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March 3, 2014

BY COURIER (2 COPIES) AND EMAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
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

I am writing on behalf of Environmental Defence to object to OPG's request for confidential treatment of its Business Case Summary for the Darlington Refurbishment Project.

Because OPG's redacted evidence has been updated, these submissions supersede and replace Environmental Defence's submissions regarding confidentiality of January 24, 2014.[1] In order to focus on the Business Case Summary, Environmental Defence is no longer objecting to the redactions in OPG's contracting strategy documents (Exhibit D2-2-1 attachments 6-1 to 7-5).

The Business Case Summary

OPG's Business Case Summary for the Darlington Refurbishment Project (Ex. D2-2-1 att. 5) is a memo from the senior management of OPG to its board of directors seeking approval of further expenditures on the Darlington Refurbishment Project. In the Business Case Summary, OPG management recommends incurring further expenditures based on an analysis purportedly showing that the refurbishment of Darlington is economic relative to other generation options, and particularly, new natural gas generating stations. Excerpts of the redacted pages are attached.

[1] Environmental Defence filed submissions regarding confidentiality on January 24, 2014. On February 6, 2014, OPG filed a very significant update to its redacted Darlington business case document (Ex. D2-2-1, Attachment 5). On February 24, 2014, as required by Procedural Order No. 3, OPG filed a letter providing grounds for its request for confidentiality. Due to the changes in the evidence, these submissions are intended to completely replace and supercede the earlier submissions.

OPG has redacted key figures in the economic analysis underlying the recommendation to proceed with the next stages of the refurbishment project, including:

1. Estimates of the total cost of the Darlington Refurbishment Project (see e.g. page 2, attached);[2]

2. The cost comparison between refurbishment and an alternative of new natural gas generating stations (see page 45, attached);[3] and

3. Estimates relating to the risk of cost overruns (see e.g. page 37, attached).

No Harm to Competitive Position

OPG argues that these figures "may affect suppliers' bids for work and ultimately increase the cost for the work."[4] However, the figures in the Business Case Summary are at such a high level that it is difficult to see how they could be used by suppliers to gain an unfair advantage. It is also difficult to see how these high-level figures could allow for the determination or derivation of commercially sensitive information.

This redacted information does not meet the criteria in Appendix A of the Practice Direction on Confidential Filings (the "Practice Direction").

Importance of the Information

Even if the redacted information could be said to be commercially sensitive or somewhat harmful to OPG's future negotiations, these concerns are outweighed by factors supporting public disclosure.

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)[5]

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.
> ...

---

[2] Exhibit D2-2-1 att. 5, p. 2.
[3] Exhibit D2-2-1 att. 5, p. 45.
[4] Letter filed by OPG on February 24, 2014, p. 2.
[5] *Practice Direction on Confidential Filings*, p. 2.

> 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)[6]

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.[7]

In this case, the value of public openness is heightened by the importance of the redacted information. OPG has redacted key figures in its economic justification of the nuclear project, including the forecast total cost, the cost comparison with natural gas generation, and certain cost overrun risk figures. This nuclear project is highly contentious, including in relation to potential costs and cost overruns. As detailed in the attached report, every nuclear project in Ontario's history has gone over budget.[8] Darlington itself was more than $11 billion (or 4.5 times) over budget.[9] This is a major public concern.

Nuclear projects always attract a considerable amount of public attention. Shielding key information from the public will not build public confidence in the outcome.

For the above reasons, Environmental Defence requests that OPG be required to produce un-redacted copies of Exhibit D2, Tab 2, Schedule 1 attachment 5.

