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January 24, 2014

BY COURIER (2 COPIES) AND EMAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
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Toronto, Ontario M4P 1E4
BoardSec@ontarioenergyboard.ca

Dear Ms. Walli:

Re: Environmental Defence Correspondence
EB-2013-0321 – Ontario Power Generation Inc. ("OPG")
2014-2015 Payment Amounts Application

We write to provide submissions on behalf of Environmental Defence on the draft issues list and on OPG's request for confidential treatment of certain information.

Draft Issues List

A number of the issues that Environmental Defence wishes to raise are identified below.[1] We believe that the draft issues list sufficiently captures these issues. However, if we are incorrect in our reading of the draft issues list, we respectfully request that the below issues be added to the issues list.

Darlington Refurbishment Project – Issues 4.5, and 4.7 to 4.10

Environmental Defence wishes to explore the following issues:

ED1 Is the proposed Darlington Refurbishment Project likely to be the lowest cost option to meet Ontario base-load electricity needs, including in comparison to alternatives?

ED2 Are the expected rate impacts of the proposed Darlington Refurbishment Project reasonable and prudent?

ED3 Are the proposed commercial and contracting strategies for the Darlington Refurbishment Project consistent with the seven principles set out in the Long-Term Energy Plan?[2]

[1] These are only a portion of the issues Environmental Defence wishes to address in this hearing.
[2] Those seven principles are detailed on page 29 of Ontario's Long-Term Energy Plan.

We believe that the above issues are sufficiently captured by the following items in the draft issues list:

Section: Capital Projects - Nuclear

4.5 Are the proposed nuclear capital expenditures and/or financial commitments appropriate?

4.7 Are the proposed test period in-service additions for the Darlington Refurbishment Project appropriate?

4.8 Are the proposed test period capital expenditures associated with the Darlington Refurbishment Project reasonable?

4.9 Are the commercial and contracting strategies used in the Darlington Refurbishment Project reasonable?

4.10 Does OPG's nuclear refurbishment process align appropriately with the principles stated in the Government of Ontario's Long Term Energy Plan issued on December 2, 2013?

For example, issues ED1 and ED2 (the cost effectiveness of the project and the expected rate impacts of the project) are sub-issues of draft issue 4.5 (whether the nuclear capital expenditures are appropriate). They are also sub-issues of draft issue 4.10, which asks whether the refurbishment process aligns with the Long-Term Energy Plan. Minimizing rate impacts is a primary goal of the Long-Term Energy Plan.[3] ED3, which asks whether the proposed refurbishment contracting strategies are consistent with the seven principles in the Long-Term Energy Plan, is a sub-issue of draft issues 4.9 and 4.10.

In the alternative, if issues ED1, ED2, and ED3 are not captured by the draft issues list, we respectfully request that they be added. OPG has put forward evidence on the cost-effectiveness of the Darlington Refurbishment Project, albeit only in comparison to one alternative (new gas-fired power plants).[4] The parties should be allowed to explore the topic of cost-effectiveness and alternatives further.

Issues ED1, ED2, and ED3 are core issues relating to the prudence of OPG's proposed Darlington Refurbishment Project. They go to the Energy Board's core role in protecting the interests of consumers, promoting cost-effectiveness, and ensuring compliance with government policy. Although OPG is not seeking approval for the *entire* Darlington Refurbishment Project in this hearing, it is seeking approval of almost **$1.5 billion** in project expenditures over the next two years.[5] The impact on consumers is huge. Before such a significant expenditure is approved, the parties should be allowed to assess and make submissions on the cost-effectiveness of the project as a whole, the expected rate impacts, and whether the contracting process will protect consumers from cost overruns.

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[3] Ontario's Long-Term Energy Plan, December, 2013, p. 85.
[4] Exhibit D2, Tab 2, Schedule 1, Attachment 5.
[5] Exhibit D2, Tab 2, Schedule 1, p. 1 (the anticipated cost is $1.469.2 billion in 2014 & 2015).

The proposed Darlington Refurbishment Project is not a *fait accompli*, and therefore an analysis of its cost-effectiveness remains highly relevant. Although Ontario indicated in the Long-Term Energy Plan that it plans to go through with the refurbishment, it also is requiring that OPG create "appropriate and realistic off-ramps."[6] The Long-Term Energy Plan also states, with respect to refurbishment, that "[t]he province will proceed with caution to ensure both flexibility and ongoing value for Ontario ratepayers."[7] The Ontario Government has not provided its final go-ahead on this project or provided written directions to proceed with construction. The Long-Term Energy Plan also contemplates alternative power sources, such as conservation and clean power imports, wherever they are cost-effective.[8] Overall, the Long-Term Energy Plan mandates continued assessment of the big picture economic impacts of the proposed Darlington Refurbishment Project.

Pickering Generating Station – Draft Issues 6.3 & 6.4

Environmental Defence wishes to explore the following issue:

ED4 Is the continued operation of Pickering Nuclear Generating Station ("Pickering GS") the most cost-effective and otherwise preferred option to meet Ontario base-load electricity needs, including in comparison to alternatives such as conservation, clean power imports, and other forms of generation (e.g. CHP, renewables)?

We believe that the above issue is sufficiently captured by the following items in the draft issues list:

Section: Operating Costs - Nuclear

6.3 Is the test period Operations, Maintenance and Administration budget for the nuclear facilities appropriate?

6.6 Are the test period expenditures related to the continued operations for Pickering Units 5 to 8 appropriate?

Issue ED4 is a sub-issue of draft issues 6.3 and 6.6 because, very simply, the proposed Pickering GS budget and expenditures are not appropriate if the Pickering GS is not the most cost-effective or preferred option for meeting Ontario's base load electricity needs.

In the alternative, if issue ED4 is *not* captured by the draft issues list, we respectfully request that it be added. The Ontario government has not made a final decision regarding the continued operation of Pickering GS. The Long-Term Energy Plan states that "[a]n earlier shutdown of the Pickering units may be possible depending on projected demand going forward, the progress of the fleet refurbishment program, and the timely

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[6] Ontario's Long-Term Energy Plan, December, 2013, p. 29.
[7] *Ibid.*
[8] Ontario's Long-Term Energy Plan, December, 2013, p. 20 "The government intends to ensure that conservation will be considered before building new generation and transmission facilities, and will be the preferred choice wherever cost-effective." and p. 45 "an import arrangement with a neighbour to guarantee the firm delivery of clean power could offer a cost-effective alternative to building domestic supply."

completion of the Clarington Transformer Station."[9] Issue ED4 relates the Energy Board's core mandate: protecting interests of consumers, promoting cost-effectiveness, and ensuring compliance with government policy. The parties should be allowed to address whether it is in the interest of consumers to continue to fund and operate the Pickering GS in comparison to potentially preferable alternatives.

For the above reasons, Environmental Defence asks that issues ED1 to ED4 be added to the draft issues list to the extent that the Board is of the view that those issues are not captured by the current draft list.

Confidentiality

Environmental Defence objects to the redactions made by OPG in the evidence on the Darlington Refurbishment Project. In particular, Environmental Defence objects to the redactions relating the cost of the project, the assessment of alternatives, and the contracting process. These redactions are objectionable because they shield information relating to nuclear costs and cost overruns from public view even though these are issues of high public concern.

The redactions at issue appear in Exhibit D2, Tab 2, Schedule 1. Two examples of the relevant redactions are enclosed. The first example (Ex. D2-2-1 att. 5) is likely the most important to Environmental Defence. It is a memo from the senior management of OPG to its board of directors, seeking approval of further expenditures on the Darlington Refurbishment Project. On page 5, management recommends proceeding with further expenditures based on an analysis purportedly showing "that the refurbishment of Darlington is economic relative to other generation options."

However, the key figures in that vitally important economic analysis are redacted. OPG has redacted its estimates of the cost of the Darlington Refurbishment Project (see p. 4) as well as the figures underlying its cost comparison between refurbishment and new natural gas generating stations (see p. 5). These figures are at such a high level that they cannot be commercially sensitive or otherwise fit within the criteria in Appendix A of the Practice Direction on Confidential Filings (the "Practice Direction").

The second example is a document detailing the contracting strategy for turbine generators. The purpose of this document is to establish that OPG's proposed strategy is prudent and accords with the Long-Term Energy Plan. In this document, OPG has redacted the amount it is estimating as "contingency costs" (see e.g. p. 7 & 13). OPG has also redacted information relating to "key risks" to its contracting strategy (see p. 20). It is unclear how the release of these figures could prejudice OPG to any significant degree.

Even if the redacted information in the above two examples and in the remainder of Ex. D2-2-1 could be said to be commercially sensitive or harmful to OPG's future negotiations, these concerns are outweighed by factors supporting public disclosure.

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[9] Ontario's Long-Term Energy Plan, December, 2013, p. 5.

The Practice Direction on Confidential Filings affirms the importance of public transparency and openness. It states that:

> The Board's general policy is that all records should be open for inspection by any person unless disclosure of the record is prohibited by law. This reflects the Board's view that its **proceedings should be open, transparent, and accessible.** (emphasis added)[10]

Public access to documents is also an important norm in the court system. As stated by the Supreme Court of Canada in *Toronto Star Newspapers Ltd. v. Ontario*:

> In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
> ...
> It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration.* (emphasis in original)[11]

The rules governing both court and Energy Board proceedings attach very significant importance to transparency and openness. These considerations can only be outweighed by strong countervailing factors. In other words, there must be a very good reason to overcome the presumption of openness and transparency.

OPG is a public organization spending public dollars. It is important that the public be able to scrutinize its expenditures. Furthermore, the Minister of Energy specifically directed OPG manage the refurbishment process in a "transparent" manner.[12]

In this case, the value of public openness is heightened by the importance of the redacted information. In the first example (Ex. D2-2-1 att. 5), OPG has redacted key figures in its economic justification of the nuclear project. This nuclear project is highly contentious. Nuclear projects always attract a considerable amount of public attention. Shielding key information from the public will not build public confidence in the outcome.

Other redactions are relevant to OPG's strategies to avoid cost overruns. This is also an issue of high public importance. As detailed in the attached report, every nuclear project in Ontario's history has gone over budget.[13] Darlington itself was more than $11 billion (or 4.5 times) over budget.[14] This is a major public concern. Information relating to

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[10] *Practice Direction on Confidential Filings*, p. 2.
[11] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at para. 1 & 4.
[12] March 8, 2011 letter from the Minister of Energy to the Chair of OPG.
[13] *Ontario's History of Nuclear Cost Overruns and Ontario Hydro's Stranded Nuclear Debt*, Appendix A to Darlington Re-Build Consumer Protection Plan by the Ontario Clean Air Alliance Research Inc..
[14] *Ibid.*

OPG's proposed strategies to avoid cost overruns should be fully open to public scrutiny and debate.

For the above reasons, Environmental Defence requests that OPG be required to produce un-redacted copies of Exhibit D2, Tab 2, Schedule 1 including, most importantly, the economic analysis of alternatives at Ex. D2-2-1 attachment 5.

Please advise if anything further is required or would be of assistance.

Yours truly,

Kent Elson

Encl.

cc: Applicant and Intervenors

ONTARIO POWER GENERATION

Recommendation for Submission to the Board of Directors

November 15, 2012

DARLINGTON REFURBISHMENT PROJECT
DETAILED PLANNING - 2013 DEFINITION PHASE - PARTIAL RELEASE

EXECUTIVE SUMMARY:

The purpose of this memorandum is to provide an update on the status on the Darlington Refurbishment Project and to request an incremental release to continue detailed planning within the Definition Phase of the project.

Life to Date actual cost, as of September 30, is $295M on a plan of $347M with a CPI of 1.14. Cumulative Definition Phase spend, at year end 2012, is forecast to be $380M on a plan of $436M. The overall program SPI is 0.96 and all program milestones within the Definition Phase are on or ahead of plan, with one exception. The Level 3 Definition Phase schedule planned for completion by October 15th will be completed by December 15th.

The CNSC public environmental assessment hearing is scheduled for December 3rd to 6th. OPG continues to respond to CNSC questions on the Integrated Safety Review (ISR) code review reports and safety factor reports.

The Re-tube and Feeder Replacement (R&FR) project remains on plan and detailed reviews of the contractor's definition phase Level 3 schedule and cost estimate are ongoing. Turbine/Generator contract negotiations with the original equipment manufacturer have concluded without being able to reach a satisfactory agreement. Management is executing "Plan B" which consists of separating the scope into Original Equipment Manufacturer (OEM) only scope and other scope. The project is evaluating alternate vendors and contract strategies for the other scope and has started discussions with Alstom for the OEM only scope. Management has also commenced contract planning for the reactor defueling work program.

The Darlington Energy Complex, which will house a full-scale reactor mock-up as well as warehouse facilities and offices, is ahead of schedule with the potential for an early occupancy around mid 2013.

Scope definition to the system level is progressing well for all projects. Management is continuing to develop its overall project plan and estimate based on results of the scoping process. Further details on the project status are provided in the attached 'Darlington Refurbishment Program Status Report' for the period ending September 30, 2012.

As provided in Appendix 1, the Darlington Refurbishment overall project cost estimate remains less than $10B (2009$) or $10.8B (2012$), excluding interest and escalation. Management continues to have a high confidence that the refurbishment of the Darlington units will result in a Levelized Unit Energy Cost (LUEC) of less than 8.0¢/kWh (2009$) or 8.6¢/kWh (2012$). The economics of Darlington Refurbishment are comparable with Combined Cycle Gas Turbines (CCGT). The continued uncertainty in long term price of gas, the cost of a CO_2 adder and the future of shale gas makes the refurbishment of Darlington an attractive option for Ontario.

Management is seeking incremental release of $492M to complete 2013 detailed planning deliverables within the Definition Phase, resulting in a total cumulative release of $928M for the project. Details of this release request are provided in Appendix 2.

Included in this request is the incremental release for Facility and Infrastructure projects to support the Darlington Refurbishment Project and extended operations of the Darlington station for an additional 30 years, including 2013 release for a new Auxiliary Heating System Facility, West Security, Office and Lunchroom / Change Room Facility, R&FR Island Support Annex, and Refurbishment of the Operations Support Building. These projects will be managed within the overall program using the internal gating/release process. Management will continue to provide quarterly status reports on the progress of these projects.

A recommendation to the Board on OEFC - Darlington Refurbishment Definition Phase Financing is being separately submitted.

RECOMMENDATION

That the Board of Directors:

- Approve a release of $492M for 2013 detailed planning deliverables (including 2013 funding for Facilities and Infrastructure projects), for a total cumulative release of $928M for the Definition Phase.

