

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act 1998*,
Schedule B to the *Energy Competition Act*, 1998, S.O. 1998, c.15;

AND IN THE MATTER OF an Application by Toronto Hydro-
System Electric Limited for an Order or Orders approving or fixing
just and reasonable rates and other service charges for the
distribution of electricity as of May 1, 2015.

AND IN THE MATTER OF Rule 27 of the Board's *Rules of
Practice and Procedure*.

BOOK OF AUTHORITIES OF THE SCHOOL ENERGY COALITION

January 26, 2015

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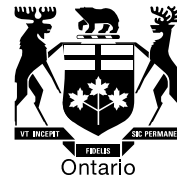
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EB-2007-0050

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15 (Schedule B) (the "Act");

AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to section 92 of the Act, for an Order or Orders granting leave to construct a transmission reinforcement project between the Bruce Power Facility and Milton Switching Station, all in the Province of Ontario;

AND IN THE MATTER OF Notices of Motion brought by Pollution Probe Foundation, and combined submission of Motion Records from the Ross Firm Group, and Fallis, Fallis and McMillan.

BEFORE: Pamela Nowina
Presiding Member and Vice-Chair

Cynthia Chaplin
Member

Ken Quesnelle
Member

DECISION AND ORDER ON MOTION

Hydro One Networks Inc. ("Hydro One") filed an amended application (the "Amended Leave to Construct Application") with the Ontario Energy Board (the "Board") dated November 30, 2007 under section 92 of the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B (the "Act"). This Amended Leave to Construct Application amends Hydro One's original application filed with the Board on March 29, 2007.

Hydro One is seeking an Order of the Board to construct approximately 180 kilometres of double-circuit 500 Kilovolt ("kV") electricity transmission line adjacent to the existing transmission corridor (500 kV and/or 230 kV) extending from the Bruce Power Facility in Kincardine Township to Hydro One's Milton Switching Station in the town of Milton. Hydro One also proposes to make modifications at the Milton, Bruce A and Bruce B transmission stations to accommodate the new transmission lines. This Leave to Construct Application was given Board file No. EB-2007-0050.

Hydro One has submitted that the project is required to meet the increased need for transmission capacity associated with the development of wind power in the Bruce area and the return to service of nuclear units at the Bruce Power Facility. Hydro One proposes an in-service date of Fall 2011 for the new 500 kV transmission line and related facilities. The estimated cost of the transmission project is approximately \$635 million.

Four Procedural Orders addressing scheduling, issues development and preliminary matters were issued in succession following receipt of the Application.

On February 25, 2008, the Board issued Procedural Order No.5 setting out the schedule for interrogatories and the filing of intervenor evidence.

On March 7, 2008 the Board issued Procedural Order No. 6 which addressed an issue of confidentiality related to a System Model used by the Independent Electricity System Operator ("IESO"). On April 1, 2008, the Board issued its Decision and Order on Confidentiality Matters.

On March 20, 2008 Pollution Probe filed a Notice of Motion with the Board seeking Orders from the Board requiring responses to various interrogatories. Pollution Probe categorized the interrogatories they are seeking answers into two types: "the Historical Information Interrogatories", and the "the Confidential Information Interrogatories". The Board notes that paragraph 3 of Procedural Order No. 5, directed Hydro One to notify the Board and intervenors if it intends to refuse to answer an interrogatory, for various reasons, by the end of the third day following the filing of an interrogatory. The Board received various

notifications from Hydro One indicating that it refused to answer a number of interrogatories from several parties.

On March 28, 2008, the Board issued Procedural Order No. 7 setting a Motion Day for April 3, 2008 to hear Pollution Probe's Motion as well as motions from any other parties relating to interrogatory responses. On April 1, 2008 the Board received a combined Motion from the Ross Firm Group and the Fallis Group, and a response from Hydro One to Pollution Probe's Motion of March 20, 2008.

Pollution Probe filed a letter with the Board on April 2, 2008 advising the Board that on April 3, 2008 it would request an adjournment of its motion seeking further and better interrogatory responses. Pollution Probe indicated that Hydro One's motion materials received on April 1, 2008, required Pollution Probe to consult with its expert witness and thus the need for an adjournment.

The Board held the Motion Day Hearing on April 3, 2008. The Board heard from Pollution Probe and the other parties on the request for an adjournment. The Board decided not to grant the adjournment and proceeded to hear the Motions. As a result of the Board's decision to deny its request for an adjournment, Pollution Probe withdrew from the Motions Proceeding.

Description of the Motions

The Pollution Probe motion grouped its request for interrogatory responses into "Historical Information" and "Confidential Information". The requests contained in the Ross-Fallis motion also requested historical information and confidential information, as well as expanded answers to some interrogatories and two requests (witness identification and the naming of "drivers") which were of a general nature. While Pollution Probe withdrew from the proceeding, the Board has considered its motion materials in determining what information the Board would find helpful to the review of Hydro One's application.

Board Findings

Historical Information

The combined Motion Record of the Ross Firm Group and the Fallis Group of

March 30, 2008 requested in part an Order of the Board that Hydro One provide full and adequate responses to the Ross Firm Group's interrogatories 1.1(i), 1.2, 2.1, 2.2 and 9.1 dealing with historical generation information. Mr. Fallis indicated during the hearing on the Motion that he would be satisfied if Hydro One could provide a complete reply to Pollution Probe's Interrogatories No.1 and No. 2 which sought historical data on Bruce "A" and "B" to cover the period from January, 1984 to 2002. These were requested in Pollution Probe's Motion Record of March 20, 2008. Mr. Ross of the Ross Firm Group indicated that a response to the group's Interrogatory 1.1(i) would not be required if Hydro One responded to Pollution Probe's Interrogatories 1 and 2.

In response to various interrogatories Hydro One provided some historical information, and declined to respond to others. In Hydro One's letter to the Board dated March 13, 2008, sent in compliance with the Board requirements set out in paragraph 3 of Procedural Order No.5, it declined to provide historical information on two grounds. The first was whether the historical information occurred in a period that pre-dates Hydro One's existence. The second related to the relevance of the historical data related to the question of the adequacy of the transmission system as it existed in distant past.

The Board notes that Pollution Probe indicated its need for historical information evidenced by questions submitted to Hydro One on October 1, 2007 in preparation for the Technical Conference held on October 15 and 16, 2007. The Board also notes the letter dated April 1, 2008 from a consultant to the Ross Firm Group, Mr. Edward R. Brill, indicated that the historical information is needed to establish a baseline for the system and to understand the system capacity going forward. Mr. Brill stated in part:

"It is SEA's understanding that the historical transmission data was requested in The Ross Firm Group interrogatories 1.1(i) and 1.2, in addition to other historical data requested by The Ross Firm Group and the Fallis Group Interrogatories. SEA requires this information in order to establish a baseline for the system and to understand the system capacity going forward.

SEA requests the historic information about generation capacities of the combined generation capabilities of Bruce "A" and "B" and "Douglas

Point”, in their best generation periods, and we request information on the megawatt levels transmitted during operation of 9 and later 8 nuclear reactor units.

SEA requests the information requested above in order to provide a complete and accurate analysis of the need and justification of the proposed project. It is SEA’s opinion that without this information, we are unable to offer an informed opinion as to the existing transmission system’s capacity and justification of the proposed Bruce to Milton 500-kV transmission line expansion.”

The Board finds that historical information would assist the Board in its understanding of the application and would assist the intervenors in preparation of their evidence. The Board notes that intervenors have indicated that this information is required in order to perform an independent expert assessment of the transmission system as it has operated in the past and how it operates currently. The Board finds that this area of enquiry is appropriate, and that therefore the requested information is relevant. The Board also notes that one of the experts expected to provide testimony has indicated that this data is necessary for the production of his evidence. Responses are therefore required as follows:

- Pollution Probe Interrogatory No. 1, covering the missing data (Capacity, Total Monthly Output, Peak Hourly Output, and Average Capacity Factor) for both Bruce A and Bruce B covering the period from Jan, 1984 to May, 2002. [Ref. C-2-1],
- Pollution Probe interrogatory No. 2, covering the missing data (Annual Output, Peak Hourly Output, and Average Annual Capacity Factor) for both Bruce A and Bruce B from 1984 to 2002. [Ref. C-2-2],
- The Board has determined that the request in Ross Firm Group’s Interrogatory 1.2 is too broad to solicit an appropriate response. However, the Board has determined that the following information is relevant and is to be provided:

(A) For each month, from January 1984 to the present, please provide the data listed below for each of the transmission circuits

evacuating power from the Bruce stations (A & B) which includes the six 230 kV lines[B27S, B28S, B4V, B5V, B22D, B23D] and the four 500 kV lines [B560M, B561M, B562L, B563L]:

- (i) Monthly Thermal Capacity in MW
- (ii) Monthly Capacity Permissible (Capability) in MW;
- (iii) Monthly Peak in MW;
- (iv) Monthly Capacity Factor

(B) For each year from January 1984 to the present, please provide the data listed below for each of the transmission circuits evacuating power from the Bruce stations (A & B) which includes the six 230 kV lines[B27S, B28S, B4V, B5V, B22D, B23D] and the four 500 kV lines [B560M, B561M, B562L, B563L]:

- (i) Annual Peak in MW;
- (ii) Annual Capacity Factor

Generation Forecast Information

Pollution Probe requested that a number of interrogatories be answered related to the forecast of generation. Hydro One itself acknowledged that the testing of the underlying generation forecast is an appropriate area of enquiry for this proceeding. The Board therefore finds that it would be assisted if parties are provided with additional information regarding that generation forecast. In particular, the Board directs Hydro One to answer the following:

- Pollution Probe Interrogatory 19(a) and 19(d)
- Pollution Probe Interrogatory No. 38
- Pollution Probe Interrogatory 42(a)
- Pollution Probe Interrogatory No. 47(c) deals with locked-in energy and seeks added levels of detail stated as “the finest level of temporal detail calculated”. The Board would be assisted if the answer to this interrogatory included an explanation of all the assumptions used for this analysis and directs that this be provided.

Hydro One may wish to consider whether any of these answers should be filed in accordance with the Board's Practice Direction on Confidential Filings.

Short Circuit Studies and Load Flow Studies

The Ross Firm Group Interrogatory 9.1 asked for the production of short circuit studies and load flow analysis. Its Interrogatory 9.2 asked for load flow computer models. Hydro One declined to respond to these interrogatories. The Ross Firm Group in its motion requested that Hydro One be ordered to provide the information. However, in his oral submissions, Mr. Ross indicated that his firm was working with the IESO to obtain the required load flow information and that he was no longer seeking an order on this issue.

The remaining issue is whether the short circuit studies should be provided. Mr. Ross said he was unprepared to argue the matter of confidentiality which was Hydro One's reason for not providing the information. Hydro One argued that the information request concerned the disclosure of customer-specific information, which Hydro One and the OPA and the IESO are not allowed to disclose due to customer impact assessment terms and conditions, as well as the provisions of the Transmission System Code. Mr. Nettleton, on behalf of Hydro One, also argued that the short circuit studies are not related to historical information and that the Ross Firm Group's expert did not request the information in his letter. Mr. Nettleton questioned why this level of detail is required since the information was used to create the customer impact assessment which has been filed in this case.

The Board can, and often does, order the production of confidential information. The Board also takes a fairly broad view of relevance for the purpose of ordering the production of evidence. However, in this instance, the Ross Firm Group has not made a case as to why the information is relevant and in light of the confidentiality concerns, the Board will not order the production of the information.

Expanded Answers

In its Motion, the Ross Firm Group asked for expanded answers to its Interrogatory 3 (to Hydro One) and Interrogatory 6 (to IESO). In response to both

those interrogatories, Hydro One referred the Ross Firm Group to other interrogatory responses and evidence. The Board is satisfied that these responses are sufficient and will not order further production of information.

Land Use Policy

The Ross Firm Group in its motion asked that Hydro One be ordered to respond to two interrogatories regarding Ontario's Provincial Policy Statement ("Land Use Policy"). The first of these interrogatories (Ross Firm Interrogatory 2.1) requested copies of all legal opinions with regard to the interpretation and implementation of the Land Use Policy. In its letter of March 13, 2008, Hydro One declined to answer the interrogatory, stating that it did not intend to rely on the requested information for purposes of its application. Hydro One pointed out that as a general proposition, legal opinions are protected by solicitor-client privilege and that the interpretation of the Land Use Policy was not a matter of evidence, but rather a matter of legal argument.

In the oral hearing, Mr. Ross, on behalf of the Ross Firm Group, argued that the information sought was relevant, and that the protection of solicitor-client privilege was limited. Mr. Ross based his argument regarding the limitation of solicitor-client privilege on *Rubinoff v. Newton*, [1967] 1 O.R. 402 (S.C.), and in particular, the following statement:

Much of what is learned by a solicitor in preparation of a case is privileged, but the moment they use that information for the purpose of founding an action or defence he must disclose the facts on which he relies

Based on the above, Mr. Ross argued that if Hydro One is relying upon a legal opinion in the interpretation of Land Use Policy to determine the acceptability of an alternative, this opinion is no longer privileged and must be produced.

In response, Mr. Nettleton, on behalf of Hydro One, reiterated that solicitor-client privilege protected legal opinions from disclosure and pointed out that in any event, Hydro One had not indicated it relied on legal opinion when interpreting Land Use Policy. Mr. Nettleton read that portion of the letter of March 13, 2008, which disclosed the basis on which the interpretation of the policy was made: "the consideration of its plain and ordinary meaning, taking into account well-

recognized, long-standing public policy objectives associated with minimizing overall impacts to the environment and the public”.

The Board will not order Hydro One to respond to Ross interrogatory 2.1. The Board believes that the Ross Firm Group can make its case regarding Hydro One's interpretation of Land Use Policy without access to Hydro One's legal opinions. Hydro One has stated that it has based its interpretation on a plain reading of the policy. The Ross Firm Group is free to challenge Hydro One's interpretation of the policy. The Board does not find it necessary to consider or determine the issue of solicitor-client privilege.

In its Interrogatory 2.2, the Ross Firm Group asked Hydro One to provide all internal memos, letters and/or reports discussing the interpretation of the Land Use Policy. Hydro One again referred the Ross Firm Group to its letter of March 13th, 2008. In this letter Hydro One explained that no such documents exist. The Board accepts Hydro One's response and will not order further response to Ross Firm Group Interrogatory 2.2.

Identification of Witnesses

In its interrogatory responses, Hydro One did not provide identification of witnesses and authors. Mr. Ross and Mr. Fallis both made submissions that Hydro One should be ordered to provide this information. In his submissions, Mr. Nettleton indicated that Hydro One would provide this information before the oral hearing and would make best efforts to produce this information one week before the hearing. This is indeed essential information, and the Board orders its production one week before the first day of the oral hearing.

Drivers

In their Motion, the Ross Firm Group and the Fallis Group, sought a declaration that the OPA, IESO and Bruce are “drivers” of the project. The Board sees no purpose in such a declaration. The Board can, and will if required, order any of these parties to provide information without giving them any special status.

Schedule

Mr. Ross and Mr. Fallis both requested that, if the Board were to accept any of their motions, the Board consider changes to the schedule to accommodate their review of new interrogatory responses. The Board has considered this request and will provide an update to the schedule in a procedural order.

Board Order

The Board directs Hydro One to respond to all its findings regarding additional information listed above.

With regard to the “historical information” interrogatories, Hydro One stated that it does not have all of the relevant data in its possession. The Board directs Hydro One to make its best efforts to obtain this information, from Ontario Power Generation, Bruce Power, or some other body. In the event that Hydro One is unsuccessful in its attempts to secure this information, the Board will exercise its powers under section 12 of the *Statutory Powers Procedure Act* and issue a summons to require a party or other organization to produce this information. The Board notes that this would result in a further delay in the proceedings.

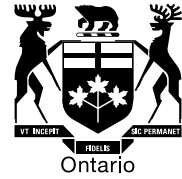
DATED at Toronto, April 7, 2008

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

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EB-2013-0010
EB-2013-0029

IN THE MATTER OF the *Electricity Act*, 1998, S. O.
1998, c.15, Schedule A;

AND IN THE MATTER OF an Application made
collectively by entities that have renewable energy
supply procurement contracts with the Ontario
Power Authority in respect of wind generation
facilities for an Order revoking amendments to the
market rules and referring the amendments back to
the Independent Electricity System Operator for
further consideration.

**DECISION ON MOTION FOR THE PRODUCTION OF EVIDENCE
AND
PROCEDURAL ORDER NO. 3**

February 12, 2013

On January 24, 2013, a number of entities that have renewable energy supply procurement contracts with the Ontario Power Authority (“OPA”) in respect of wind generation facilities (the “Applicants”) collectively filed with the Ontario Energy Board an application under section 33(4) of the *Electricity Act*, 1998 seeking the review of certain amendments to the market rules made by the Independent Electricity System Operator (“IESO”). The market rule amendments in question (the “Renewable Integration Amendments”) deal with the dispatching of, and the establishment of floor prices for, variable generation facilities, defined as all wind and solar photovoltaic resources with an installed capacity of 5MW or greater,¹ or all wind and solar photovoltaic resources that are directly connected to the IESO-controlled grid.

¹ Wind and solar photovoltaic resources that are embedded (i.e., not directly connected to the IESO-controlled grid) are captured by the Renewable Integration Amendments only if they are registered market participants.

On January 28, 2013, the Board issued its Notice of Application and Oral Hearing in relation to the Application.

The Board issued its Procedural Order No. 1 on January 29, 2013 and its Procedural Order No. 2 on February 4, 2013.

Letter of Direction to the IESO to Produce Evidence

As noted in Procedural Order No. 1, the Applicants previously filed an application with the Board under section 21 of the *Ontario Energy Board Act, 1998* asking the Board to give directions to the IESO to prepare evidence (the “Section 21 Application”).² The Applicants and the IESO both filed submissions in respect of the Section 21 Application. Acting on its own motion, the Board issued a Letter of Direction to the IESO on January 22, 2013 to produce certain evidence by January 29, 2013 (the “Letter of Direction”). The IESO filed voluminous materials on January 29, 2013, and filed a revised set of documents that included a supplementary document on January 31, 2013. These materials were later re-filed on February 6, 2013 in response to Procedural Order No. 2.³

The Applicants’ Motion

As part of the current Application, the Applicants re-filed their request for the production of materials from the IESO, which the Board has treated as a motion. Procedural Order No.1 established the process for the hearing of that motion; namely, the filing of submissions and an oral hearing. Submissions were filed by the Applicants, the IESO and the School Energy Coalition (“SEC”). Those submissions, together with the submissions of the Applicants and the IESO in respect of the Section 21 Application and the transcript of the oral hearing held on February 11, 2013, are available for review at the Board’s offices and on its website.

Submissions of the Parties

In their written and oral submissions, the Applicants reiterated their request for the production by the IESO of all of the materials identified in their Section 21 Application,

² EB-2013-0010. As noted in Procedural Order No. 2, the Board has combined the Section 21 Application proceeding with this one.

³ As required by Procedural Order No. 2, the re-filing was to include un-redacted versions of a number of documents that the IESO had redacted for reasons of relevance.

as reproduced in Schedule A to their February 5, 2013 submissions (the “Requested Evidence”). For convenience of reference, the Requested Evidence is listed in Appendix A to this Decision and Procedural Order.

The Applicants submitted that all of the Requested Evidence may be relevant to the issues in this proceeding, and noted that the Board has taken a broad view of relevance for the purpose of ordering the production of evidence. The Applicants also stated that the Board has previously highlighted the importance of fairness in Board proceedings, and has in other proceedings ordered parties to make best efforts to obtain information from third parties. Further, the Applicants noted that the IESO has long been aware of the potential for their Application, and that the Applicants asked the IESO for the Requested Evidence in November 2012. Hence, in the Applicants’ view, the IESO should be in a position to provide the Requested Evidence in a timely manner. The Applicants, for their part, are prepared to proceed to an oral hearing on March 7, 2013.

In their February 7, 2013 submissions, the IESO expressed reliance on the submissions that it made for the Section 21 Application. The IESO reiterated its position that certain portions of the Requested Evidence go to an issue that is outside the scope of the IESO’s mandate and outside the scope of the review of market rule amendments as set out in section 33 of the Electricity Act. Specifically, the IESO submits that the impact of the Renewable Integration Amendments on the Applicants’ payment rights under their contracts with the OPA, and how those payment rights compare to the payment rights of other dispatchable generators who have contracts with third parties, is clearly out of scope for this proceeding. The IESO invited the Board to first determine the scope of the issues in this proceeding, and to address the issue of evidence thereafter.

During the oral hearing, counsel for the IESO also submitted that the discovery process in relation to the Application should not be used for the collateral purpose of gaining an advantage in negotiations that are ongoing between the OPA and the Applicants. Noting that the Applicants have indicated that they do not intend to file evidence, counsel for the IESO also expressed concern that the production obligations of the parties should be contemporaneous and symmetrical, as is typically seen in applications (i.e. the filing of evidence by the parties followed by interrogatories as required), rather than proceeding by way of ordering the IESO to produce additional

materials. Counsel for the IESO confirmed that the IESO intends to produce evidence, and that the IESO proposes to do so by March 4, 2013.

In their February 7, 2013 submissions, SEC stated that the Board must have sufficient evidence on which to make a decision in this proceeding, and agreed with the Applicants that the test for determining relevance must be broad. In SEC's view, the IESO takes too narrow a view of the issues in this proceeding. Noting that the Board and the parties have little experience or jurisprudence to guide a review under section 33 of the Electricity Act, SEC did not favour the Board staging this proceeding and making determinations on relevance at this time. According to SEC, such determinations should only be made on the basis of a complete evidentiary record. Moreover, SEC submitted that while the Applicants' focus is on how they are affected by the Renewable Integration Amendments, the Board must consider a much broader range of considerations to ensure that other purposes of the Electricity Act are not ignored at the expense of those specifically raised by the Applicants. In SEC's view, the Board should err on the side of broader rather than narrower production, and should order the production of all documents in the possession of the IESO that relate to the Renewable Integration Amendments except where the documents are clearly not relevant to any possible issue in this proceeding.

Board Findings

The Board must accommodate two imperatives in this proceeding; namely, to treat the parties fairly and to issue an order that embodies the Board's final decision no later than March 25, 2013. As counsel for the Applicants pointed out, this places obligations on all of the parties. The Board's *Rules of Practice and Procedure* provide for a thorough process for the filing of evidence and the exchange of interrogatories. While the Board is guided by the principles reflected in those *Rules*, the Board concludes that the process must be adapted in this case to ensure fairness while respecting the statutory timeframe. As well as being time constrained, this proceeding differs from the Board's more customary proceedings. In their Application, the Applicants seek to overturn the action of another party; they are not seeking approval for an action on their part. In this proceeding, the Board must make a determination about the IESO's market rule amendments; the Board therefore expects that initial material necessary for the Board's review will originate with the IESO.

The Board will therefore order the IESO to produce the following materials, being a subset of the Requested Evidence, to the extent that the materials have not already been produced pursuant to the Letter of Direction:

- i. all materials (including reports, presentations and analyses but excluding correspondence) in the possession of the IESO with respect to how the IESO or any other government agency compensates market participants for curtailing or maneuvering their facilities to address: (a) actual or forecast instances of surplus energy; or (b) efficiency of the IESO-administered markets or reliability of the IESO-controlled grid to the extent that the existence and nature of such compensation is not discernible from the market rules or associated market manuals;
- ii. all materials (including reports, presentations and analyses but excluding correspondence) in the possession of the IESO relating to the way in which the Renewable Integration Amendments may impact the extent of curtailment to which variable generators may be subject, including any analysis of historical data, forecasts, projections or estimates of curtailments under ranges of scenarios, and including the underlying methodology, assumptions and calculations;
- iii. all materials (including reports, presentations and analyses but excluding correspondence) in the possession of the IESO respecting the way in which the Renewable Integration Amendments may have an impact on amounts owing by the OPA to variable generators in respect of their procurement contracts; and
- iv. all materials (including reports, presentations and analyses but excluding correspondence) in the possession of the IESO in respect of the matters addressed in any of the purposes set out in section 1 of the Electricity Act in relation to the Renewable Integration Amendments process, including all materials relating to the development and consideration of options that involved alternatives to imposing dispatch and floor price requirements on wind generators.