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

Yours truly,

Kent Elson

Encl.

cc: Applicant and Intervenors

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[6] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at para. 1 & 4.
[7] March 8, 2011 letter from the Minister of Energy to the Chair of OPG.
[8] *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..
[9] *Ibid.*

DARLINGTON REFURBISHMENT BUSINESS CASE SUMMARY

1.0 RECOMMENDATION:

In 2009, OPG's Board of Directors approved the Economic Feasibility Assessment and the Business Case Summary related to the refurbishment of the Darlington Nuclear Generating Station. The Board approved the project and released funds to commence preliminary planning within the Definition Phase in accordance with the Program's release strategy. Management also approved the release of funds in November 2011 and November 2012 to complete detailed planning activities within the Definition Phase. The purpose of this Business Case Summary is to provide an update on the status and economics of the Darlington Refurbishment Program ("DRP") and to request funding to continue to complete planned 2014 detailed planning activities within the Definition Phase.

In 2010, Management communicated that the project cost would be less than $10 Billion in 2009$ which is equivalent to $10.8 Billion in 2013$, excluding capitalized interest and escalation. Taking into account the current level of cost and schedule development, Management continues to communicate, with high confidence, that the cost of the DRP will be less than $10 Billion in 2013$, excluding capitalized interest and escalation. By asserting high confidence that the DRP will be less than $10 Billion in 2013$, Management is indicating increasing confidence regarding the maximum amount likely to be expended. The $10 Billion cost estimate in 2013$ is $12.9 Billion including capitalized interest and future escalation.

The current point estimate being used for the calculation of the Levelized Unit Energy Cost ("LUEC") is [redacted] Billion (2013$), including [redacted] Billion of project and program contingency and $820 Million life-to-date costs to the end of 2013. This point estimate also includes approximately [redacted] Million in provision funds related to Re-tube Waste Containers as well as [redacted] Million related to facility improvements required at Darlington due to an additional 30 years of post-refurbishment operations. This project estimate, including capitalized interest and future escalation translates into a completion cost of [redacted] Billion.

At a cost of [redacted] Billion (2013$), the Levelized Unit Energy Cost ("LUEC") of refurbishing and continuing to operate the Darlington units for a further 30 years is estimated to be 7.9 ¢/kWh (2013$), based on a high-confidence estimate of the Darlington Refurbishment Program. Excluding costs for fixed Corporate Overheads for Pension and Other Post-Employment benefits which are independent of the decision to refurbish Darlington, the LUEC is estimated at 7.5 ¢/kWh (2013$). In 2010, Management had communicated that the project LUEC would be less than 8 ¢/kWh in 2009$, which is equivalent to 8.7 ¢/kWh in 2013$.

The economics of refurbishing the Darlington Station are comparable with Combined Cycle Gas Turbines (CCGT) at a median long-term forecast of gas prices of approximately $6/mm BTU and assuming carbon prices of $15 - $30/tonne. At median gas prices and $15/tonne carbon prices, the LUEC for CCGT is estimated at 7.5¢/kWh (2013$), with the carbon pricing accounting for 0.6 ¢/kWh of that LUEC. At low long-term gas prices of about $4/mmBTU and zero carbon prices, the price of CCGT would be more favourable than the price for refurbishing the Darlington Station. It should be noted that the costs to make gas-fired generation carbon-free (i.e. carbon sequestration), is estimated to be the equivalent of a $100/tonne carbon price, which would add 4 ¢/kWh to the LUEC of a CCGT.

While CCGTs have shorter execution lead times, lower up-front investment and lower ongoing operations, maintenance and administrative costs, there are significant uncertainties with regards to future gas prices and the potential implementation of carbon prices. There are other considerations which contribute to and support the favourable economic assessment for refurbishing the Darlington Station. These include:

- The use of an existing generation site with a proven environmental record and a supportive host community avoids the additional costs to OPG (and ratepayers) of site selection, securing environmental approvals and development of host community support at an unproven green or brown field site. It also avoids the additional costs to ratepayers of establishing a new transmission infrastructure.