Recommended By:	**Approved for Submission to the Board of Directors**
"Original signed by:"	*"Original signed by Donn Hanbidge on behalf of :"*
Albert Sweetnam Executive Vice President, Nuclear Projects	Tom Mitchell President and Chief Executive Officer

This Board memorandum was reviewed and approved for submission to the Board of Directors by the Nuclear Oversight Committee on November 13, 2012.

APPENDIX 1 - UPDATE ON THE DARLINGTON REFURBISHMENT PROJECT ECONOMICS

The Darlington Refurbishment Project has been assessed against other feasible generation projects which OPG might consider, including new Combined Cycle Gas Turbines (CCGT). The following is a summary of the economic assessment.

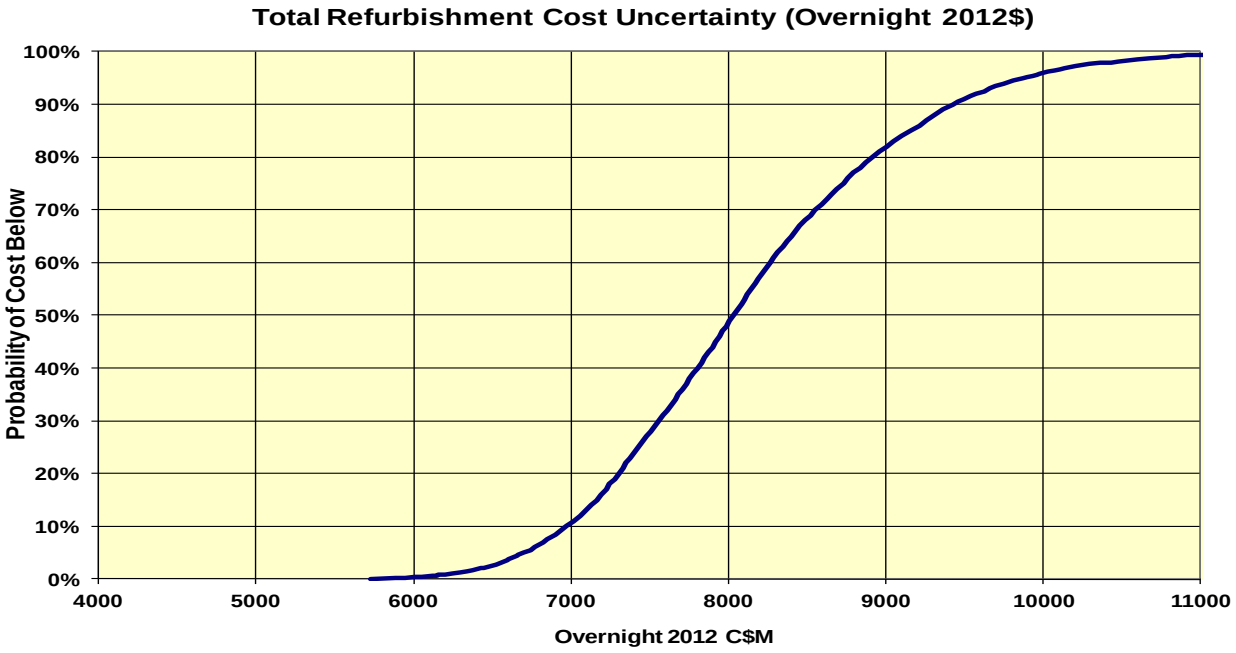
Summary of the Economic Assessment

The Darlington Refurbishment Screening Level Economic Assessment was prepared and was endorsed by the Darlington Management Advisory Committee on September 29, 2008 and subsequently reported to the Nuclear Generation Projects Committee of the Board on November 19, 2008. In November 2009, based on the economics of the project as documented in the Preliminary Business Case, the OPG Board of Directors approved the overall timeline and release strategy for the refurbishment, and released funds to complete the Preliminary Planning within the Definition Phase of the Darlington Refurbishment Project, and commence development of the required infrastructure. In November 2011, the OPG Board of Directors released additional funds to commence the Detailed Planning work in the Definition Phase.

The economic assessment has been updated to reflect current knowledge and understanding of the Darlington Refurbishment Project and to reflect additional experience from other refurbishment projects.

As shown in Figure 1 below, the Darlington Refurbishment Project overall costs estimate remains less than $10B (2009$) or $10.8B (2012$) which is consistent with the Preliminary Business Case of November 2009. This amount includes contingency and excludes interest and escalation.

Figure 1: Darlington Refurbishment Project Cost Confidence Ranges



The current expectation on schedule duration remains an average of 36 months per unit, with a total duration of 88 months assuming 19 and 17 month overlaps between units.

The future operating costs and performance of Darlington are a significant aspect of the economic assessment. An updated analysis has been completed of past performance in order to forecast the expected capability factor for the Darlington units in the post-refurbishment period. The following table summarizes the refurbishment and key post-refurbishment costs and performance assumptions used in the economic assessment.

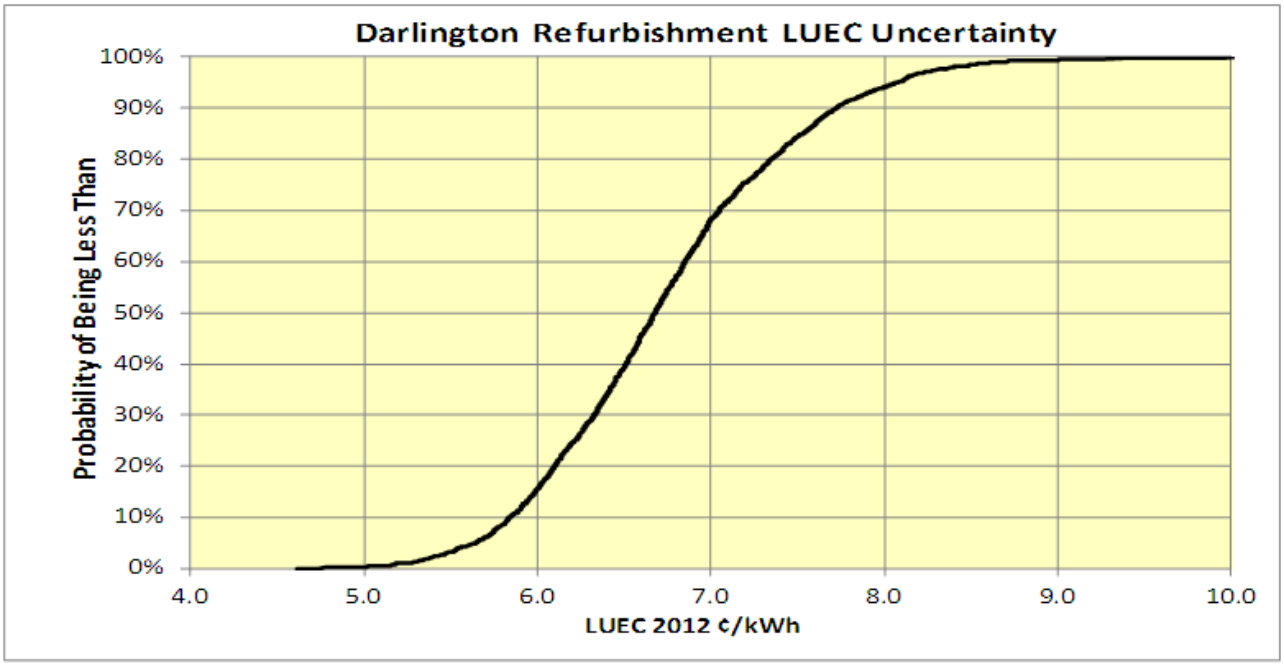
Table 1: Current Darlington Refurbishment/Post-Refurbishment Costs and Performance Forecasts

	Low Confidence (10%)	Medium Confidence (50%)	High Confidence (90%)	Opportunity
Refurbishment Cost ($B) Overnight Costs (2012$) Total Cost – 4 units (1) Avg. Cost per Unit	[redacted]	[redacted]	[redacted]	Lower overall project costs by applying lessons learned, effective planning and control of scope, and execution excellence and exploiting economies of scale
Post Refurbishment Capability Factor	93%	88%	83%	Replacing equipment in refurbishment that allows increased unit reliability
Post Refurbishment Annual Costs (2) (2012$M/yr)	[redacted]	[redacted]	[redacted]	Through business transformation continue to lower the direct and indirect costs of operations

Notes:
(1) Total Cost includes Interest and Escalation.
(2) Includes Station Base (OM&A), Outages (OM&A), and Projects (Capital and OM&A) and Nuclear and Corporate Support; excludes Fuel & Fuel Related

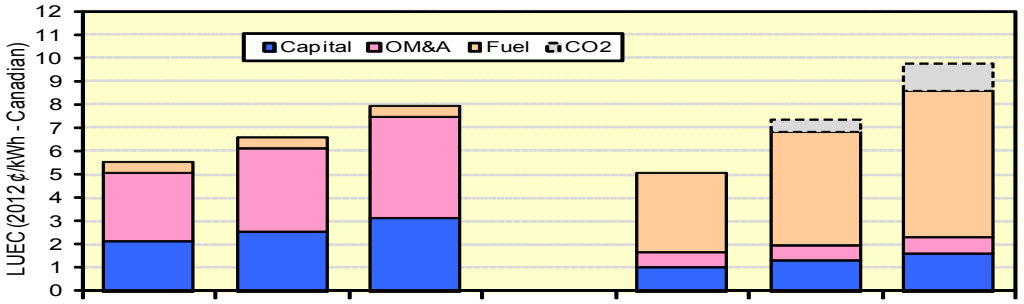
As shown in Figure 2 below, OPG continues to have high confidence that the refurbishment of Darlington will result in a LUEC of <8.0 ¢/kWh (2009$) or <8.6 ¢/KWh (2012$), which is consistent with the LUEC reported by OPG in 2009.

Figure 2: Darlington Refurbishment Levelized Unit Energy Cost Confidence Ranges



The economics of Darlington Refurbishment are comparable with Combined Cycle Gas Turbines (CCGT); however, there is uncertainty in gas plant power costs including the cost of CO_2 and the future of shale gas, as shown in Figure 3 below.

Figure 3: Levelized Unit Energy Costs for Darlington Refurbishment and Comparators



Assumptions:	Darlington Refurb				New CCGT		
	Low	Median	High		Low	Median	High
Overnight capital (C$B)	[redacted]				[redacted]		
Overnight capital (C$/kW)							
Annual Capacity Factor (%)	93%	88%	83%		93%	88%	83%
Gas Price (C$/mmBtu @ Henry Hub)					4	6	8
CO_2 Offset Cost (C$/tonne)					0	15	30

Recommendation

On the basis of this updated analysis which continues to show that the refurbishment of Darlington is economic relative to other generation options, Management recommends proceeding with further detailed planning expenditures in the Definition Phase of the Darlington Refurbishment Project.

1.0 EXECUTIVE SUMMARY

The Darlington Refurbishment ("**DR**") Commercial Strategy identified a need to establish separate contracting strategies for each of the major projects under the DR Program. The recommended contracting strategy is based on the business drivers and commercial principles set out in the DR Program Commercial Strategy and specific contracting considerations relevant to the Turbine Generator ("**TG**") Project ("**Project**").

The Darlington TG sets were custom designed and are unique to Darlington Nuclear Generating Station ("**DNGS**"). The Project under the DR Program is a combination of piecemeal retrofits, repairs of hardware, hydraulics and full controls upgrades. Successful planning and execution of this work will need a large amount of technical integration and accurate interfacing. The contracting strategy for the Project thereby recommends bundling the following work into one package for contracting purpose as the most preferred option:

- Turbine High Pressure, Low Pressure, and Auxiliaries repairs/replacements
- Generator Rotor, Stator, and Auxiliaries repairs/replacements
- Moisture Separator Reheater repairs/replacements
- Turbine Controls Upgrade
- Generator Controls Upgrade

Bundling the work in this manner allows work to be efficiently scoped, planned, scheduled, and managed in accordance with the DR Program schedule.

Having considered various contracting and sourcing models, the TG Project Team concluded the nature of the TG work will fit well into the procurement model for an Engineering, Procurement and Construction ("**EPC**") contract. The recommended approach is to negotiate acceptable contract terms with the Original Equipment Manufacturer ("**OEM**") as the primary option while in parallel continue to perform the preparatory work that would allow OPG to pursue, in whole or in part, a competitive bidding process as a backup option. This approach will allow OPG to minimize impact on the DR Program schedule, if OPG decides to cancel the negotiations with the OEM for any reason (including for reasons of not being able to achieve the negotiation objectives within a specified time frame) and continue pursuing other sourcing alternatives.

Various pricing models were considered by the Project Team. The recommended pricing models vary based on the nature of the work and have been determined based on operational knowledge/experience.

The approach recommended in this contracting strategy is expected to allow OPG to achieve the DR Program and Project objectives, as well as post-refurbishment goals within acceptable risk thresholds and value for money considerations.

2.0 INTRODUCTION

2.1 Background Information

The Project is one of the major projects within the DR Program. The goal of the Project is to complete a major overhaul and upgrade of the turbine generator sets and their control systems to extend the life of the equipment for an additional 25 to 30 years. Five separate and distinct phases have been identified, presented to the DR Scope Review Board ("**SRB**")[1] and approved at Project Gate 0 on May 5, 2011:

(a) Steam Turbines and Turbine Auxiliaries: inspections, repairs, and/or replacements of High Pressure ("**HP**") and Low Pressure ("**LP**") turbine components and a number of turbine auxiliaries;

(b) Generator and Generator Auxiliaries: inspections, repairs, and/or replacements of generator components (including generator stator rewind) and a number of generator auxiliaries,

(c) Moisture Separator Reheater ("**MSR**"): inspection, overhaul, and/or replacements of MSR internals and auxiliaries (e.g. strainers, valves);

(d) Turbine Control Upgrade: replacement of the obsolete analogue Steam Turbine Electronic Control ("**STEC**") System, includes entire Turbine Supervisory System with modern design (digital system); and

(e) Generator Excitation Upgrade: replacement of the obsolete Generator Excitation system controls with modern design (digital system) and a set of additional Generator Excitation and Protection equipment to resolve obsolescence.