The Board is satisfied that the above materials may be relevant to the issues before the Board; namely, whether the Renewable Integration Amendments are inconsistent with

the purposes of the Electricity Act or unjustly discriminate against or in favour of a market participant or class of market participants. It remains to be determined to what extent the underlying information was considered by the IESO, or to what extent it should have been considered by the IESO. To be clear, the IESO is required to produce all materials captured by the items above irrespective of whether or not the IESO considers the materials to be relevant.

Item (iv) is very similar to item (viii) in the Board's Letter of Direction. However, there was some uncertainty during the hearing as to whether any distinction had been made between "information" and "material". The Board expects the IESO to confirm whether what it has already filed under the Letter of Direction fully meets item (iv) and to file any additional material if necessary to comply with item (iv).

The Board agrees with SEC that all of the purposes of the Electricity Act should be considered, and this is reflected in item (iv) above.

The Board will not order the IESO to request information of other government bodies. The Board finds that the appropriate information for the IESO to provide is the information that it has in its possession. The Board rarely requires a party to request information from third parties, and given the constraints applicable to this proceeding the Board concludes that such an approach would not assist the Board.

The Board will also not order the IESO to produce any further correspondence beyond correspondence that was captured by the Board's Letter of Direction. The production of correspondence has the potential to be particularly onerous for the IESO but of relatively limited incremental value in assisting the Board. The Board's focus in this proceeding is on the impact or effect of the Renewable Integration Amendments, which the Board believes can be understood from the other materials to be produced under the above items and from the IESO's filings pursuant to the Letter of Direction.

The Applicants also requested that the IESO produce all materials with respect to the expectations that market participants would be compensated with respect to the Renewable Integration Amendments. This request is adequately covered in item (i) above.

As noted above, the IESO argued that the scope of this proceeding should be established by the Board so as to exclude any consideration of the consequential impacts of the Renewable Integration Amendments on the Applicants (or other market participants) arising from their contracts with the OPA. The IESO maintained that it did not, and should not, consider those impacts in the market rule amendment process. The Board is not prepared to make the requested determination at this time in the absence of seeing the materials in the possession of the IESO. If this proceeding were not under a statutory time constraint, the Board might take the approach of conducting a preliminary enquiry into the scope of the issues prior to the filing of evidence and the exchange of interrogatories. However, given the time constraint the approach proposed by the IESO could result in disclosure being completed only a very short time before the Board is required to issue its order in this proceeding. That would be unfair to the Applicants, and would compromise the ability of the Board to appropriately consider the evidence and the issues before issuing its order. In the Board's view, the alternative of requiring early disclosure on a range of issues, even though some may eventually be found to be out of scope, does not unduly harm the IESO. The Board accepts that there is an administrative burden associated with the production of materials on a compressed schedule. However, as noted above the Board is only ordering the production of materials that are already in the possession of the IESO. The Board is not requiring production from third parties via the IESO, nor is it requiring the IESO to produce correspondence or new analyses.

Confidentiality Claims

During the oral hearing on the Applicants' motion, the Board confirmed the schedule for the filing of submissions on the confidentiality claims being made by the OPA and the Ministry of Energy in respect of certain of the materials filed by the IESO in response to the Letter of Direction. The process for addressing those confidentiality claims is proceeding in parallel with the further production of materials by the IESO that is being ordered under the terms of this Decision and Procedural Order.

The Board is concerned that any confidentiality issues associated with the materials to be produced by the IESO under the terms of this Decision and Procedural Order not engender any further delay in this proceeding. The Board expects that, in making this further production, the IESO will comply with the Board's *Rules of Practice and Procedure* and the *Practice Direction on Confidential Filings*. If considered appropriate by the relevant parties, any material in respect of which a confidentiality claim is being

made may be filed by the IESO, the OPA or the Ministry of Energy, provided again that the filing is in accordance with the above-noted Board regulatory requirements. To the extent that a confidentiality claim is being made on the same basis as applies to the current confidentiality claims, it will be sufficient to simply state that.

Remaining Steps in this Proceeding

As noted above, the IESO has stated that it intends to file evidence. The IESO has also indicated that it would like to pose interrogatories to the Applicants. The Applicants have not indicated that they intend to file any evidence, but they have stated that they are prepared to answer interrogatories to the extent that the Board considers them relevant and to the extent that the Applicants have the information in question.

The Board will make provision for the IESO to file evidence if it so chooses, and to pose interrogatories to the Applicants. The Board will allow all other intervenors to do the same. The Board will also make provision for the Applicants to file evidence if they choose. All of this evidence and interrogatories will be due on February 22, 2013. This is sooner than the IESO had proposed. However, the Board has already indicated that it must achieve fairness to the parties within the context of the statutory deadline.

The Board will not make provision for the filing of interrogatories on the IESO's evidence, or on the evidence of any other party (including the Applicants) which is filed on February 22, 2013. The Board is aware that the schedule outlined above will not allow parties to ask interrogatories of the Applicants on any evidence that the Applicants may file. The Board believes that any issues in this regard can be adequately addressed through cross-examination at the oral hearing. In addition, the Board will make provision for a Technical Conference should the parties want the opportunity to ask questions of a technical nature on the evidence.

The hearing of the Application will commence on March 7, 2013 and continue on March 8, 2013 if required. The Board will issue further direction in due course on the conduct of the hearing.

The Board considers it necessary to make provision for the following procedural matters. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. On or before **Friday, February 22, 2013**, the IESO shall file with the Board and deliver to all parties all materials in its possession that are captured by the list set out in this Decision and Procedural Order under the heading “Board Findings”. Where applicable, that filing shall comply with Rule 10 of the Board’s *Rules of Practice and Procedure* and the *Practice Direction on Confidential Filings* as set out in this Decision and Procedural Order under the heading “Confidentiality Claims”. If the IESO’s filing is voluminous, it may be filed and served on disc only. Nine discs shall be filed with the Board.
2. Any party that wishes to file evidence in this proceeding shall file that evidence with the Board and deliver a copy to all other parties on or before **Friday, February 22, 2013**.
3. Any party or Board staff that wishes to ask interrogatories of the Applicants shall file the interrogatories with the Board and deliver a copy of the interrogatories to all other parties on or before **Friday, February 22, 2013**.
4. Responses to interrogatories shall be filed with the Board and delivered to all other parties on or before **Friday, March 1, 2013**.
5. A Technical Conference will be held to review the evidence filed by the parties. The Technical Conference will commence at 9:30 a.m. on **Monday, March 4, 2013** in the Board’s West Hearing Room on the 25th Floor at 2300 Yonge Street, Toronto.
6. The oral hearing of the Application will commence at 9:30 a.m. on **Thursday, March 7, 2013** in the Board’s West Hearing Room on the 25th Floor at 2300 Yonge Street, Toronto. The hearing is currently scheduled for up to 2 days.

All filings to the Board must quote file number EB-2013-0029, be made through the Board’s web portal at <https://www.pes.ontarioenergyboard.ca/eservice/> and, except as noted above, shall consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender’s name, postal address and telephone number, fax number and e-mail address. Parties shall use the document

naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>.

If the web portal is not available, parties may e-mail their documents to the address below. Those who do not have internet access are required to submit all filings on a disc in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Edik Zwarenstein at Edik.Zwarenstein@ontarioenergyboard.ca and the Board's Associate General Counsel, Martine Band at Martine.Band@ontarioenergyboard.ca.

ADDRESS

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Attention: Board Secretary
E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

DATED at Toronto, February 12, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Attachments: Appendix A: Requested Evidence (reproduced from the Applicants' February 5, 2013 submissions)

APPENDIX A

TO

**DECISION ON MOTION FOR THE PRODUCTION OF EVIDENCE
AND
PROCEDURAL ORDER NO. 3**

Renewable Energy Supply Generators

Board File No: EB-2013-0010/EB-2013-0029

February 12, 2013

Requested Evidence

(reproduced from the Applicants' February 5, 2013 submissions)

- b) Information relating to discrimination against Affected Generators by exposing them to uncompensated and involuntary curtailment, including:**
- All Materials (defined as including internal correspondence and modelling, and all communications with Government Agencies (defined as including the OPA and Ontario Electricity Finance Corporation ("OEFC")), and all Market Participants) with respect to how the IESO or any other government agency compensates market participants for curtailing or manoeuvring their facilities to address actual or forecasts instances of surplus energy or for other purposes;
 - All Materials with respect to the expectations that market participants, including but not limited to Affected Generators, would be compensated with respect to the SE-91 Amendments; and
 - For greater certainty, satisfying this request includes the requirement that the IESO specifically request Government Agencies to provide all of their Materials with respect to:
 - compensation of market participants for curtailing or manoeuvring their facilities to address actual or forecasts instances of surplus energy; and

- with respect to the expectations that market participants, including but not limited to Affected Generators, would be compensated with respect to the SE-91 Amendments.

c) Information relating to discrimination in favour of the OPA:

- All Materials relating to the way in which the SE-91 Amendments may impact the extent of curtailments to which the Affected Generators may be subject, and, in particular, all forecasts, projections or estimates of curtailments under ranges of scenarios, identifying who prepared them, and including the underlying methodology, assumptions and calculations of such forecasts, projections or estimates;
- All Materials respecting the way in which the SE-91 Amendments may have an impact on amounts owing by the OPA to Affected Generators in respect of their procurement contracts; and
- For greater certainty, satisfying this request includes the requirement that the IESO specifically request Government Agencies to provide all of their Materials with respect to:
 - the way in which the SE-91 Amendments may impact the amount that the Affected Generators may be subject to curtailment, and, in particular, a forecast of curtailments; and
 - the expectations that market participants, including but not limited to Affected Generators would be compensated with respect to the SE-91 Amendments.

d) Information relating to the consistency of the SE-91 Amendments with the purposes of the EA, including:

All Materials considered by the IESO in respect of the matters addressed in ss. 1(d), (e) and (i) of the EA in the SE-91 Amendment process, including all Materials relating to the development and consideration of options that involved alternatives to imposing dispatch and floor price requirements on wind generators.

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**Ontario Energy Board Commission de l'énergie
de l'Ontario**



EB-2012-0459

IN THE MATTER OF AN APPLICATION BY

Enbridge Gas Distribution Inc.

2014 - 2018 Rate Application

DECISION WITH REASONS

July 17, 2014

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF an Application by Enbridge Gas
Distribution Inc. for an order or orders approving or fixing
rates for the sale, distribution, transmission and storage of
gas commencing January 1, 2014.

BEFORE: Paula Conboy
Presiding Member

Cynthia Chaplin
Member

Emad Elsayed
Member

DECISION WITH REASONS

July 17, 2014

Rate Setting Mechanism

Enbridge proposed a five-year Custom Incentive Rate-setting (“Custom IR”) plan to begin January 1, 2014. If approved, the plan would fix Enbridge’s allowed distribution revenue (“Allowed Revenue”) for each year in the five-year term based on a forecast of capital and operating costs, inclusive of productivity savings. The proposed revenue requirement for 2014 is \$1,009 million, rising to an estimated \$1,292 million in 2018.

The concept of any incentive rate-setting approach is that it decouples costs from the rates that a distributor charges for its services. This is deliberate and is designed to incent more efficient performance. The approach provides the opportunity for a distributor to earn, and potentially exceed, the allowed rate of return on equity. The Board monitors the company’s results over the term of the plan to ensure that the company is actually finding productivity improvements and not simply cutting costs in a way which compromises safety, reliability or other important customer metrics. The Board also monitors the company’s financial results over the plan term to make sure that the company did not over-forecast its costs at the outset of the plan.

The Board has been regulating natural gas and electricity utilities under IR plans for years and the approach has been widely used in other jurisdictions such as the Great Britain and Australia. In 2005, the Board set out the criteria for natural gas utility IR plans in its Natural Gas Forum (“NGF”) Report. Electricity distributors have been under some form of IR regulation since 2000. Most recently, the Board issued its Renewed Regulatory Framework for Electricity Distributors (“RRFE”)² report in which the Board outlines a new five-year Custom IR option for electricity distributors, along with a traditional IR option and an Annual IR option.

Enbridge explained that in developing its proposal, it was guided by the NGF Report and the RRFE Report as well as a “building blocks” ratemaking model that has been used in Great Britain and Australia. Enbridge’s proposed Custom IR plan and its last IR plan both relied on forecasts of costs and revenues. However, in the last IR (“traditional IR”), rates for the first year were set on a single forward test-year cost of service (or “base” year) basis. Rates for subsequent years of the plan were set using an index based on an externally derived inflation factor and productivity adjustment. These annual rate adjustments recognize that costs rise with inflation but also that a company should be

² *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*, October 18, 2012.

striving for continuous improvement in productivity. In the current application, Enbridge proposed to set its rates for 2014 through 2018 based on a five-year forecast of its revenue requirement and sales volumes. Some annual adjustments are proposed for certain pre-determined factors; these are discussed further elsewhere in this decision.

Most parties opposed Enbridge's proposal and many argued that the Board should impose a traditional IR plan on the company.

Board Findings

Enbridge's application for a "Custom IR plan" is the first of its kind since the Board issued its RRFE Report. The RRFE Report was targeted explicitly to electricity distributors. However, the objectives and principles in the RRFE Report are consistent with those of the earlier NGF Report which focused exclusively on natural gas. In many important respects the Board's policy articulated in the RRFE Report is the natural evolution of the Board's thinking in the areas of both natural gas and electricity rate-setting. It is therefore appropriate that Enbridge looked to the RRFE Report for guidance on developing its plan.

Each Custom IR application will be considered on an individual basis. Indeed, one of the purposes of the Custom IR option is to provide a utility with the opportunity to tailor its rate profile to meet its specific needs. However, an applicant for Custom IR is also responsible for providing a robust plan which is properly documented and supported. This initial Custom IR application by Enbridge has been a significant learning experience for all parties and for the Board as it works to implement its new policy framework. It is the Board's expectation that this decision will provide further guidance on the interpretation and implementation of the Board's rate-setting policies.

Enbridge submitted that a Custom IR is appropriate given its extraordinary capital requirements, especially its GTA and Ottawa projects and its Work and Asset Management project. Together, these projects raise the capital expenditures over the 2014 to 2018 period by approximately 28% above what Enbridge termed its "core capital" requirements.³ The company also noted that its increasing depreciation costs, productivity challenges and uncertainty about its other capital spending requirements contributed to the need for the Custom IR framework. Enbridge claimed that it would not be able to provide safe and reliable service to its customers if the company were subject to the formulaic adjustments approved under a traditional IR.

³ Enbridge defines "core capital" as "...all capital spending, except for three identified major projects: the GTA and Ottawa Reinforcements and the Work and Asset Management Project (WAMS)."

Enbridge also maintained that the Custom IR plan will benefit customers by supporting necessary investment to ensure safe and reliable service. In Enbridge's view, customers and the company will benefit from the establishment of rates for a five-year period because it will produce fair and predictable rates while reducing regulatory burden. Under Enbridge's proposal customer distribution bills are projected to increase by an average of 2% annually, with an initial reduction followed by increases above expected inflation. The Board has indicated that distributors whose capital needs are expected to be comparatively stable over time should be able to operate under the traditional IR plan. Intervenor argued that there are provisions under the traditional IR that could accommodate the three major projects and that the company could operate safely and reliably under traditional IR because the company's core capital is relatively stable.

The Board finds that Enbridge's capital requirements are sufficient to support the request for a Custom IR. Other approaches could have been used, for example the Incremental Capital Module that is available to electricity distributors under traditional IR or the Y factor approach negotiated by Union Gas, but it is open to a utility to request a Custom IR if the expenditures are significant and if the application is adequately supported. As the Board stated in the RRFE Report:

The Custom IR method will be most appropriate for distributors with significantly large multi-year or highly variable investment commitments that exceed historical levels.⁴

Many parties also argued that the traditional IR model contained in Union Gas' Settlement Agreement and subsequently approved by the Board (EB-2013-0202) should be applied to Enbridge. The Board does not accept this argument. The Board has long indicated its reluctance to impose a negotiated settlement from one utility to another without a thorough analysis of the circumstances for each utility. In accepting settlement agreements, the Board has made it clear that there is no precedential value in the individual components of a settlement agreement as all settlements contain trade-offs. The Board will not impose the Union Gas Settlement Agreement on Enbridge.

In its RRFE Report, the Board indicated that a distributor applying for Custom IR would need to file robust evidence and external benchmarking to support the reasonableness of its forecasts, especially given the recognized incentive to over-forecast, the uncertainties with long-term forecasting, and the level of rate increases projected (higher than under traditional IR). The Board also identified its expectation that a distributor would file a

⁴ RRFE Report, p. 19.

comprehensive asset management plan that is linked to the capital budget and operationalized to support the prioritization of decisions and the optimization of utility assets. A distributor would need to demonstrate its ability to manage within the rates set, given that actual costs and revenues will ultimately vary from forecast.

Parties argued that Enbridge has not provided sufficiently robust evidence on its costs and revenues that would allow the Board to set rates that are just and reasonable for the next five years. Specifically parties criticized the benchmarking work which compared Enbridge to a number of peer US companies. Enbridge retained Concentric Energy Advisors Inc. ("Concentric") to undertake benchmarking analysis and Mr. Coyne from Concentric provided expert evidence at the oral hearing. The Concentric studies concluded that Enbridge is among the most efficient of its US peers in most categories measured. Enbridge argued that Concentric's benchmarking analysis confirms that the company is among the most efficient. Board staff retained Pacific Economics Group Research LLC ("PEG") to undertake analysis of the Enbridge proposal, and Dr. Kaufmann from PEG provided expert evidence at the oral hearing. Dr. Kaufmann was of the opinion that the benchmarking analyses were inadequate. Most parties supported Dr. Kaufmann's analysis and argued that the benchmarking analysis provided by Concentric was flawed and could not be relied upon to reach conclusions as to the efficiency level of Enbridge or the reasonableness of its budgets.

The Board finds that there are significant limitations to the benchmarking analysis. First, it is not a total cost benchmarking. Other than net plant per customer the Concentric analysis did not include capital costs in its benchmarking and yet capital represents approximately 65% of the total costs in this case. The RRFE Report is clear that the Board will use total cost benchmarking. Mr. Coyne and Dr. Kaufmann did prepare ad hoc measures of total unit cost during the proceeding. In the case of Dr. Kaufmann, the results suggest that Enbridge is not as efficient as Enbridge claims to be. Second, there are significant concerns with the comparator group developed by Concentric, which was driven significantly by weather considerations. Dr. Kaufmann disagreed that weather would be a significant factor. The evidence was not conclusive one way or the other regarding the importance of weather, however, because of its reliance on the weather factor, the Concentric comparator group included companies which in other important respects are not comparable to Enbridge and excluded companies which in other important respects are comparable to Enbridge. In particular, the comparator group contains a number of older northeast utilities which still have large amounts of cast iron and bare steel pipe, which Enbridge has mostly replaced, and the group excludes almost

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EB-2013-0115

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by Burlington
Hydro Inc. for an order approving just and reasonable rates
and other charges for electricity distribution to be effective
May 1, 2014.

PROCEDURAL ORDER NO. 4
March 19, 2014

Burlington Hydro Inc. ("Burlington Hydro") filed a complete cost of service application with the Ontario Energy Board (the "Board") on October 25, 2013 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, seeking approval for changes to the rates that Burlington Hydro charges for electricity distribution, to be effective May 1, 2014.

On March 11, 2014, the School Energy Coalition ("SEC") filed a Notice of Motion ("Motion"). The Motion seeks the following relief:

1. An order requiring Burlington Hydro to provide a full and adequate response to interrogatory 2.1-SEC-5 and/or 2.1-SEC-4, by producing the benchmarking survey it participated in, and is referred to in the response to interrogatory 2.1-SEC-5.
2. Such further and other relief as the SEC may request and the Board may grant.

In response to SEC-5 Burlington Hydro referenced a benchmarking survey ("the Benchmarking Survey") but stated that it was bound by contract to neither disclose the survey nor any details about it unless ordered by the Board.

On March 12, 2014, the Board issued Procedural Order No. 3 which, among other things, established an expedited schedule for Board staff and intervenors to file submissions on the Motion, for Burlington Hydro to file a response, and for SEC to file supporting material, if required, and a reply submission. The Board indicated that it would issue a decision on the Motion by the end of day Tuesday March 18, 2014. On March 14, 2014 Board staff submitted that SEC's request for the Benchmarking Survey is clearly within the scope of the current proceeding, as it pertains to Issue 2.1 of the Issues List and benchmarking is a core component of the Board's Renewed Regulatory Framework for Electricity Distributors (RRFE). Board staff submitted that Burlington Hydro should be required to produce the Benchmarking Survey and that the document should be designated as confidential on an interim basis in order to determine its relevance. Board staff also noted that in previous Board decisions, the Board has not accepted a party's confidentiality agreement with a third party as a basis for withholding documents or information.

On March 17, 2014, Burlington Hydro submitted that the Board should consider the specific circumstances of this case. While acknowledging that the Board has the authority to order production of documents, despite the existence of a contractual obligation on the regulated utility to refrain from disclosure, Burlington Hydro submitted that the circumstances in this case were materially different from the examples cited by SEC and Board staff. Specifically, the Board should consider that:

- Burlington Hydro did not conduct the survey, but was only a participant;
- Burlington Hydro only became a participant and obtained copies of the survey as a result of entering into a contract preventing it from disclosing the details; and
- The survey is not central to the application; Burlington Hydro did not refer or rely on the survey in its application or interrogatory responses, except to be truthful about its participation in the survey.

Regarding the relevance of the information contained within the survey, Burlington Hydro submitted that, in its view, the Board's reliance on benchmarking as noted in the RRFE Report and the Scorecard Approach Report relates to Board initiated benchmarking. Burlington Hydro submitted that while third party benchmarking material may be useful, the Board's interest should not be taken as a carte blanche directive to produce all benchmarking material regardless of the circumstances.

Burlington Hydro submitted that, should such contractual obligations be consistently ignored by the Board, utilities would have their access to third party information, for any use, severely restricted.

On March 18, SEC noted the Board's past approach, wherein a document should be disclosed if it is relevant, and its probative value will outweigh any prejudicial effects. SEC submitted that the fact that Burlington Hydro did not rely on the Benchmarking Survey in preparing its application does not determine the relevance of the document. SEC further submitted that the Board's standard for ordering the production of evidence is not reliance but relevance, and that the Board takes a fairly broad view of relevance. SEC submitted that interrogatories allow for the provision of information in addition to that filed, and that the document is relevant to the proceeding in that the Issues List contains a specific question regarding performance benchmarking. SEC noted that, although Burlington Hydro had individually addressed the differences between this case and those cited in parties' submissions, it had not provided a single case where the relevant document was not produced due to a third party non-disclosure agreement.

