulated issues.

- (3) Any party who proposes an issue pursuant to [Rule 19\(2\)](#) shall explain the issue's relevance to the application.

- (4) Notwithstanding the above, the Board may direct that certain issues or items will be excluded from consideration during the application.

- (5) In an attempt to avoid multiplicity of proceedings on the same issue, the Board may, in any decision, identify issues that will not be revisited until a specified time period has elapsed, absent a significant change in circumstances, or other reason which, in the opinion of the Board, justifies an earlier consideration.

Written submissions

20 (1) The Board may direct parties to make written submissions for the purpose of considering matters that relate to

- (a) the clarification or simplification of issues;

- (b) the necessity or desirability of amending an application;

- (c) the admission of certain facts or the verification of those facts by affidavit, or the use by any party of documents of a public nature;

- (d) the settling of matters that relate to information requests;

- (e) the procedure to be adopted in the application;
 - (f) the exchange of documents among the parties; and
 - (g) any other matter that could aid in the conduct and disposition of the application.
- (2) A Book of Authorities or any case, is not required to be filed electronically or by paper, if they are available online. A list of the authorities and citations should be included at the end of the submissions. Specific paragraphs relied upon should be included in the text.

Technical conferences

21 An applicant may, and shall if directed by the Board, convene a technical conference or a series of technical conferences that relate to

- (a) the clarification or simplification of issues; or
- (b) any other matter that could aid in the conduct and disposition of the application.

Hearings

- 22** (1) Hearings may be conducted in an informal manner and need not follow the strict rules of practice and procedure required in a court of law.
- (2) The Board may, at its discretion, conduct a hearing or a preliminary hearing in person, in writing or by teleconference, video conference or by any other electronic means.
- (3) At the hearing of an application, the applicant shall present its evidence first, and after the evidence of all other parties is given, shall have the right to reply.
- (4) A party may call and examine witnesses, cross-examine opposing witnesses and present arguments and submissions.
- (5) The Board may receive in evidence any statement, document, information or matter that, in the opinion of the Board, may assist it to deal with the matter before the Board whether or not the statement, document, information or matter is given or produced under oath or would be admissible as evidence in a court of law.
- (6) A party may be represented before the Board by counsel or an agent.
- (7) A hearing may be adjourned from time to time by the Board on reasonable grounds on its own motion or at the request of any party.
- (8) The Board may, in a Hearing Order, set a date by which a party must indicate if that party requires the attendance of an expert witness, either in person or by electronic means, for purposes of cross-examination.

[Briefs may be required]

23 The Board, whenever it deems it desirable, may require briefs to be filed by the parties within such time as the Board may prescribe.

[Decision may be in parts]

24 The Board may issue a decision in several parts if it is determined by the Board to be in the public interest to do so.

Settlements

- 25** (1) The Board may dispose of all or part of an application by approving a settlement of one or more of the issues entered into between two or more parties to a proceeding.
- (2) Where a settlement is proposed in an application, the Board shall issue a procedural order pursuant to [Rule 5\(3\)](#) setting out the procedure by which the Board shall consider whether or not to approve the settlement.
- (3) Where there are parties who disagree with the settlement proposal, they shall in all cases be given an opportunity to be heard on the matter.
- (4) The Board may accept or reject a settlement proposal in whole or in part.
- (5) The Board may, in a Hearing Order, set a date by which the parties are to advise the Board as to whether there is any reasonable prospect of settlement of all or part of the application.
- (6) The Board may, in a Hearing Order, set a dedicated period of time after the close of evidence to permit the parties to engage in settlement discussions.

Audio and video recording of hearings

- 26** (1) Audio and video recording of an oral or electronic hearing which is open to the public may be permitted on conditions the Board considers appropriate.
- (2) The Board may refuse to permit the recording of all or any part of an oral or electronic hearing if, in the opinion of the Board, such coverage would inhibit specific witnesses or disrupt the hearing in any way.
- (3) Where recording is allowed, the following shall apply unless otherwise directed by the Board:
- (a) only equipment which does not produce distracting sound or light shall be used;
 - (b) where possible, existing audio systems present in the hearing room shall be used;
 - (c) media personnel shall not move about while the hearing is in progress; and
 - (d) equipment shall be positioned unobtrusively before the hearing begins and shall not be relocated while the hearing is in progress.