Based on the Class 5 estimates[2] developed in 2011 for the above work, the total estimated value for the Project is around $510 M, of which around [redacted] is the

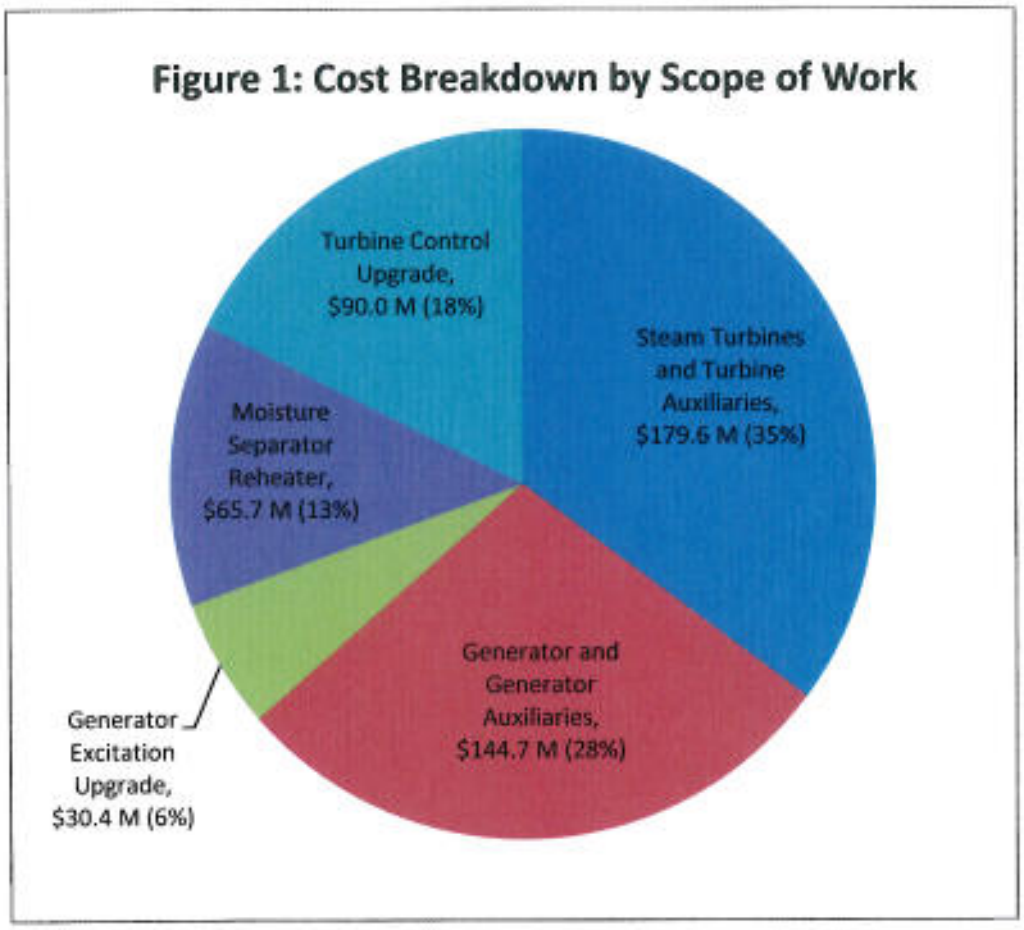
[1] *The purpose of the SRB is to:*
- *challenge the proposed refurbishment work scope to ensure work is necessary for the successful refurbishment of Darlington;*
- *align the scope with the objectives of maintaining/improving reliability and lowering production costs; and*
- *ensure investments in refurbishment deliver value for money.*

[2] *Cost Estimate Classification System from the Association for the Advancement of Cost Engineering (AACE) which maps the phases and stages of project cost estimating together with a generic maturity and quality matrix. The Project Class 5 estimates are based on current Darlington Scope Request (DSR) forms, prepared at the initial stages of project definition based on limited information.*

confirmed scope and [redacted] is classified as the contingency scope.[3] The contingency scope is the work that has been identified as "potentially required". A set of contingency items are listed for the Steam Turbine and Turbine Auxiliaries, Generator and Generator Auxiliaries and MSR phases. Once inspections and analyses are complete, recommendations will be made as to whether this scope of work is required.

Although some of the work can be done as part of Darlington's project portfolio for inspection and maintenance, the whole work is planned to be executed during the refurbishment outage for efficiency to minimize outage schedule. The breakdown of work sub-packages by estimated $ value (and % value) is presented below. These estimates may change over time as the project definition phase progresses and will be updated.

Figure 1: Cost Breakdown by Scope of Work



[3] *In addition to the above estimates, approximately $60 M of turbine related operations & maintenance ("OM&A") cyclical work (e.g. regular equipment maintenance activities, removal and installation of the HP casings, etc.) are also planned for execution during this Project.*

The Darlington TGs were originally designed, manufactured and installed by Brown Boveri Canada Inc. ("**BBC**"). BBC, the OEM has since undergone a number of changes as a business entity – BBC was bought out by Asea Brown Boveri ("**ABB**") and subsequently ABB's TG business segment was bought out by Alstom Power ("**Alstom**"). Currently, Alstom is the OEM on record and has been providing technical, engineering, maintenance and outage support services for the Darlington TG units. These TG sets are considered specialized products, unique in North America as they were custom designed specifically for Darlington.

2.2 Objectives and Scope of Strategy

The key purpose of this document is to set out the overall contracting strategy for delivery of the Project scope of work. This document will:

(a) Identify the contracting alternatives suitable for the Project;

(b) Document evaluation considerations; and

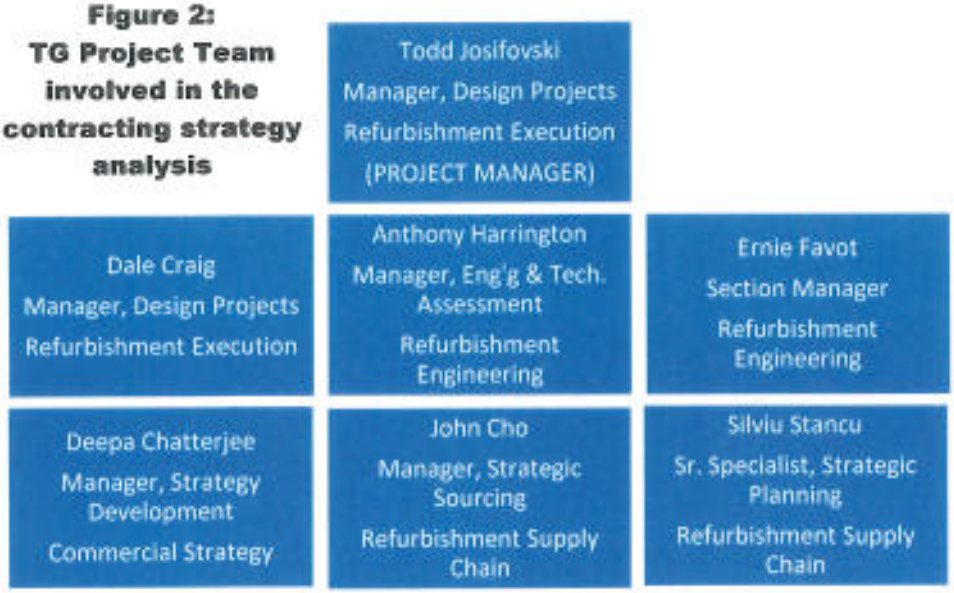
(c) Recommend a contracting strategy (including strategy around sourcing and pricing).

A Contracting Strategy Summary for Turbine Generators (NK38-REP-09701-10030-R000) was prepared to provide an overview and key drivers for the proposed contracting strategy. That document was reviewed and approved by the EVP, Nuclear Projects on March 9, 2012. As the Project Team progresses with the recommended path forward, this document was created to provide a more in-depth analysis of the main alternatives and key factors considered by the Project Team in the process of developing the proposed contracting strategy.

2.3 Development Process

The Project Team was established in early March 2011 with representation from Engineering, Execution, Supply Chain and Commercial Strategy (renamed Nuclear Commercial Development in June 2012). This core Project Team commenced the strategy development work through understanding the scope of work with the review and analyses of background information available from OPG's 2010 Darlington Steam Turbine Electronics Controls Project (DN STEC Upgrade Project 16-33973), relevant internal and external operating experience ("**OPEX**") and results from comprehensive Component Condition Assessments ("**CCA**"). The Project Team identified and analyzed potential options around work packaging, contracting approaches/models and pricing options. Inputs were also solicited from other key stakeholders within the company and external sources.

Figure 2:
TG Project Team involved in the contracting strategy analysis



3.0 STAKEHOLDER ANALYSIS

In addition to the Project Team engaged in strategy development, key stakeholders groups who provided input included representatives from Law (internal and external counsel from Blake, Cassels & Graydon, LLP), Finance, DR Planning & Control and Hydro Supply Chain. The recommended strategy was also communicated to the Chief Supply Officer ("**CSO**") and the following committees:

- DR Program Level Cross-Functional Sourcing Team ("**CFST**")
- Refurbishment Project Executive Team ("**RPET**")
- Nuclear Executive Committee ("**NEC**")
- Executive Advisory Committee ("**EAC**")
- Nuclear Oversight Committee ("**NOC**") of OPG's Board of Directors

4.0 CONTRACTING CONSIDERATIONS

In developing the contracting strategy for the Project, the Project Team took into consideration the need to ensure the achievement of OPG's business objectives and the DR Program and Project objectives while keeping with Guiding Commercial Principles as outlined in the DR Program Commercial Strategy (NK38-REP-00150-10001).

The following business drivers have also been considered in evaluating the contracting strategy for this Project:

- Operational Reliability: TG units are critical components for nuclear generation. Any problem requiring an unexpected shutdown of the main turbine is likely to cause a significant unplanned outage, potentially resulting in millions of dollars of downtime costs. The DGNS have approximately 870,000 KWh of generation capacity per unit and costs associated with unplanned outages can amount to $1.25 M per day for one unit. Operational reliability is a critical consideration for this Project.

5.0 VENDOR/MARKETPLACE CAPABILITIES, RESTRICTIONS

Based on market intelligence, the Project Team identified the following vendors as capable of undertaking the whole or parts of the scope of work ("**SOW**"):

(a) Turbines, Generators, and Auxiliaries: Siemens, General Electric ("**GE**"), Alstom;

(b) Moisture Separator Reheaters: Siemens, GE, Alstom, Babcock & Wilcox; and

(c) Turbine, Generator and Excitation Controls (includes Excitation power component upgrades): Siemens, GE, Alstom, ABB. Invensys can only perform turbine and general controls.

The Project Team has also identified that some off-shore Japanese and Korean TG manufacturers such as Toshiba, and Mitsubishi who may be in a position to offer some alternative options for this work. However, additional OPEX will need to be sought out on their performance in similar projects. Additionally, it will be important to seek out information on these companies performance as a support organisation for longer term maintenance requirements. These companies will be considered in any competitive bidding options.

Based on the 2010 Vendor Assessment Report from the DN STEC Upgrade Project (NK38-REP-64100-10002-R000) which evaluated five vendors (GE, Siemens, ABB, Alstom, Invensys), each is identified as capable of supplying a functional turbine control system. While the general hardware and software architectures for all systems were very similar, the key variations between vendors existed in the types of redundancy, ability to interface with existing systems, Human Machine Interface ("**HMI**") offerings, installation and commissioning capabilities, hardware and software support periods, and simulator integration support.

Alstom, as the OEM has been providing technical support to OPG to address life cycle management issues and technical expertise during Darlington's planned outages for the last 15 years, working with the design basis of Darlington's TG set. In the TG industry, Alstom currently holds the dominant position in the nuclear generation refurbishment market winning more than half of the available world refurbishment market since 2004. Next to Alstom, Siemens and GE are second and third in terms of installed base of nuclear turbines globally[3]. Of these three vendors, only Siemens and Alstom have retrofitted equipment on other manufacturers' steam TG's. Most retrofits are performed by the OEM.[4]

Siemens is currently the OEM for OPG's turbine units at Pickering Nuclear Generating Station ("PNGS"), providing on-going maintenance and technical support. [redacted]

[3] *2011 industry data indicates Alstom has a market share of 30%, Siemens 23%, and GE 15%.*

[4] *Electric Power Research Institute (EPRI), 2010 Technical Report on Large Steam Turbine Component Retrofits and Replacements: Lessons Learned*

6.0 CONTRACTING ALTERNATIVES ANALYSIS

6.1 Work Packaging for Contracting Purpose

The Project Team considered the following two work packaging options for contracting purposes:

- Option 1: Unbundle the total SOW by scope (i.e. equipment/component or labour and materials) or type of work (i.e. Engineering, Procurement or Construction); and
- Option 2: Bundle all TG work as one package.

A summary of the analysis completed are included in Appendix A. Under Option 1, based on the nature of the vendor, the Project Team determined that the lowest level of unbundling technically feasible is to divide the Project by equipment/component into the five phases identified in Section 2.1. Although Option 1 provides the opportunity for OPG to increase the number of potential vendors to bid on the separate scope items with more leverage for OPG to obtain better contract terms and prices, it introduces substantial risks in several key areas which may prevent OPG from meeting the Project and DR objectives, increased technical and project management challenges. These include extensive in-house integration and monitoring efforts (i.e. coordination, scheduling, contract management, etc.), significant increase in equipment compatibility issues and overall inefficiencies with the lack of a single point of accountability.

The Project Team recommends proceeding with Option 2. Contracting all TG work as one package under Option 2 not only minimizes the work effort required for OPG, it provides greater confidence of seamless integration of equipment with overall vendor quality management and sharing of risks with the single point of accountability which will be essential given the expected regulatory scrutiny that the Project would likely be subject to.

Work packaging under Option 2 is also supported by industry research prepared by the DN STEC Upgrade Project team in 2010 (OPEX Report NK38-REP-64000-10001: DNGS Steam Turbine Controls Retrofit). The research, based on a review of a number of Electric Power Research Institute Reports and direct OPEX enquiries from eight utilities in Canada and the US, which completed similar controls retrofits stated: "The strategy during the planning stage of such a complex project should be to use the same vendor for turbine, generator, and electro hydraulic governor if possible to facilitate easy interface and reduce risks. If not, the interfaces have to be very well-defined and understood prior to design and implementation."

6.2 Contracting Model

To maintain alignment with the overall contracting framework that has been adopted for the DR Program, the Project Team examined the following contracting models for this Project:

- Option 1: Traditional Design-Bid-Build
- Option 2: Design-Build or EPC
- Option 3: Turnkey

Based on analysis of these contracting models as summarized in Appendix B, the Project Team recommends proceeding with Option 2. Under Option 2, an EPC contract would facilitate efficient scoping, planning, and execution, consistent with timing and scheduling considerations for the DR Program. This model minimizes the number of vendor interfaces and hand-offs while assigning a "single point of accountability" for Project execution. The other two options were not considered viable because of the extensive integration efforts required in this Project.

6.3 Sourcing Strategy

The next decision point is around the sourcing approach to be adopted for this Project. Other vendors have no design basis knowledge of the Darlington TG sets. A 2006 competitive process for replacement of the last state of turbine blades at Darlington did not yield a viable proposal from a non-OEM vendor due to limitations in critical/key machine boundary conditions only known to the OEM. The non-OEM vendor had to make significant assumptions and factor in a number of technical constraints. To consider non-OEM vendors, OPG would need to obtain Intellectual Property ("**IP**") rights from OEM Alstom to make the information available to the other vendors or the other vendors will need to either reverse engineer, or completely re-design the components in order to complete all the repairs, replacements and controls upgrades. The table below provides a summary provided by Faithful+Gould Inc. ("**F&G**"), an engineering consultant hired by OPG, in respect of the potential additional costs associated with obtaining the design basis information to facilitate a competitive sourcing strategy.