DARLINGTON REFURBISHMENT BUSINESS CASE SUMMARY
APPENDIX B – SUMMARY OF ESTIMATE

ONTARIO POWER GENERATION	**PROJECT** **Summary of Estimate**	Date	November 14, 2013
		Project #	27959 (OM&A) 73010 & 73011 (Capital)

Facility Name:	Darlington Nuclear Station
Project Title:	**Darlington Refurbishment Program (DRP)** Definition Phase

Estimated Cost in Million $

Year	LTD 2013	2014	2015	Total	%
Major Projects **Includes:** Retube and Feeder Replacement, Fuel Handling, Defueling, Steam Generators, Turbine Generators, and Balance of Plant projects	266	348	309	**923**	39
Facility and Infrastructure Projects	201	147	93	**441**	19
Holt Road Improvements	3	14	16	**33**	1
Operations/ Maintenance Support	13	16	29	**58**	2
OPG Oversight and Program Support	245	124	123	**492**	21
Regulatory, including CNSC Fees	54	8	2	**64**	3
Insurance	1	2	7	**10**	0
Interest	32	52	81	**165**	7
Contingency	[redacted]				
Escalation					
Totals	**820**	**788**	**756**	**2,365**	

Notes:	1.	LTD costs include all costs related to the Darlington Refurbishment project Definition Phase, including Preliminary Planning (2010 to 2011) and Detailed Planning (2012 and 2013, based on 2013 Year End forecast). 2014 and 2015 cash flows represent forecast expenditures for each year. The above table excludes initiation phase (2007 to 2009) costs incurred prior to approval of the project in 2010 totaling $34M. These costs are not eligible for capitalization within the DRP.
	2.	Interest and Escalation rates are based on current allocation rates provided by Corporate Finance

Prepared by:	**Approved by:**
G. Rose Director, Planning and Control Nuclear Refurbishment	**D. Reiner** SVP, Nuclear Refurbishment

DARLINGTON REFURBISHMENT BUSINESS CASE SUMMARY
APPENDIX C – SUMMARY OF ECONOMIC ASSESSMENT

1.0 Assessing the Economics of Refurbishment

In order to assess the economics of the refurbishment decision on Darlington, the following key factors must be considered:

- Refurbishment Scope, Cost, Duration and Timing
- Expected Life of each unit post-refurbishment
- Forecast annual operating costs post-refurbishment, including Operation, Maintenance and Administration costs, On-going Project (Capital & OM&A) costs, Outage costs, Fuel costs, Nuclear Waste Management and Decommissioning (Provisions) costs and Overhead (Nuclear and Corporate) costs.
- Forecast Performance post-refurbishment (annual capacity factor/capability factor).
- Economic Indices (e.g. labour and material escalation rates, appropriate discount rate)

The above factors can be used to determine the LUEC of the refurbishment option. There are other potential incremental costs or opportunities associated with a decision to go or not to go ahead, such as changes to the present value of the decommissioning liability or incremental transmission costs, which are applicable if one were to take a societal view of the costs and benefits of the project, which may also influence the ultimate decision.

The above items are discussed in more detail in the following sections.

1.1. Refurbishment Scope, Cost and Reference Schedule

1.1.1. Refurbishment Scope

The main scope of work during the refurbishment of each Darlington unit is the replacement of fuel channels (pressure tubes and calandria tubes) and feeder pipes (up to the feeder header). The refurbishment scope does not include replacement of the steam generators. The scope also includes provisions for outage support work (unit islanding, facilities, construction island barriers, heavy water management, and radioactive waste management).

Since 2009, significant progress has been made in defining the scope of the refurbishment work and the categorization of this scope has become more granular. Core scope and non-core scope has been clearly defined, with both core scope and non-core scope divided into several categories for ease of categorization, review and decision-making. Certain categories of non-core scope must successfully pass a cost-benefit analysis test before being considered for inclusion in the refurbishment scope. There are now formal on-going assessments of the technical merits, costs, and funding requirements of each proposed scope item and formal review and approval of proposed scope by the Scope Review Board. Required regulatory scope has been identified through CNSC approval of the Environmental Assessment and CNSC staff assessment of the Integrated Safety Review. Following initial approval, secondary reviews of non-core scope have also been executed as a result of a broad scope review and also triggered in part by a re-assessment of Component Condition Assessments and these reviews have led to further rationalization of the scope.