Disposal of exhibits

- 27** (1) A person who has submitted exhibits to the Board may request that the Board return the exhibits.
- (2) The Board, at the end of six months from the date of the final order in the application, provided no appeal or judicial review has been commenced within that time, may return requested exhibits and may destroy any remaining exhibits.

Production of documents and discovery

- 28** The Board may make orders for production of documents, for inspection, for examination for discovery, for the examination of witnesses who cannot attend the hearing by reason of sickness or other unavoidable cause, and for the examination of witnesses resident outside of Nova Scotia, as the nature of the application may require, and upon such terms as to costs or otherwise as may be just.

[Production of documents]

- 29** A party may give another party notice in writing to produce any documents which relate to any matter in question between the parties, which are in the custody, power or possession of said other party, and if such notice be not complied with secondary evidence of such documents may be given.

[Admission of documents]

- 30** A party may be called upon by any other party, by notice in writing, to admit any document which requires to be proved, saving all just exceptions; and in default of notice to admit, the costs of proving the document shall not be allowed except where, in the opinion of the Board, the omission to give notice was a saving of expense.

Subpoenas

- 31** (1) At the request of a party, the Board may issue a subpoena, which shall be signed by the Clerk and sealed with the Board's seal.
- (2) A subpoena issued pursuant to [Rule 31\(1\)](#) shall be issued in the form prescribed by the Board and may set out the names of any number of persons required to appear before the Board.
- (3) No person served with a subpoena is required to appear before the Board pursuant to the subpoena unless the person has been paid or tendered conduct money in an amount sufficient to cover the person's reasonable fees and traveling expenses as fixed by the Board from time to time.
- (4) A subpoena shall be served personally on the person to whom it is directed at least two clear business days before the date on which the person is to appear.

Financial condition

- 32** Whenever a corporation subject to the [Public Utilities Act](#), the [Gas Distribution Act](#) or the [Motor Carrier Act](#) is required or called upon to present its financial statements, they shall be prepared in accordance with the recommendations of the Canadian Institute of Chartered Accountants set out in the C.I.C.A. Handbook.

Applications for authority to issue shares, stocks, bonds, debentures or other evidences of indebtedness

- 33** (1) In all applications made to the Board pursuant to the [Public Utilities Act](#) by corporations for authority to issue any shares, stocks, bonds, debentures or other evidence of indebtedness, the application must show

- (a) the amount and terms of the proposed issues, the purposes for which the proceeds are to be used and the nature of the security if any;
- (b) if the purpose is the acquisition of property, a general description of the property, from whom it is to be acquired, and the terms of the contract for such acquisition, if any has been made. Names of the owners of property to be acquired for rights of way need not be set out, but a general description of the proposed route, will be sufficient;

(Note. The description of property should include the number, dimensions, type and location of each class of items mentioned in the application. For example, the item of “land” should state the area and the location thereof; expenditure for “building construction” should state dimensions of buildings so that cubical contents may be ascertained, and also give the type of construction, including foundations; a description of plant, machinery, equipment, etc., should be given, including the number, and size of each unit, its type, etc.

It should also be stated whether the amount proposed to be expended on each item covers the entire cost thereof, or whether a portion of such cost has been submitted in a prior statement to the Board, or may be included in some future statement of expenditure, for which security may be proposed to be issued, and authority asked.)