Figure 3: Additional Estimated Costs Associated with Obtaining Design Basis Information for Competition[5]	
Obtaining IP Rights for Design Basis information from OEM:	
• Restricted[6]	$22.9 M to $39.1 M
• Unrestricted (allows for manufacturing and sale of components)	$40.5 M to $62.1 M
Reverse Engineering[7]:	
• Additional work to allow Reverse Engineering	$11.7 M to $39.0 M (min. for 1 unit to max. for 4 units)
• Reverse Engineering – including Controls (vendor costs only, excludes OPG internal costs)	$14.6 M to $22.5 M

The report identified that although most components can now be reverse engineered, OEM specific work areas for the Turbine, Generator and Excitation Controls SOW include controls logic, hydraulics, and system integration where extensive work technical specification and engineering work with a high level of complexity is required. Empirical evidence in F&G's analysis suggests that success to first-time-right quality remains limited which may result in higher potential risks, additional costs and delays in the Project schedule. The Koeburg Nuclear Power Station is an example of a turbine reverse engineering activity which resulted in dependability problems; the unit was in service for ten months before the failure occurred and investigation identified shortcomings in the reverse engineering process and material receiving process.

[redacted]

[5] *F&G, OPG Darlington Refurbishment IP and Reverse Engineering Report (February 2012)*

[6] *Restricted IP Rights are limited to provision of outline Operating and Maintenance drawings showing general arrangements of equipment and exploded views but not material specifications, detailed clearances and technical specifications.*

[7] *Reverse Engineering describes the practice of determining material make-up and dimensions of an existing part and using that information to design and manufacture a replacement part.*

Based on the above cost estimates, a competitive sourcing strategy may add approximately 5% - 12% additional costs to the overall Project to obtain the necessary design basis information. There may also be additional increase in internal costs and efforts which have not been quantified. Given the value for money considerations and DR Program objective to minimize the impact on existing units, the Project Team decided that the best sourcing strategy is to initially approach Alstom with the full SOW and endeavour to negotiate appropriate contract terms, while in parallel embarking on preparatory activities respecting other sourcing alternatives. With this approach, if negotiations with Alstom are unsuccessful, OPG will be able to minimize impact on the Project schedule and continue pursuing other sourcing alternatives, including engaging other vendors in a competitive process.

7.0 RECOMMENDED CONTRACTING STRATEGY

Based on the Contracting Alternatives Analyses in Section 6.0, the Project Team recommends the following contracting strategy:

Plan A – Initial Negotiations with OEM

As an initial step, OPG will bundle the whole TG work into one package and engage OEM Alstom in negotiations for an EPC contract. As evidenced in the information provided in Section 6.0 above, this approach appears to be the most optimal approach that allows OPG to obtain value for money based on the lowest operational risk and lowest project cost. This approach also appears to best align with the DR program objectives of long-term reliability and maintainability of the equipment, with reliable performance and lower production costs. The basis of selection for the Plan A is also validated through in a facilitated workshop using the Kepner-Tregoe ("**KT**") Decision Analysis[8] tool as outlined in Appendix C. In summary:

- Bundling of the whole TG work into one package for contracting purposes offers the best opportunity for a successful project from cost, schedule, and quality perspectives given the high level of integration required between the various work phases for this Project. It is assessed qualitatively that the potential benefits from bundling will outweigh the potential cost savings that may be derived from piecemealing the work for contracting purposes. This approach is also recommended by industry OPEX.

- The Design-Build (EPC) contracting model offers the most balanced approach for the whole TG work with the best opportunity for a successful project from cost,

[8] *Kepner Tregoe Decision Analysis tool is a structured methodology for gathering information and prioritizing and evaluating it. It was developed by Charles H. Kepner and Benjamin B. Tregoe in the 1960s. This is a rational model that is well respected in business management circles. An important aspect of Kepner-Tregoe decision making is the assessment and prioritizing of risk.*

schedule, and quality perspectives with a single point of accountability and sharing of risks.

- Engaging the OEM as an Initial Step is a prudent decision from a value for money, Project and operational risks perspectives given the additional costs associated with obtaining the design basis information to facilitate competition, increased internal resource commitments and the potential equipment compatibility issues. Alstom as the OEM for OPG's TG sets at Darlington will have the ability to manufacture required parts in a reasonable time frame and OPG will be able to obtain spare parts with no extra-stocking or quality requalification requirements. Alstom has a good track record of field execution with OPG Nuclear and the nuclear industry, with significant experience in this type of work and presence in more than half of the world refurbishment market. The other two vendors under consideration for a bundled EPC contract should OPG engage in a competitive process would include GE and Siemens. GE has [redacted]

The negotiations strategy with Alstom will include a pre-defined set of negotiation objectives and key success factors, building on the key principles of accountability, transparency and value for money. This is outlined in the Darlington Refurbishment Turbine Generator Project Negotiations Plan (NK38-PLAN-09701-10096). OPG will maintain appropriate leverage in the negotiations with a defined timeline to complete negotiations and full disclosure of OPG's plans to engage in a competitive process if negotiations are unsuccessful.

In preparation for negotiations, the Project Team gathered available commercial OPEX for Alstom through discussions with internal OPG stakeholders across the organization that had past experience of negotiations and experience working with Alstom. Such stakeholder feedback provided the Project Team with an understanding of the key commercial terms that Alstom had provided or agreed to in previous competitive processes or single source purchases. OPG intends to negotiate a new agreement for the Project that will be comparable to an agreement successfully negotiated with Alstom in the past as a result of a competitive process and build in any lessons learnt from OPG's past experience with Alstom.

Negotiations are not a commitment to enter into an agreement. For OPG to engage Alstom in an EPC contract for the entire SOW, the proposed contract must achieve the pre-determined negotiation objectives including being commercially viable (i.e. value for money, transparency, appropriate allocation of risks, appropriate commercial terms, etc.). Should OPG contract the services of Alstom under Plan A, it would require a full single source justification in accordance with OPG-PROC-0058: Procurement Activities, and the appropriate levels of approvals mandated by OPG-STD-0017: Organizational Authority Register ("**OAR**"). The proposed timelines, key deliverables and due diligence associated with the proposed negotiation activities are outlined in Appendix D.

Plan B – Competitive Sourcing

The Plan B option involves OPG engaging in an alternate procurement process which involves competitive sourcing. This option will be invoked under the following possible scenarios in Plan A:

i. OPG is unsuccessful in achieving the desired negotiation objectives and goals;

ii. Either OPG or Alstom decides to cancel negotiations for any reason; or

iii. OPG's senior management does not approve the single source contract when negotiations are completed.

Under this plan, OPG will issue an Expression of Interest ("**EOI**") to potential vendors and will develop technical requirements/specifications for the Request for Proposals (**RFP**"). OPG plans to consider the available options in respect of procuring materials, equipment and services regarding the Project, and the intent of the EOI is to assist OPG to assess the market for such materials, equipment and services taking into consideration Project risks related to the scope, cost and schedule. OPG will use the information submitted by potential vendors in response to the EOI to prepare a proponents list and the RFP, review scope risk related to non-OEM vendors and determine if the OEM needs to be engaged for specific activities and/or supply of equipment on a selective single source basis. Vendors may express interest in the entire scope of the Project, or individual work scopes (i.e. any of the 5 scopes of work) that are suited to their experience, expertise or interest.

The Project Team will initiate activities associated with Plan B in parallel with Plan A. Work will continue to assess which equipment/component will require design basis or other information from OEM to unbundle the TG work to re-evaluate the SOW packaging for contracting purposes. These additional planning activities and adherence to the requirements in engaging in a transparent and fair competitive process in Plan B are expected to require 18 months of work effort. Details of the key deliverables and the TG Project schedule will be reassessed when Plan B is invoked to incorporate the timelines as outlined in Appendix E. Plan B is not expected to impact the critical path for the overall DR Program.

8.0 CHOICE OF PRICING MODEL

The Project Team recommends that the pricing models be different for the confirmed scope of the work [redacted] and the contingency scope of work [redacted]

For the confirmed scope, it is recommended that:

(a) The materials for the TG and Auxiliaries (including skids) and MSR to be done on a fixed price basis since the work will be essentially completed on the vendor's premises.

(b) If any interface engineering (e.g. Engineering Change Control ("**ECC**") type integration work) is required for the above work, then it should be managed through a cost reimbursable plus fixed-fee model. Another option may be to ask the vendor to provide a fixed price (based on the estimated work effort (in hours) × hourly labour rate) for the ECC integration work based on the various existing interface agreements that will be provided to the vendor.

(c) The inspection, analysis, and repair/overhaul work for TG and Auxiliaries at site to be based on a cost reimbursable, with a target price plus fixed fee model. The target price should be arrived at through an open book pricing approach.

(d) The engineering and supply portion of the Turbine Controls and Generator Excitation Upgrades to be done on a fixed price basis. The installation and testing work at site should be based on a cost reimbursable, with a target price plus fixed fee model. The target price should be arrived through an open book pricing approach.

(e) All types of commissioning support work to be priced on a cost reimbursable basis, as the level of uncertainty in scope is maximum for this portion of the work in the Project definition phase.

For the contingency scope of work, the Project Team recommends that any work accepted as confirmed scope from this bucket during Project execution should be package under fixed price and fixed schedule model. To achieve transparency and value for money, OPG should pursue an open-book contract with the vendor for full disclosure, cost transparency and build-in incentive/disincentive mechanisms around target costs to promote risk sharing. An open-book contract will allow OPG to work with the vendor to obtain visibility into each major cost item to reach a target price that reflects an appropriate risk profile for each party. This also provides OPG with an audit trail to mitigate regulatory risks associated with rate applications and the ability to retain information in planning future projects.

9.0 PROCUREMENT PROCESS PREREQUISITES/CONSIDERATIONS

The procurement process and negotiation strategy needs to effectively executed in order to obtain value for money and appropriate commercial terms. Approvals to enter into a contract will not be obtained unless value for money can be demonstrated.

The process includes the following stages:

- Stage I – Prepare for Negotiations
- Stage II – Conduct Negotiations
- Stage III – Complete the Commercial Agreement
- Stage IV – Obtain Approvals and Execute Agreement

Stage I - Prepare for Negotiations

The objective of Stage I is to prepare OPG to enter into negotiations with the OEM. At the end of this stage, OPG will be prepared to negotiate with Alstom and, in the event negotiations fail to achieve the desired objectives, to have a preliminary preparation/plan to initiate a competitive process. This stage will comprise of a number of activities largely executed in parallel.

Stage II - Conduct Negotiations

The objective of Stage II is to conduct the negotiations and arrive at a commercially acceptable agreement with appropriate commercial terms and pricing which meets technical requirements. The core activity will be the actual conduct of negotiations.

Stage III - Complete the Commercial Agreement

(Refer to Stage V if Stage II is unsuccessful)

On completion of successful negotiations, as measured against the negotiation objectives, the actual agreement will be completed and finalized. This stage will include OPG internal stakeholder reviews of the draft agreement to assess whether value for money has been obtained.

Stage IV - Obtain Approvals and Execute Agreement

OPG will prepare/complete required documents for review and approval in accordance with OPG-PROC-0058: Procurement Activities. The key documents will include:

- "Single Source Justification" Form
- "Major Contract Memorandum"
- "Recommendation for Submission to the Board of Directors Memorandum" (with supporting information)

Stage V - Subsequent Phase (if Stage II is unsuccessful)

If the negotiations do not succeed within the specified time frame, OPG will terminate the negotiations and pursue other procurement alternatives (i.e. re-package and issue RFP). An alternate procurement approach has the potential to considerably delay the Project schedule due to the associated engineering and technical requirements, and, as well, negatively impact multiple Project objectives identified earlier in this Report. The possible options and other positions that OPG may take, including off-ramps during negotiations, will be further developed and executed during this stage.

10.0 INTERFACE OR INTEGRATION ISSUES WITH OTHER CONTRACTING STRATEGIES/MAJOR CONTRACTS FOR THE DARLINGTON REFURBISHMENT WORK

A bundled EPC approach to the TG work can be performed mostly in a stand-alone manner due to the following:

(a) The islanding approach plans to create a "fence inside the fence" for the TG machines;

(b) The areas can be easily geographically segregated; and

(c) Well defined termination points will be developed to define the limits of all the geographic segregation.

As the definition phase progresses further for all other DR Program projects, including for the Balance of Plant, integration issues will be reassessed.

11.0 KEY RISKS AND PROPOSED MITIGATION

Some of the key risks and proposed mitigation are:

(a) [redacted] In the event negotiations break off or become stalled, there is a significant risk to the TG Project in terms of schedule. The contract negotiations have to be carefully planned and managed. To focus the negotiation efforts, OPG has developed a Negotiation Plan (NK38-PLAN-09701-10096) which outlines the negotiation objectives in advance.

(b) [redacted] OPG has the final decision authority for scope and plans to implement a strict scope review and control process for deciding any additional scope inclusion from this group of work. OPG has knowledgeable people who can assess recommendations and determine work to be done prior to work proceeding.

(c) Engineering has confirmed that if the work goes to the OEM, it will only need functional specifications compared to the detailed technical specifications that will be required for a competitive scenario. Scope definition and technical requirements are expected to be further refined through discussions with Alstom under Plan A, which may reduce the incremental engineering work required if OPG has to engage in a competitive process under Plan B.

(d) Due to engineering and material lead times, the contract(s) need to be executed in early 2013 to meet an October 2016 start date for the Project. OPG will have to engage Alstom in active negotiations with a target date of completion that will

Her Majesty The Queen *Appellant*

v.

Toronto Star Newspapers Ltd., Canadian Broadcasting Corporation and Sun Media Corporation *Respondents*

and

Canadian Association of Journalists *Intervener*

Sa Majesté la Reine *Appelante*

c.

Toronto Star Newspapers Ltd., Société Radio-Canada et Corporation Sun Media *Intimées*

et

Association canadienne des journalistes *Intervenante*

INDEXED AS: TORONTO STAR NEWSPAPERS LTD. *v.* ONTARIO

Neutral citation: 2005 SCC 41.

File No.: 30113.

2005: February 9; 2005: June 29.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of expression — Freedom of the press — Dagenais/Mentuck test — Search warrants — Crown requesting order sealing warrants and informations used to obtain warrants — Whether Dagenais/Mentuck test applicable to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings.