In response to Burlington Hydro's submission that access to third party information would be restricted if contractual obligations are ignored, SEC suggested that the opposite is a more likely scenario, due to a clear signal from the Board that it will be relying on an outcomes-based approach that involves benchmarking in the regulation of electricity distribution rates. SEC submitted that the probative value of the document outweighs the potential prejudicial effects, in that such surveys allow the Board to properly determine key issues in this proceeding and that benchmarking is an accepted method to determine if the proposed rates meet the statutory requirement of being "just and reasonable". SEC submitted that this is important information, paid for by ratepayers, about Burlington Hydro's regulated costs and that its probative value outweighs any prejudicial effects.

Finding

Burlington Hydro shall immediately provide the Benchmarking Survey referred to in its response to 2.1-SEC-5 to qualifying parties that have executed a Declaration and Undertaking pursuant to s.6.1 of the Board's *Practice Direction on Confidential Filings* ("the *Practice Direction*").

Distributors cannot limit or exclude the Board's jurisdiction by private agreements amongst themselves or with third parties. The Board has often stated that distributors must be cognizant of this when entering into confidentiality agreements with third parties that extend to the provision of information and documents that the utility knows or ought to know may be reasonably required to be produced as part of the regulatory process. The Board finds that benchmarking surveys fall squarely into that category particularly under the Board's Renewed Regulatory Framework for Electricity Distributors. Benchmarking information is also specifically important in addressing Issue 2.1 in the Board approved issues list.

The Benchmarking Survey will be treated as confidential on an interim basis, and will be included among the documents designated as the Proposed Confidential Material in Procedural Order No. 3. Parties may make submissions on the confidentiality status of the Proposed Confidential Material in accordance with the schedule set out in Procedural Order No. 3.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. Burlington Hydro shall immediately provide unredacted versions of the Benchmarking Survey referred to in its response to 2.1-SEC-5 to all qualified parties that have executed a Declaration and Undertaking pursuant to the Board's *Practice Direction*.
2. Parties shall make submissions on the confidentiality status of the Proposed Confidential Material and Burlington Hydro's proposal to retract the information if it is not afforded confidential status in accordance with the schedule established in Procedural Order No. 3.
3. Parties shall frame submissions related to the Proposed Confidential Material in a manner that will allow the submissions to be placed on the public record.

All filings to the Board must quote the file number, EB-2013-0115, be made through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/service/>, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and

document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Martha McOuat at martha.mcouat@ontarioenergyboard.ca and Board Counsel, Ljuba Djurjevic at ljuba.djurjevic@ontarioenergyboard.ca.

ADDRESS

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Fax: 416-440-7656

DATED at Toronto, **March 19, 2014**

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

5



EB-2013-0159

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by Oakville Hydro
Electricity Distribution Inc. for an order approving just and
reasonable rates and other charges for electricity
distribution to be effective May 1, 2014.

PROCEDURAL ORDER NO. 6

April 3, 2014

Oakville Hydro Electricity Distribution Inc. ("Oakville Hydro") filed a complete cost of service application with the Ontario Energy Board (the "Board") on October 1, 2013 under section 78 of the *Ontario Energy Board Act, 1998*), seeking approval for changes to the rates that Oakville Hydro charges for electricity distribution, to be effective May 1, 2014.

Oakville Hydro filed its interrogatory responses with the Board on February 21, 2014.

On February 27, 2014 the School Energy Coalition ("SEC") filed a Notice of Motion ("Motion"). The Motion seeks the following relief:

1. An order requiring Oakville Hydro to provide full and adequate responses to Interrogatory 2.1-SEC-3 by producing copies of two surveys/studies.
2. Such further and other relief as SEC may request and the Board may grant.

The Board issued Procedural Order No. 3 on February 28, 2014 which established a schedule for parties to make submissions on the Motion.

On March 4, 2014 the Canadian Electricity Association (CEA) filed a letter requesting intervenor status in order that it could make submissions on the Motion. The CEA indicated that it is the owner of copyright of benchmarking reports and data models that could be disclosed as a result of granting the Motion. The CEA also specified that, if granted intervenor status, it would make submissions on the Motion and also requested that Procedural Order No. 3 be amended to allow more time for submissions on the Motion.

The Board issued Procedural Order No. 4 on March 6, 2014 and granted the CEA intervenor status for the sole purpose of responding to the Motion and making submissions with respect to not only the request for production of the benchmarking report but also, if the report is ordered produced, whether it should be treated as confidential in whole or in part. Accordingly, the Board amended the deadlines for submissions. Any Settlement Proposal would be filed by April 3, 2014.

On March 13, 2014 the Board received a letter from the CEA which requested that the deadline for the filing of submissions from intervenors be extended from March 17, 2014 to March 24, 2014. The CEA also advised that it would be filing a Notice of Constitutional Question pursuant to section 38.01 of the Board's Rules of Practice and Procedure at the time it files its submission on the SEC Motion.

On March 14, 2014, the Board issued Procedural Order No.5 amending the submission dates regarding the SEC Motion.

The CEA filed its response to the SEC Motion and Notice of Constitutional Question on March 24, 2014.

On April 2, 2013 SEC filed a letter indicating that it was no longer seeking an order requiring disclosure of the benchmarking survey and material prepared by the CEA. While withdrawing the Motion with regard to the CEA survey and material, SEC confirmed that it is still seeking disclosure of the second, currently unidentified benchmarking study/survey in which Oakville Hydro participated. Also on April 2, 2014, the CEA informed the Attorneys General of both Ontario and Canada that it was withdrawing its Notice of Constitutional Question.

The Board has determined that Oakville immediately provide the outstanding study referenced in response to 2.1-SEC-3 on a confidential basis. The information is relevant to the proceeding and necessary to determine Issue 2.1. The Board will declare

this study to be confidential on an interim basis. Oakville Hydro is directed to provide the confidential information directly to a requesting party that has executed a Declaration and Undertaking.

Parties shall have an opportunity to make submissions in accordance with the schedule set out below.

The Board considers it necessary to make provision at this time for the following procedural steps.

THE BOARD ORDERS THAT:

1. Oakville Hydro shall provide a copy of the remaining study requested in 2.1-SEC-3 on a confidential basis on or before end of day April 7, 2014.
2. Other intervenors or Board staff who wish to file submissions on the confidentiality of the study shall file their submission with the Board and deliver it to all parties on or before end of day April 9, 2014.
3. Oakville Hydro shall file its responding submission, if any, and deliver it to all parties on or before end of day April 14, 2014.

All filings to the Board must quote the file number, EB-2013-0159 and be made electronically through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>, in searchable / unrestricted PDF format. Two paper copies must also be filed at the Board's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

Parties should also send all communications and materials for this proceeding to Board staff's case manager, Harold Thiessen at Harold.Thiessen@ontarioenergyboard.ca and Board counsel, Maureen Helt at Maureen.Helt@ontarioenergyboard.ca.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto, April 3, 2014

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

6



EB-2013- 0174

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by Veridian
Connections Inc. for an order approving just and reasonable
rates and other charges for electricity distribution to be
effective May 1, 2014.

PROCEDURAL ORDER NO. 4

February 25, 2014

Veridian Connections Inc. ("Veridian") filed a complete application with the Ontario Energy Board (the "Board") on October 31, 2013 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to the rates that Veridian charges for electricity distribution, to be effective May 1, 2014.

Pursuant to Procedural Order No. 2, Veridian filed its interrogatory responses with the Board on February 18, 2014.

On February 19, 2014 the School Energy Coalition ("SEC") filed a Notice of Motion ("Motion"). The Motion seeks the following relief:

1. An order requiring Veridian to provide full and adequate responses to Interrogatories 2.1-SEC-2 and 4.2-SEC-1, by producing the information requested.
2. Such further and other relief as the SEC may request and the Board may grant.

On February 20, 2014 the Board issued Procedural Order No. 3 which provided the opportunity for Board staff and the other intervenors to file submissions on the Motion, for Veridian to file a response and for SEC to file supporting material, if required, and a reply submission. The Board also indicated that it would issue a decision on the Motion by the end of day Tuesday February 25, 2014.

On February 20, 2014 Veridian notified the Board that Veridian would file the information that is the subject of the SEC's Motion (the "Information") on a confidential basis while at the Board for the technical conference to be held on February 21, 2014. Veridian indicated it would provide copies of the Information to those intervenors who signed the Board's form of Declaration and Undertaking for confidential information.

On February 22, 2014 SEC notified the Board that it was withdrawing its request for relief in regard to Interrogatory 4.2-SEC-11 since Veridian had provided the information. With regard to Interrogatory 2.1-SEC-2, SEC indicated that it was still seeking a Board order requiring production of the entire information requested in that Veridian had not provided all the information sought in response to the interrogatory. For purposes of this Procedural Order, the Board will refer to the information in question as the "requested information".

On February 24, 2014 Veridian submitted that the requested information was not relevant to this proceeding. In the event the Board orders Veridian to disclose the requested information, Veridian asked that it be treated on a confidential basis. Veridian also requested that should the Board order Veridian to disclose the requested information on the public record, that the order be delayed to allow the owner of the requested information an opportunity to seek alternative remedies.

On February 25, 2014 SEC filed its reply submission and re-iterated its request that Veridian provide the requested information. With respect to its confidential treatment, SEC indicated that most of the statistics analysed in in the requested information appear to be publically available.

Finding

Veridian shall provide a complete answer to 2.1-SEC-2 and produce the requested information.

The requested information includes the contextual background for conclusions reached in the information provided in response to Interrogatory 2.1-SEC-2 and is therefore clearly relevant. As this information is relevant to the proceeding, it must be produced.

The requested information will be treated at this time as confidential.

The Board directs Veridian to provide the confidential information directly to a requesting party that has executed a Declaration and Undertaking. If Veridian wishes to have the requested information deemed confidential on a permanent basis, it shall file such a request in accordance with the Board's Practice Direction on Confidentiality. Parties shall have an opportunity to make submissions in accordance with the schedule set out below.

The Board considers it necessary to make provision at this time for the following procedural steps.

THE BOARD ORDERS THAT:

1. Veridian shall provide a complete answer to 2.1-SEC-2 and produce the requested information by February 26, 2014.
2. Intervenors or Board staff who wish to object to Veridian's claim for confidential treatment of the required information shall file their submission with the Board and deliver it to all parties on or before March 3, 2014.
3. Veridian shall file its response, if any, to the submissions of parties regarding the confidential treatment of the required information with the Board and deliver it to all parties by March 7, 2014.

All filings to the Board must quote the file number, EB-2013-0174 and be made electronically through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>, in searchable / unrestricted PDF format. Two paper copies must also be filed at the Board's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have

internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

Parties should also send all communications and materials for this proceeding to Board staff's case manager, Richard Battista at Richard.Battista@ontarioenergyboard.ca and Board counsel, Maureen Helt at Maureen.Helt@ontarioenergyboard.ca.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto, February 25, 2014

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

7



ONTARIO ENERGY BOARD

FILE NO.: EB-2012-0031

VOLUME: Motion Hearing

DATE: October 23, 2012

BEFORE:	Paula Conboy	Presiding Member
	Cynthia Chaplin	Member and Vice-Chair
	Emad Elsayed	Member

THE ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act
1998, S.O. 1998, c.15, (Schedule B);

AND IN THE MATTER OF a review of an application
filed by Hydro One Networks Inc. for an order or
orders approving a transmission revenue
requirement and rates and other charges for the
transmission of electricity for 2013 and 2014.

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Tuesday, October 23rd, 2012,
commencing at 9:31 a.m.

MOTION HEARING

BEFORE:

PAULA CONBOY	Presiding Member
CYNTHIA CHAPLIN	Member and Vice-Chair
EMAD ELSAYED	Member

1 --- On resuming at 11:01 a.m.

2 **DECISION:**

3 MS. CONBOY: With respect to Schools Energy Coalition
4 Interrogatory No. 24, in-service dates by month, the Board
5 concludes that the forecasted in-service dates are relevant
6 and will order their production. We understand that Hydro
7 One has that information available with them today.

8 Although rate base is determined based on the half-
9 year rule, Schools has argued that delays beyond the end of
10 the year could have a material impact on the calculation of
11 rate base, and the Board accepts this argument.

12 With respect to Schools Energy Coalition Interrogatory
13 No. 27 and the HIS Global Insight, the Board concludes that
14 the information is relevant. It forms the basis for a
15 number of cost escalation assumptions in Hydro One's
16 evidence.

17 IHS Global Insight has expressed its preference that
18 the information not be produced. However, given the
19 importance of this data, the Board has concluded that it
20 should be produced. The Board will order its production in
21 confidence in accordance with the Practice Direction.

22 Hydro One will be required to provide the full
23 document to counsel and consultants who execute the Board's
24 declaration and undertaking. Hydro One will also be
25 required to prepare a redacted version or appropriate
26 summary to be placed on the public record.

27 With respect to School Energy Coalition Interrogatory
28 No. 3, the CEA information -- survey information, rather,

1 Hydro One seeks to rely on the results of this CEA survey
2 for the proposition that its performance is better than
3 average on 85 percent of the costs-related performance
4 metrics examined in the CEA study. However, Hydro One has
5 only provided its actual results and some information on
6 the averages of the other utilities.

7 Schools seeks the full survey so as to know the
8 identity of the other participants and the specific
9 results. Schools argues that this is needed to assess the
10 comparability of other utilities and more precise
11 quantitative information.

12 We have in the past expressed expectations around
13 benchmarking and are supportive of Hydro One taking part in
14 this study. However, those studies are almost useless to
15 the Board if we are only able to see Hydro One's individual
16 results against an average, when we don't even know the
17 identity of the other participants.

18 We are somewhat surprised that Hydro One would agree
19 to the confidentiality arrangements described by the
20 company today. Hydro One is well aware of the Board's view
21 of the importance of benchmarking. Hydro One must have had
22 some level of expectation that it would be required to
23 produce this information if it intended to rely upon it in
24 its evidence.

25 The Board also notes that the CEA is an organization
26 of utility members, not truly a third-party service
27 provider. The other participants are almost certainly
28 regulated within their particular jurisdictions, with

1 similar standards of disclosure.

2 Given the importance of this type of information and
3 the strong probative value of benchmarking data, the Board
4 will order the production of the CEA Committee on
5 Performance Excellence survey information. This is
6 referred to in the evidence as the 2010 Transmission Study
7 of Canadian Utilities. We will allow this to be filed in
8 confidence, in accordance with the Board's Practice
9 Direction.

10 Hydro One will be required to provide the full
11 document to the counsel and consultants who execute the
12 Board's declaration and undertaking. Hydro One will also
13 be required to prepare a redacted version or appropriate
14 summary for the public record.

15 And that's it for today. Are there any questions from
16 the parties?

17 MS. VARJACIC: Thank you, Madam Chair. If I might,
18 with respect to the CEA survey, ask for the Board's
19 indulgence on production for a couple of days, simply so
20 that Hydro One can let the CEA know and the other member
21 utilities?

22 MS. CONBOY: That will be fine. Thank you.

23 MS. VARJACIC: Thank you.

24 MS. CONBOY: Okay. Thank you very much, everybody.

25 --- Whereupon the hearing adjourned at 11:05 a.m.

26

8



SUPREME COURT OF CANADA

CITATION: Bank of Montreal v. Marcotte, 2014 SCC 55

DATE: 20140919

DOCKET: 35009

BETWEEN:

Bank of Montreal

Appellant

and

Réal Marcotte, Bernard Laparé, Attorney General of Quebec and

Président de l'Office de la protection du consommateur

Respondents

AND BETWEEN:

Citibank Canada

Appellant

and

Réal Marcotte, Bernard Laparé, Attorney General of Quebec and

Président de l'Office de la protection du consommateur

Respondents

AND BETWEEN:

Toronto-Dominion Bank

Appellant

and

Réal Marcotte, Bernard Laparé, Attorney General of Quebec and

Président de l'Office de la protection du consommateur

Respondents

AND BETWEEN:

National Bank of Canada

Appellant

and

Réal Marcotte, Bernard Laparé, Attorney General of Quebec and

Président de l'Office de la protection du consommateur

Respondents

AND BETWEEN:

Réal Marcotte and Bernard Laparé

Appellants

and

Bank of Montreal, Amex Bank of Canada, Royal Bank of Canada,

Toronto-Dominion Bank, Canadian Imperial Bank of Commerce,

Bank of Nova Scotia, National Bank of Canada, Laurentian Bank of Canada,

Citibank Canada and Attorney General of Canada
Respondents
- and -
**Attorney General of Canada, Attorney General of Ontario,
Attorney General of Quebec, Attorney General of Alberta,
Président de l'Office de la protection du consommateur and
Canadian Bankers Association**
Intervenors

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

JOINT REASONS FOR JUDGMENT: Rothstein and Wagner JJ. (McLachlin C.J. and LeBel, (paras. 1 to 117) Abella, Cromwell and Moldaver JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

BANK OF MONTREAL v. MARCOTTE

Bank of Montreal

Appellant

v.

**Réal Marcotte, Bernard Laparé, Attorney General of Quebec and
Président de l'Office de la protection du consommateur**

Respondents

- and -

Citibank Canada

Appellant

v.

**Réal Marcotte, Bernard Laparé, Attorney General of Quebec and
Président de l'Office de la protection du consommateur**

Respondents

- and -

Toronto-Dominion Bank

Appellant

v.

**Réal Marcotte, Bernard Laparé, Attorney General of Quebec and
Président de l'Office de la protection du consommateur**

Respondents

- and -

National Bank of Canada

Appellant

v.

**Réal Marcotte, Bernard Laparé, Attorney General of Quebec and
Président de l'Office de la protection du consommateur**

Respondents

- and -

Réal Marcotte and Bernard Laparé

Appellants

v.

**Bank of Montreal, Amex Bank of Canada, Royal Bank
of Canada, Toronto-Dominion Bank, Canadian Imperial
Bank of Commerce, Bank of Nova Scotia, National Bank
of Canada, Laurentian Bank of Canada, Citibank Canada and
Attorney General of Canada**

Respondents

and

**Attorney General of Canada, Attorney General of Ontario,
Attorney General of Quebec, Attorney General of Alberta,
Président de l'Office de la protection du consommateur and
Canadian Bankers Association**

Intervenors

Indexed as: Bank of Montreal v. Marcotte

2014 SCC 55

File No.: 35009.

2014: February 13; 2014: September 19.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Civil procedure — Class actions — Standing — Representative plaintiffs initiating class action against credit card issuers on grounds they failed to disclose conversion charges on credit card purchases made in foreign currencies — Representative plaintiffs not having direct cause of action or legal relationship with each defendant — Whether plaintiffs have standing to sue all defendants — Code of Civil Procedure, CQLR, c. C-25, art. 55.

Consumer protection — Contracts of credit — Contracts extending variable credit — Credit cards — Obligation to disclose costs in contract — Appropriate remedy for failing to disclose — Conversion charges imposed by financial institutions on cardholders for transactions in foreign currencies — Class actions — Whether conversion charges imposed are “credit charges” or “net capital” as defined by the legislation — Whether Banks failed to disclose charges to cardholders — Whether reimbursement of conversion charges collected from

consumer class members should be ordered — Consumer Protection Act, CQLR, c. P-40.1, ss. 12, 68, 69, 70, 272.

Consumer protection — Recourses — Obligation to disclose costs in contract — Appropriate remedy for failing to disclose — Whether class members are entitled to punitive damages — Consumer Protection Act, CQLR, c. P-40.1, s. 272.

Constitutional law — Division of powers — Banking — Interjurisdictional immunity — Federal paramountcy — Quebec’s consumer protection legislation regulating disclosure of conversion charges with respect to contracts of credit — Whether provincial legislation constitutionally inapplicable or inoperative in respect of bank-issued credit and charge cards by virtue of doctrine of interjurisdictional immunity or federal paramountcy — Constitution Act, 1867, c. 91(15); Bank Act, S.C. 1991, c. 46, ss. 16, 988; Consumer Protection Act, CQLR, c. P-40.1, ss. 12, 272.

A class action was launched by consumers to seek repayment of conversion charges imposed by several credit card issuers (the “Banks”) on credit card purchases made in foreign currencies primarily on the basis that the conversion charges violated Quebec’s *Consumer Protection Act* (“CPA”). The Banks argued that (1) the representative plaintiffs did not have a direct cause of action against each of the Banks and therefore did not have standing to sue all of them, (2) the CPA did not apply to them due to the *Constitution Act, 1867*, and (3) no repayment of the conversion charges was owed. The Superior Court maintained the class action and

found that the *CPA* applied to the Banks. It determined that the conversion charges were “credit charges” for the purposes of contracts extending variable credit, and ordered all the Banks to reimburse the conversion charges. It further required BMO, NBC, Citibank, TD and Amex (the “Group A Banks”) to pay punitive damages for failing to disclose the conversion charges. The Court of Appeal determined that the conversion charges were “net capital” and allowed the appeal of the non-Group A Banks. It maintained the order against the Group A Banks, but overturned the amount awarded against Amex as well as the award of punitive damages against all Group A Banks, with the exception of TD.

Held: The appeals by the Group A Banks should be dismissed. The appeal by the representative plaintiffs should be allowed in part.

The representative plaintiffs have standing to sue all of the Banks. The law permits a collective action where the representative does not have a direct cause of action against, or a legal relationship with, each defendant. Indeed, art. 55 of the *Code of Civil Procedure* (“*CCP*”), which requires plaintiffs to have “sufficient interest” in the action, must be interpreted in harmony with the provisions governing class actions and in accordance with the principle of proportionality found in art. 4.2 of the *CCP*. This approach is consistent with most other Canadian jurisdictions and the *CCP* itself, and it ensures the economy of judicial resources, enhances access to justice and averts the possibility of conflicting judgments on the same question of law or fact. In addition, the analysis of whether the plaintiffs have standing must have the

same outcome regardless of whether it is conducted before or after the class action is authorized, because at both stages, the court must look to the authorization criteria of art. 1003 of the *CCP*.

Different obligations flow from whether conversion charges are qualified as credit charges or net capital. If the conversion charges qualify as credit charges, then according to the *CPA* they would have to be disclosed on their own, be included in the disclosed credit rate, and be subject to a grace period. If conversion charges qualify as net capital, they would not be included in the credit rate or be subject to the grace period, but would still have to be disclosed under s. 12 of the *CPA*, the general disclosure provision. In this case, conversion charges constitute sums for which credit is actually extended, within the meaning of s. 68 of the *CPA*, and are best classified as net capital. They do not fall under any of the categories in s. 70 of the *CPA*. Treating conversion charges as administrative charges or commissions pursuant to ss. 70(d) and (f) of the *CPA*, and therefore as credit charges, would not achieve the objectives of the *CPA* either by restoring the balance between merchants and consumers or by improving consumers' abilities to make informed choices. Rather, it would force merchants to either disclose a wide range for the credit rate, which would confuse consumers, or require cardholders to unknowingly subsidize ancillary services that other cardholders choose to use which would only benefit some consumers at the cost of others and reduce the ability of consumers to make informed choices. Because neither option benefits consumers, s. 17 of the *CPA* and art. 1432 of the *Civil Code of Québec* — both of which require contracts to be interpreted so as

to favour consumers in cases of doubt or ambiguity — do not require classifying these charges as credit charges. Moreover, conversion charges are not fees that consumers must pay under the contract in order to access credit within the meaning of s. 69 of the *CPA*. Rather, they are additional fees for an optional service that is not necessary for consumers to access the credit.

The doctrine of interjurisdictional immunity does not apply. Sections 12 and 272 of the *CPA*, which deal with the disclosure of charges requirement and the remedies for breach of same, do not impair the federal banking power. While lending, broadly defined, is central to banking, it cannot be said that a disclosure requirement for certain charges ancillary to one type of consumer credit impairs or significantly trammels the manner in which Parliament's legislative jurisdiction over bank lending can be exercised.