- (c) if the purpose is for the construction, completion, extension or improvement of facilities, the existing facilities must be set forth as well as those proposed;
- (d) if the purpose is the improvement or maintenance of service, the existing service must be set forth as well as any improvements or betterments proposed;
- (e) if the purpose is the refunding of obligations, such obligations must be described fully, showing character, amount, date of issue, date of maturity, and all other material facts concerning the same;
- (f) the financial condition of the applicant;
- (g) if the application is for the issue of bonds or debentures to be secured by an existing mortgage, the amount of bonds or debentures, if any, already issued under said mortgage and the amount and application made of the proceeds;
- (h) if the proceeds are to be used for construction, completion, extension or improvement purposes, the affidavit of a competent person must be annexed, showing the estimated cost thereof in reasonable detail;
- (i) in applications for the issues of shares or stocks, the application must state that no franchise or right is capitalized directly or indirectly, except as authorized by the *Public Utilities Act*. In case it is proposed to capitalize any franchise or right as therein authorized, there shall be filed with the application a verified copy of such franchise, and a certificate of the proper officer of the province or municipality granting the same, showing the amount that has been actually paid for such franchise or right;

- (j) if any contract, agreement or arrangement, verbal or written has been made to sell the shares, stocks, bonds, debentures or other evidence of indebtedness proposed to be issued, such contract, agreement or arrangement must be described in full, and if in writing a copy of the same must be annexed to the application;
 - (k) if no contract, agreement or arrangement has been made for the sale or other disposal of the shares, stocks, bonds, debentures or other evidences of indebtedness proposed to be issued, there must be annexed an affidavit of a competent person showing the amount which can probably be realized from the sale or disposition thereof, and the reasons for the opinion of the deponent;
 - (l) there must be annexed to the application an affidavit made by at least three of the directors of the applicant, showing that it is the intention of the applicant in good faith to use the proceeds of the shares, stocks, bonds, debentures or other evidence of indebtedness proposed to be issued, for the purposes set forth in the application.
- (2) Before granting any such application, the Board shall require such notice thereof to be given at the expense of the applicant, by publication for such time, and in such newspaper or newspapers as it may deem proper, to the end that all person who may be interested therein or affected thereby may have an opportunity for a hearing.
- (3) Notwithstanding [Rule 33\(2\)](#), the Board may grant such application without the necessity of requiring notice thereof to be given and without the necessity of holding a public hearing, provided the applicant is participating in a borrowing or the issuance of shares, stocks, bonds, debentures or other evidence of indebtedness through the Nova Scotia Municipal Finance Corporation pursuant to the provisions of the [Municipal Finance Corporation Act](#), as amended.
- (4) Any order of the Board granting such application or any part thereof, shall
- (a) prescribe the purpose for which the proceeds of the security or obligation authorized shall be used;
 - (b) direct the applicant to report to the Board under oath the sale or other disposition of the securities or obligations authorized, the terms and conditions thereof, and the amount realized therefrom;
 - (c) require the applicant to make a report at least once every six months, showing in detail the use and application by it of the monies so realized, until such monies shall have been fully expended;
 - (d) contain such other provisions as the Board may deem necessary or appropriate in each case.

Costs

34 Any application for costs shall be governed by the Board's *Cost Rules*.

[Please note: Unless otherwise noted, square brackets in Forms A and B do *not* indicate editorial corrections made by the ORR. They are part of the forms.]

Form A – Information Requests

M0XXXX

Nova Scotia Utility and Review Board

In the Matter of: the XXXX Act

– and –

In the Matter of: insert application / matter name

Information Requests

[insert whether Non-Confidential / Confidential / Redacted]

To: insert party name
insert counsel name
insert email address

From: insert party name – e.g. Nova Scotia Utility and Review Board

Responses due: insert date – e.g. Wednesday, December 14, 2017

Copies: 1 electronic copy (PDF searchable)
xx hard copies
[as directed by pre-hearing order or the Board Clerk]

Contact person: insert individual’s name and contact details – e.g. see below
(name)
Senior Advisor
Nova Scotia Utility and Review Board
Tel: (902) 424-4448; Fax: (902) 424-3919
xxxxx@novascotia.ca

Issued at , Nova Scotia, this day of , 20 .

Clerk of the Board

Questions: [Questions are to be numbered sequentially with **line numbering applied**]

Request IR-1: (Question Identifier to be bolded)

One clear space between identifier and the question:

- a) Subparagraphs to be indented and lettered.
- b) No clear space between subparagraphs.