Criminal law — Provincial offences — Search warrants — Sealing orders — Open court principle — Protection of confidential informant — Crown requesting order sealing warrants and informations used to obtain warrants — Whether Dagenais/Mentuck test applicable to sealing orders concerning search warrants and informations upon which issuance of warrants was judicially authorized — Whether Dagenais/Mentuck test applicable at pre-charge or "investigative stage" of criminal proceedings.

RÉPERTORIÉ : TORONTO STAR NEWSPAPERS LTD. *c.* ONTARIO

Référence neutre : 2005 CSC 41.

N^{o} du greffe : 30113.

2005 : 9 février; 2005 : 29 juin.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Liberté d'expression — Liberté de la presse — Critère de Dagenais/Mentuck — Mandats de perquisition — Demande par le ministère public de mise sous scellés des mandats et des dénonciations utilisées pour les obtenir — Le critère de Dagenais/Mentuck est-il applicable chaque fois qu'un juge exerce son pouvoir discrétionnaire de restreindre la liberté d'expression et la liberté de la presse relativement à des procédures judiciaires?

Droit criminel — Infractions provinciales — Mandats de perquisition — Ordonnances de mise sous scellés — Principe de la publicité des débats judiciaires — Protection d'un informateur — Demande par le ministère public de mise sous scellés des mandats et des dénonciations utilisées pour les obtenir — Le critère de Dagenais/Mentuck est-il applicable aux ordonnances de mise sous scellés visant les mandats de perquisition et les dénonciations qui en ont justifié la délivrance? — Le critère de Dagenais/Mentuck est-il applicable à l'étape antérieure au dépôt d'accusations ou à « l'étape de l'enquête » dans une procédure criminelle?

Search warrants relating to alleged violations of provincial legislation were issued. The Crown brought an *ex parte* application for an order sealing the search warrants, the informations used to obtain the warrants and related documents, claiming that public disclosure of the material could identify a confidential informant and could interfere with the ongoing criminal investigation. A court order directed that the warrants and informations be sealed. Various media outlets brought a motion for *certiorari* and *mandamus* in the Superior Court, which quashed the sealing order and ordered that the documents be made public except to the extent that the contents of the informations could disclose the identity of a confidential informant. Applying the *Dagenais/Mentuck* test, the Court of Appeal affirmed the decision to quash the sealing order but edited materials more extensively to protect informant's identity.

Held: The appeal should be dismissed.

The *Dagenais/Mentuck* test applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings, including orders to seal search warrant materials made upon application by the Crown. Court proceedings are presumptively "open" in Canada and public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration. Though applicable at every stage of the judicial process, the *Dagenais/Mentuck* test must be applied in a flexible and contextual manner, and regard must be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. [4] [7-8] [30-31]

Here, the Crown has not demonstrated that the flexible *Dagenais/Mentuck* test as applied to search warrant materials is unworkable in practice, nor has it shown that the Court of Appeal failed to adopt a "contextual" approach. The evidence brought by the Crown in support of its application to delay access amounted to a generalized assertion of possible disadvantage to an ongoing investigation. A party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise

Des mandats de perquisition ont été décernés relativement à des contraventions alléguées à la législation provinciale. Le ministère public a déposé une requête *ex parte* afin d'obtenir la mise sous scellés des mandats de perquisition, des dénonciations ayant servi à obtenir les mandats ainsi que de documents connexes, en faisant valoir que la divulgation de ces documents au public pourrait permettre d'identifier un informateur et compromettre l'enquête criminelle en cours. Le tribunal a ordonné la mise sous scellés des mandats et des dénonciations. Différents organes médiatiques ont présenté une requête en *certiorari* et *mandamus* devant la Cour supérieure, qui a annulé l'ordonnance de mise sous scellés et ordonné que les documents soient rendus publics, sauf dans la mesure où la teneur des dénonciations pouvait révéler l'identité d'un informateur. Appliquant le critère de *Dagenais/Mentuck*, la Cour d'appel a confirmé l'ordonnance de mise sous scellés, mais elle a procédé à une épuration plus étendue des documents afin de préserver la confidentialité de l'identité de l'informateur.

Arrêt : Le pourvoi est rejeté.

Le critère de *Dagenais/Mentuck* s'applique chaque fois qu'un juge exerce son pouvoir discrétionnaire de restreindre la liberté d'expression et la liberté de la presse relativement à des procédures judiciaires, y compris lorsque le ministère sollicite la mise sous scellés des documents relatifs à une demande de mandat de perquisition. La présomption de « publicité » des procédures judiciaires est bien établie au Canada et l'accès du public ne sera interdit que lorsque le tribunal compétent conclut, dans l'exercice de son pouvoir discrétionnaire, que la divulgation serait préjudiciable aux fins de la justice ou nuirait indûment à la bonne administration de la justice. Bien qu'il soit applicable à chacune des étapes du processus judiciaire, le critère de *Dagenais/Mentuck* doit être utilisé avec souplesse et en fonction du contexte, en tenant compte des circonstances dans lesquelles une ordonnance de mise sous scellés est demandée par le ministère public ou par d'autres parties qui ont établi leur intérêt véritable à retarder la divulgation au public. [4] [7-8] [30-31]

En l'espèce, le ministère public n'a pas démontré que le critère souple de *Dagenais/Mentuck*, tel qu'il est appliqué aux documents relatifs à des mandats de perquisition, ne convient pas en pratique, ni que la Cour d'appel a omis d'adopter une approche « contextuelle ». La preuve soumise par le ministère public à l'appui de sa demande de report de la divulgation équivalait à une allégation générale d'entrave éventuelle à une enquête en cours. Une allégation générale selon laquelle la publicité des débats pourrait

investigative efficacy. The party must, at the very least, allege a serious and specific risk to the integrity of the criminal investigation. The Crown has not discharged its burden in this case. [9-10] [34-35] [39]

Cases Cited

Applied: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; **referred to:** *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43; *National Post Co. v. Ontario* (2003), 176 C.C.C. (3d) 432; *R. v. Eurocopter Canada Ltd.*, [2001] O.J. No. 1591 (QL); *Flahiff v. Bonin*, [1998] R.J.Q. 327; *Toronto Star Newspapers Ltd. v. Ontario*, [2000] O.J. No. 2398 (QL).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 2(*b*).
Criminal Code, R.S.C. 1985, c. C-46, s. 487.3.
Provincial Offences Act, R.S.O. 1990, c. P.33.

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rosenberg and Borins JJ.A.) (2003), 67 O.R. (3d) 577 (*sub nom. R. v. Toronto Star Newspapers Ltd.*), 232 D.L.R. (4th) 217, 178 C.C.C. (3d) 349, 17 C.R. (6th) 392, 110 C.R.R. (2d) 288, 178 O.A.C. 60, [2003] O.J. No. 4006 (QL), allowing the Crown's appeal, to a very limited extent, from an order of McGarry J. quashing the sealing order of Livingstone J. Appeal dismissed.

Scott C. Hutchison and *Melissa Ragsdale*, for the appellant.

Paul B. Schabas and *Ryder Gilliland*, for the respondents.

Written submissions only by *John Norris*, for the intervener.

The judgment of the Court was delivered by

compromettre l'efficacité de l'enquête ne peut étayer à elle seule une demande visant à restreindre l'accès du public à des procédures judiciaires. La partie qui demande le secret doit au moins alléguer l'existence d'un risque grave et précis pour l'intégrité de l'enquête criminelle. Le ministère public ne s'est pas acquitté du fardeau qui lui incombait en l'espèce. [9-10] [34-35] [39]

Jurisprudence

Arrêts appliqués : *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76; **arrêts mentionnés :** *Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175; *Vancouver Sun (Re)*, [2004] 2 R.C.S. 332, 2004 CSC 43; *National Post Co. c. Ontario* (2003), 176 C.C.C. (3d) 432; *R. c. Eurocopter Canada Ltd.*, [2001] O.J. No. 1591 (QL); *Flahiff c. Bonin*, [1998] R.J.Q. 327; *Toronto Star Newspapers Ltd. c. Ontario*, [2000] O.J. No. 2398 (QL).

Lois et règlements cités

Charte canadienne des droits et libertés, art. 2*b*).
Code criminel, L.R.C. 1985, ch. C-46, art. 487.3.
Loi sur les infractions provinciales, L.R.O. 1990, ch. P.33.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, Rosenberg et Borins) (2003), 67 O.R. (3d) 577 (*sub nom. R. c. Toronto Star Newspapers Ltd.*), 232 D.L.R. (4th) 217, 178 C.C.C. (3d) 349, 17 C.R. (6th) 392, 110 C.R.R. (2d) 288, 178 O.A.C. 60, [2003] O.J. No. 4006 (QL), qui a accueilli, mais de façon très limitée, l'appel du ministère public contre une décision du juge McGarry infirmant l'ordonnance de mise sous scellés des documents de la cour prononcée par la juge Livingstone. Pourvoi rejeté.

Scott C. Hutchison et *Melissa Ragsdale*, pour l'appelante.

Paul B. Schabas et *Ryder Gilliland*, pour les intimées.

Argumentation écrite seulement par *John Norris*, pour l'intervenante.

Version française du jugement de la Cour rendu par

FISH J. —

I

In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.

That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(*b*) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.

The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.

Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration*.

This criterion has come to be known as the *Dagenais/Mentuck* test, after the decisions of this Court in which the governing principles were established and refined. The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the precharge or "investigative stage" of criminal proceedings. More particularly, whether it applies to "sealing orders" concerning search warrants and the

LE JUGE FISH —

I

1 Dans tout environnement constitutionnel, l'administration de la justice s'épanouit au grand jour — et s'étiole sous le voile du secret.

2 Cette leçon de l'histoire a été consacrée dans la *Charte canadienne des droits et libertés*. L'alinéa 2*b*) de la *Charte* garantit, en termes plus généraux, la liberté de communication et la liberté d'expression. La vitalité de ces deux libertés fondamentales voisines repose sur l'accès du public aux renseignements d'intérêt public. Ce qui se passe devant les tribunaux devrait donc être, et est effectivement, au cœur des préoccupations des Canadiens.

3 Bien que fondamentales, les libertés que je viens de mentionner ne sont aucunement absolues. Dans certaines circonstances, l'accès du public à des renseignements confidentiels ou de nature délicate se rapportant à des procédures judiciaires compromettra l'intégrité de notre système de justice au lieu de la préserver. Dans certains cas, un bouclier temporaire suffira; dans d'autres, une protection permanente sera justifiée.

4 Les demandes concurrentes se rapportant à des procédures judiciaires amènent nécessairement les tribunaux à exercer leur pouvoir discrétionnaire. La présomption de « publicité » des procédures judiciaires est désormais bien établie au Canada. L'accès du public ne sera interdit que lorsque le tribunal compétent conclut, dans l'exercice de son pouvoir discrétionnaire, que la divulgation *serait préjudiciable aux fins de la justice* ou *nuirait indûment à la bonne administration de la justice*.

5 Ce critère est maintenant appelé le critère de *Dagenais/Mentuck*, d'après les arrêts dans lesquels notre Cour a formulé et précisé les principes applicables. Il s'agit en l'espèce de déterminer si ce critère, élaboré relativement à des interdictions de publication au moment du procès, s'applique également à l'étape antérieure au dépôt d'accusations ou à « l'étape de l'enquête » dans une procédure criminelle. Il faut plus particulièrement décider s'il

informations upon which their issuance was judicially authorized.

6 The Court of Appeal for Ontario held that it does and the Crown now appeals against that decision.

7 I would dismiss the appeal. In my view, the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(*b*) of the *Charter.*

8 The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution in opting for full and immediate disclosure.

9 Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result.

s'applique aux « ordonnances de mise sous scellés » visant les mandats de perquisition et les dénonciations qui en ont justifié la délivrance.

La Cour d'appel de l'Ontario a statué que ce critère s'applique effectivement à cette étape et le ministère public se pourvoit maintenant contre cette décision.

Je suis d'avis de rejeter le pourvoi. J'estime que le critère de *Dagenais/Mentuck* s'applique à *chaque fois* qu'un juge exerce son pouvoir discrétionnaire de restreindre la liberté d'expression et la liberté de la presse relativement à des procédures judiciaires. Toute autre conclusion romprait, à mon avis, avec la jurisprudence de notre Cour, qui est demeurée constante au cours des vingt dernières années. Elle porterait également atteinte au principe de la publicité des débats judiciaires qui est inextricablement lié aux valeurs fondamentales consacrées à l'al. 2*b*) de la *Charte*.

Bien qu'il soit applicable à chacune des étapes du processus judiciaire, le critère de *Dagenais/Mentuck* est depuis toujours censé être utilisé avec souplesse et en fonction du contexte. Par exemple, un risque important pour la bonne administration de la justice à l'étape de l'enquête ira souvent de pair avec des considérations qui auront perdu toute leur pertinence au moment du procès. Par contre, il peut être beaucoup plus difficile à cette étape préliminaire de démontrer concrètement le risque perçu. Le fait qu'une ordonnance de mise sous scellés soit demandée à cette étape pour une courte période seulement peut à lui seul inciter le tribunal à faire preuve de prudence avant d'ordonner une divulgation complète et immédiate.

Toutefois, même dans ce cas, une allégation générale selon laquelle la publicité des débats pourrait compromettre l'efficacité de l'enquête ne pourra étayer à elle seule une demande visant à restreindre l'accès du public à des procédures judiciaires. Si une telle allégation générale suffisait à justifier une ordonnance de mise sous scellés, la présomption jouerait en faveur du secret, plutôt que de la publicité des débats, ce qui serait tout simplement inacceptable.

In this case, the evidence brought by the Crown in support of its application to delay access amounted to a generalized assertion of possible disadvantage to an ongoing investigation. The Court of Appeal accordingly held that the Crown had not discharged its burden. As mentioned earlier, I would not interfere with that finding and I propose, accordingly, that we dismiss the present appeal.

II

The relevant facts were fully and accurately set out in these terms by Doherty J.A. in the Court of Appeal for Ontario ((2003), 67 O.R. (3d) 577):

On August 20, 2003, a justice of the peace issued six search warrants for various locations linked to the business of Aylmer Meat Packers Inc. ("Aylmer"). The informations sworn to obtain the warrants were identical. The warrants were obtained under the provisions of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 and related to alleged violations of provincial legislation regulating the slaughter of cattle. The informations were sworn by Roger Weber, an agricultural investigator with the Ministry of Natural Resources. The warrants were executed on August 21 and 22, 2003.

On about August 26, 2003, the investigation by the Ministry of Natural Resources into the operation of Aylmer became the subject of widespread media reports. The suitability for human consumption of meat slaughtered and processed by Aylmer became a matter of public concern.