Non-core refurbishment scope includes advancement of future life-cycle work (i.e. work that would be necessary in the post-refurbishment life to ensure that the plant can continue to operate safely and reliably during its post-refurbishment life), where it makes business sense to advance this work into the refurbishment outage, e.g. because of the duration of the work or the state of the plant required to execute the work.

DARLINGTON REFURBISHMENT BUSINESS CASE SUMMARY
APPENDIX C – SUMMARY OF ECONOMIC ASSESSMENT

1.1.2. Refurbishment Costs

In conjunction with the scope reviews and updates, cost estimates for the refurbishment scope of work have been updated as part of the Detailed Planning activities. As well, benchmarking has continued against publicly available costs of other on-going CANDU refurbishment projects at Pt. Lepreau and the Bruce 1 & 2 Units and lessons learned from these projects continue to be incorporated into the Darlington Refurbishment Program cost estimate.

A contract has been let for the main scope of the refurbishment outage, i.e. the re-tube and feeder replacement activities and definition phase work is well underway. The establishment of this contract has resulted in improving cost certainty on this major component of the scope. Other project bundles, such as Fuel Handling, Defueling, Turbine Generator and Steam Generator have either had contracts let or are in the final stages of evaluation and negotiation. Updated estimates of the OPG Program Management and Oversight function have also been completed.

Table C1 summarizes the Refurbishment Project costs which were utilized in the economic assessment. The overnight cost estimate for the known scope of work is [redacted] Billion. With [redacted] Billion of contingency added to bring the bottom line total to [redacted] Billion (2013$), this is considered a high confidence (90% confidence) estimate.

For the purposes of preparing sensitivity analyses, ranges were applied to the most likely estimates in each line item of the cost estimate.

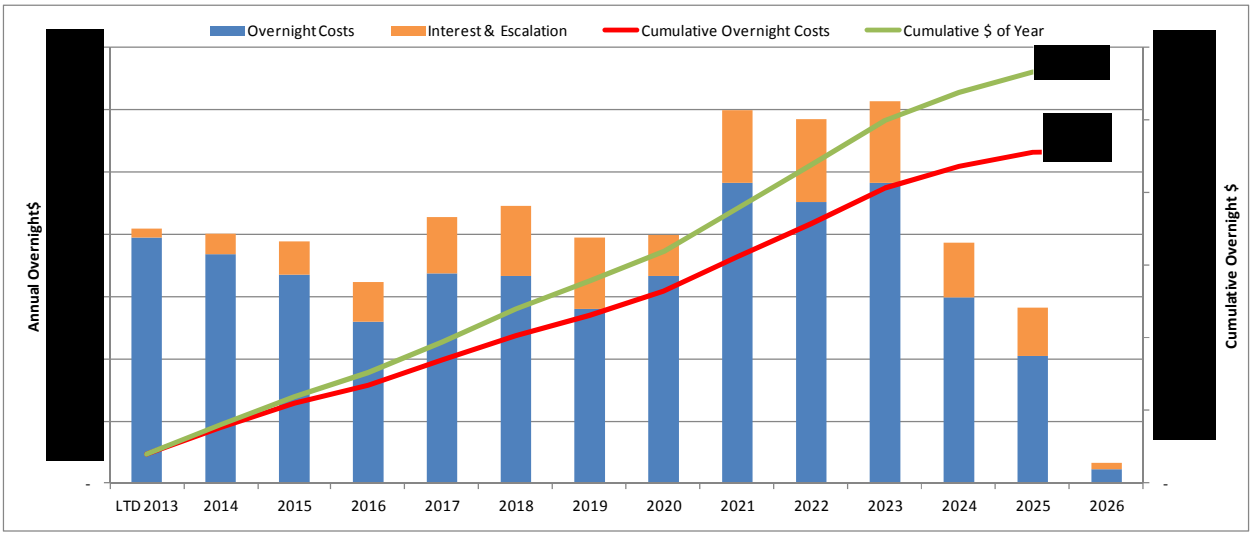
Table C1: Refurbishment Project Costs Used in the Updated Economic Assessment