Similarly, the doctrine of paramountcy is not engaged. Assuming that a purpose of the *Bank Act* is to provide for exclusive national standards, ss. 12 and 272 of the *CPA* cannot be said to frustrate or undermine that purpose, because they do not provide for standards applicable to banking products and banking services offered by banks. Rather, they articulate a contractual norm analogous to the substantive rules of contract found in the *CCQ*. The basic rules of contract cannot be said to frustrate the federal purpose of comprehensive and exclusive standards, and the general rules regarding disclosure and accompanying remedies support rather than frustrate the federal scheme. In addition, ss. 12 and 272 of the *CPA* are not inconsistent with

ss. 16 and 988 of the *Bank Act* and therefore do not frustrate the narrower federal purpose of ensuring that bank contracts are not nullified even if a bank breaches its disclosure obligations. The Plaintiffs seek restitution of the conversion charges and punitive damages, not nullification of their contracts or of the specific clauses at issue.

The Group A Banks breached s. 12 of the *CPA* by failing to disclose the conversion charges. This violation is not related to the terms and conditions of payment or to the computation or indication of the credit charges or the credit rate, which are specifically covered by s. 271 of the *CPA*. It is a substantive violation that goes against the *CPA*'s objective of permitting consumers to make informed choices, and, at the very least, the violation results from ignorant or careless conduct. Section 272 of the *CPA* applies, and the appropriate remedy is a reduction of the cardholders' obligations in the amount of all conversion charges imposed during the period of non-disclosure. As there is an absolute presumption of prejudice for violations that give rise to s. 272 remedies, the commercial competitiveness of the conversion charges imposed is of no consequence.

In addition, the trial judgment with respect to punitive damages should be restored. The threshold for awarding punitive damages is not higher in the context of class actions where the plaintiffs are awarded collective recovery as opposed to individual recovery. The mode of recovery is not a factor set out in the jurisprudence for assessing punitive damages, nor would it be reasonable to include it as one.

Moreover, the amount of punitive damages awarded in this case is rationally connected to the purposes for which the damages are awarded. Indeed, neither evidence of antisocial behaviour nor reprehensible conduct is required to award punitive damages under the *CPA*. Rather, what is necessary is an examination of the overall conduct of the merchant, before, during and after the violation, for behaviour that was lax, passive, or ignorant with respect to consumers' rights and to their own obligations, or conduct that displays ignorance, carelessness or serious negligence. In this case, the Group A Banks breached the *CPA* without any explanation for a period of years, and that negligence overwhelms their unexplained decision to start disclosing a fee they were charging consumers without their knowledge.

Cases Cited

Applied: *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265;
overruled: *Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349; **distinguished:** *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; **referred to:** *Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57; *Amex Bank of Canada v. Adams*, 2014 SCC 56; *Regroupement des CHSLD Christ-Roy (Centre hospitalier, soins longue durée) v. Comité provincial des malades*, 2007 QCCA 1068, [2007] R.J.Q. 1753; *MacKinnon v. National Money Mart Co.*, 2004 BCCA 472, 33 B.C.L.R. (4th) 21; *Service aux marchands détaillants ltée (Household Finance) v. Option consommateurs*, 2006 QCCA 1319 (CanLII), leave to appeal refused, [2007] 1 S.C.R.

xi; *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2007 QCCA 694 (CanLII); *General Motors du Canada ltée v. Billette*, 2009 QCCA 2476, [2010] R.J.Q. 66; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600; *Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3; *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168.

Statutes and Regulations Cited

Bank Act, S.C. 1991, c. 46, preamble [ad. 2012, c. 19, s. 525], ss. 16, 452, 988.

Civil Code of Québec, arts. 1422, 1432, 1621.

Code of Civil Procedure, CQLR, c. C-25, arts. 4.2, 55, 59, 67, Book IX, 1003, 1015, 1048, 1051.

Constitution Act, 1867, s. 91(15).

Consumer Protection Act, CQLR, c. P-40.1, Title I, ss. 12, 17, Chapter III, Division III, 68, 69 “credit charges”, 70, 72, 126, 127, 271, 272.

Cost of Borrowing (Banks) Regulations, SOR/2001-101.

Financial Consumer Agency of Canada Act, S.C. 2001, c. 9.

Authors Cited

Bulmer, John. "Payment Systems: The Credit Card Market in Canada". Background paper PRB 09-10E, prepared for the Library of Parliament, Parliamentary Information and Research Service, September 24, 2009 (online: <http://www.parl.gc.ca/content/lop/researchpublications/prb0910-e.pdf>).

Masse, Claude. *Loi sur la protection du consommateur: Analyse et commentaires*. Cowansville, Qué.: Yvon Blais, 1999.

APPEALS from a judgment of the Quebec Court of Appeal (Forget, Dalphond and Bich JJ.A.), 2012 QCCA 1396, [2012] R.J.Q. 1541, [2012] AZ-50881449, [2012] Q.J. No. 7428 (QL), 2012 CarswellQue 14792, setting aside in part a decision of Gascon J., 2009 QCCS 2764 (CanLII), [2009] AZ-50560820, [2009] J.Q. n° 5771 (QL), 2009 CarswellQue 6515. Appeals by the Bank of Montreal, Citibank Canada, the Toronto-Dominion Bank and the National Bank of Canada dismissed and appeal by Réal Marcotte and Bernard Laparé allowed in part.

Mahmud Jamal, Sylvain Deslauriers, Silvana Conte, Alberto Martinez, W. David Rankin, Anne-Marie Lizotte and Alexandre Fallon, for the appellants/respondents the Bank of Montreal, Citibank Canada, the Toronto-Dominion Bank and the National Bank of Canada and for the respondents the Amex Bank of Canada, the Royal Bank of Canada, the Canadian Imperial Bank of Commerce, the Bank of Nova Scotia and the Laurentian Bank of Canada.

Bruce W. Johnston, Philippe H. Trudel, André Lespérance and Andrew E. Cleland, for the respondents/appellants Réal Marcotte and Bernard Laparé.

Jean-François Jobin, Francis Demers and Samuel Chayer, for the respondent/intervener the Attorney General of Quebec.

Marc Migneault and Joël Simard, for the respondent/intervener Président de l'Office de la protection du consommateur.

Bernard Letarte and Pierre Salois, for the respondent/intervener the Attorney General of Canada.

Janet E. Minor and Robert A. Donato, for the intervener the Attorney General of Ontario.

Robert J. Normey, for the intervener the Attorney General of Alberta.

John B. Laskin and Myriam M. Seers, for the intervener the Canadian Bankers Association.

The judgment of the Court was delivered by

ROTHSTEIN AND WAGNER JJ. —

I. Introduction

[1] Credit cards are so ubiquitous and commonly used that their many conveniences have become easy to overlook. One such convenience is the ability to use a credit card provided by a Canadian issuer to make purchases in foreign currencies. This conversion service presents an alternative to exchanging Canadian currency for foreign currency, purchasing and cashing traveller's cheques, or withdrawing foreign currency using a bank convenience card.

[2] The present case and its companion cases, *Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57, and *Amex Bank of Canada v. Adams*, 2014 SCC 56, are appeals of decisions on the merits of three class actions. The class actions were launched to seek repayment of the conversion charges imposed by several credit card issuing financial institutions on credit card purchases made in foreign currencies primarily on the basis that the conversion charges violated Quebec's *Consumer Protection Act*, CQLR, c. P-40.1 ("CPA"). The financial institutions argue that the CPA does not apply to them due to the *Constitution Act, 1867* and that no repayment of the conversion charges is owed, regardless of the manner in which the conversion charge was disclosed in the credit card contracts.

[3] For the reasons below, we conclude that the CPA does apply to the credit card issuers. Any conversion charge imposed by an issuer without sufficient disclosure to the cardholder must be repaid.

II. Facts

[4] A list of definitions of all technical terms used in these reasons is set out in the Appendix.

A. *Overview of Credit Cards and Conversion Charges*

[5] A simplified domestic credit card payment involves four parties: the cardholder, the merchant, the card issuer (typically a bank, credit union, or store), and the credit card company (Visa, MasterCard and American Express). The payment proceeds as follows:

1. The cardholder presents his credit card to the merchant.
2. The merchant sends the credit card information to the card issuer for authorization.
3. Once authorized, the merchant charges the purchase to the card.
4. The card issuer pays the merchant the amount charged minus the *interchange fee*, a rate set by the credit card company but retained by the card issuer.
5. The card issuer pays the credit card company a *network access fee* per transaction. The network access fee is less than the interchange fee.

6. The cardholder pays the card issuer.

(J. Bulmer, “Payment Systems: The Credit Card Market in Canada”
Library of Parliament, background paper PRB 09-10E, September 24,
2009, (online))

For the sake of simplicity, the role of payment processors, which are corporations that act as middlemen between merchants and card issuers, has been omitted from this description as payment processors are not relevant to these appeals.

[6] A credit card provided by a Canadian card issuer can be used to make purchases in a foreign currency. The conversion is performed by the credit card company and proceeds as follows:

1. The purchase amount is converted from the foreign currency to Canadian dollars according to the *interbank rate*. The conversion occurs either directly or by first converting the purchase amount to U.S. dollars, then converting that amount to Canadian dollars.
2. The *conversion charge* is calculated by applying the conversion charge percentage rate to the amount resulting from the first step.

3. The amount from the first step and the conversion charge are added together and charged to the card. The monthly statement displays the total amount.

B. *Cardholder Agreements*

[7] There are numerous cardholder agreements at issue in the present appeals. Each card issuer provides multiple cards. The cardholder agreements for these cards have changed over the years. However, the cardholder agreements fall into two groups: (1) those that state that an exchange rate or a conversion rate is applied to purchases in foreign currencies and either do not mention the conversion charge or do not provide details about it, and (2) those that describe the conversion charge in addition to the exchange rate. An example of a group 1 provision is found in a Citibank MasterCard cardholder agreement that reads as follows:

Charges Made in Foreign Currency: If you make a purchase or obtain a cash advance (or return a purchase) in a foreign currency, your account will be charged (or credited for a return) in Canadian dollars. We will use a rate of exchange that reflects the cost of foreign funds at the time of the transaction and an administration charge for the transaction handling through the MasterCard International Incorporated network. These costs will be included for both credits and debits to your account. [Emphasis added.]

By contrast, an example of a group 2 provision is found in a Royal Bank of Canada Visa cardholder agreement that reads as follows:

Foreign Currency Fee: [The card issuer] will charge a currency conversion fee equal to 1.8% of the amount of any Debt or other transaction not incurred in Canadian dollars. [The card issuer] will convert this Debt or other transaction and fee to Canadian dollars at [its] conversion cost in effect on the day [it] post[s] the converted Debt or other transaction and fee to the Account. [Emphasis added.]

[8] Cardholders receive information about their credit card through the initial application, the cardholder agreement, the “card carrier” used to deliver the card to its holder, monthly statements, and updates and amendments to the cardholder agreement.

C. Procedural History

[9] Réal Marcotte was the proposed representative plaintiff in the April 17, 2003 application for authorization (the civil law equivalent of “certification” in common law class actions) to institute a class action against the Bank of Montreal (“BMO”), Amex Bank of Canada (“Amex”), Royal Bank of Canada (“RBC”), Toronto-Dominion Bank (“TD”), Canadian Imperial Bank of Commerce (“CIBC”), Bank of Nova Scotia (“Scotiabank”), National Bank of Canada (“NBC”), Laurentian Bank of Canada (“Laurentian”) and Citibank Canada (collectively referred to hereafter as “Banks”), along with the Fédération des caisses Desjardins du Québec (“Desjardins”) (the “BMO Action”). Mr. Marcotte is a BMO and Desjardins cardholder. Bernard Laparé, who is an Amex cardholder, was added as a representative plaintiff after Amex made a motion for dismissal on the basis of Mr. Marcotte’s lack of standing against it (Mr. Marcotte and Mr. Laparé are collectively

referred to hereafter as the “Plaintiffs”). Amex was the only Bank to make such a motion.

[10] Mr. Marcotte filed a separate class action against Desjardins, a credit union (the “Desjardins Action”), after the Banks indicated that they would make a constitutional argument based on the s. 91(15) federal banking head of power in the *Constitution Act, 1867*. The hearing on the merits for the BMO and Desjardins Actions was held jointly. The Banks agreed not to contest the authorization of the class action in return for having a joint hearing, though they reserved the right to raise the issue of the Plaintiffs’ lack of standing against the Banks with which they did not hold a card.

[11] A year and a half after the Plaintiffs filed suit against the Banks and Desjardins, a second class action was commenced against Amex (the “Amex Action”). Unlike the BMO and Desjardins Actions, the class in the Amex Action included consumer and non-consumer holders of credit and charge cards. The same trial judge, Gascon J., as he then was, heard the BMO, Desjardins and Amex Actions, with the Amex Action hearing on the merits taking place soon after the joint hearing in the BMO and Desjardins Actions. All three trial judgments were rendered on the same day.

III. Judicial History

[12] Although separate trial and appeal judgments were rendered for the BMO, Desjardins and Amex Actions, the judgments refer to each other on many occasions. The summaries below concern the trial and Court of Appeal judgments for the BMO Action but refer to the judgments rendered for the Desjardins and Amex Actions where appropriate.

A. *Quebec Superior Court, 2009 QCCS 2764 (CanLII)*

[13] Gascon J. refused to dismiss the class action on the basis that the Plaintiffs do not have standing to sue all of the Banks. He held that once a class action has been authorized, it must be viewed from the perspective of the class rather than that of the representative plaintiff. In this case, the legal and factual backgrounds at issue were common to all the Banks. Therefore, requiring a separate class action against each Bank would be a waste of resources, whereas allowing the BMO Action to proceed would result in no identified prejudice to the Banks.

[14] Gascon J. concluded that the conversion charges are “credit charges” within the meaning of s. 69 of the *CPA*. Under the *CPA*, any charge that is not net capital is a credit charge. Gascon J. found that the evidence did not support the theory that the conversion charges are net capital since the foreign merchant never receives the conversion charge and it is not part of the exchange rate. Instead, the evidence demonstrated that the conversion charge is a fee for services related to the credit card and therefore a credit charge. It is the credit card companies, not the credit card

issuers, that perform the actual conversion. Credit charges under the *CPA* include accessory fees in addition to fees directly related to the extension of credit.

[15] Gascon J. made a finding of fact that five of the Banks — BMO, NBC, Citibank, TD and Amex (the “Group A Banks”) — failed to disclose the conversion charges. The Plaintiffs did not challenge the disclosure made by the four other banks — RBC, CIBC, Scotiabank and Laurentian (the “Group B Banks”). Gascon J. held that payment of the conversion charges by cardholders does not constitute a waiver of their right of action or of the protection of the *CPA*.

[16] According to Gascon J., the prescription period for cardholders of the Group B Banks who formed their initial contract before April 17, 2000 — three years before the class action was filed — had not run out because a new contract is formed every time a credit card is renewed. Prescription for cardholders of the Group A Banks was suspended until those banks began to disclose the charges.

[17] Gascon J. rejected the Banks’ constitutional argument that the *CPA* does not apply to them due to the doctrine of interjurisdictional immunity, concluding that credit card contracts are not at the core of banking activities and the *CPA* does not interfere with the federal banking regime. He also rejected the similar argument based on the doctrine of paramountcy, concluding that there was no operational conflict or frustration of federal purpose.

[18] Reimbursement of the conversion charges, as provided for in s. 272 of the *CPA*, was ordered as the appropriate sanction. Where possible, Gascon J. ordered collective recovery of all conversion charges imposed during the class periods, meaning each Bank must repay all conversion charges in a lump sum. Individual recovery was ordered where there was insufficient evidence to support collective recovery, meaning each class member would have the right to claim repayment of the conversion charges they paid during the relevant period. This was the case for cardholders of the Group B Banks as a result of the different prescription periods that applied to each cardholder depending on when they first renewed their cards after April 17, 2000. Individual recovery was also ordered against TD, which failed to provide sufficient evidence that would have permitted collective recovery. The five Group A Banks were additionally required to pay \$25 per class member as punitive damages for failing to disclose the conversion charge.

B. *Quebec Court of Appeal, 2012 QCCA 1396 (CanLII)*

[19] Dalphond J.A. upheld Gascon J.’s conclusion that the Plaintiffs were adequate representative plaintiffs against all of the Banks. Dalphond J.A. held that permitting such class actions to proceed accorded with the general provisions of the *Quebec Code of Civil Procedure*, CQLR, c. C-25 (“*CCP*”), some of which allow people to sue on behalf of another party, and with the spirit of Book IX of the *CCP*, which governs class actions. What is needed by the representative plaintiff is not a personal legal interest, but *sufficient* interest. The quality of the representative

plaintiff is distinct from the interest of the represented members. As long as there is a real sub-group of members for each defendant, a defendant cannot move to dismiss the action against them on the basis of the authorized representative having insufficient legal interest. Here, the class action was authorized with Mr. Marcotte and Mr. Laparé as its representative plaintiffs. The Banks' argument on this issue attacked the quality of the representative plaintiffs, not whether there was a real sub-group of members for each Bank, and was rightly dismissed at trial.

[20] Dalphond J.A. agreed that neither interjurisdictional immunity nor paramountcy prevent the *CPA* from applying to the Banks. The credit offered through credit cards does not fall under s. 91(15) of the *Constitution Act, 1867*. Paramountcy applies to complaints made to the Office de la protection du consommateur against banks — only the Financial Consumer Agency of Canada (“FCAC”) has the authority to receive customer complaints against banks — but in light of the fact that conversion charges constitute net capital, the federal and provincial schemes work together harmoniously. The civil remedies in the *CPA* and the *Civil Code of Québec* (“*CCQ*”) remain available.

[21] As explained by Dalphond J.A. in his judgment in the Desjardins Action, the conversion charges constitute net capital under the *CPA* and not credit charges. The *CPA* classifies all fees tied to a contract extending variable credit (such as a credit card contract) as either net capital or credit charges. Credit charges are fees imposed to access credit either in the lead up to obtaining a credit card, such as

membership fees, or subsequent to using the credit, such as interest or insurance premiums. Other fees imposed in the context of a credit card contract, such as fees for a copy of a lost monthly statement or to withdraw money from the ATM of another financial institution, are not credit charges. They, like conversion charges, are fees charged in exchange for a service the cardholder has chosen to use, not to access the credit.

[22] According to Dalphond J.A., classifying conversion charges as credit charges would have consequences contrary to the purpose of the *CPA*. The annual percentage credit rate that the *CPA* requires be disclosed to consumers on the credit card contract would vary between 18% and 900%, information more likely to confuse consumers than inform them. The 21-day grace period would apply to conversion charges so that customers who pay their balance before that time would not have to pay the conversion charge. As a result, card issuers would have to fund the conversion service by raising the membership fee or the general credit rate, resulting in cardholders being charged a hidden fee for a service that only some use. Dalphond J.A. concluded that conversion charges must be classified as net capital as they are [TRANSLATION] “charges invoiced for the use, at the consumer’s choice, of a service that is ancillary to the [credit] card and unconnected to the actual issuance of credit Canadian dollars that is available under the [credit card contract]” (2012 QCCA 1395, [2012] R.J.Q. 1526, at para. 60)

[23] Applying the conclusion in the Desjardins Action to the BMO Action, Dalphond J.A. noted that under the *Bank Act*, S.C. 1991, c. 46, conversion charges are not included in the borrowing costs or borrowing rate defined in the federal scheme. As a result, he allowed the appeals brought by the Group B Banks, who were found at trial to have disclosed the conversion charge to cardholders.

[24] For the reasons given by Dalphond J.A. in the Amex Action, the Group A Banks were held to have breached both the *CPA* and the *CCQ* by not disclosing the conversion charge to cardholders. In the Amex Action, Dalphond J.A. applied the finding at trial that Amex had not disclosed the conversion charges in contravention of the *CPA*, the general principles of law found in the *CCQ*, and s. 452 of the *Bank Act*. Dalphond J.A. agreed with the trial judge that the conversion charge was not a component of the exchange rate but was instead a fee or cost for a service. For a 10-year period, neither the credit card contracts used by Amex nor common usage imposed an obligation to pay the conversion charge on cardholders. As a result, the receipt of a payment not due provisions permitted recovery of the amounts paid. The fact that the conversion charge rate was reasonable and competitive was held to be insufficient cause for refusing to order restitution. Refusing to grant restitution is a discretionary decision of the trial judge, and “Amex has failed to show that the trial judge did not exercise his discretion judiciously” by “showing that there was a palpable and overriding error in his assessment of the situation” (2012 QCCA 1394, [2012] R.J.Q. 1512, at paras. 47 and 50).

[25] As a result, in the Amex Action, Amex was ordered to repay the conversion charges collected during the period of non-disclosure on a collective recovery basis to the defined classes. Similarly, in the BMO Action, BMO, NBC and Citibank were ordered to repay the conversion charges collected during the relevant periods on a collective recovery basis. TD was ordered to repay the conversion charges on an individual recovery basis because it provided insufficient evidence to determine the total amount of conversion charges imposed during the relevant period. The Court of Appeal overturned the amount awarded against Amex in the BMO Action, stating that that amount was entirely covered by the amount awarded against Amex in the Amex Action. Punitive damages were only awarded against TD in light of its failure to provide evidence that would have permitted collective recovery. The punitive damages against the other Group A Banks were overturned because collective recovery already has an important punitive aspect and ordering punitive damages would serve no preventive purpose.

[26] Dalphond J.A. concluded by dismissing waiver, prescription and the absence of prejudice as grounds for refusing to grant restitution against the Group A Banks. The cardholders could not have waived their right to dispute the conversion charges by paying off their accounts because the conversion charges were not disclosed to the cardholders and waivers can only be made with full knowledge. Prescription only began to run when the Group A Banks' failure to disclose the conversion charges was discovered. The absence of prejudice is irrelevant since the

Group A Banks had no legal right to impose the conversion charges and restitution would not grant an undue advantage to the cardholders.

[27] In the BMO Action, the Group A Banks and the Plaintiffs appeal the decision of the Court of Appeal before this Court. The Banks appeal Dalphond J.A.'s conclusion that interjurisdictional immunity and paramountcy do not apply, that the conversion charges imposed by the Group A Banks should be reimbursed, and that the Plaintiffs had standing against all of the Banks. The Plaintiffs appeal Dalphond J.A.'s conclusion that the conversion charges are net capital and not credit charges. Leave was granted by this Court for both appeals on April 11, 2013, along with the appeals in the Desjardins and Amex Actions.

IV. Issues

[28] This appeal raises the following issues:

- (a) Do the representative plaintiffs have standing to bring a class action against all of the Banks, including those against which they do not have a personal right of action?
- (b) Are the conversion charges net capital or credit charges under the *CPA*?

(c) Are ss. 12 and 272 of the *CPA* constitutionally inapplicable in respect of bank-issued credit cards by reason of the doctrine of interjurisdictional immunity?

(d) Are ss. 12 and 272 of the *CPA* constitutionally inoperative in respect of bank-issued credit cards by reason of the doctrine of federal paramountcy?

(e) What remedies, if any, are owed to the class members?

V. Analysis

A. *The Representative Plaintiffs Have Standing*

[29] The five Group A Banks argue that the trial judge and Court of Appeal erred in finding that the Plaintiffs had standing to bring this class action. The Banks argue that the Court of Appeal decision conflicts with arts. 55 and 59 of the *CCP*, which respectively require plaintiffs to have a “sufficient interest” and a “common interest” in the action. The Group A Banks rely on *Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349, for the proposition that a representative plaintiff in a class action must have a cause of action against each defendant. They submit that the Court of Appeal’s decision has replaced *Agropur*’s clear rule with “an elastic, case-by-case knowledge test” (Banks A.F., at para. 111).