On about August 27, 2003, the Ontario Provincial Police commenced a fraud investigation into the business affairs of Aylmer. The officers involved in that investigation were advised that Inspector Weber had applied for and obtained the search warrants described above.

On September 2, 2003, the Crown brought an *ex parte* application in open court in the Ontario Court of Justice for an order sealing the search warrants, the informations used to obtain the warrants and related documents. The Crown claimed that public disclosure of the material could identify a confidential informant and could interfere with the ongoing criminal investigation.

En l'espèce, la preuve soumise par le ministère public à l'appui de sa demande de report de la divulgation équivaut à une allégation générale d'entrave éventuelle à une enquête en cours. La Cour d'appel a donc conclu que le ministère public ne s'était pas acquitté du fardeau qui lui incombait. Comme je l'ai dit précédemment, je suis d'avis de ne pas modifier cette conclusion et je propose en conséquence que nous rejetions le présent pourvoi.

II

Le juge Doherty de la Cour d'appel de l'Ontario a rapporté intégralement et fidèlement les faits pertinents ((2003), 67 O.R. (3d) 577) :

[TRADUCTION] Le 20 août 2003, un juge de paix a délivré six mandats de perquisition visant divers endroits liés à l'entreprise Aylmer Meat Packers Inc. (« Aylmer »). Les dénonciations faites sous serment dans le but d'obtenir les mandats étaient identiques. Les mandats ont été obtenus en vertu des dispositions de la *Loi sur les infractions provinciales*, L.R.O. 1990, ch. P.33, et concernaient des contraventions alléguées à la législation provinciale réglementant l'abattage des bovins. Les dénonciations ont été faites sous serment par Roger Weber, un enquêteur du secteur agricole au ministère des Richesses naturelles. Les mandats ont été exécutés les 21 et 22 août 2003.

Vers le 26 août 2003, l'enquête du ministère des Richesses naturelles sur les activités d'Aylmer a commencé à faire beaucoup de bruit dans les médias. La question de savoir si la viande des animaux abattus et traités par Aylmer étaient propre à la consommation humaine est devenue un sujet d'intérêt public.

Vers le 27 août 2003, la Police provinciale de l'Ontario a entrepris une enquête pour fraude concernant les activités commerciales d'Aylmer. Les policiers participant à cette enquête ont été informés que l'inspecteur Weber avait demandé et obtenu les mandats de perquisition décrits précédemment.

Le 2 septembre 2003, le ministère public a déposé une requête *ex parte* lors d'une audience publique devant la Cour de justice de l'Ontario afin d'obtenir la mise sous scellés des mandats de perquisition, des dénonciations ayant servi à obtenir les mandats ainsi que des documents connexes. Le ministère public a fait valoir que la divulgation de ces documents au public pourrait permettre d'identifier un informateur et compromettre l'enquête criminelle en cours.

Justice Livingstone made an order directing that the warrants and informations were to be sealed along with the affidavit of Detective Sergeant Andre Clelland, dated August 30, 2003 filed in support of the application for a sealing order and a letter, dated September 2, 2003, from Roger Weber indicating that the Ministry of Natural Resources took no objection to the application. The sealing order was to expire December 2, 2003. The Clelland affidavit and Inspector Weber's letter were subsequently made part of the public record on the consent of the Crown.

The Toronto Star Newspapers Limited and other media outlets (respondents) brought a motion for *certiorari* and *mandamus* in the Superior Court. That application proceeded before McGarry J. on September 15 and 16, 2003. On September 24, 2003, McGarry J. released reasons quashing the sealing order and directing that the documents should be made public except to the extent that the contents of the informations could disclose the identity of a confidential informant. McGarry J. edited one of the informations to delete references to material that could identify the confidential informant and told counsel that the edited version would be made available to the respondents unless the Crown appealed within two days. . . . [paras. 1-6]

12 The Crown did, indeed, appeal — but with marginal success.

13 The Court of Appeal for Ontario held that Livingstone J. had exceeded her jurisdiction by refusing to grant a brief adjournment to allow counsel for the media to attend and make submissions on the application for a sealing order. Speaking for the court, Doherty J.A. found that the media can legitimately be expected to play an important role on applications to prohibit their access, and that of the public they serve, to court records and court proceedings. "There was no good reason", he stated, "to deny *The London Free Press* an opportunity to make submissions" (para. 15). This amounted, in his view, to a denial of natural justice and resulted in a loss of jurisdiction. I find it unnecessary to express a decided view on this branch of the matter, since it is not in issue before us, and find it sufficient for present purposes to refer to the guidelines on notice to the media and media standing set out in *Dagenais v. Canadian*

La juge Livingstone a ordonné la mise sous scellés des mandats et des dénonciations ainsi que de l'affidavit du sergent-détective Andre Clelland, en date du 30 août 2003, produit à l'appui de la demande de mise sous scellés, et d'une lettre de Roger Weber, en date du 2 septembre 2003, indiquant que le ministère des Richesses naturelles ne s'opposait pas à la demande. L'ordonnance de mise sous scellés devait cesser d'avoir effet le 2 décembre 2003. L'affidavit du sergent-détective Clelland et la lettre de l'inspecteur Weber ont plus tard été versés au dossier public avec le consentement du ministère public.

Toronto Star Newspapers Limited et d'autres organes médiatiques (intimés) ont présenté une requête en *certiorari* et *mandamus* devant la Cour supérieure. Cette requête a été entendue par le juge McGarry les 15 et 16 septembre 2003. Le 24 septembre 2003, le juge McGarry a prononcé les motifs de sa décision d'annuler l'ordonnance de mise sous scellés et d'ordonner que les documents soient rendus publics, sauf dans la mesure où la teneur des dénonciations pouvait révéler l'identité d'un informateur. Le juge McGarry a épuré l'une des dénonciations en en supprimant les éléments qui pourraient permettre d'identifier l'informateur et a déclaré aux avocats que les intimées auraient accès à la version épurée, à moins que le ministère public interjette appel dans les deux jours. . . [par. 1 à 6]

Le ministère public a effectivement interjeté appel, mais il a alors obtenu un jugement qui lui était à peine plus favorable que la décision de première instance.

La Cour d'appel de l'Ontario a statué que la juge Livingstone avait outrepassé sa compétence en refusant d'accorder un bref ajournement pour permettre aux avocats des médias de comparaître et de soumettre des observations relativement à la demande de mise sous scellés. S'exprimant au nom de la Cour, le juge Doherty a conclu qu'on pouvait légitimement s'attendre à ce que les médias jouent un rôle important lors de la présentation de demandes visant à leur interdire, ainsi qu'au public dont ils servent les intérêts, l'accès à des dossiers et débats judiciaires. Selon lui, [TRADUCTION] « [i]l n'existait aucun motif valable de refuser de donner à *The London Free Press* l'occasion de présenter des observations » (par. 15). À son avis, un tel refus constituait un déni de justice naturelle et entraînait une perte de compétence. J'estime qu'il n'est pas nécessaire que je statue sur cet aspect de l'affaire, car il n'est pas en litige dans le présent pourvoi; il suffit pour l'instant

Broadcasting Corp., [1994] 3 S.C.R. 835, particularly at pp. 868-69 and 890-91.

Doherty J.A. next addressed the merits of the request for a sealing order. Applying this Court's decision in *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76, he concluded that the Crown had not displaced the presumption that judicial proceedings are open and public. Like McGarry J., Doherty J.A. recognized that the materials had to be edited to exclude information that could reveal the identity of the confidential informant and the editing he found appropriate was "somewhat more extensive than that done by McGarry J." (para. 28).

The order of the Court of Appeal has now become final and the factual basis for a sealing order has evaporated with the passage of time. In the absence of a stay, the edited material was released on October 29, 2003, and the proceedings have to that extent become moot.

The Crown nonetheless pursues its appeal to this Court with respect to the underlying question of law: What is the governing test on an application to delay public access to search warrant materials that would otherwise become accessible upon execution of the search warrant?

Essentially, the Crown contends that the Court of Appeal erred in law in applying the "stringent" *Dagenais/Mentuck* test without taking into account the particular characteristics and circumstances of the pre-charge, investigative phase of the proceedings.

III

Once a search warrant is executed, the warrant and the information upon which it is issued must be made available to the public unless an applicant seeking a sealing order can demonstrate that public

de se reporter aux principes directeurs concernant l'avis aux médias et leur qualité pour agir, énoncés dans *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, plus particulièrement aux p. 868-869 et 890-891.

14 Le juge Doherty a ensuite examiné le bien-fondé de la demande de mise sous scellés. Appliquant l'arrêt de notre Cour *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76, il a conclu que le ministère public n'avait pas réfuté la présomption de publicité des procédures judiciaires. Comme le juge McGarry, le juge Doherty a reconnu que les documents devaient être épurés par la suppression des renseignements pouvant révéler l'identité de l'informateur et il estimait que cette épuration devait être [TRADUCTION] « un peu plus étendue que celle faite par le juge McGarry » (par. 28).

15 L'ordonnance de la Cour d'appel est maintenant définitive et le fondement factuel qui justifiait la mise sous scellés est disparu avec le temps. En l'absence de sursis d'exécution, les documents épurés ont été rendus publics le 29 octobre 2003 et, en ce qui les concerne, l'instance ne présente plus qu'un intérêt théorique.

16 Le ministère public poursuit néanmoins son pourvoi devant notre Cour relativement à la question de droit sous-jacente : Quel critère s'applique à une demande de report de la divulgation des renseignements relatifs à un mandat de perquisition qui deviendraient normalement accessibles dès l'exécution du mandat?

17 Pour l'essentiel, le ministère public prétend que la Cour d'appel a commis une erreur de droit en appliquant le critère « rigoureux » de *Dagenais/Mentuck* sans tenir compte des caractéristiques et des circonstances particulières de l'étape de l'enquête antérieure au dépôt des accusations.

III

18 Une fois un mandat de perquisition exécuté, le mandat et la dénonciation qui a permis d'en obtenir la délivrance doivent être rendus publics, sauf si la personne qui sollicite une ordonnance de mise sous

access would subvert the ends of justice: *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175. "[W]hat should be sought", it was held in *MacIntyre*, "is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime" (Dickson J., as he then was, speaking for the majority, at p. 184).

19 *MacIntyre* was not decided under the *Charter*. The Court was nonetheless alert in that case to the principles of openness and accountability in judicial proceedings that are now subsumed under the *Charter*'s guarantee of freedom of expression and of the press.

20 Search warrants are obtained *ex parte* and *in camera*, and generally executed before any charges have been laid. The Crown had contended in *MacIntyre* that they ought therefore to be presumptively shrouded in secrecy in order to preserve the integrity of the ongoing investigation. The Court found instead that the presumption of openness was effectively rebutted *until* the search warrant was executed — but not thereafter. In the words of Dickson J.:

> . . . the force of the 'administration of justice' argument abates once the warrant has been executed, *i.e.* after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtually disappears. . . . The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance. [pp. 188-89]

21 After a search warrant has been executed, openness was to be presumptively favoured. The party seeking to deny public access thereafter was bound to prove that disclosure would subvert the ends of justice.

scellés peut démontrer que leur divulgation serait préjudiciable aux fins de la justice : *Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175. La Cour a statué dans *MacIntyre* que « ce qu'il faut viser, c'est le maximum de responsabilité et d'accessibilité, sans aller jusqu'à causer un tort à un innocent ou à réduire l'efficacité du mandat de perquisition comme arme dans la lutte continue de la société contre le crime » (le juge Dickson, devenu plus tard Juge en chef, s'exprimant au nom de la majorité, à la p. 184).

L'affaire *MacIntyre* n'a pas été tranchée sous le régime de la *Charte*. La Cour était néanmoins consciente dans cet arrêt des principes de publicité des débats et d'imputabilité dans l'exercice du pouvoir judiciaire qui sont désormais inclus dans la liberté d'expression et la liberté de la presse garanties par la *Charte*.

Les mandats de perquisition sont obtenus *ex parte* et à huis clos; en général, ils sont exécutés avant que des accusations ne soient portées. Le ministère public avait fait valoir dans *MacIntyre* qu'on pouvait donc présumer qu'ils devaient être gardés secrets afin de préserver l'intégrité de l'enquête en cours. La Cour a plutôt conclu que la présomption de la publicité des procédures judiciaires était effectivement réfutée *jusqu'à ce que* le mandat de perquisition soit exécuté — mais non après. Comme l'a dit le juge Dickson :

> . . . la valeur de la thèse de « l'administration de la justice » diminue après l'exécution du mandat, c.-à.-d. après la visite des lieux et la perquisition. Le caractère confidentiel de la procédure a, par la suite, moins d'importance puisque les objectifs que vise le principe du secret sont en grande partie sinon complètement atteints. La nécessité de maintenir le secret a en pratique disparu. [. . .] C'est avec beaucoup d'hésitation que l'on se résoudra à restreindre l'accès traditionnellement absolu du public aux travaux des tribunaux. [p. 188-189]

Une fois le mandat de perquisition exécuté, la présomption devait jouer en faveur de la publicité des débats. La partie qui cherchait à interdire l'accès du public aux renseignements devait donc, après l'exécution du mandat, prouver que leur divulgation serait préjudiciable aux fins de la justice.

These principles, as they apply in the criminal investigative context, were subsequently adopted by Parliament and codified in s. 487.3 of the *Criminal Code*, R.S.C. 1985, c. C-46. That provision does not govern this case, since our concern here is with warrants issued under the *Provincial Offences Act* of Ontario, R.S.O. 1990, c. P.33. It nonetheless provides a useful reference point since it encapsulates in statutory form the common law that governs, in the absence of valid legislation to the contrary, throughout Canada.

22 Ces principes, tels qu'ils s'appliquent dans les enquêtes de nature criminelle, ont été plus tard adoptés par le Parlement et codifiés à l'art. 487.3 du *Code criminel*, L.R.C. 1985, ch. C-46. Cette disposition ne s'applique pas à l'affaire qui nous est soumise, puisqu'elle porte sur des mandats décernés sous le régime de la *Loi sur les infractions provinciales* de l'Ontario, L.R.O. 1990, ch. P.33. Elle nous fournit néanmoins un élément de référence utile puisqu'elle résume, dans une disposition législative, les règles de common law qui s'appliquent partout au Canada en l'absence d'une loi contraire valide.

Section 487.3(2) is of particular relevance to this case. It contemplates a sealing order on the ground that the ends of justice would be subverted, in that disclosure of the information would compromise the nature and extent of an ongoing investigation. That is what the Crown argued here. It is doubtless a proper ground for a sealing order with respect to an information used to obtain a provincial warrant and not only to informations under the *Criminal Code*. In either case, however, the ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperilled. And that, as we shall see, is what Doherty J.A. found to be lacking here.