Category of Work			Nov-13	Nov-12	Nov-11	Nov-09	Plan/ Plan 09 - 13	Description of Work
Project Estimate ($2013)	Direct Work	Major Contracts (RFR, FH, Defueling, SG, TG)	[redacted]					Vendor EPC (Engineering, Procurement, Construction) costs for major component work programs, including retube and feeder replacement, turbine generator upgrades and digital control system, Steam Generator primary side clean, and fuel handling equipment refurbishment.
		Balance of Plant						Vendor EPC costs for refurbishment of balance of plant equipment including implementation of 3rd Emergency Power Generator and Containment Filtered Venting.
		Islanding						Includes containment isolations (bulkheads), D20 management modifications and negative pressure containment
		Holt Road Improvements						Estimate from MTO. Stand alone BCS to be provided to BoD
		System Shutdown						Includes In-Station Facilities
		Operations & Maintenance Support						Includes online, cyclical, project support, chemistry, radiation and return to service programs
		Waste Mgmt & Waste Containers						Tipping fee based on m3. Excludes storage buidling due to accounting determination
		New Fuel						Fuel replacement for each refurbished unit once returned to service.
		Facilities and Infrastructure Projects						Facilities and infrastructure improvements to support refurbishment activities (i.e. Darlington Energy Complex, D2O Storage Facility) and extended station operations (i.e. Water and Sewer, electrical upgrades, Operations Support Building renovation).
		Total Direct Work						
		OPG Project Management and Support						
		Total Direct plus Indirect Work						
		Contingency and Management Reserve						
		Total Project Estimate						
		Capitalized Interest						
		Tottal Project Estimate Incl. Interest ($2013)						
		Future Escalation						
		Total Project Estimate ($ of the year)						

DARLINGTON REFURBISHMENT BUSINESS CASE SUMMARY
APPENDIX C – SUMMARY OF ECONOMIC ASSESSMENT

Figure C1 provides the anticipated cash flows for the DRP, based on the current estimate.

Figure C1: Darlington Refurbishment Program Anticipated Cash Flow



OPG continues to benchmark its cost and schedule assumptions and plans against other CANDU refurbishments. OPG's refurbishment schedule is based on the Wolsong refurbishment actual duration, pro-rated to account for the Darlington Station's larger unit size (480 fuel channels in a Darlington or Bruce unit vs. 380 fuel channels in a CANDU 6 design).

Table C2 provides a comparative assessment, based on publicly available information, of the current cost and schedule of the Darlington Refurbishment as compared to other CANDU refurbishments.

Table C2: Darlington Refurbishment Comparison to Other Refurbishments

Station (Per Unit)	Start Date	Planned / Actual Duration (Months)	Planned / Actual Cost
Darlington Station	OCT 2016	36/TBD	[redacted]
Pt. Lepreau	MAR 2008	18/55(1)	$1.0B/$1.4B (2)
Wolsong	APR 2009	22/28(1)	Not Available
Bruce A Units 1 & 2(3)	OCT 2005	25/84 for 2 units	$1.4B/$2.4B ($4.8B/2 units)

Notes:

(1) Pt. Lepreau and Wolsong are for CANDU 6 designs with 380 calandria/pressure tubes and a dedicated fuelling machine versus the Darlington and Bruce designs of 480 pressure tubes and a shared fuel handling system. Refurbishment assessed the Wolsong actual duration and pro-rated applicable series to conclude that the corresponding duration for the Darlington Station is approximately 34 months.

(2) An additional [redacted] in replacement energy costs, operations and maintenance costs, and incremental financing for non-project related costs was incurred by New Brunswick Power.