[30] The Plaintiffs, Mr. Marcotte and Mr. Laparé, counter that *Agropur* does not apply for two reasons: first, it was decided at the authorization stage, and second, this case falls into an exception to *Agropur* created by the Court of Appeal in *Regroupement des CHSLD Christ-Roy (Centre hospitalier, soins longue durée) v. Comité provincial des malades*, 2007 QCCA 1068, [2007] R.J.Q. 1753. They further argue that the *CCP* allows a person to act on behalf of others, that the banks have not suffered any prejudice from the current arrangement, that the Court of Appeal's position is shared by most Canadian jurisdictions, and finally, that the Banks' position would lead to a waste of judicial resources.

[31] That the Banks' position would lead to a waste of juridical resources is true, as echoed by the statement of the trial judge: [TRANSLATION] "this would all have been done for nothing, and such a conclusion would have no adverse effect on the members and would not clearly benefit the banks" (para. 200). But the question is not solely whether granting standing is right in terms of judicial economy, or whether to deny it at this stage of the proceedings is pointless. The question is also whether the law permits a collective action where the representative does not have a direct cause of action against, or a legal relationship with, each defendant. In our opinion it does. Article 55 of the *CCP* must be interpreted in harmony with Book IX of the *CCP* in order to achieve the outcome that is best suited to the goals of class actions. However, a few points merit further clarification: how to interpret *Agropur*, and how to apply the principle of proportionality found in art. 4.2 of the *CCP*.

[32] We will begin with the Court of Appeal judgment. In our opinion, Dalphond J.A. correctly concluded that art. 55 of the *CCP*, which requires plaintiffs to have “sufficient interest” in the action, must be adapted to the context of class actions in accordance with the principle of proportionality found in art. 4.2 of the *CCP*. We note in particular the effect of art. 1051 of the *CCP* which renders the other provisions of the *CCP*, including art. 55, applicable to class action proceedings, but in a way that respects the spirit of Book IX of the *CCP*. The nature of this “sufficient interest” has to reflect the collective and representative nature of a class action. Justice Dalphond also correctly distinguished between the ability to adequately act as a representative and the ability to obtain a judgment against a defendant. As long as the representative plaintiff is an adequate representative of the class per art. 1003(*d*) of the *CCP* and the actions against each defendant involve identical, similar or related questions of law or fact per art. 1003(*a*), it is open to a judge to authorize the class action. This conclusion ensures the economy of judicial resources, increases access to justice, and averts the possibility of conflicting judgments on the same question of law or fact.

[33] It is an approach that is consistent with most other Canadian jurisdictions. In *MacKinnon v. National Money Mart Co.*, 2004 BCCA 472, 33 B.C.L.R. (4th) 21, the British Columbia Court of Appeal held that a cause of action against each defendant could be held by class members rather than by the representative plaintiff (para. 51). Alberta, Manitoba and Saskatchewan followed suit (see Court of Appeal reasons, at paras. 55-57).

[34] It is an approach that is also consistent with the *CCP* itself. As Dalphond J.A. notes in the Court of Appeal reasons, art. 55 requires that interest be direct and personal to be sufficient:

[TRANSLATION] This interest may result from a contractual relationship between the plaintiff and the named defendant or from an extra-contractual breach by the named person against the plaintiff. This does not mean, however, that the plaintiff must always be the one with the standing (the victim of a fault who sues the wrongdoer, for example). Indeed, Quebec law acknowledges that some people may sue on behalf of an interested person (e.g., the tutor of a minor (article 159 *C.C.Q.*), the ad hoc tutor (article 190 *C.C.Q.*) or the mandatary designated by mandate in anticipation of incapacity (article 2166 *C.C.Q.*)). This acknowledgement of a person's capacity to act on behalf of others arises from explicit statutory authorization (e.g., parents' tutorship of their minor, unemancipated children, article 192 *C.C.Q.*), from appointment (e.g., article 200 *C.C.Q.*), or from a judgment (article 205 *C.C.Q.*). [Emphasis added; para. 61.]

Additionally, art. 1048 of the *CCP* allows a corporate body or association to act as a representative in a class action as long as one of its members is part of the class and that member's interest against the defendant is linked to the objects for which the corporate body or association was constituted. The *CCP* therefore permits an entity or person without a direct and personal interest in the claims against some of the defendants to represent the class in various circumstances.

[35] Moreover, the malleability of the "sufficient interest" criteria is evident in art. 1015, which states that a representative plaintiff "is deemed to have a sufficient interest notwithstanding his acceptance of the defendant's offers respecting his personal claim". In a similar vein, the Quebec Court of Appeal allowed a class action

where the representative's personal claim was prescribed, but the majority of group members' actions were not (*Service aux marchands détaillants ltée (Household Finance) v. Option consommateurs*, 2006 QCCA 1319 (CanLII), at para. 66, leave to appeal refused, [2007] 1 S.C.R. xi).

[36] The question then becomes how to reconcile *Agropur* and *CHSLD Christ-Roy*.

[37] In *Agropur*, the Quebec Court of Appeal upheld an authorization judgment denying standing to a representative who did not have a personal cause of action against, or a legal relationship with, each defendant (paras. 110 and 112). Pelletier J.A. found that the representative plaintiff had only consumed milk from one of the producers being sued, and held:

[TRANSLATION] In class actions involving a number of respondents, this Court has implicitly confirmed that the applicant must assert a cause of action against each of them. Moreover, this jurisprudence is consistent with that of the Ontario and U.S. courts. In my opinion, any ambiguity in this regard should be removed by clearly reaffirming the principle that a representative must establish a cause of action in respect of each of the parties against whom the action is to be brought. [Emphasis added; para. 110.]

[38] Although *Agropur* seems to establish a bright-line rule forbidding class actions with multiple defendants where the representative does not have a cause of action against each defendant, later judgments of the Court of Appeal do not appear to have applied such a principle. Indeed, the Court of Appeal allowed such a claim to

proceed in *CHSLD Christ-Roy*. In doing so, the court held that its situation was distinct from that of *Agropur* in two ways: first, *Agropur* contested the authorization itself, whereas in *CHSLD Christ-Roy* the decision was an appeal from the trial decision on the merits; and second, unlike *Agropur*, there was one cause of action common to the class, rather than several.

[39] The court in *CHSLD Christ-Roy* reasoned that art. 1003(d) of the *CCP* focuses on the representative character of the plaintiff and his or her capacity to adequately serve as a representative of the group members, and that representative plaintiff's standing was satisfied by his or her being a part of the class that had already been authorized based on a legitimate single cause of action (para. 27). Moreover, the court then found the consequences of denying standing would be contrary to the objectives of the class action mechanism:

[TRANSLATION] The presence of multiple defendants in this case does not require that there be as many representatives as there are CHSLDs. Indeed, the issue in dispute is common to all the establishments, be they private under agreement or public, that do not offer their users the laundry services to which they argue they are entitled under the *Act*. To proceed as the appellants suggest would result in as many class actions as there are establishments, which would entail significant, maybe even very significant, fees and procedural complexity that would require more resources from the legal system than are required. To impose on the users of long-term treatment facilities the obligation to bring as many class actions as there are establishments [could] dissuade them from asserting their rights before the courts, which would be contrary to the objectives of class action lawsuits. To accept the public establishments' proposal would, in a case such as this one, [tend to] stifle the class action lawsuit and undermine its social objective. [para. 31]

[40] As the law stands, it is unclear in the province of Quebec whether it is possible to bring a class action suit against multiple defendants where the representative does not have a direct cause of action against each of them. The cases since *Agropur* that have allowed such class actions all occurred at the post-authorization stage and used this distinction to allow the class action (see *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2007 QCCA 694 (CanLII), at para. 22; *General Motors du Canada ltée v. Billette*, 2009 QCCA 2476, [2010] R.J.Q. 66, at paras. 50-51). In fact, in his reasons for this case, Dalphond J.A. similarly wrote that the legal link between each defendant and the members of the relevant sub-group had been established at the authorization stage, thereby ensuring that there was a genuine cause of action on the part of the *class members* towards all of the defendants (para. 71).

[41] We cannot agree that representative plaintiffs for a class action who do not have a direct cause of action against each defendant do not have standing if that issue is raised at the authorization stage, but do have standing if the issue is raised once the class action is already authorized. Both lower courts justified this result by noting that once a class action has been authorized, the analysis must be done from the view of the group rather than the representative plaintiffs because at that point a class with a valid cause of action already exists. The question of whether representative plaintiffs can have standing against defendants with whom they do not have a direct cause of action must have the same answer whether or not it is raised before or after the class action is authorized.

[42] Standing in the context of class actions must be analyzed through the lens of the criteria for authorization of class actions set out in the *CCP*. That analysis must have the same outcome regardless of whether it is conducted before or after the class action is authorized. As stated above, determining whether art. 55 of the *CCP* is satisfied requires interpreting that provision harmoniously with the class action authorization criteria of art. 1003 in order to take into account the collective nature of class actions. The nature of the interest necessary to establish the standing of the representative must be understood from the perspective of the common interest of the proposed class, and not solely from the perspective of the representative plaintiffs. The legal principles that govern a challenge to standing should be the same whether the challenge occurs at the authorization stage or at the merits stage, because, at both stages, the court must look to the authorization criteria of art. 1003 to resolve the issue. The difficulty of concluding otherwise is well illustrated in this case, where, by this reasoning, the entire class action could have been halted at the authorization stage had the Banks contested standing at that time instead of at the merits stage.

[43] Nothing in the nature of class actions or the authorization criteria of art. 1003 requires representatives to have a direct cause of action against, or a legal relationship with, each defendant in the class action. The focus under art. 1003 of the *CCP* is on whether there are identical, similar or related questions of law or fact; whether there is someone who can represent the class adequately; whether there are enough facts to justify the conclusion sought; and whether it is a situation that would be difficult to bring with a simple joinder of actions under art. 67 of the *CCP* or via

mandatory under art. 59 of the *CCP*. As noted in *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, this Court has given a broad interpretation and application to the requirements for authorization, and “the tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation” (para. 60). Article 1003(d) still requires the representative plaintiff to be “in a position to represent the members adequately”. Under this provision, the court has the authority to assess whether a proposed representative plaintiff could adequately represent members of a class against defendants with whom he would not otherwise have standing to sue.

[44] In addition, reading art. 55 of the *CCP* harmoniously with the requirements of art. 1003 is in line with this Court’s jurisprudence on art. 4.2 and proportionality more generally. In *Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, this Court recently confirmed that the principle of proportionality is an important factor in civil procedure, one that “must be considered in the assessment with respect to each of [the] criteria” found under art. 1003 (para. 66). This principle reinforces the judicial discretion already found in the language of art. 1003 (*Vivendi*, at paras. 33 and 68). The importance of the proportionality requirement of art. 4.2 has been underlined in *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, in a passage that seems particularly apt in the context of the function of class actions:

Moreover, the requirement of proportionality in the conduct of proceedings reflects the nature of the civil justice system, which, while

frequently called on to settle private disputes, discharges state functions and constitutes a public service. This principle means that litigation must be consistent with the principles of good faith and of balance between litigants and must not result in an abuse of the public service provided by the institutions of the civil justice system. [para. 43]

[45] In other words, the authorizing judge has an obligation to consider proportionality — the balance between litigants, good faith, etc. — when assessing whether the representative is adequate, or whether the class contains enough members with personal causes of action against each defendant.

[46] The facts of this case demonstrate the importance of granting the representative plaintiffs standing even where they do not have a personal cause of action against each defendant. As in *CHSLD Christ-Roy*, the same legal issues are present in the action of each class member against each Bank. Each Bank faces more or less the same issues regarding the interpretation and application of the *CPA*, and counters with the same arguments about its constitutional applicability. Even more tellingly, when questioned by the trial judge as to whether he should disregard the evidence heard from one Bank in his decision *vis-à-vis* the other Banks, the Banks argued that even if Mr. Marcotte and Mr. Laparé were found to not have standing for all of the Banks, this evidence was pertinent to the questions at issue for all the Banks and should not be disregarded (trial reasons, at para. 197).

[47] We conclude that the trial judge and the Court of Appeal were correct to find that the representative plaintiffs have standing to sue all of the Banks. The class action was authorized under the criteria of art. 1003, and for the aforementioned

reasons, the current challenge to the representative plaintiffs’ standing must fail. This Court’s flexible approach to authorization in *Infineon* and *Vivendi* supports a proportional approach to class action standing that economizes judicial resources and enhances access to justice. It is inappropriate that different outcomes might result depending on when standing is challenged. For these reasons, we find the portions of *Agropur* pertaining to standing should no longer be followed and that the Plaintiffs in the present appeals have standing to bring a class action against all of the Banks.

B. The Conversion Charges Are Net Capital Under the CPA

[48] On appeal, Dalfond J.A. reversed the trial judge’s finding that the conversion charges constitute credit charges under the *CPA*. Before this Court, the parties largely reprise their arguments before the lower courts. The Banks and Desjardins argue that characterizing the conversion charges as credit charges would result in absurd outcomes that are counter to the purposes of the *CPA*. The Plaintiffs argue that characterizing the conversion charges as net capital would undermine the standardized disclosure regime of the *CPA* that permits consumers to meaningfully compare credit options.

[49] The *CPA* defines “net capital” and “credit charges” for the purpose of contracts extending variable credit (which include credit card contracts) as follows:

68. The net capital is

...

(b) in the case of a contract involving credit or a contract extending variable credit, the sum for which credit is actually extended.

Every component of the credit charges is excluded from this sum.

69. “Credit charges” means the amount the consumer must pay under the contract in addition to

(a) the net capital in the case of a contract for the loan of money or a contract extending variable credit;

...

70. The credit charges shall be determined as the sum of their components, particularly the following:

(a) the amount claimed as interest;

(b) the premium for insurance subscribed for, except any automobile insurance premium;

(c) the rebate;

(d) administration charges, brokerage fees, appraiser’s fees, contract fees and the cost incurred for obtaining a credit report;

(e) membership or renewal fees;

(f) the commission;

(g) the value of the rebate or of the discount to which the consumer is entitled if he pays cash;

(h) the duties chargeable, under a federal or provincial Act, on the credit.

The categories of net capital and credit charges are exhaustive: all fees or charges that consumers pay by reason of a credit card contract must be one or the other.

[50] All credit charges other than membership fees and cash rebates are used to calculate the credit rate (s. 72 of the *CPA*). The credit rate is applied to any outstanding amount owed after a 21-day grace period (ss. 126 and 127). If the conversion charge qualifies as a credit charge, then according to the *CPA* it would have to be disclosed on its own, included in the disclosed credit rate, and be subject to the 21-day grace period. If the conversion charge qualifies as net capital, it would not be included in the credit rate or be subject to the 21-day grace period, but would still have to be disclosed under the general s. 12 disclosure provision of the *CPA*.

[51] There are two steps to determine whether a fee is a credit charge or net capital. The first step is to determine whether the fee or charge falls under one of the enumerated credit charge categories in s. 70. If it does, it is a credit charge. If it does not, the second step is to determine whether the fee or charge constitutes a “sum for which credit is actually extended” (s. 68). If it does, it is net capital. If it does not, it is a non-enumerated credit charge (s. 69).

[52] Conversion charges do not fall under any of the s. 70 categories. At trial, they were characterized in the Desjardins Action as either administration charges or commissions, which are enumerated credit charges (s. 70(d) and (f)). However, the trial judge based this characterization on an assumption that the legislature did not intend for consumers to have to distinguish administration charges or commissions related to services ancillary to the contract from administration charges or commissions related to the actual granting of credit. According to this reasoning,

having to distinguish between ancillary and directly related charges would create ambiguity and uncertainty and would therefore be contrary to the *CPA*'s goals of consumer protection and information.

[53] The result of this reasoning would be that any administration charges or commissions disclosed in the credit card contract, not just those related directly to the granting of credit, would be considered credit charges. The Amex trial judgment notes that the FCAC classifies the conversion charge as “similar to the fee for making copies, the cash advances fee, the over the limit fee, the wire transfer or money orders fees, or the annulled or dishonoured cheques fees” (2009 QCCS 2695, [2009] R.J.Q. 1746, at para. 136). In the Desjardins Court of Appeal decision, Dalphond J.A. similarly pointed out such charges would include the fee for obtaining an extra copy of a monthly statement or an additional card, stopping payment on a cheque drawn on a credit card account, and ATM fees. Similar to conversion charges, these fees are incurred when a cardholder chooses to use a service connected to the use of a credit card.

[54] If all of these fees were credit charges, they would have to be included in the credit rate. Card issuers could do this in one of two ways. They could impose the charges on a transaction basis, in which case they would have to disclose a wide range for the credit rate (in the Desjardins Court of Appeal decision, at para. 55, Dalphond J.A. gave between 18% and 900% as an example of the credit rate that Desjardins would have to disclose to its Visa cardholders if the credit rate included

conversion charges). Charges imposed on a transaction basis would benefit from the 21-day grace period, meaning cardholders who pay the balance of their account before the end of the grace period would not pay any of those charges at all. Alternatively, card issuers could choose not to charge for such services on a transactional basis. The result of this option would inevitably be the cross-subsidization of the cost of these services by cardholders who do not utilize the services. This option would conceal the existence of the costs of these services and their imposition on other cardholders as they would not be disclosed separately.

[55] Neither option achieves the objectives of the *CPA*. As explained recently by this Court, the *CPA*'s objectives are "to restore the balance in the contractual relationship between merchants and consumers" and "to eliminate unfair and misleading practices that may distort the information available to consumers and prevent them from making informed choices" (*Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265, at paras. 160-61). Neither option for treating conversion charges as credit charges would restore the balance between merchants and consumers or improve consumers' abilities to make informed choices. Disclosing a wide range for the credit rate, the result of imposing such charges on a transactional basis, would confuse consumers. Requiring cardholders to unknowingly subsidize ancillary services that other cardholders choose to use reduces the ability of consumers to make informed choices while only benefitting some consumers at the cost of others. Because neither option benefits consumers, s. 17 of the *CPA* and art. 1432 of the *CCQ* — both of which require contracts to be interpreted so as to favour consumers

in cases of doubt or ambiguity — do not require classifying these charges as credit charges.

[56] Section 69 of the *CPA* defines “credit charges” as fees that consumers “must pay under the contract” other than net capital. Conversion charges are not fees that consumers “must pay” in order to access credit. Rather, they are additional fees for an optional service that is not necessary for consumers to access the credit. In addition, unlike obtaining an additional card or copy of a monthly statement, consumers can choose to obtain conversion services from third parties. The conversion charge is even less connected to gaining access to credit than the other fees for ancillary services listed by the Court of Appeal. For these reasons, it is appropriate to distinguish administration charges or commissions related to services ancillary to the contract from administration charges or commissions related to the actual granting of credit.

[57] In contrast with the problems created by classifying conversion charges as credit charges, classifying them as net capital fits with the text of the *CPA* and is easy to implement. Any purchaser who chooses to buy something in a foreign currency must first convert their Canadian dollars into the foreign currency. Common conversion methods other than that provided through a credit card include exchanging cash, buying traveller’s cheques, withdrawing money at a foreign ATM, or using a conversion service provided by the merchant (referred to as “dynamic currency conversion”). Generally, all of these methods involve a conversion charge. It is not

usually possible for ordinary purchasers to convert currency without paying a fee or an exchange rate higher than the interbank rate, the rate used by credit card companies to convert purchases in foreign currencies into the local currency. Only large financial institutions trading in \$1 million blocks have direct access to the interbank rate.

[58] Section 68 of the *CPA* defines “net capital” (in the context of credit cards) as “the sum for which credit is actually extended”. Claude Masse expands on this definition, stating that it must be [TRANSLATION] “sums or values that benefit the consumer” (*Loi sur la protection du consommateur: Analyse et commentaires* (1999), at p. 418). Whether a sum or value benefits a consumer must be considered from the point of view of the consumer, not the merchant. For this reason, the trial judge erred in holding that conversion charges do not benefit consumers because they are not received by the foreign merchant (Desjardins trial reasons, 2009 QCCS 2743 (CanLII), at para. 246). In the case of conversion charges, consumers benefit from having their currency converted to the foreign currency. If a consumer chooses to use a foreign merchant’s dynamic currency conversion and pays by credit card, the conversion charge would clearly be considered net capital. It would make little sense to reclassify conversion charges as credit charges for the sole reason that they are imposed by the card issuer. For that reason, conversion charges constitute sums for which credit is actually extended and are best classified as net capital.

[59] Additional support for classifying conversion charges as net capital comes from considering the fact that instead of imposing a separate conversion charge, card issuers could choose to define the exchange rate as the interbank rate plus some percentage markup. In that case, there would be no doubt that the exchange rate in its entirety constitutes net capital. The result would be identical from the point of view of the cardholder and the card issuer. The only difference would be that the wording of the disclosure of the exchange rate would be slightly different. The trial judge was correct to conclude that the conversion charge at issue in the present appeals cannot be considered part of the exchange rate. However, it would make little sense to classify an exchange rate plus a conversion charge as part credit charge and part net capital, but an exchange rate that includes a percentage markup as purely net capital. Doing so would neither protect nor benefit consumers.

[60] It is irrelevant that the card issuers do not perform the actual conversion of the currency. Card issuers contract with the entity that actually performs the conversion, then in turn contract with the cardholders that benefit from the service. From the point of view of cardholders, they benefit from the conversion service as a result of their contract with the card issuers. It makes no difference to them who actually converts their currency.

[61] To summarize, conversion charges do not fall under any of the enumerated credit charge categories in s. 70 and do qualify as net capital under s. 68. As the Court of Appeal correctly concluded, classifying conversion charges as credit

charges would lead to numerous problems, both practical and conceptual, that would hinder the objectives of the *CPA*. This conclusion is not based on whether classifying conversion charges as net capital is *preferable*, as the Plaintiffs argue it was, but rather on a proper interpretation of the provisions at issue.

C. The Doctrine of Interjurisdictional Immunity Does Not Apply

[62] The Banks argue that the doctrine of interjurisdictional immunity renders the *CPA* inapplicable to their credit card activities. Interjurisdictional immunity operates to prevent laws enacted by one level of government from impermissibly trenching on the “unassailable core” of jurisdiction reserved for the other level of government. Under s. 91(15) of the *Constitution Act, 1867*, Parliament enjoys exclusive jurisdiction over banking. The Banks submit that the applicability of the relevant provisions of the *CPA* to banks would impair the core federal banking power. We disagree.

[63] While interjurisdictional immunity remains an extant constitutional doctrine, this Court has cautioned against excessive reliance on it. A broad application of the doctrine is in tension with the modern cooperative approach to federalism which favours, where possible, the application of statutes enacted by both levels of government. As such, this Court in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, held that the doctrine must be applied “with restraint” and “should in general be reserved for situations already covered by precedent” (paras. 67

and 77). We note that there is no precedent for the doctrine's application to the credit card activities of banks.

[64] In the rare circumstances in which interjurisdictional immunity applies, a provincial law will be inapplicable to the extent that its application would “impair” the core of a federal power. Impairment occurs where the federal power is “seriously or significantly trammel[ed]”, particularly in our “era of cooperative, flexible federalism”: *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (“COPA”), at para. 45. Therefore two related questions must be asked: First, does the power to regulate disclosure of conversion charges lie at the core of federal jurisdiction over banking? Second, if so, do the provisions of the *CPA* at issue significantly trammel or impair the manner in which the federal power can be exercised?

[65] To answer these questions, the only provisions that need be considered are ss. 12 and 272 of the *CPA*, which deal with the disclosure of charges requirement and the remedies for breach of same. The overall regulatory regime established by the *CPA*, namely the enforcement role granted to the Office de la protection du consommateur, is not at issue. All that need be considered is whether the provisions that found a civil suit brought directly by consumers are applicable under the interjurisdictional immunity doctrine.