23 Le paragraphe 487.3(2) est particulièrement pertinent en l'espèce. Il prévoit qu'une ordonnance de mise sous scellés peut être fondée sur le fait que la communication serait préjudiciable aux fins de la justice parce qu'elle compromettrait la nature et l'étendue d'une enquête en cours. C'est ce motif que le ministère public fait valoir en l'espèce. Il s'agit certainement d'un motif valable de mettre sous scellés une dénonciation utilisée pour obtenir un mandat provincial, en plus des dénonciations faites sous le régime du *Code criminel*. Dans les deux cas, il ne suffit cependant pas d'invoquer ce motif dans l'abstrait; il faut l'étayer d'allégations spécifiques liées à l'enquête que l'on prétend compromise. C'est ce qui n'a pas été fait en l'espèce, selon le juge Doherty, comme nous le verrons plus loin.

Since the advent of the *Charter*, the Court has had occasion to consider discretionary actions which limit the openness of judicial proceedings in other contexts. The governing principles were first set out in *Dagenais*.

24 Depuis l'entrée en vigueur de la *Charte*, la Cour a eu l'occasion d'examiner l'exercice du pouvoir discrétionnaire de restreindre la publicité des procédures judiciaires dans d'autres contextes. Les principes applicables ont été initialement formulés dans *Dagenais*.

In that case, four accused sought a ban on publication of a television mini-series, *The Boys of St. Vincent*, which was fictional in appearance — but strikingly similar in fact — to the subject matter of their trial. Writing for a majority of the Court, Lamer C.J. held that a ban should only be imposed where alternative measures cannot prevent the serious risk to the interests at stake and, even then, only to the extent found by the Court to be necessary to prevent a real and substantial risk to the fairness of the trial. In addition, a ban should only be ordered where its

25 Dans cette affaire, quatre accusés ont demandé au tribunal d'interdire la télédiffusion d'une mini-série intitulée *Les garçons de Saint-Vincent*, un drame fictif en apparence, mais dont les faits étaient remarquablement semblables à ceux dont il était question dans leur procès. S'exprimant au nom de la majorité de la Cour, le juge en chef Lamer a statué que l'interdiction ne devait être accordée que s'il n'existait pas d'autres mesures raisonnables pouvant écarter le risque sérieux pour les intérêts en jeu et, même dans ce cas, seulement dans la mesure où la Cour

salutary effects outweigh its negative impact on the freedom of expression of those affected by the ban. Here, too, the presumption was said to favour openness, and the party seeking a restriction on disclosure was therefore required to justify the solicited limitation on freedom of expression.

l'estimait nécessaire pour écarter un risque réel et important que le procès soit inéquitable. De plus, une interdiction ne doit être prononcée que lorsque ses effets bénéfiques l'emportent sur son incidence négative sur la liberté d'expression des personnes visées. Dans cette affaire aussi, on a affirmé que la présomption jouait en faveur de la publicité et que, par conséquent, la partie qui voulait restreindre la divulgation devait justifier cette atteinte à la liberté d'expression.

26 The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:

Dans *Mentuck*, la Cour a réaffirmé, tout en le reformulant dans une certaine mesure, le critère énoncé dans *Dagenais*. Dans *Mentuck*, le ministère public demandait une interdiction de publication visant l'identité de policiers banalisés et les techniques d'enquête qu'ils avaient utilisées. La Cour a statué que l'exercice du pouvoir discrétionnaire de restreindre la liberté d'expression relativement à des procédures judiciaires touche divers droits et qu'une ordonnance de non-publication ne doit être rendue que si :

(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

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

(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. [para. 32]

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. [par. 32]

27 Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis must be *real*, *substantial*, and *well grounded in the evidence*: "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34).

S'exprimant au nom de la Cour, le juge Iacobucci a souligné que le « risque » dont il est question dans le premier volet de l'analyse doit être *réel et important* et qu'il doit s'agir d'un risque dont l'existence *est bien appuyée par la preuve* : « il faut que ce soit un danger grave que l'on cherche à éviter, et non un important bénéfice ou avantage pour l'administration de la justice que l'on cherche à obtenir » (par. 34).

28 The *Dagenais/Mentuck* test, as it has since come to be known, has been applied to the exercise of discretion to limit freedom of expression and of the press in a variety of legal settings. And this Court has recently held that the test applies to

Le critère de *Dagenais/Mentuck*, tel qu'il est appelé désormais, a été appliqué à l'exercice du pouvoir discrétionnaire de restreindre la liberté d'expression et la liberté de la presse dans divers contextes juridiques. Notre Cour a récemment statué

all discretionary actions which have that limiting effect:

> While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion 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, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [[1996] 3 S.C.R. 480], at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41).

(*Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43, at para. 31)

Finally, in *Vancouver Sun*, the Court expressly endorsed the reasons of Dickson J. in *MacIntyre* and emphasized that the presumption of openness *extends to the pre-trial stage of judicial proceedings*. "The open court principle", it was held, "is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein" (para. 26). It therefore applies at every stage of proceedings (paras. 23-27).

The Crown now argues that the open court principle embodied in the *Dagenais/Mentuck* test ought not to be applied when the Crown seeks to seal search warrant application materials. This argument is doomed to failure by more than two decades of unwavering decisions in this Court: the *Dagenais/Mentuck* test has repeatedly and consistently been applied to all discretionary judicial orders limiting the openness of judicial proceedings.

que ce critère s'applique *chaque fois* que l'exercice du pouvoir discrétionnaire a cet effet restrictif :

> Même si le critère a été élaboré dans le contexte des interdictions de publication, il s'applique également chaque fois que le juge de première instance exerce son pouvoir discrétionnaire de restreindre la liberté d'expression de la presse durant les procédures judiciaires. Le pouvoir discrétionnaire doit être exercé en conformité avec la *Charte*, peu importe qu'il soit issu de la common law, comme c'est le cas pour l'interdiction de publication [. . .]; d'origine législative, par exemple sous le régime du par. 486(1) du *Code criminel*, lequel permet d'exclure le public des procédures judiciaires dans certains cas (*Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [[1996] 3 R.C.S. 480], par. 69); ou prévu dans des règles de pratique, par exemple, dans le cas d'une ordonnance de confidentialité (*Sierra Club du Canada c. Canada (Ministre des Finances)*, [2002] 2 R.C.S. 522, 2002 CSC 41).

(*Vancouver Sun (Re)*, [2004] 2 R.C.S. 332, 2004 CSC 43, par. 31)

29 Enfin, dans *Vancouver Sun*, la Cour a approuvé expressément les motifs du juge Dickson dans *MacIntyre* et a souligné que la présomption de publicité des procédures judiciaires *s'applique aussi au stade précédant le procès*. Elle a statué que le « principe de la publicité des débats en justice est inextricablement lié à la liberté d'expression garantie par l'al. 2*b*) de la *Charte* et sert à promouvoir les valeurs fondamentales qu'elle véhicule » (par. 26). Ce principe s'applique donc à chacune des étapes de la procédure (par. 23-27).

30 Le ministère public fait maintenant valoir que le principe de la publicité des débats en justice, incorporé au critère de *Dagenais/Mentuck*, ne doit pas être appliqué lorsque le ministère sollicite la mise sous scellés des documents relatifs à une demande de mandat de perquisition. Cet argument est voué à l'échec en raison des décisions constantes rendues par notre Cour depuis plus de vingt ans : le critère de *Dagenais/Mentuck* a été appliqué régulièrement et à maintes reprises, chaque fois qu'une ordonnance judiciaire discrétionnaire restreignait la publicité des procédures judiciaires.

31 It hardly follows, however, that the *Dagenais/Mentuck* test should be applied mechanistically. Regard must always be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. The test, though applicable at *all* stages, is a flexible and contextual one. Courts have thus tailored it to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown-initiated applications for publication bans.

Cela ne veut toutefois pas dire que le critère de *Dagenais/Mentuck* devrait être appliqué de manière mécanique. Il faut toujours tenir compte des circonstances dans lesquelles une ordonnance de mise sous scellés est demandée par le ministère public ou par d'autres parties qui ont établi leur intérêt véritable à retarder la divulgation au public. Bien qu'il s'applique à *toutes* les étapes, ce critère est souple et doit être appliqué en fonction du contexte. Les tribunaux l'ont donc formulé de manière à ce qu'il s'adapte à diverses mesures discrétionnaires, dont les ordonnances de confidentialité, les investigations judiciaires et les demandes présentées par le ministère public en vue d'obtenir des interdictions de publication.

32 In *Vancouver Sun*, the Court recognized that the evidentiary burden on an application to hold an investigative hearing *in camera* cannot be subject to the same stringent standard as applications for a publication ban at trial:

> Even though the evidence may reveal little more than reasonable expectations, this is often all that can be expected at that stage of the process and the presiding judge, applying the *Dagenais/Mentuck* test in a contextual manner, would be entitled to proceed on the basis of evidence that satisfies him or her that publicity would unduly impair the proper administration of justice. [para. 43]

Dans *Vancouver Sun*, la Cour a reconnu que le fardeau de la preuve ne peut être soumis au même critère rigoureux dans le cas d'une demande visant la tenue d'une investigation judiciaire à huis clos que dans le cas d'une demande d'interdiction de publication au procès :

> Il est possible que la preuve ne révèle pas beaucoup plus qu'on pourrait raisonnablement exiger, mais c'est souvent tout ce à quoi on peut s'attendre à cette étape de la procédure, et le juge qui préside, en appliquant le critère de *Dagenais/Mentuck* en fonction du contexte, aurait le droit de se fonder sur la preuve qui le convainc que la publicité des débats ne nuirait pas indûment à la bonne administration de la justice. [par. 43]

33 Similar considerations apply to other applications to limit openness at the investigative stage of the judicial process.

Des considérations similaires s'appliquent aux autres demandes visant à restreindre la publicité au stade de l'enquête dans le processus judiciaire.

IV

IV

34 The Crown has not demonstrated, on this appeal, that the flexible *Dagenais/Mentuck* test as applied to search warrant materials is unworkable in practice. The respondents, on the other hand, have drawn our attention to several cases in which the test was effectively and reasonably applied. Sealing orders or partial sealing orders were in fact granted, for example, in *National Post Co. v. Ontario* (2003), 176 C.C.C. (3d) 432 (Ont. S.C.J.); *R. v. Eurocopter Canada Ltd.*, [2001] O.J. No. 1591 (QL) (S.C.J.); *Flahiff v. Bonin*, [1998] R.J.Q. 327 (C.A.); and *Toronto Star*

Le ministère public n'a pas démontré, dans le présent pourvoi, que le critère souple de *Dagenais/Mentuck*, tel qu'il est appliqué aux documents relatifs à des mandats de perquisition, ne convient pas en pratique. En revanche, les intimées ont attiré notre attention sur diverses décisions dans lesquelles ce critère a été utilisé efficacement et de manière raisonnable. Des ordonnances de mise sous scellés totale ou partielle ont effectivement été rendues, par exemple, dans *National Post Co. c. Ontario* (2003), 176 C.C.C. (3d) 432 (C.S.J. Ont.); *R. c. Eurocopter Canada Ltd.*, [2001] O.J. No. 1591 (QL) (C.S.J.);

Newspapers Ltd. v. Ontario, [2000] O.J. No. 2398 (QL) (S.C.J.).

Nor has the Crown satisfied us that Doherty J.A. failed to adopt a "contextual" approach to the order sought in this case.

In support of its application, the Crown relied exclusively on the affidavit of a police officer who asserted his belief, "based on [his] involvement in this investigation that the release of the Warrants, Informations to Obtain and other documents would interfere with the integrity of the ongoing police investigation" (Appellant's Record, at p. 70). The officer stated that, should the contents of the information become public, witnesses could be fixed with information from sources other than their personal knowledge and expressed his opinion "that the release of the details contained in the Informations to Obtain [the search warrants] has the potential to make it more difficult for the Ontario Provincial Police to gather the best evidence in respect of its investigation" (Appellant's Record, at p. 72).

Doherty J.A. rejected these broad assertions for two reasons.

First, he found that they amounted to a "general proposition that pre-trial publication of the details of a police investigation risks the tainting of statements taken from potential witnesses" (para. 26). In Doherty J.A.'s view, if that general proposition were sufficient to obtain a sealing order,

> the presumptive rule would favour secrecy and not openness prior to trial. A general assertion that public disclosure may distract from the ability of the police to get at the truth by tainting a potential witness's statement is no more valid than the equally general and contrary assertion that public disclosure enhances the ability of the police to get at the truth by causing concerned citizens to come forward with valuable information. [para. 26]

Flahiff c. Bonin, [1998] R.J.Q. 327 (C.A.), et *Toronto Star Newspapers Ltd. c. Ontario*, [2000] O.J. No. 2398 (QL) (C.S.J.).

35 Le ministère public ne nous a pas convaincus non plus que le juge Doherty a omis d'adopter une approche « contextuelle » relativement à l'ordonnance sollicitée en l'espèce.

36 Au soutien de sa demande, le ministère public s'est appuyé exclusivement sur l'affidavit d'un policier qui a affirmé avoir des motifs de croire, [TRADUCTION] « compte tenu de [sa] participation à l'enquête, que la divulgation des mandats, de la dénonciation produite en vue d'obtenir les mandats et d'autres documents compromettrait l'intégrité de l'enquête policière en cours » (dossier de l'appelante, p. 70). Le policier a dit que, si la teneur de la dénonciation était rendue publique, des témoins pourraient être influencés par des renseignements provenant d'autres sources, dont ils n'ont pas une connaissance personnelle, et que, à son avis, [TRADUCTION] « la divulgation des détails contenus dans les dénonciations produites en vue d'obtenir [les mandats de perquisition] pourrait rendre plus ardue la recherche par la Police provinciale de l'Ontario de la meilleure preuve pour son enquête » (dossier de l'appelante, p. 72).

37 Le juge Doherty a rejeté ces allégations générales pour deux motifs.

38 Premièrement, il a conclu qu'il s'agissait d'un [TRADUCTION] « énoncé général selon lequel la publication avant le procès des détails d'une enquête policière risque d'influencer les déclarations obtenues de témoins éventuels » (par. 26). De l'avis du juge Doherty, si un tel énoncé général était suffisant pour obtenir une ordonnance de mise sous scellés,

> [TRADUCTION] la présomption jouerait en faveur du secret et non de la publicité avant le procès. Une allégation générale selon laquelle la divulgation au public est susceptible d'empêcher la police d'obtenir la vérité parce qu'elle peut influencer les déclarations d'un témoin éventuel n'est pas plus valable que l'allégation tout aussi générale, mais contraire, voulant que la divulgation au public facilite pour la police la découverte de la vérité parce qu'elle peut amener les citoyens intéressés qui possèdent des renseignements valables à se manifester. [par. 26]

39 Second, Doherty J.A. found that the affiant's concern, for which he offered no specific basis, amounted to a mere assertion that "the police might have an advantage in questioning some individuals if those individuals [are] unaware of the details of the police investigation" (para. 27). In oral argument before this Court, counsel for the Crown referred to this as the "advantage of surprise". In this regard, Doherty J.A. noted Iacobucci J.'s conclusion in *Mentuck*, at para. 34, that access to court documents cannot be denied solely for the purpose of giving law enforcement officers an investigative *advantage*; rather, the party seeking confidentiality must at the very least allege a *serious and specific risk to the integrity of the criminal investigation*.