(3) Bruce scope includes replacement of Steam Generators as well as large Balance of Plant scope due to fact that units were in a laid-up state prior to refurbishment. Refurbishment of Units 1 and 2 commenced in October 2005 with Unit 1 complete in September 2012 and Unit 2 in October 2012, for a total of 7 years (84 months). The cost estimate publicly quoted is from November 2010; it is uncertain whether this cost estimate includes all of the applicable capitalized interest costs and/or operations and maintenance costs that can be directly attributable to the project.

DARLINGTON REFURBISHMENT BUSINESS CASE SUMMARY
APPENDIX C – SUMMARY OF ECONOMIC ASSESSMENT

1.1.3. Contingency and Risks - Refurbishment

Included in the refurbishment estimate is an allowance for uncertainties in project scope, costs and schedule. In addition, allowances are added for known discrete risks.

At the 50%, 70% and 90% confidence levels the total amounts included for contingency and risks are approximately [redacted] Billion, [redacted] Billion and [redacted] Billion, respectively. The contributing factors to these contingency amount estimates are broken out as follows:

- Cost Estimate Uncertainty

  This contingency item represents the amount that has to be added to the most likely estimates of the project bundles and project support and oversight estimates to bring the confidence level in these estimates to a certain level of confidence, e.g. 50% probability or 90% probability. This is due to the cost estimate ranges developed for each scope item showing more of a potential to increase than to decrease. This results in the expected value being higher than the most likely estimate. Recent progress in developing contracts for the project bundles and in reviewing and refining the project support and oversight estimates has resulted in a reduction in the amount of contingency needed for this item.

- Contingent Work Risk

  This contingency item represents an amount that has been estimated for potential work that may be required following inspections of equipment prior to and during the refurbishment outages. This potential work was identified during scope development activities during both the Preliminary Planning and Detailed Planning Phases.

- Labour/Materials Price Risk

  This item deals with risks associated with the potential for labour and material prices to be higher than expected in tight markets and is in addition to the cost estimate uncertainty. High demand for qualified workers and the required materials may occur if concurrent infrastructure improvement projects in Canada and worldwide result in tightening markets for labour and materials. As contracts are finalized, the contingency required for Labour/Materials Price Uncertainty will decline.

- Discrete Risk Items

  This item reflects contingency to address discrete risks listed in the risk register that are not accounted for in the other risk categories shown above. It includes regulatory delays, materials delays, rework risks and discovery work.

- Schedule Uncertainty Risks

  This item reflects the schedule uncertainty risk; the complexity of the project poses a risk to meeting the schedule. Schedule uncertainty risk should improve as the Detailed Planning Phase of the Project progresses.

  The estimates for each of these contributors to contingencies and risks at the 50%, 70% and 90% confidence levels are shown in Table C3.

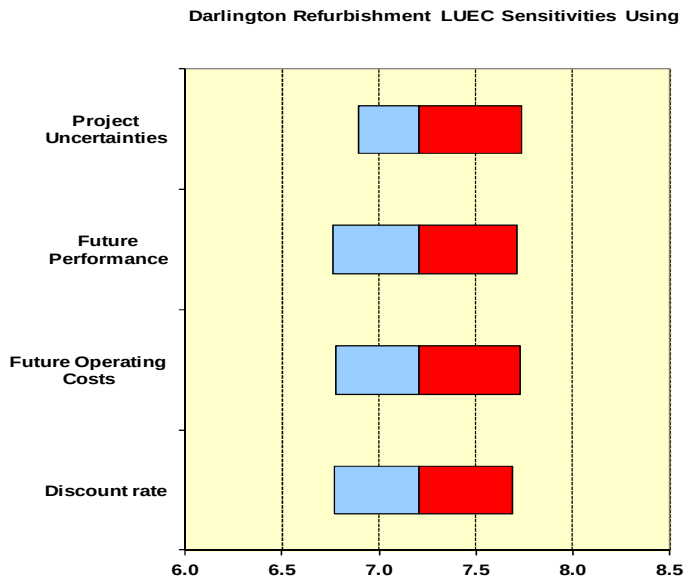
DARLINGTON REFURBISHMENT BUSINESS CASE SUMMARY
APPENDIX C – SUMMARY OF ECONOMIC ASSESSMENT