[66] Setting aside the first question for the moment, whether either of these provisions touches on the core of the federal banking power, the answer to the second

question is clear: neither provision can be said to impair that federal power. Even if the provisions are characterized broadly as regulating bank lending or foreign currency conversion, they still fail to satisfy the impairment step of the *COPA* test. While lending, broadly defined, is central to banking and has been recognized as such by this Court in previous decisions, it cannot plausibly be said that a disclosure requirement for certain charges ancillary to one type of consumer credit “impairs” or “significantly trammels” the manner in which Parliament’s legislative jurisdiction over bank lending can be exercised. Although the s. 12 disclosure obligation and the s. 272 civil remedies relate to bank lending, these provisions do not in any way impair any activities that are “vital or essential to banking” such that Parliament might be forced to specifically legislate to override the provincial law (*Canadian Western Bank*, at para. 86). Requiring banks to inform customers of how their relationship will be governed or be subject to certain remedies does not limit banks’ abilities to dictate the terms of that relationship or otherwise limit their activities. Similarly, even if foreign currency conversion is accepted as being part of the core of the federal banking power, imposing a broad disclosure requirement for charges relating to currency conversion in no way impairs that power. As such, the *CPA* does not impair the federal banking power and the doctrine of interjurisdictional immunity is not engaged.

[67] This conclusion fits with prior decisions of this Court that have dealt with interjurisdictional immunity in the context of the federal banking power. The following comments of this Court in *Canadian Western Bank* are particularly

applicable to the principle that s. 91(15) of the *Constitution Act, 1867* does not give Parliament exclusive jurisdiction over all aspects of lending or currency conversion by banks:

However, it must be repeated that just because Parliament *can* create innovative forms for financing does not mean that s. 91(15) grants Parliament *exclusive* authority to regulate their promotion. . . . The rigid demarcation sought by the banks between federal and provincial regulations would not only risk a legal vacuum, but deny to lawmakers at both levels of government the flexibility to carry out their respective responsibilities. [Emphasis in original; para. 89.]

[68] The Banks argue for exactly the type of amorphous, sweeping immunity that was rejected in *Canadian Western Bank*. Banks cannot avoid the application of all provincial statutes that in any way touch on their operations, including lending and currency conversion. Provincial regulation of mortgages, securities and contracts can all be said to relate to lending in some general sense, and will at times have a significant impact on banks' operations. However, as this Court concluded in *Canadian Western Bank*, this is not enough to trigger interjurisdictional immunity. The provisions of the *CPA* do not prevent banks from lending money or converting currency, but only require that conversion fees be disclosed to consumers.

[69] The present appeals are distinguishable from *COPA*. In addition to the directly relevant precedent on the federal aeronautics power, *COPA* also involved provincial statutory provisions that amounted to a blanket ban, under certain conditions, on an activity that fell within the core of the federal aeronautics power. As the Court pointed out, applying these provincial provisions would force Parliament to

pass legislation to countermand the provincial rules, failing which the activity could not occur at all. The same is not true for the *CPA* provisions at issue here. The disclosure and remedy provisions do affect how banks carry out a certain aspect of their activities, but as discussed above that effect does not amount to impairment. It is hard to imagine how these provisions would force Parliament to pass legislation to countermand them, failing which it would be impaired in its ability to achieve the purpose for which exclusive jurisdiction over banking was conferred. For these reasons, we conclude that the Court of Appeal was correct in holding that interjurisdictional immunity is not engaged.

D. The Doctrine of Paramountcy Does Not Apply

[70] The Banks additionally argue that ss. 12 and 272 of the *CPA* are inoperative with respect to banks as a result of the doctrine of federal paramountcy. Paramountcy is engaged where there is a conflict between valid provincial and federal law. In such cases, the federal law prevails, and the provincial law is rendered inoperative to the extent of the conflict. Conflict can be established by impossibility of dual compliance or by frustration of a federal purpose: *Canadian Western Bank*, at para. 73. The Banks argue that the provisions of the *CPA* frustrate the purpose of the federal banking scheme.

[71] Even where it is possible to simultaneously comply with both federal and provincial laws, situations will arise where requiring compliance with a provincial law will frustrate the purpose of a federal law. An example of this is *Law Society of*

British Columbia v. Mangat, 2001 SCC 67, [2001] 3 S.C.R. 113. *Mangat* dealt with a federal scheme that empowered non-lawyers to appear for a fee before immigration tribunals for the purpose of promoting informal, accessible and expeditious hearings. By contrast, a provincial law prohibited such paid appearances by non-lawyers. Even though forced compliance with the provincial law would not result in a *breach* of the federal law (as appearances by non-lawyers were not *mandatory* under the federal scheme), it would nonetheless clearly frustrate the federal purpose.

[72] In *Mangat*, it was clear that the provincial law frustrated the purpose of the federal law as it precluded people from ever using the federal scheme for paid non-lawyers. However, care must be taken not to give too broad a scope to paramountcy on the basis of frustration of federal purpose. The mere fact that Parliament has legislated in an area does not preclude provincial legislation from operating in the same area, as stated by this Court in *Canadian Western Bank*, at para. 74:

The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject. As this Court recently stated, “to impute to Parliament such an intention to ‘occup[y] the field’ in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O’Grady*” (*Rothmans*, at para. 21).

[73] As the party seeking to invoke paramountcy, the Banks bear the burden of proof and “must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose”: *COPA*, at

para. 66. The Banks allege frustration of two federal purposes. The broader federal purpose, they say, is to provide for exclusive federal banking standards. The second, narrower, purpose is to ensure that bank contracts are not nullified even if a bank breaches its disclosure obligations.

[74] Before dealing substantively with the arguments, it is worth providing a brief overview of the relevant federal and provincial regimes. Consumer banking products are federally regulated under the *Bank Act*, the *Cost of Borrowing (Banks) Regulations*, SOR/2001-101, and the *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9, the latter creating the FCAC, the federal regulator. Consumer protection is provincially regulated in Quebec under the *CPA* by the Office de la protection du consommateur. The *CPA* sets out general rules governing all consumer contracts, but also sets out rules relating to contracts of credit specifically in Division III of Chapter III of Title I of the Act (“Division III”).

[75] Both Division III of the *CPA*, and the federal *Bank Act* and *Cost of Borrowing (Banks) Regulations*, provide detailed rules relating to the manner in which credit card charges must be computed, claimed, and disclosed. The two sets of rules are consistent with one another. Both regimes provide that “credit charges” (or “cost of borrowing” under the federal scheme) must be disclosed as part of the “credit rate” (or “interest rate” under the federal scheme). The FCAC has held that conversion charges are “non-interest charges” under the federal scheme which is consistent with their being “net capital” for the purposes of the *CPA*. The provisions

regulating the grace period and the date on which interest begins to accrue are likewise consistent.

[76] In light of our conclusion above that the conversion charge is net capital, none of these specific provisions in Division III of the *CPA* need be considered in the context of the paramountcy issue. The Group B Banks complied with both the provincial requirements found in the *CPA* and the federal requirements. The Group A Banks complied with the disclosure requirements of Division III of the *CPA*, but, as will be discussed below, failed to disclose the conversion charges at all in breach of s. 12, the *CPA*'s general disclosure provision that applies to all consumer contracts. The consumers claim redress against the Group A Banks under s. 272 of the *CPA* for their breach of s. 12. Both rules are applicable to consumer contracts generally. Under s. 12, "[n]o costs may be claimed from a consumer unless the amount thereof is precisely indicated in the contract." Section 272 provides consumers with various civil remedies for breaches of the Act, including specific performance, reduction of the consumer's obligation and rescission or annulment of the contract, as well as for punitive damages.

[77] We now consider the two federal purposes put forward by the Banks.

[78] First, the Banks say that a purpose of the federal scheme is to provide for "clear, comprehensive, exclusive, national standards applicable to banking products and banking services offered by banks", citing the preamble to the *Bank Act*. The preamble was enacted in 2012 (S.C. 2012, c. 19, s. 525), shortly before the Court of

Appeal rendered its decision in this matter, meaning the proposition that it can be used retroactively as an interpretive aid is dubious (see e.g. *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at paras. 45-46). However, even if we assume that a purpose of the *Bank Act* is to provide for exclusive national standards, such a purpose would still not be frustrated by ss. 12 and 272.

[79] Sections 12 and 272 do not provide for “standards applicable to banking products and banking services offered by banks”, but rather articulate a contractual norm in Quebec. Merchants must bring costs to the attention of consumers and, failing to do so, cannot claim them. This requirement does not amount to setting a standard applicable to banking products. Rather, it is analogous to the substantive rules of contract found in the *CCQ*, the operation of which the Banks do not dispute. If the Banks’ argument amounts to claiming that the federal scheme was intended to be a complete code to which no other rules at all can be applied, that argument must also fail as the federal scheme is dependent on fundamental provincial rules such as the basic rules of contract. Just as the basic rules of contract cannot be said to frustrate the federal purpose of comprehensive and exclusive standards, if indeed such purpose exists, so too do general rules regarding disclosure and accompanying remedies support rather than frustrate the federal scheme.

[80] It is arguable that a provincial requirement that conversion charges be calculated or disclosed in a different manner than that required by federal law would engage paramountcy. If the province provided for a different grace period, or a

different method of interest computation or disclosure, it could perhaps be said to either result in an operational conflict or undermine a federal purpose of exclusive national standards (assuming, without deciding, that such a purpose could be made out). Currently, however, the federal and provincial standards are the same. Duplication is not, on its own, enough to trigger paramountcy. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, La Forest J., at p. 151, quoted with approval the following passage from *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 190, written by Dickson J. (as he then was) on the concurrent application of duplicative federal and provincial legislation:

. . . there is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament.

[81] For these reasons, even if a purpose of exclusive federal standards could be made out, it cannot be said to be frustrated in this case. Sections 12 and 272 cannot be said to frustrate or undermine a goal of exclusive national standards. This conclusion finds additional support in the conclusion reached in the companion case *Amex* regarding non-consumer cardholders, whereby those cardholders were awarded restitution under the receipt of a payment not due provisions found in the *CCQ*.

[82] The Banks also assert a second, narrower, purpose of the *Bank Act*: to ensure that bank contracts are not nullified even if a bank breaches its disclosure obligations. Sections 16 and 988 of the *Bank Act* provide that a contract is not invalid

solely by reason of being contrary to a provision of the Act. The *Bank Act* instead provides for criminal sanctions against banks that breach their disclosure obligations. This, say the Banks, evinces a federal intention to preserve banks' contracts and to provide for criminal sanctions *instead of* civil remedies such as punitive damages against banks that breach their disclosure obligations. This argument must also fail.

[83] With respect to ss. 16 and 988, it is enough to note that the remedy sought by the Plaintiffs is a reduction of how much they paid to the Banks, not the nullification of their contracts or even of the specific clauses at issue in these appeals. A clause or contract that is nullified is deemed to have never existed, requiring both parties to restore to the other any prestations received (art. 1422 of the *CCQ*). However, in the case of the Group A Banks, the conversion charge was never disclosed in their contracts, meaning it was not imposed pursuant to any clause in those contracts. As a result, reimbursement of the conversion charges cannot be said to result from or be indicative of nullification. Rather, it was chosen by the trial judge as an appropriate remedy for the Banks' breach of the *CPA*. In other cases, paramountcy might indeed render s. 272 inoperative to the extent it is applied to nullify a contract on the basis of a breach of a *CPA* provision that is similar to a provision of the *Bank Act*. However, that is not the issue before the Court. At this time, we need only consider whether paramountcy prevents s. 272 from being applied so as to order restitution of the conversion charges and punitive damages.

[84] With respect to the Banks' broader argument that provinces cannot provide for additional sanctions on top of federal sanctions, in our view this argument is similar to their argument respecting interjurisdictional immunity, whereby they seek a sweeping immunity for banks from provincial laws of general application. There are many provincial laws providing for a variety of civil causes of action that can potentially be raised against banks. The silence of the *Bank Act* on civil remedies cannot be taken to mean that civil remedies are inconsistent with the *Bank Act*, absent a conflict with ss. 16 and 988. In the present appeals there is no such conflict as the Plaintiffs are not seeking to invalidate their contracts. As this Court stated in *Canadian Western Bank*, at para. 24: ". . . constitutional doctrine must facilitate, not undermine what this Court has called 'co-operative federalism'". We conclude that ss. 12 and 272 of the *CPA* are not inconsistent with ss. 16 and 988 of the *Bank Act* and do not frustrate any federal purpose. As such, paramountcy is not engaged.

E. *The Group A Banks Must Reimburse the Conversion Charges and Pay Punitive Damages*

(1) Reimbursement of the Conversion Charges

(a) *The Group A Banks Failed to Disclose the Conversion Charge*

[85] Gascon J. made detailed findings of fact that the Group A Banks had failed to disclose the conversion charge in their cardholder agreements. He examined cardholder agreements for each Bank, concluding that the "conversion rate",

“exchange rate” or “administration charge” disclosed in their cardholder agreements could not be read as including the conversion charge or were not sufficiently precise for the requirements of s. 12 of the *CPA*.

[86] The Banks have demonstrated no palpable and overriding error for Gascon J.’s conclusions of fact that the Group A Banks breached s. 12 of the *CPA* by failing to disclose the conversion charge. His finding must therefore stand.

(b) *The Appropriate Remedy Is Reimbursement Under Section 272*

[87] At trial, reimbursement of the conversion charges to the cardholders was ordered under s. 272(c) of the *CPA*. Section 272 provides for the following civil remedies:

272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,

(a) the specific performance of the obligation;

(b) the authorization to execute it at the merchant’s or manufacturer’s expense;

(c) that his obligations be reduced;

(d) that the contract be rescinded;

(e) that the contract be set aside; or

(f) that the contract be annulled,

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

[88] The Banks argue that s. 271 of the *CPA*, not s. 272, should apply to their breach of s. 12 of the *CPA*. Section 271 provides the additional civil remedies of nullity of contract or the restoration of improperly imposed credit charges. These remedies are available if the merchant fails to conform to certain of the Act's rules, unless the merchant can prove that the consumer suffered no prejudice as a result of its failure:

271. If any rule provided in sections 25 to 28 governing the making of contracts is not observed or if a contract does not conform to the requirements of this Act or the regulations, the consumer may demand the nullity of the contract.

In the case of a contract of credit, if any of the terms and conditions of payment, or the computation or any indication of the credit charges or the credit rate does not conform to this Act or the regulations, the consumer may at his option demand the nullity of the contract or demand that the credit charges be cancelled and that any part of them already paid be restored.

The court shall grant the demand of the consumer unless the merchant shows that the consumer suffered no prejudice from the fact that one of the above mentioned rules or requirements was not respected.

[89] In *Household Finance*, the Quebec Court of Appeal had held that ss. 271 and 272 are mutually exclusive. If we were to accept the Banks' argument that s. 271 applies to their breach of s. 12, then punitive damages are not available and the Banks would have the chance to prove that reimbursement is not warranted because the cardholders suffered no prejudice.

[90] This Court discussed the scope of ss. 271 and 272 in *Richard*. It noted that “[s]ection 271 *C.P.A.* sanctions the violation of certain rules governing the formation of consumer contracts, whereas the purpose of s. 272 *C.P.A.* is not simply to sanction violations of formal requirements of the Act, but to sanction all violations that are prejudicial to the consumer” (para. 112). Section 271 applies only when the merchant fails to conform to the rules regarding the formal requirements of the formation of consumer contracts, including the terms and conditions of payment and the computation and disclosure of credit charges and the credit rate. In contrast, s. 272 applies to substantial breaches of the Act that result in prejudice to consumers.

[91] The Court laid out guidelines in *Richard*. for determining which violations of the *CPA* can give rise to s. 272 remedies. In the context of awarding punitive damages, the Court stated that “violations by merchants on manufacturers that are intentional, malicious or vexatious, and conduct on their part in which they display ignorance, carelessness or serious negligence with respect to their obligations and consumers’ rights under the *C.P.A.* may result in awards of punitive damages [under s. 272]” (para. 180 (emphasis added)). Consumers do not “have to prove that the merchant intended to mislead” for s. 272 to apply (para. 128).

[92] The violation at issue in the present appeals is the failure by the Group A Banks to disclose the conversion charge in breach of s. 12 of the *CPA*. It is a substantive violation that goes against the Act’s objective of permitting consumers to make informed choices. The violation is unrelated to the formation of the consumer

contract at issue. In this case, the breach of s. 12 surpasses a violation of the formal requirements of the *CPA*. It is not related to the terms and conditions of payment or the computation or indication of the credit charges or the credit rate, which are specifically covered by s. 271. At the very least, this violation results from ignorant or careless conduct as required by the test in *Richard*. As a result, s. 272 and not s. 271 applies.

[93] In light of the complete failure by the Group A Banks to disclose the conversion charge in the cardholder agreements, the appropriate remedy under s. 272 is a reduction of the cardholders' obligations in the amount of all conversion charges imposed during the non-disclosing periods. As there is an "absolute presumption of prejudice" for violations that give rise to s. 272 remedies (*Richard*, at para. 112), the commercial competitiveness of the conversion charges imposed by the Group A Banks is of no consequence.

[94] Because only s. 272 applies to the breach of the *CPA* at issue in these appeals, the issue of whether ss. 271 and 272 are mutually exclusive need not be addressed.

(2) Punitive Damages Are Owed by the Group A Banks

[95] The parties did not make extensive arguments on the issue of punitive damages. The Banks briefly supported the Court of Appeal overturning the punitive damages awarded at trial against BMO, NBC, Citibank and Amex, and argued the

punitive damages awarded against TD should be overturned because there was no finding that TD's conduct was "reprehensible, malicious, or vexatious" (Banks A.F., at para. 105). The Plaintiffs' arguments do not address the issue of punitive damages directly. However, as the Plaintiffs have asked this Court to reinstate the trial judgment, the issue of the punitive damages awarded against all Group A Banks at trial must be addressed.

[96] At trial, Gascon J. awarded punitive damages on an individual recovery basis in light of the failure of the Group A Banks to disclose the conversion charge. His conclusion was not based on the conversion charges being credit charges. Gascon J. concluded that their failure to disclose the conversion charge was serious and contrary to a fundamental objective of the *CPA*: permitting consumers to make informed choices. He noted that there was no legitimate basis for failing to disclose the conversion charge. As a result, he characterized the Group A Banks' behaviour as [TRANSLATION] "reprehensible and unacceptable", justifying punitive damages (para. 1260). Similarly, in the Amex Action, Gascon J. awarded punitive damages in light of Amex's "blunt disregard of its obligations" and its failure to provide a "reasonable explanation or legitimate excuse", which supports the conclusion that "Amex may well have chosen to wilfully hide the [conversion charge] within the exchange rate" (paras. 425 and 427).

[97] The Court of Appeal overturned the punitive damages imposed on all of the Group A Banks other than TD on the basis that no additional damages need be

awarded to fulfil a preventive purpose (para. 124; see also Amex Court of Appeal reasons, at para. 61). It noted the punitive aspect of collective recovery, the fact that the Group A Banks had corrected their violation of s. 12 and the lack of evidence of “antisocial or reprehensible conduct . . . requiring some form of punishment in addition to an award of restitution of all the fees collected” (*ibid.*, at para. 59).

[98] In *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168, this Court confirmed that there are only two grounds for an appellate court to interfere with a trial court’s assessment of punitive damages:

(1) if there is an error of law; or (2) if the amount is not rationally connected to the purposes for which the damages are awarded, namely prevention, deterrence (both specific and general), and denunciation
[para. 134]

[99] In our opinion neither of the criteria were met in this case. Furthermore, there are identifiable errors in the Court of Appeal’s analysis. Given the law on punitive damages in the *CCQ* and the criteria set out by this Court we conclude that with regards to punitive damages, the trial judgment should be restored.

(a) *Error of Law*

[100] Article 1621 of the *CCQ* governs awards of punitive damages under Quebec law, and only permits courts to award punitive damages if they are “provided for by law”, in which case they “may not exceed what is sufficient to fulfil their

preventive purpose”. The only basis for awarding punitive damages in the present appeals is s. 272 of the *CPA*, which states that consumers “may also claim punitive damages” if the merchant “fails to fulfil an obligation imposed on him by [the *CPA*]”.

[101] This Court dealt with punitive damages awards under s. 272 of the *CPA* in *Richard*. It concluded that such damages must have a preventive objective, meaning their purpose must be “to discourage the repetition of undesirable conduct” (para. 180). They may only be awarded in light of “intentional, malicious or vexatious” violations of the *CPA* or conduct that displays “ignorance, carelessness or serious negligence with respect to consumers’ rights and to the obligations they have to consumers under the *C.P.A.*”, assessed in light of “not only the merchant’s conduct prior to the violation, but also how (if at all) the merchant’s attitude toward the consumer . . . changed after the violation” (*ibid.*, at paras. 177-78).

[102] As discussed above, s. 272 imposes an absolute presumption of prejudice to the consumer. The Court in *Richard* set out the analytical approach to claims for punitive damages under s. 272 of the *CPA* as follows:

The punitive damages provided for in s. 272 *C.P.A.* must be awarded in accordance with art. 1621 C.C.Q. and must have a preventive objective, that is, to discourage the repetition of undesirable conduct;

Having regard to this objective and the objectives of the *C.P.A.*, violations by merchants or manufacturers that are intentional, malicious or vexatious, and conduct on their part in which they display ignorance, carelessness or serious negligence with respect to their obligations and consumers’ rights under the *C.P.A.* may result in awards of punitive damages. However, before awarding such damages, the court must

consider the whole of the merchant's conduct at the time of and after the violation. [Emphasis added; para. 180.]

[103] While the trial judge did not have the benefit of this Court's decision in *Richard*, we do not find that he made an error in law. The focus in *Richard* is the preventive function of punitive damages per art. 1621 of the *CCQ* and the need to consider the objectives of the legislation authorizing the punitive damages (paras. 155-56). The trial judge uses this standard at paras. 1231 and 1234 of the trial judgment. While the law was expanded and clarified — in particular with regards to the objectives of the *CPA* relevant to the assessment of punitive damages and the need to consider the merchant's conduct after the violation — we conclude that the trial judge used the appropriate guidelines.

[104] The Court of Appeal, on the other hand, found that the trial judge erred in failing to consider the fact that collective recovery “often comprises an important punitive aspect as compared to individual recovery” (Amex Court of Appeal reasons, at para. 57; the Court of Appeal's reasons in the Amex Action were said to apply to punitive damages for the Group A Banks in the BMO Action as well (see BMO Court of Appeal reasons, at para. 124)). We respectfully disagree that this was a factor that the trial judge should have considered. There is no case law to support using collective recovery as a basis for not awarding punitive damages. The Court of Appeal supports its argument by citing a treatise on class actions by Lafond that highlights the corrective, preventive and deterrent aspects inherent to collective recovery. While there may be some truth to the idea that the aims and effects of

collective recovery overlap with those of punitive damages, this overlap cannot be a factor in the legal test for the determination of punitive damages. By the Court of Appeal's reasoning, the threshold for awarding punitive damages would be higher in a class action where the plaintiffs were awarded collective recovery as opposed to individual recovery. We see no valid reason to so conclude. After all, collective recovery is nothing more than the full extent of a defendant's obligation if the plaintiffs make their case. The mode of recovery is not a factor set out by this Court's jurisprudence for assessing punitive damages under the *CCQ* nor would it be reasonable to include it as one.