Request IR-2:

Footer to be inserted on each page.

Document: XXXXXX Date filed: Mo. Day/Yr. UARB(Recipient) Page X of X

Form B – Response to Information Request

M0XXXX

Nova Scotia Utility and Review Board

In the Matter of: the XXXX Act

– and –

In the Matter of: insert **application / matter** name

Responses to Information Requests

[insert whether **Non-Confidential / Confidential / Redacted**]

To: [insert name of party (or Board) requesting information]

From:[name of party responding]

Date: insert date response is filed with the Board

Date ~~files~~ [filed]*: Month, day, year Respondent(Originator) IR-# Page X of X
[* **editorial correction**]

Request IR-1:

Questions are to be restated sequentially and completely. **Line numbering must be applied.**

Response IR-1

One clear space between identifier and response. Response to be written in full – attach any schedules and attachments relating to the response

**** [each separate response must start on a separate page and must include the heading as above]**

Date ~~files~~ [filed]*: Month, day, year
[* editorial correction]

Respondent(Originator) IR-# Page X of X

Legislative History
Reference Tables

Board Regulatory Rules

N.S. Reg.
235/2005

Utility and Review Board Act

Note: The information in these tables does not form part of the regulations and is compiled by the Office of the Registrar of Regulations for reference only.

Source Law

The current consolidation of the *Board Regulatory Rules* made under the *Utility and Review Board Act* includes all of the following regulations:

N.S. Regulation	In force date*	How in force	Royal Gazette Part II Issue
235/2005	Dec 29, 2005	date filed	Jan 20, 2006
180/2010	Dec 2, 2010	date filed (not filed within 7 days)	Dec 17, 2010
145/2012	Jul 17, 2012	date filed (not filed within 7 days)	Jul 27, 2012
9/2013 ¹	Jan 16, 2013	date specified	Feb 8, 2013
112/2017	Jul 24, 2017	date filed (not filed within 7 days)	Aug 4, 2017
90/2021	May 31, 2021	date filed	Jun 18, 2021

The following regulations are not yet in force and are not included in the current consolidation:

N.S. Regulation	In force date*	How in force	Royal Gazette Part II Issue

*See subsection 3(6) of the *Regulations Act* for rules about in force dates of regulations.

Amendments by Provision

ad. = added	fc. = fee change	rep. = repealed
am. = amended	ra. = reassigned	rs. = repealed and substituted
Provision affected	How affected	
1 ²	rs. 145/2012	
7(3).....	am. 180/2010	
7(4).....	am. 180/2010, 112/2007	
7A.....	ad. 90/2021	
19(4).....	ad. 9/2013	
19(5).....	ad. 9/2013	
20.....	ra. as 20(1) 112/2017	

ad. = added

am. = amended

fc. = fee change

ra. = reassigned

rep. = repealed

rs. = repealed and substituted

Provision affected	How affected
20(1).....	ra. from 20 112/2017
20(2).....	ad. 112/2017
22(8).....	ad. 9/2013
25(5)-(6) ³	ad. 9/2013

Forms

Form A.....	rs. 112/2017
Form B.....	rs. 112/2017

Note that changes to headings are not included in the above table.

Editorial Notes and Corrections

Note	Effective date
1 Headings shown in the amending document are the existing Section headings and were not inserted into the consolidation before the added subsections.	Feb 8, 2013
2 Brackets around the heading were included as part of the amendment and are not an editorial correction by the ORR. The brackets have been removed for the purposes of the consolidation.	Jul 27, 2012
3 N.S. Reg. 9/2013 purported to add clauses 25(5)(a) and (b) . These clauses have been redesignated as subsections 25(5) and (6) for the purposes of the consolidation.	Feb 8, 2013

Repealed and Superseded

N.S. Regulation	Title	In force date	Repealed date

Note: Only regulations that are specifically repealed and replaced appear in this table. It may not reflect the entire history of regulations on this subject matter.