Table C3: Contingency & Risk Amounts added to the Darlington Project Cost Estimate

#	Category	Examples	Contingency (2013$M)		
			50% Conf.	70% Conf.	90% Conf.
1	**Cost Estimate Uncertainty** – Risk that actual cost of project scope is higher than planned.	Uncertainty in costs of project Bundles such as R&FR, Fuel Handling, T/G set and Balance of Plant	[redacted]		
2	**Contingent Work** –Work which may be required dependent on inspection results.	Repair and/or replace equipment that could not be visually assessed / tested during the condition assessments.			
3	**Labour/Material Price Uncertainty** – Risk that labour & materials prices may escalate higher than forecast	Labour market pressures lead to higher than expected labour prices			
4	**Discrete Risk Items** – Known risks that the project will manage	Regulatory delays, Material Delays, Rework, Discovery Work			
5	**Schedule Estimate Uncertainty** – Risk that actual duration of the refurbishment is longer than planned	Longer duration results in continued overhead costs			
		TOTAL:			

DARLINGTON REFURBISHMENT BUSINESS CASE SUMMARY
APPENDIX C – SUMMARY OF ECONOMIC ASSESSMENT

Figure C5: Sensitivity Analysis – Darlington LUEC

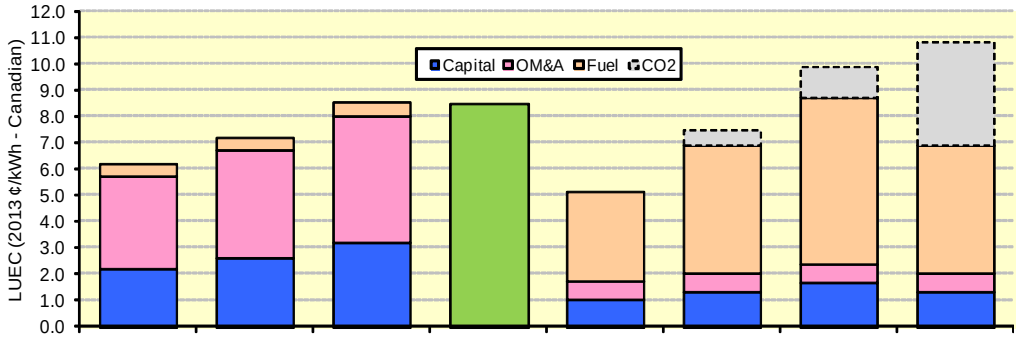


Assumptions	Lower	Median	Upper
Project Uncertainties			
Refurb Cost (2013$)	-10%	[redacted]	15%
Refurb Duration (months)	-2 mths	36 mths	+5 mths
Future Performance			
ACF (%)	-5%	88%	5%
Life of Refurb Units (yrs)	+2 yrs	30 yrs	-2 yrs
Future Operating Costs			
Base OM&A ($M)	-5%	270	10%
Outage OM&A ($M)	-10%	115	10%
Sustaining Projects ($M)	-10%	135	10%
Nuclear Support ($M)	-5%	215	15%
Corp Support Incr ($M)	-15%	235	10%
Fuel ($/MWh)	-15%	5	15%
Discount Rate	-1%	7%	+1%

2.3. Comparisons to Other Options

A significant input into the decision-making process on the economic viability of the Darlington Refurbishment is a comparison to the LUECs of other options competing with this project. Figure C6 presents such a comparison.