(b) *The Amount Is Rationally Connected to the Purposes for Which the Damages Are Awarded*

[105] The trial judge made findings of fact relevant to the award of punitive damages in both the BMO and Amex Actions. In the BMO Action, the trial judge discussed the breach of s. of the 12 *CPA* by the Group A Banks:

[TRANSLATION] This violation is a serious one that disregards a fundamental objective of protection of the *CPA*, namely that consumers must be clearly informed of all the conditions of their contracts so that they can make considered choices knowing exactly what they are agreeing to.

But none of the five banks in question have provided explanations or justifications for the failure to disclose these conversion fees. This is surprising. Unlike for the violations of sections 72, 83, 91 and 92 *CPA* discussed above, it is impossible to identify a legitimate basis for the practice whether from a business point of view or otherwise.

Under this head, the impugned conduct of the five banks remains reprehensible and unacceptable. Their want of concern for consumers is

serious. The additional sanction of punitive damages is justified to this extent. [paras. 1258-60]

[106] The trial judge discussed Amex's lack of disclosure in similarly strong terms:

While it is true that under the circumstances, the conduct of Amex can hardly be qualified as antisocial or particularly reprehensible or intolerable, it still remains that for an interval of 10 years, it clearly disregarded its obligations under the *CPA*.

At the very least, it showed a rather blunt disregard of its obligations. To the extent that of the various chartered banks operating in Canada in 2002, the FCAC found that Amex was the only one then failing to disclose the [conversion charge].

Moreover, no legitimate excuse for Amex's behaviour has been offered or given. One can indeed hardly understand why Amex elected to disclose the [conversion charge] up to 1993 and yet stopped doing so for 10 years, until the FCAC advised it that this was improper.

In the absence of any reasonable explanation or legitimate excuse, a logical inference remains. Amex may well have chosen to wilfully hide the [conversion charge] within the exchange rate, leaving the consumer unable to ascertain its existence, let alone its extent. This would be quite disturbing. [paras. 424-27]

[107] The Court of Appeal found that "in June 2009 there was no need to impose punitive damages to discourage a practice that had been discontinued six years earlier by Amex and even before that by other banks" (Amex Court of Appeal reasons, at para. 58). Furthermore, the Court of Appeal found that the plaintiff did not discharge his burden "to adduce evidence of antisocial or reprehensible conduct" (*ibid.*, at para. 59).

[108] With respect, based on the findings of fact by the trial judge, we arrive at a different conclusion. The *CPA* is a statute of public order whose obligations and objectives will inform any order of punitive damages stemming from a breach of the Act. These obligations and objectives were discussed at length in *Richard*:

In establishing the criteria for awarding punitive damages under s. 272 *C.P.A.*, it must be borne in mind that the *C.P.A.* is a statute of public order. No consumer may waive in advance his or her rights under the Act (s. 262 *C.P.A.*), nor may any merchant or manufacturer derogate from the Act, except to offer more advantageous warranties (s. 261 *C.P.A.*). The provisions on prohibited practices are also of public order (L'Heureux and Lacoursière, at pp. 443 *et seq.*).

The fact that the consumer-merchant relationship is subject to rules of public order highlights the importance of those rules and the need for the courts to ensure that they are strictly applied. Therefore, merchants and manufacturers cannot be lax, passive or ignorant with respect to consumers' rights and to their own obligations under the *C.P.A.* On the contrary, the approach taken by the legislature suggests that they must be highly diligent in fulfilling their obligations. They must therefore make an effort to find out what obligations they have and take reasonable steps to fulfil them.

In our opinion, therefore, the purpose of the *C.P.A.* is to prevent conduct on the part of merchants and manufacturers in which they display ignorance, carelessness or serious negligence with respect to consumers' rights and to the obligations they have to consumers under the *C.P.A.* Obviously, the recourse in punitive damages provided for in s. 272 *C.P.A.* also applies, for example, to acts that are intentional, malicious or vexatious.

The mere fact that a provision of the *C.P.A.* has been violated is not enough to justify an award of punitive damages, however. Thus, where a merchant realizes that an error has been made and tries diligently to solve the problems caused to the consumer, this should be taken into account. Neither the *C.P.A.* nor art. 1621 *C.C.Q.* requires a court to be inflexible or to ignore attempts by a merchant or manufacturer to correct a problem. A court that has to decide whether to award punitive damages should thus consider not only the merchant's conduct prior to the violation, but also how (if at all) the merchant's attitude toward the consumer, and toward consumers in general, changed after the violation. It is only by analysing

the whole of the merchant's conduct that the court will be able to determine whether the imperatives of prevention justify an award of punitive damages in the case before it. [paras. 175-78]

[109] Therefore, with respect to the Court of Appeal, neither evidence of antisocial behaviour nor reprehensible conduct is *required* to award punitive damages under the *CPA*. Rather, what is necessary is an examination of the overall conduct of the merchant, before, during and after the violation, for behaviour that was “lax, passive or ignorant with respect to consumers’ rights and to their own obligations”, or conduct that displays “ignorance, carelessness or serious negligence”.

[110] In the BMO Action, the trial judge found that the Group A Banks’ breach was serious and even contemptuous of a fundamental objective of the *CPA* — that the consumer have knowledge of the conditions of her or his contract. The trial judge found those Banks’ failure to explain this breach showed a serious lack of concern or care towards the consumers that was reprehensible and unacceptable. In the Amex Action, the trial judge found that the bank disregarded its obligations under the *CPA*, and inferred that in removing references to the rate available to the consumer, Amex may have wilfully hidden its conversion rate for 10 years.

[111] There is no palpable or overriding error in these findings of fact, or in the trial judge’s use of them to support an order of punitive damages. It was open to the trial judge to conclude that the conduct of the Banks amounted to ignorance, carelessness or both. In the case of the Group A Banks, there was noncompliance with the *CPA* without any explanation for a period of years. What prompted each

bank to start disclosing the conversion charge is unclear. Their cooperation with this lawsuit — namely, providing the information to permit collective recovery — is not enough to amount to evidence of diligence in solving the problem caused to the consumers or of a positive attitude towards consumers in general. Their negligence during the period of non-disclosure overwhelms their unexplained decision to start disclosing a fee they were charging consumers without their knowledge. The facts are worse for Amex, who in disclosing the fee until 1993, and then hiding it for 10 years until the FCAC decision, exhibited the opposite of diligence and demonstrated an undesirable attitude towards the consumers.

[112] As noted in *Richard*, the *CPA* has two main objectives: restoring the balance between merchants and consumers in their contractual relationships, and eliminating unfair and misleading practices that may distort the information available to consumers and prevent them from making informed choices (paras. 160-61). Both of these objectives are important in this context where consumers are often powerless in the face of changes to their credit card contracts, particularly when refusing payment can result in additional costs in the form of interest. In our opinion it was open to the trial judge to conclude that the Group A Banks breached their responsibilities in contravention of the *CPA* and its objectives. The clarifications made in *Richard* do not change the fact that there is a rational connection between the amount of punitive damages and the purpose for which they were awarded. The trial judge did not make a palpable and overriding error in awarding punitive damages as a

preventive measure, not only to deter the Banks, but all merchants, from this kind of careless behaviour.

[113] The trial judge's award of punitive damages is rationally connected to the purposes of the punitive damages. The trial judgment with regards to punitive damages should be restored for all the Group A Banks.

(3) The Case of Amex

[114] The above conclusions apply to all Group A Banks, including Amex in its position as a defendant in the BMO Action. Contrary to the conclusion of the Court of Appeal in the BMO Action, the classes in the BMO and Amex Actions were carefully described so as not to overlap. As noted by Gascon J. in his judgment in the Amex Action, in 2007 the Amex Action class description was modified "to avoid duplication between the group descriptions of the [BMO Action] and those of this file" (para. 7, fn. 6). Indeed, the class in the BMO Action covered conversion charges imposed on consumer credit card holders from April 17, 2000 onward, while the class in the Amex Action only covered conversion charges imposed on consumer credit card holders prior to April 17, 2000. The trial orders in the BMO and Amex Actions did not overlap.

[115] This issue was not argued before our Court. However, the Plaintiffs have asked this Court to reinstate the trial judgment. Further, the Plaintiffs applied to the Court of Appeal to correct its order on the basis that the classes in the BMO and

Amex Actions do not overlap. The Banks did not dispute that the classes in the two actions do not overlap, arguing only that there was no evidence in the record of the conversion charges charged by Amex for the month of January 2003 and, therefore, that collective recovery for that month should be denied. The Court of Appeal denied the application without giving reasons.

[116] We are of the opinion that the award at trial against Amex in the BMO Action should be restored to the extent that it accords with our conclusion that the conversion charges are net capital. Amex must repay all conversion charges imposed between April 17, 2000 and January 31, 2003, which is when it began disclosing the conversion charge. For the period of April 17, 2000 to December 31, 2002, Gascon J.'s order of individual recovery is restored. For January 2003, consistent with how the Court of Appeal calculated collective recovery for the other Group A Banks, an award of \$87,078.33 is ordered (1/12 of \$1,044,940, the total amount of conversion charges imposed by Amex in 2003 reduced by Amex's average rate of bad debts). Punitive damages awarded against Amex are also restored.

VI. Conclusion

[117] All relevant provisions of the *CPA* are constitutionally applicable and operative and the Plaintiffs have standing to bring this class action. The conversion charges are net capital in the sense of the *CPA* and were properly disclosed by the Group B Banks. The Group A Banks failed to disclose the conversion charges and must therefore refund the collected conversion charges to their cardholders. They are

additionally liable for punitive damages. For these reasons, the appeals by the Banks are dismissed with costs before our Court. The appeal by the Plaintiffs is allowed in part without costs before our Court in light of the divided success. Costs for the courts below remain as ordered by Dalphond J.A. at paras. 151-54 of his judgment in the BMO Action, except in the case of Amex, against which the costs award made by the trial judge should be restored.

APPENDIX

Glossary of Terms

Card issuer: the institution, typically a bank, credit union, or store, that issues the credit card to the cardholder; collects the interchange fee; pays the network access fee to the credit card company in return for using their card.

Cardholder: party to the cardholder agreement with the card issuer; uses the credit card to make payments to merchants, repays the card issuer at a later date.

Cardholder agreement: the contract between cardholders and card issuers for the use of the credit card.

Conversion charge: percentage added to purchases made in foreign currencies after the original amount is converted to Canadian dollars.

CPA: Consumer Protection Act, CQLR, c. P-40.1.

Credit card company: Visa, MasterCard and American Express; charges the network access fee and sets the rate for the interchange fee collected by Card Issuers.

Credit charge (*CPA*): one of two types of charges permitted by the *CPA* under cardholder agreements; all amounts owed under the agreement other than net capital.

Credit rate (*CPA*): all credit charges owed under a cardholder agreement, with certain exceptions, expressed as an annual percentage.

Interbank rate: an exchange rate only available to large financial institutions trading in \$1 million blocks.

Interchange fee: a rate set by credit card companies but collected by card issuers.

Merchant: provides goods or services to cardholders in exchange for payment through the credit card.

Net capital (CPA): the sum of money for which credit is actually extended to cardholders through their credit card other than sums specifically categorized as credit charges.

Network access fee: fee set and collected by credit card companies from card issuers.

Appeals by the Bank of Montreal, Citibank Canada, the Toronto-Dominion Bank and the National Bank of Canada dismissed and appeal by Réal Marcotte and Bernard Laparé allowed in part.

Solicitors for the appellants/respondents the Bank of Montreal, Citibank Canada, the Toronto-Dominion Bank and the National Bank of Canada and for the respondents the Amex Bank of Canada, the Royal Bank of Canada, the Canadian Imperial Bank of Commerce, the Bank of Nova Scotia and the Laurentian Bank of Canada: Osler, Hoskin & Harcourt, Montréal and Toronto; Deslauriers & Cie, Montréal.

Solicitors for the respondents/appellants Réal Marcotte and Bernard Laparé: Trudel & Johnston, Montréal; Lauzon Bélanger Lespérance inc., Montréal.

Solicitors for the respondent/intervener the Attorney General of Quebec: Bernard, Roy & Associés, Montréal.

Solicitors for the respondent/intervener Président de l'Office de la protection du consommateur: Allard, Renaud et Associés, Trois-Rivières; Office de la protection du consommateur, Trois-Rivières.

Solicitor for the respondent/intervener the Attorney General of Canada: Attorney General of Canada, Montréal.

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

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Canadian Bankers Association: Torys, Toronto.

9

Indexed as:

Ontario (Human Rights Commission) v. Dofasco Inc.

Between

**Ontario Human Rights Commission, applicant (appellant), and
Dofasco Inc., Catherine Jeffrey and The Board of Inquiry
(Human Rights Code), respondents (respondents in appeal)**

[2001] O.J. No. 4420

57 O.R. (3d) 693

208 D.L.R. (4th) 276

151 O.A.C. 201

39 Admin. L.R. 199

14 C.C.E.L. (3d) 165

109 A.C.W.S. (3d) 462

Docket No. C35181

Ontario Court of Appeal
Toronto, Ontario

Morden, Abella and Rosenberg JJ.A.

Heard: June 14, 2001.

Judgment: November 16, 2001.

(65 paras.)

On appeal from an order of the Divisional Court (Hartt, Carnwath and Matlow JJ.) dated June 22, 2000.

Counsel:

Naomi Overend and Jennifer Scott, for the appellant.

Michael Hines, for the respondent, Dofasco Inc.

Fiona Campbell, for the complainant, Catherine Jeffrey.

Margaret Leighton, for the Board of Inquiry.

The judgment of the Court was delivered by

1 MORDEN J.A.:-- This appeal is concerned with the nature and extent of the power of a board of inquiry under the Human Rights Code, R.S.O. 1990, c. H.19 to order a complainant, who alleges that she was discriminated against in her employment on the basis of a physical handicap, to disclose medical and other documents relating to her.

2 I shall, shortly, describe what has taken place in this proceeding but say now that the board of inquiry ("the board") which is composed of one person, Matthew D. Garfield, made an order, on a motion by Dofasco Inc., requiring the complainant, Catherine Jeffrey, to disclose certain documents. I shall set out the terms of the order, which are considerably more complex than this brief statement indicates, later in these reasons.

3 The appellant, the Ontario Human Rights Commission ("the commission"), brought an application to the Divisional Court for judicial review of the board's order, which the court dismissed. The commission, with leave, appeals to this court from this decision.

The Underlying Facts Relating to the Disclosure Order

4 The facts relating to the board's disclosure order and to the judicial review proceeding, which is before the court, are, in the main, those set forth in the pleadings filed with the board. Pleadings are provided for in the Rules 35 to 37 of the board's Rules of Practice.

5 The commission's pleading alleged that the complainant was employed by Dofasco from 1976 to 1994. She worked as a crane operator. She was injured in 1988 and re-injured in 1990. She was diagnosed with chronic pain disability/fibromyositis/fibromyalgia. This condition made her incapable of working as a crane operator.

6 The complainant was off work between 1990 and 1994 but continued to have contact with Dofasco Inc. from time to time. On March 1, 1994 Dofasco, for the first and only time, raised the possibility of assigning her reasonably suitable alternative work, as a switchboard operator. Her response was to defer the decision on whether or not to accept this work until after she had consulted with her specialist doctor. She informed Dofasco of this. Because of her doctor's absence, she was unable to see him until April 26, 1994.

7 Dofasco was unwilling to wait for this and demanded that the complainant report to Dofasco Medical Services on March 11 and report for work on March 14. She did report to Dofasco Medical Services on March 11. Despite knowing that she was unable to see her specialist until April 26, Dofasco Inc. terminated her employment forthwith after she did not report for work on March 14, claiming that her contract of employment had been frustrated because of her "prolonged and ongoing refusal to report for available and suitable work".

8 The commission alleged that the facts disclosed the following issues:

- (a) The complainant was terminated because of her handicap, which constitutes prima facie discrimination;
- (b) Dofasco did not attempt to accommodate the needs arising from the complainant's handicap to the point of "undue hardship", and therefore cannot establish that the complainant was "incapable" of her essential duties;
- (c) In fact, Dofasco was not engaged in a good faith process of accommodation, given the timing of its job offer, its refusal to wait for the complainant to get required medical

advice, and its refusal to consider any other options;

(The commission raised additional issues in its pleading relating to harassment and reprisals on the part of Dofasco. They are not relevant to the proceeding before the court.)

9 This is followed by the general allegation that Dofasco discriminated against the complainant on the ground of handicap contrary to ss. 5 and 9 of the Human Rights Code.

10 The commission sought the following remedies:

- (a) Compensation for lost wages and benefits for the complainant for the period March 15, 1994 to the present, less any amounts of such compensation the complainant received for this period from the WSIB or CPP;
- (b) Compensation for the intrinsic value of the rights infringed in the amount of \$10,000;
- (c) Compensation for mental anguish suffered because of the wilful or reckless manner of infringement in the amount of \$10,000;

11 Dofasco's pleading is relatively long and detailed. A summary set forth in paragraph 37 reads:

To summarize, for four years the Complainant consistently asserted inability to perform productive work for Dofasco, apparently supported by her physicians, while failing to provide relevant medical information and emphasizing her desire for WCB vocational training. In the four years between her second accident and her termination, the Complainant never stated she was ready to return to work or that her physicians had cleared her to return to work. During that time period, she never suggested there were any particular jobs or bundles of duties that she could productively perform, nor, to the Respondent's knowledge, did any of her physicians. During her four year absence from work, the Complainant repeatedly took the position that (initially) she was not ready to return to work, and (later) that she was unlikely to ever be able to return to work at Dofasco. The Commission's Pleadings do not refer to any indication from the Complainant that she was, either prior to or subsequent to her termination, medically fit to return to any productive job at Dofasco. This background, coupled with her refusal to even attempt an ultra-light duty job, the WCB's concurrence that she could do the work and her clear focus on maintaining WCB eligibility, constituted ample grounds for terminating the employment relationship. For four years, the Complainant had not fulfilled the basic "essential duty" of an employee to, ie., perform productive work. Apart from wishful thinking, there was no reason to believe that, whatever accommodation Dofasco made for her, she ever would. A "window of opportunity", arising out of the broader corporate restructuring process, became accessible for a short period of time [earlier in Dofasco's pleading it was alleged that there was a "pressing" need to fill the switchboard operator's vacancy]. Dofasco acted reasonably in stating its preparedness to accept medical clearance from a doctor other than the absent specialist and its readiness to physically modify the worksite. The Complainant declined to take advantage of this, and the window "closed". There was no prospect that such an opportunity would arise again in the foreseeable future. Dofasco then proceeded to exercise its rights of termination under Section 17 of the Code.

Dofasco also pleaded:

Dofasco has now learned that in August, 1993, the Complainant was awarded disability benefits under the Canada Pension Plan. Dofasco has requested but has not yet received documents explaining why this decision was reached despite the findings of Dr. Darracott in November, 1992 [that "from a physical point of view, there [was] no clinical evidence to suggest she has physically disabling pathology"].

Under the Canada Pension Plan, an applicant can only receive a CPP Disability Pension if they are "incapable regularly of pursuing any substantially gainful occupation" and their disability is "likely to be long continued and of indefinite duration".

12 Dofasco then raised the following issues:

At the time of her termination, was the Complainant capable of performing any work, or was she "incapable of pursuing any substantially gainful occupation", as her CPP Disability Pension status would suggest?

If the Complainant now claims to have been capable of performing work in March, 1994, should the Board of Inquiry dismiss this Complaint as an abuse of process, given the fact that such a position directly contradicts the position she has successfully taken before the Canada Pension Plan i[n] respect of the same time period?

If, as her CPP status would suggest, the Complainant was totally unemployable in March, 1994, did Dofasco have any obligation at all to accommodate her "needs"?

Assuming the Complainant was capable of some work in March, 1994, was she capable of the switchboard duties?

Assuming the Complainant's needs were such that some measure of accommodation would have permitted her to perform work in March, 1994, were Dofasco's efforts at accommodation sufficient to accommodate those needs?

Did the Complainant, herself, take all reasonable steps available to her to participate in the accommodative process?

The Motion Before The Board

13 After the exchange of pleadings, Dofasco brought a motion for:

An Order compelling production of the files of Dr. Leong, Dr. Buckley, Dr. Kean and Dr. Forrest relating to the Complainant during the period between March 22, 1990 and the present date;

An order compelling production of the files of any other medical practitioner who examined or treated the Complainant during the period between March 22, 1990 until the present date;

An order compelling production of all files maintained by the Workplace Safety and Insurance Board regarding the Complainant;

An order compelling production of the Complainant's medical file maintained by the Medical Department of Dofasco Inc.

An order compelling production of the Complainant's disability pension file maintained by the Canada Pension Plan;

An order compelling production of true copies of the Complainant's income tax returns from 1993 until the present as well as true copies of any documents received by the Complainant from Revenue Canada which confirm or correct any of those returns.

Alternatively, an order requiring the Complainant's written consent to the disclosure of each of the foregoing documents to the Respondent's counsel.

Such further and other relief as to this Board of Inquiry seems just.

14 The board heard the motion on December 16, 1999 and gave its decision orally that day. It stated the competing submissions of the parties as follows:

Dofasco brings a motion for production of medical files, WCB file, CPP file and income tax returns (TIs and notices of assessment) from the Complainant. Dofasco argues that it should have the same degree of access to original documents in a file as the Complainant. Dofasco also submits that it is being denied the ability to know the case it has to meet, prepare its defence under section 17 of the Code, and deal with central issues in this case including the quantum of damages. Dofasco has highlighted instances of imperfect disclosure in these proceedings including sequentially numbered documents not produced by the Complainant.

The Commission opposes the motion and argues that the relief sought is too wide and that Dofasco is not entitled to the production of files per se and documents not relevant to the handicap of the Complainant (chronic pain disability, fibromyositis, fibromyalgia). The Commission argues that the Board's rules do not contemplate such a wide net of disclosure - a "fishing expedition".

Though not present, the Complainant, through letters by her counsel in the motion materials, indicates that she has met her disclosure obligations under the Rules.

15 After stating that "[t]he motion is granted in part", the board gave the following reasons:

The test for production is arguable relevance. Section 5.4(1) of the Statutory Powers Procedure Act and Board of Inquiry Rule 42 give me a broad power to order disclosure. Rule 42 confers on me the power to order disclosure of "... anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding."

The threshold for disclosure here, as in the courts, is not a very high one. There must be some relevance and the production must have some nexus to issues before the Board. The general movement is toward greater disclosure. This is reflected by the Ontario Court of Appeal's comments in *Cook v. Ip* (1985), 5 C.P.C. (2d) 81, at 86:

There can be no doubt that it is in the public interest to ensure that all relevant evidence is available to the Court. This is essential if justice is to be done between the parties ... The production of medical records is thus fundamental to a Court's determination of the nature, extent and effect of the injuries which may have been suffered and the appropriate measure of damages flowing from them.

Dofasco has satisfied me that the nature of the documents sought (some of which are known and some of which are not known) are crucial to knowing its case to be met and preparing its key defence under section 17 of the Code. The motion materials clearly show that production by the Complainant has been incomplete. My goal is to balance the needs of Dofasco to know and prepare its case and the confidentiality of the Complainant inherent in such disclosure.

The Commission argues against an order of disclosure of documents from medical practitioners not enumerated by Dofasco and those parts of the file of Dr. Leong (the Complainant's family doctor) dealing with medical conditions not enumerated above. I find that ailments other than those listed above are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages. Dofasco should not be prevented from presenting such arguments.

I find further that information contained in the Complainant's files at the WSB and CPP will arguably be relevant to the issues in this proceeding. Employment related income is clearly relevant to issues in this proceeding, including the quantum of damages. Information in the Complainant's file at Dofasco's medical department will no doubt be relevant to key issues in this proceeding.