Deuxièmement, le juge Doherty a conclu que les inquiétudes de l'auteur de l'affidavit, pour lesquelles il n'a pas fourni de raisons précises, signifiaient simplement que [TRADUCTION] « la police pourrait jouir d'un avantage lorsqu'elle interroge certains individus si ces derniers ignorent les détails de l'enquête policière » (par. 27). Dans sa plaidoirie devant notre Cour, l'avocat du ministère public a parlé à cet égard de [TRADUCTION] « l'avantage lié à l'effet de surprise ». À cet égard, le juge Doherty a rappelé la conclusion énoncée par le juge Iacobucci, au par. 34 de l'arrêt *Mentuck*, que l'accès à des documents du tribunal ne saurait être refusé dans le seul but de conférer aux responsables de l'application de la loi un *avantage* pour le déroulement de l'enquête; au contraire, la partie qui demande le secret doit au moins alléguer l'existence d'un *risque grave et précis pour l'intégrité de l'enquête criminelle*.

40 Finally, the Crown submits that Doherty J.A. applied a "stringent" standard — presumably, an *excessively* stringent standard — in assessing the merits of the sealing application. This complaint is unfounded.

Enfin, le ministère public soutient que le juge Doherty a appliqué une norme « rigoureuse » — sans doute même *trop* rigoureuse — lorsqu'il a examiné le bien-fondé de la demande de mise sous scellés. Cette prétention n'est pas fondée.

41 Quite properly, Doherty J.A. emphasized the importance of freedom of expression and of the press, and noted that applications to intrude on that freedom must be "subject to close scrutiny and meet rigorous standards" (para. 19). Ultimately, however, he rejected the Crown's claim in this instance because it rested entirely on a general assertion that publicity can compromise investigative integrity.

Le juge Doherty a insisté à juste titre sur l'importance de la liberté d'expression et de la liberté de la presse, et il a souligné que les demandes visant à empiéter sur ces libertés doivent être [TRADUCTION] « scrutées à la loupe et satisfaire à des normes rigoureuses » (par. 19). Toutefois, il a finalement rejeté la demande présentée par le ministère public en l'espèce parce qu'elle reposait entièrement sur une allégation générale portant que la publicité peut compromettre l'intégrité de l'enquête.

42 At no point in his reasons did Doherty J.A. demand or require a high degree of predictive certainty in the Crown's evidence of necessity.

Nulle part dans ses motifs le juge Doherty n'exige un degré élevé de certitude des prédictions incluses dans la preuve de nécessité produite par le ministère public.

V

V

43 For all of these reasons, I propose that we dismiss the appeal, with costs to the respondents, on a party-and-party basis.

Pour tous ces motifs, je propose que nous rejetions le pourvoi, avec dépens partie-partie en faveur des intimées.

Appeal dismissed with costs.

Solicitor for the appellant: Ministry of the Attorney General, Toronto.

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

Solicitors for the intervener: Ruby & Edwardh, Toronto.

Pourvoi rejeté avec dépens.

Procureur de l'appelante : Ministère du Procureur général, Toronto.

Procureurs des intimées : Blake, Cassels & Graydon, Toronto.

Procureurs de l'intervenante : Ruby & Edwardh, Toronto.

Appendix A: Ontario's History of Nuclear Cost Overruns and Ontario Hydro's Stranded Nuclear Debt

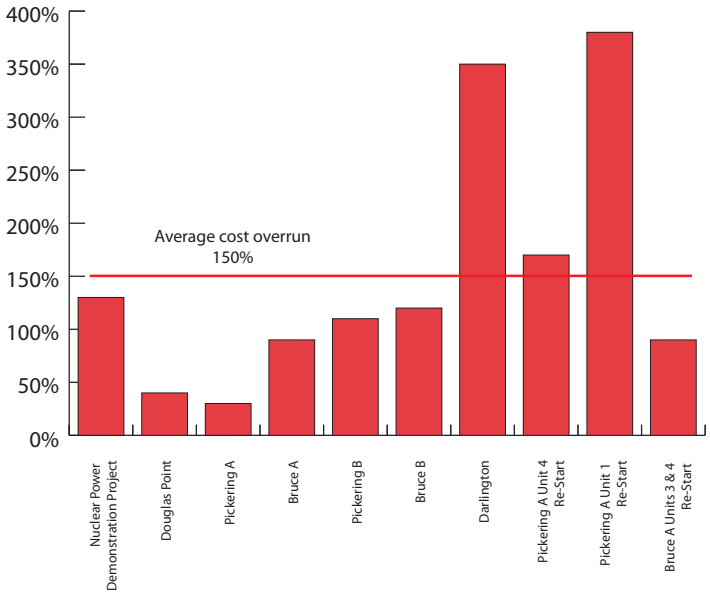
Ontario's History of Nuclear Cost Overruns

Every nuclear project in Ontario's history has gone over budget.

- The original cost estimate for the 20 megawatt (MW) Nuclear Power Demonstration Project on the Ottawa River was $14.5 million.[39] The actual cost was 2.3 times higher at $33 million.[40]
- The original cost estimate for the 200 MW Douglas Point Nuclear Power Station on Lake Huron was $60 million.[41] The actual cost was 1.4 times higher at $85 million.[42]
- In 1967 Ontario Hydro estimated that the 2,160 MW Pickering A Nuclear Generating Station would cost $527.65 million.[43] The actual cost was 1.3 times higher at $700 million.[44]
- In 1969 Ontario Hydro estimated that the 3,200 MW Bruce A Nuclear Generating Station would cost $944 million.[45] The actual cost was 1.9 times higher at $1.8 billion.[46]
- In 1975 Ontario Hydro estimated that the 2,160 MW Pickering B Nuclear Generating Station would cost $1.8 billion.[47] The actual cost was 2.1 times higher at $3.8 billion.[48]
- In 1975 Ontario Hydro estimated that the cost of the 3,200 MW Bruce B Nuclear Generating Station would be $2.7 billion.[49] The actual cost was 2.2 times higher at $5.9 billion.[50]
- In 1975 Ontario Hydro estimated that the cost of the 3,400 MW Darlington Nuclear Generating Station would be $3.2 billion.[51] The actual cost was 4.5 times higher at $14.319 billion.[52]
- In 1999 Ontario Power Generation (OPG) estimated that the total cost of returning the shutdown Pickering A Unit 4 to service would be $457 million.[53] The actual cost was 2.7 times higher at $1.25 billion.[54]
- In 1999 OPG estimated that the total cost of returning the shutdown Pickering A Unit 1 to service would be $213 million.[55] The actual cost was 4.8 times higher at $1.016 billion.[56] Nevertheless, a February 2010 OPG news release asserted that the project was completed "on budget".[57]
- Bruce Power estimated that the total cost of returning the shutdown Bruce A Units 3 and 4 to service would be $375 million. The actual cost was 1.9 times higher at $725 million.[58]
- In 2005 the Ontario Power Authority signed a contract with Bruce Power for the return to service of the shutdown Bruce A Units 1 and 2. In 2005 the estimated capital cost was $2.75 billion. The units have still not been returned to service, but in February 2010 TransCanada Corp. (a major shareholder of Bruce Power) estimated that the project will cost $3.8 billion.[59]

On average, the actual costs of the Ontario nuclear projects that have been completed to-date have exceeded their original cost estimates by 2.5 times.

Ontario's History of Nuclear Cost Overruns



Fool me once, shame on you. Fool me twice, shame on me. Fool me 11 times...

Ontario Hydro's Stranded Nuclear Debt

In 1999, as a result of the cost overruns and the poor performance of its nuclear reactors, Ontario Hydro was broken up into five companies. All of its generation assets were transferred to Ontario Power Generation (OPG). In order to keep OPG solvent, $19.4 billion of Ontario Hydro's debt or unfunded liabilities associated with electricity generation facilities was transferred to the Ontario Electricity Financial Corporation (an agency of the Government of Ontario) as "stranded debt" or "unfunded liability".[60]

> The defunct Ontario Hydro's nuclear debt costs Ontario's consumers and taxpayers $1.8 billion per year.

The Ontario Electricity Financial Corporation (OEFC) collects revenues from the following sources to help pay off the nuclear stranded debt.

- A debt retirement charge of 0.7 cents per kWh which is levied on all Ontario electricity consumers.
- All of the provincial income tax payments from OPG, Hydro One and Ontario's municipal electric utilities (e.g., Toronto Hydro).
- All of the dividend payments from OPG and Hydro One to their sole shareholder, the Government of Ontario.

In 2009, the sum of the above-noted nuclear debt retirement payments was $1.8 billion.[61] This is equivalent to an annual nuclear debt retirement charge of $137.73 per person in Ontario or $551 for a family of four.[62]

In 2001 the OEFC forecast that the nuclear debt would be fully paid off "in the years ranging from 2010 to 2017".[63] However, as of 2009, the debt has only been reduced by $3.2 billion to $16.2 billion.[64] The OEFC is now forecasting that the debt will be eliminated between 2014 and 2018.[65]

Endnotes

1 Ontario Energy Board Docket No. EB-2010-0008, Exhibit D2, Tab 2, Schedule 1, Page 6.

2 Ontario Energy Board Docket No. EB-2010-0008, Exhibit D2, Tab 2, Schedule 1, Page 11.

3 Ontario Energy Board Docket No. EB-2010-0008, Exhibit L, Tab 10, Schedule 014.

4 Ontario Energy Board Docket No. EB-2010-0008, Exhibit D2, Tab 2, Schedule 1, Page 10.

5 Ontario Energy Board Docket No. EB-2010-0008, Exhibit JT1.2.

6 Ontario Energy Board Docket No. EB-2010-0008, Exhibit D2, Tab 2, Schedule 1, Pages 4 & 5.

7 Ontario Energy Board Docket No. EB-2010-0008, Undertaking JT1.3.

8 Ontario Energy Board Docket No. EB-2010-0008, Exhibit L, Tab 10, Schedule 002.

9 Ontario Ministry of Energy, Science and Technology, *Direction for Change: Charting a Course for Competitive Electricity and Jobs in Ontario*, (November 1997), page 7. The Ontario nuclear industry often claims higher average capacity utilization rates by ignoring the performance of reactors that are temporarily or permanently and pre-maturely shutdown.

10 Email from Carrie Reid, Customer Relations, Independent Electricity System Operator to Jack Gibbons, Ontario Clean Air Alliance, June 24, 2010.

11 OPG Review Committee, *Transforming Ontario's Power Generation Company*, (March 15, 2004), Page 50.

12 Email from Carrie Reid, Customer Relations, Independent Electricity System Operator to Jack Gibbons, Ontario Clean Air Alliance, June 24, 2010.

13 Emails from Carrie Reid and Rebecca Short, Customer Relations, Independent Electricity System Operator to Jack Gibbons, Ontario Clean Air Alliance, July 21, 2010 and September 14, 2010.

14 Ontario Energy Board Docket No. EB-2010-0008, Exhibit L, Tab 10, Schedule 004.

15 Ontario Energy Board Docket No. EB-2010-0008, Exhibit L, Tab 6, Schedule 002 and Tab 10, Schedule 002.

16 Letter from CIBC World Markets Inc. to James Gillis, Ontario Deputy Minister of Energy, October 17, 2005.

17 Ontario Energy Board Docket No. EB-2010-0008, Exhibit L, Tab 10, Schedule 006.

18 According to OPG, assuming 70% equity financing and a required equity rate of return of 18%, the Darlington Re-Build will produce electricity at a total cost of 10 to 14 cents per kWh (assuming an 82% capacity utilization rate) or 12 to 18 cents per kWh (assuming a 64% capacity utilization rate). Furthermore, according to OPG, the Darlington Re-Build's non-capital costs (i.e., operating, maintenance, administration and fuel costs) are 3.9 to 5.2 cents per kWh. All costs are in 2009$. We have increased OPG's estimated capital costs per kWh by a factor of 2.5 to calculate the impact of a 150% capital cost overrun on the Darlington Re-Build's total cost of power. Ontario Energy Board Docket No. EB-2010-0008, Exhibit L, Tab 10, Schedules 003 and 006.

19 Ontario Clean Air Alliance, *Conservation vs. Electricity Supply: A summary of the Ontario Power Authority's procurement efforts*, (July 19, 2010).

20 Ontario Power Authority, *Industrial Accelerator Program: Program Rules Version 2.0*, (June 24, 2010), pages 13, 14 & 15.

21 Ontario Power Authority, *Supply Mix Analysis Report*, Volume 2, (December 2005), page 210; and *Integrated Power System Plan*, Exhibit G, Tab2, Schedule 1, page 7.

22 Assuming energy efficiencies of 80 to 90% and an average annual capacity utilization rate of 90%. Ontario Power Authority, *Integrated Power System Plan*, Exhibit I, Tab 31, Schedule 90.

23 Ontario Power Authority, *Integrated Power System Plan*, Exhibit I, Tab 31, Schedule 21, page 1.

24 *Integrated Power System Plan*, Exhibit L, Tab 8, Schedule 7: Thomas R. Casten, Recycled Energy Development LLC, *The Role of Recycled Energy and Combined Heat and Power (CHP) in Ontario's Electricity Future*, page 3.

25 Catherine Strickland & John Nyboer, MK Jaccard and Associates, *Cogeneration Potential in Canada: Phase 2*, (April 2002), page 30.

26 Hagler Bailly Canada, *Potential for Cogeneration in Ontario: Final Report*, (August 2000), page 25.

27 Ontario Power Generation, *Sustainable Development Report 2009*, page 46.

28 Ontario Energy Board Docket No. EB-2008-0272, Exhibit I, Tab 5, Schedule 6.

29 Hydro Quebec, *Annual Report 2009: Shaping The Future*, page 53.

30 Ontario Power Authority, *A Progress Report On Electricity Supply: First Quarter 2010*, pages 6, 24 & 25.

31 Steve Erwin, "Bruce nuclear cost overruns will fall in taxpayers' laps: critics", *Brockville Recorder and Times*, October 18, 2005.

32 Tyler Hamilton, "Reactor repairs confirmed over budget", *Toronto Star*, April 18, 2008.

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