Figure C6: Levelized Unit Energy Costs for Darlington Refurbishment and Comparators



Assumptions:	Darlington Refurb			Bruce 1/2	New CCGT			
Scenarios	Low	Median	High	-	Low	Median	High	Carbon-free based on Median
Overnight capital (C$B)	[redacted]							
Overnight capital (C$/kW)								
Annual Fixed Operating Cost (C$M)	885	965	1,075	N/A	15	15	15	15
Annual Capacity Factor (%)	93%	88%	83%	85% (est.)	93%	88%	83%	88%
Gas Price (C$/mmBtu @ Henry Hub)					4	6	8	6
CO2 Offset Cost (C$/tonne)					0	15	30	100

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

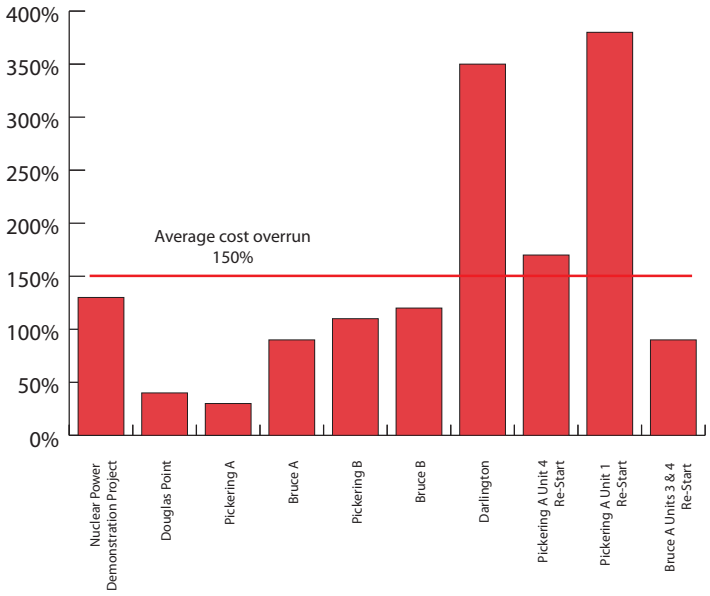
Ontario's History of Nuclear Cost Overruns

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.

33 *Second Amending Agreement to the Bruce Power Refurbishment Implementation Agreement Between Bruce Power L.P. and Bruce Power A L.P. and Ontario Power Authority*, July 6, 2009. Available online at: www.powerauthority.on.ca/Page.asp?PageID=122&ContentID=891.

34 Ontario Ministry of Energy, *News Release*, "Ontario Takes Next Step To Ensure Clean, Affordable And Reliable Energy Supply For Generations To Come", (March 7, 2008).

35 According to the Government's news release, "The competitive process will help to ensure the greatest amount of cost certainty, lowest possible price and a fair approach to risk sharing." See Infrastructure Ontario, *Backgrounder*, "Nuclear Procurement Project Phase 2", (June 16, 2008).

36 Shawn McCarthy & Karen Howlett, "Ontario's move puts AECL's future in doubt", *Globe and Mail*, (June 30, 2009).

37 Tyler Hamilton, "Nuclear bid rejected for 26 billion reasons: Ontario ditched plan for new reactors over high price tag that would wipe out 20-year budget", *Toronto Star*, (July 14, 2009).

38 Romina Maurino, "Province puts nuke plans on hold", *Toronto Sun*, (June 30, 2009); and Susan Riley, "Nuclear summer", *Ottawa Citizen*, (July 31, 2009).

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40 The Hydro-Electric Power Commission of Ontario, *Annual Report 1962*, page 60.

41 *Government Intervention in the Canadian Nuclear Industry*, page 107.

42 Paul McKay, *Electric Empire: The Inside Story of Ontario Hydro*, (Between The Lines, 1983), page 59.

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61 Ontario Electricity Financial Corporation, *Annual Report 2009*, page 12.

62 Ontario's population in 2009 was 13,069,200.

63 Ontario Electricity Financial Corporation, *Annual Report 2001*, page 29.

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65 Ontario Electricity Financial Corporation, *Annual Report 2009*, page 20.

66. According to the NB Power Group's *2007/08 Annual Report*, total construction costs, excluding replacement fuel and purchased power costs, would be approximately $1 billion (see page 20). According to recent reports, the project is approximately $1 billion over budget. See Chris Morris, "Leaders spar over Lepreau", *Telegraph-Journal*, (August 23, 2010).