16 Following this, the board made its "order" as follows:

1. The Complainant shall provide to her counsel an executed Consent to the disclosure of the file of Dr. Leong, Dr. Buckley, Dr. Kean and Dr. Forrest relating to the Complainant during the period between March 22, 1990 and the present date. Complainant's counsel shall then provide said Consents to the doctors and request production by January 15, 2000.
2. The Complainant shall provide a list to Mr. Hines [counsel for Dofasco] by January 31, 2000 of any other medical practitioner who examined or treated her during the period between March 22, 1990 until the present date, the doctor's area of expertise or specialty, the dates of said visits, and the ailment or condition treated.
3. The Complainant shall provide to her counsel executed Consents to the disclosure of her files maintained at the Workplace Safety and Insurance Board, at the Canada Pension Plan regarding her disability and her medical file maintained by Dofasco's medical department, all for the period between March 22, 1990 until the present date. Complainant's counsel shall then provide said Consents to the above entities and request production by January 15, 2000.
4. The Complainant shall produce to Mr. Hines true copies of her T1 income tax returns and notices of assessment from 1993 until the present. Said documents may be edited by the Complainant so that non-employment income parts are expunged. Production of the income tax documents as above shall be given by January 31, 2000.
5. The Complainant shall provide a sworn Affidavit of Documents as stipulated in the Rules of Civil Procedure dealing with documents obtained from the above sources. The Affidavit shall also include a section listing those documents not provided to Dofasco for reason of not being arguably relevant. Said affidavit, including copies of productions shall be provided to Mr. Hines by January 31, 2000. Mr. Hines may see the originals of productions upon request to the

- Complainant's counsel.
6. Disbursements of the productions above shall be borne by Dofasco.
 7. The Complainant's counsel shall get Mr. Hines' approval as to the form and content of the Consents and letters of request.

The Application for Judicial Review

17 The commission brought an application for judicial review of the board's decision before the Divisional Court. It sought, in the notice of application, an order quashing the board's order and remitting the matter to the board for "a decision in accordance with proper legal principles to be specified" and stated the following grounds:

In making this order, the Board of Inquiry:

- i) Made an error of law in its interpretation of s. 17 of the Human Rights Code;
- ii) Made an error of law in its interpretation of the Rules of Practice of the Board of Inquiry in placing even more onerous procedural and substantive obligations on the complainant with respect to disclosure than would the Rules of Civil Procedure, despite the fact that the Rules of Practice of the Board of Inquiry specify, for parties other than the Human Rights Commission, only that disclosure must be made of documents on which that party will rely;
- iii) Exercised its discretion unreasonably, or patently unreasonably, in requiring disclosure concerning medical conditions unrelated to the handicaps alleged in the complaint, in the absence of any evidence that the complaint had any such conditions which might have affected her ability to work. This constitutes, almost by definition, a "fishing expedition" [emphasis in original].

18 The Divisional Court (Hartt, Carnwath and Matlow JJ.) dismissed the application. Carnwath J. gave the following reasons for the court orally at the conclusion of the hearing:

We all agree the application fails. We find it would be unreasonable to interfere with the interim decision of the Board, a decision devoid of exceptional or extraordinary circumstances. The hearing before the Board should not be fragmented and should be permitted to run its course. The section 17 issue should receive a full hearing by the Board. Any aggrieved party may appeal, based on a full evidentiary record. Moreover, records are arguably relevant to the determination of a remedy and quantum of damages.

We find the Board's decision was a reasonable exercise of its discretion at this preliminary stage. In carrying out the balancing of the fourth part of the test in *A.M. v. Ryan*, [1997] 1 S.C.R. 157, we find the Board's exercise of discretion to be reasonable, particularly in the light of the acknowledgment of counsel that the usual undertaking of Mr. Hines to maintain confidentiality is in effect.

The panel, in the exercise of its discretion, awards party-and-party costs of \$3,500.00, inclusive of fees and disbursements, plus G.S.T. to Dofasco Inc. The costs are awarded solely against the Commission.

Legislative Provisions

19 Before setting forth the issues argued before this court and my reasons relating to them, I set forth the relevant

legislative provisions in the Human Rights Code, R.S.O. 1990, c. H.19, as amended, the Rules of Practice made by the Board of Inquiry, and the Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, as amended.

Human Rights Code

5.-(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or handicap.

...

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

...

17.(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

- (2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

...

35.(1) There shall be a board of inquiry for the purposes of this Act composed of such members as are appointed by the Lieutenant Governor in Council.

...

- (5) The board of inquiry may make rules regulating its practice and procedure and generally for the conduct and management of its affairs and such rules are not regulations within the meaning of the Regulations Act.

...

39.(1) The board of inquiry shall hold a hearing,

- (a) to determine whether a right of the complainant under this Act has been infringed;

- (b) to determine who infringed the right; and
- (c) to decide upon an appropriate order under section 41,

and the hearing shall be commenced within thirty days after the date on which the subject-matter of the complaint was referred to the board.

- (2) The parties to a proceeding before the board of inquiry are,

the Commission, which shall have the carriage of the complaint;

the complainant;

any person who the Commission alleges has infringed the right;

any person appearing to the board of inquiry to have infringed the right;

...

- (4) Where the board exercises its power under clause 12(1)(b) of the Statutory Powers Procedure Act to issue a summons requiring the production in evidence of documents or things, it may, upon the production of documents or things before it, adjourn the proceedings to permit the parties to examine the documents or things.

Rules of Practice - Ontario Board of Inquiry - Effective November 1, 1996

1. These Rules apply to all proceedings of the Board of Inquiry ...

MUTUAL DISCLOSURE

- 40. The Human Rights Commission, shall provide full disclosure of the results of its investigation including, but not limited to, witness statements, documents, and evidence relating to the complaint, to all parties and to any other person the panel directs, at least ten (10) days prior to the first scheduled mediation date or thirty (30) days before the case management-prehearing if no mediation is scheduled.
- 41. All other parties except the Human Rights Commission, shall deliver to all parties full disclosure of the information and evidence including, but not limited to, witness statements and documents it will rely on to support its case at least ten (10) days prior to the first scheduled case management-prehearing.
- 42. At any time in a proceeding, a panel may order any party to deliver to any other party further particulars, physical or documentary evidence, expert(s)' reports, lists of witnesses

and witness statements for the purposes of the hearing, and anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding.

43. If a party fails to disclose in accordance with these Rules or an order of the panel, the party may not refer to or enter the document or physical evidence at the hearing without an order or a ruling of the panel which may be on such conditions as the panel considers appropriate.

Statutory Powers Procedure Act

2. This Act, and any rule made by a tribunal under section 25.1 shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.

...

5.4(1) If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

- (a) the exchange of documents;
- (b) the oral or written examination of a party;
- (c) the exchange of witness statements and reports of expert witnesses;
- (d) the provision of particulars;
- (e) any other form of disclosure.

- (1.1) The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding.
- (2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information.

...

8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

...

12(1) A tribunal may require any person, including a party, by summons,

...

- (b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal,

relevant to the subject-matter of the proceeding and admissible at an oral or electronic hearing.

...

25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,

- (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
- (b) establish rules under section 25.1.

25.1(1) A tribunal may make rules governing the practice and procedure before it.

- (2) The rules may be of general or particular application.
- (3) The rules shall be consistent with this Act and with the other Acts to which they relate.
- (4) The tribunal shall make the rules available to the public in English and in French.
- (5) Rules adopted under this section are not regulations as defined in the Regulations Act.
- (6) The power conferred by this section is in addition to any power to adopt rules that the tribunal may have under another Act.
- 32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply despite anything in this Act, the provisions of this Act prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.

The Issues Raised by the Commission

20 The basic issues raised by the commission are that the Divisional Court erred in applying the review standard of reasonableness rather than correctness and that the board committed jurisdictional error in ordering extensive disclosure and productions of records that (a) were in the hands of non-parties to the proceeding and (b) were privileged. The commission also argued that the Board erred in ordering disclosure of documents that were not arguably relevant to the proceeding and documents other than those on which the disclosing party intended to rely.

What the Board and the Divisional Court Decided

The Board's Order

21 Before the issues raised by the commission can be properly addressed, it is essential to have an accurate understanding of the meaning and scope of the board's order. No doubt, and I say this with respect to the board, its order could be expressed more clearly than it is. Following the hearing of this appeal, we sought further submissions in writing from counsel for each party on particular questions relating to the meaning of the order. On the basis of all the

submissions made, I now express my opinion on what the board did order in so far as it relates to the issues in this proceeding.

22 I think that paragraph 5 in the order, which relates to the provision of an affidavit of documents, is the key paragraph in the order. It refers to the "documents obtained from the above sources." I take this to refer to the documents ("files") referred to in paragraphs 1 and 3 of the order. I do not interpret it as referring to paragraph 2, which does not refer to either files or documents, or to paragraph 4, which relates to the complainant's income tax returns and provides that they be produced to Mr. Hines, counsel for Dofasco. No argument was directed to paragraph 4 and I do not regard it as being a contentious matter in this proceeding.

23 The difficulty in interpreting paragraph 5 is that, literally, it provides that both the affidavit of documents and copies of the productions are to be provided to Mr. Hines by a certain date. In my view, the only sensible meaning of the paragraph is that the complainant is obliged to produce only those documents for which no claim of privilege (provided for in an affidavit of documents) or for which no claim to withhold production on the ground of non-arguable relevance is asserted in the affidavit. I say this because there would be no point in requiring the use of the affidavit of documents if all of the documents listed in it, including those, on proper grounds, sought to be withheld, had to be produced to the opposite party at the outset of the process. The purpose of the affidavit, as in ordinary civil litigation, is to provide a framework within which the board may subsequently determine whether claims of privilege and irrelevance should be upheld. I shall expand on this point further later in these reasons.

24 It may be noted that this interpretation is consistent with the second sentence in paragraph 5: "The affidavit shall also include a section listing those documents not provided to Dofasco for reason of not being arguably relevant" (emphasis added).

25 The commission and the complainant argue against this interpretation largely on the basis that the board had earlier said in its reasons: "I find that ailments other than those listed above are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages." In the context of the reasons and order as a whole, I do not read this as expressing a final decision on the producibility of every document. I read it as being subject to the affidavit of documents procedure contemplated by paragraph 5.

26 Further, it may be noted that earlier in its reasons the board stated its basis conclusion in these words: "The motion is granted in part". This meant that the moving party, Dofasco, was not successful in obtaining immediate production of the documents it sought or, at least, all of them.

27 I would also note that my interpretation of paragraph 5 of the board's order is in accord with the meaning contended for by counsel for the board itself. Because the correct interpretation of the order relates to the question of whether the board acted within or exceeded its jurisdiction, I think that it was appropriate for the board to make a submission on the subject (Brown and Evans, *Judicial Review of Administrative Action in Canada* (1998-) at pp. 4-49 to 4-54).

The Divisional Court's Reasons

28 It is clear that the Divisional Court did not read the board's order as I have. The court assumed that the complainant was required to produce all of the documents sought by Dofasco. For the purpose of analyzing the court's reasons, I shall accept its interpretation. The first paragraph in its reasons indicates that the commission's application was premature and that the issues respecting the production of documents should await determination until after the board had heard the complaint on its substantive merits. The court said that the "records are arguably relevant to the determination of a remedy and quantum of damages" and, further, that an aggrieved party could appeal "based on a full evidentiary record". With respect, all of this overlooks the fact that the right of the complainant to protection from production of documents that are privileged or not arguably relevant would be irreparably infringed the moment the documents were handed over to Dofasco, whether or not they were used against the complainant at the hearing.

29 I move on to the next paragraph in the Divisional Court's reasons. I do not think that it can rightly be said that the board carried out "the balancing of the fourth part of the test in *A.M. v. Ryan*, [1997] 1 S.C.R. 157". The board made no reference to this decision. The board did say that "my goal is to balance the needs of Dofasco to know and prepare its case and the confidentiality of the Complainant inherent in such disclosure". That "goal" was to be carried out at the next stage of the proceeding, before the main hearing, after the documents for which privilege and non-relevance was claimed had been identified in the affidavit of documents.

30 The Divisional Court went on to say that the exercise of the board's discretion was reasonable particularly in light of the "usual undertaking of Mr. Hines to maintain confidentiality [being] in effect."

31 There is no document in the material setting forth an undertaking and no undertaking is referred to in the order, as would be expected if an undertaking was material to the order made. The board, through its counsel, informed us that "[t]he undertaking referred to by the Divisional Court was not given to the Board. The Board has no knowledge of the specific terms of the undertaking and was not asked to consider or rule on this issue."

32 Mr. Hines informed us that he gave an undertaking "not to disclose any document (or information contained therein) to my client or or anyone else (including, for example, potential expert witnesses) without the permission of the Board of Inquiry. It was expressly acknowledged that such permission for further disclosure could only be obtained after argument involving the commission and Mrs. Jeffrey". (Emphasis in original.)

33 Mr. Hines said that he could not explain why the Divisional Court referred to it as "the usual undertaking". He agreed with counsel for the commission that the undertaking was "unusual."

34 The commission informed us that, during the hearing of the motion, Mr. Hines offered an undertaking not to disclose the documents ordered produced to him to his client Dofasco but that the undertaking did not form part of the board's order on production.

35 I, of course, have no hesitation in accepting Mr. Hines' statement that, in the course of argument he offered the undertaking he described. It appears, however, that it had no effect on the board's decision. In the circumstances, I have no doubt that the undertaking should not be taken into account in determining the meaning and legal effect of the board's order.

36 I might add that the foregoing discussion shows that, if it is intended that an undertaking be material to the making of an order, the undertaking should be in writing and, also, referred to in the order.

The Board's General Powers relating to Disclosure

37 Before addressing the specific jurisdictional issues raised by the commission, I shall deal with matters of a more general nature relating to the board's powers respecting disclosure.

38 As far as history is concerned, it was the generally held view that administrative tribunals did not have an inherent power to order pre-hearing disclosure of documents (see Mullan, *Administrative Law* (2001) at p. 242) but this could be subject to a tribunal's duty, in some cases, to order pre-hearing disclosure as part of its duty to give effect to principles of natural justice or procedural fairness: *Ontario (Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital)* (1993), 115 D.L.R. (4th) 279 (Ont. Div. Ct.); *Howe v. Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.), Laskin J.A. in dissent.

39 When the Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, as amended, was first enacted in 1971, S.O. 1971, c. 47, it conferred the right on a person whose "good character, propriety of conduct or competence was an issue" in a proceeding "to be furnished prior to the proceeding with reasonable information of any allegations with respect thereto" (emphasis added). This was the only right to pre-hearing disclosure conferred by the Act until 1994 and the enactment of s. 5.4 by S.O. 1994, c. 27, s. 56(12). This amendment was preceded by a proposal by the Society of

Ontario Adjudicators and Regulators to amend the Statutory Powers Procedure Act, in several respects. The proposal respecting disclosure read as follows:

A tribunal may require disclosure at any stage of the proceedings, including

- (a) the disclosure and exchange of documents;
- (b) the examination of a party or witness;
- (c) an examination by written questions;
- (d) the inspection of property;
- (e) the filing of witness statements;
- (f) the provision of particulars.

See Appendix III of Administrative Law - Issues and Practice, Anisman and Reid ed., (1995) at page 266.

40 The Society's brief explanation for the proposal was that it was "for greater certainty and to expedite proceedings". Before the amendment it may not have been that clear that tribunals could provide for pre-hearing disclosure, at least to the extent of having the power to order such disclosure. In any event, it can be seen from s. 5.4(1) that the Legislature did not enact a general provision conferring powers relating to disclosure on all tribunals. It restricted the power to only those tribunals that had made rules dealing with disclosure under s. 25.1.

41 Having regard to the foregoing, if a tribunal was of the view that power relating to pre-hearing disclosure was not relevant to or appropriate for its proceedings, it would not make rules dealing with disclosure. Obviously, the Board of Inquiry provided for in the Ontario Human Rights Code thought that power to make orders relating to pre-hearing disclosure was important to its processes because it made Rules of Practice which included rules dealing with disclosure (Rules 40-44) which came into effect on November 1, 1996. It appears that these rules were made under both s. 25.1 of the Statutory Powers Procedure Act and s. 35(5) of the Human Rights Code. It may be noted that each of these statutory enabling provisions was enacted by the same statute, S.O. 1994, c. 27: s. 56(38) for the Statutory Powers Procedure Act and s. 65(10) for the Human Rights Code.

42 I shall now consider some of the terms in the disclosure scheme. The first observation relates to the meaning of the key word "disclosure" in s. 5.4 of the Statutory Powers Procedure Act and in the board's rules. As the context of s. 5.4 and the rules make clear, the word clearly extends to the obligation of a party to furnish to the other party documents in its possession for the other party's inspection. I mention this because in the Rules of Civil Procedure, R.R.O. 1990, Regulation 194, as amended, "disclosure" means something less: the disclosure in a party's affidavit of documents of the existence of documents and does not extend to making the documents available to the other side for inspection. This latter step is called production. Disclosure and production in the Rules of Civil Procedure together comprise the total process of documentary discovery. See, in particular, rules 30.01 to 30.05.

43 The foregoing analysis does not mean that under s. 5.4 and the board's rules the board cannot make orders which are part of, or a step in, the complete disclosure process as long as their purpose is to lead to the proper production of documents, e.g. an order directing the preparation and delivery of an affidavit of documents. This power would be included in the board's general power relating to disclosure. This observation is relevant to the board's order in this case, which provided for an affidavit of documents as a prelude to ruling subsequently on what documents should be produced.

44 My second observation relates to the first. It can be seen at a glance that the disclosure provisions relating to the board are substantially fewer and much less detailed than those provided for in the Rules of Civil Procedure. It appears to me that what is expected with respect to the board's powers is that, in many proceedings before the board, the powers would not have to be exercised because parties would voluntarily exchange all relevant documents. In other proceedings the board might be required to make any one or more of a wide range of particular orders provided that they are directed

toward the ultimate proper production of documents to the party seeking production.

The Jurisdiction of the Board to Make the Orders Challenged in this Proceeding

45 I should mention at this point that, by reason of my interpretation of the board's order, which is different from that of the Divisional Court, it is not necessary to consider the appropriate standard of review. For the reasons I shall give, whether the standard be reasonableness or correctness, paragraphs 1, 3, and 5 in the order are within the board's authority and paragraph 2 is not. I now address the remaining issues raised by the appellant.

Did the Board Err in not Confining its Order only to Documents on which the Complainant Intended to Rely to Support Her Case?

46 The commission submits that the board's order should have been confined to only those documents on which the complainant intends to rely to support her case. It relies upon Rule 41 in making the submission. Rule 41, standing alone, appears to support the commission's submission. There is, however, more in the governing legislation than Rule 41. Rule 42, which is backed up by s. 5.4(1) of the Statutory Powers Procedure Act, confers on the board the power to order any party to deliver to any other party "further ... documentary evidence ... for the purposes of the hearing, and anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding". This would clearly include any documents in a party's possession that are relevant to an issue in the proceeding and which may be helpful to the other party.

47 This interpretation accords with one of the recognized purposes of discovery, which include not only enabling a party to know the case he or she has to meet but, also, to obtain documents "which may ... enable the party requiring the affidavit [of documents] either to advance his own case or to damage the case of his adversary" (*Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.) at 63; and see *Williston and Rolls, The Law of Civil Procedure* (1970) at pp. 894-898). This, in turn, facilitates more accurate fact-finding at the trial or hearing, if the proceeding has not earlier resulted in a settlement. I refer, generally, to *Cook v. Ip* (1985), 52 O.R. (2d) 289 (C.A.) at 292.

48 Section 5.4(1) of the Statutory Powers Procedure Act, which confers power on the board to "make orders for [a] the exchange of documents", should be read as meaning the exchange of documents to carry out the basic purposes of pre-hearing disclosure and so should not be read as confined to documents on which a party intends to rely.

49 The commission has referred to Rule 43, which is concerned with the sanction for failing to disclose, as being some indication that a party's disclosure rights are confined to receiving only those documents on which the other party will rely. Clearly, this sanction relates only to the case of non-disclosure of a document on which a party wishes to rely, but this consideration cannot reasonably result in the conclusion that the whole of the disclosure scheme is confined to documents on which the producing party intends to rely.

Did the Board Err in Ordering Non-Parties to Disclose Documents?

50 The commission submits that the board had no power to order disclosure from the complainant's doctors because they are not parties to the proceeding. It is not necessary to determine whether the disclosure provisions in the board's rules and s. 5.4 of the Statutory Powers Procedure Act confer power to order disclosure by non-parties because I think that the order in question is confined to imposing disclosure obligations on a party (the complainant) and not on her doctors, who are not parties. The complainant has a general right of access to her medical records in the form of obtaining copies of them from her doctors: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138. This is consistent with the general position in civil proceedings that a party has control over his or her doctors' records and has the obligation to produce them: *Holmsted and Watson, Ontario Civil Procedure* [1984-] at pp. 30-38 to 30-39; and 30-49 to 30-62.

51 It is generally agreed that if documents under the control of non-parties are important to the fair and accurate resolution of issues it is preferable that they be produced before the hearing to avoid almost inevitable adjournments if

they are produced for the first time at the hearing (see s. 39(4) of the Human Rights Code) and to enable each side to prepare its case more effectively. In this regard s. 2 of the Statutory Powers Procedure Act (which provides that the Act and rules made under it "shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits") may be of assistance in interpreting s. 5.4(1)(e) in a way that would support pre-hearing disclosure from third parties. This point was not argued and I express no final opinion on it.

Did The Board Err in Ordering Production of Documents that are Privileged or are Not Arguably Relevant?

52 I mention at the outset that Mr. Hines conceded that the board had no power to order the production of privileged documents. This is correct (Statutory Powers Procedure Act, s. 5.4(2)) and, in the same vein, I think that the board has no power to order the production of documents that are not arguably relevant. The exercise of such a power would invade a party's privacy rights without any countervailing advantage to the administration of justice. This does not mean that a court should not show deference to a decision by the board that a particular document is arguably relevant but this, of course, is a different issue.

53 This is an appropriate place to deal in general terms with the question of substantive relevance in this proceeding. In its reasons, the board found that "the ailments other than those listed above [chronic pain disability, fibromyositis, and fibromyalgia] are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages." In my view, the board had a reasonable basis for this finding. There was material before the board that the complainant had satisfied the Canada Pension Plan administrators that she was "incapable of pursuing any substantially gainful occupation."

54 Dofasco's position, accepted by the board, is that the evidence relating to this disability benefit is relevant to its defence under s. 17(1) of the Human Rights Code that the complainant was "incapable of performing or fulfilling the essential duties or requirements" of work at Dofasco. Further, there was a rational basis for the board's finding that the "motion materials clearly show that production by the complainant has been incomplete."

55 In dealing with the specific issues of privilege and non-relevance I shall first consider paragraph 5 in the board's order which relates to the provision by the complainant of an affidavit of documents and copies of production. I have, earlier in these reasons, set forth my interpretation of this paragraph. It appears to be concerned with the documents in the possession of the doctors named in paragraph 1 and with the documents referred in paragraph 3, which are in the files of the Workplace Safety and Insurance Board, the Canada Pension Plan, and Dofasco's medical department. I shall then consider paragraph 2 of the order which requires the complainant to furnish to counsel for Dofasco the medical information referred to in it.

56 I shall not consider paragraph 4, which relates to the production to Mr. Hines of income tax returns and notices of assessment, because, as I have earlier noted, no complaint was made with respect to it.

57 If paragraph 5 were interpreted to require the complainant to provide to Mr. Hines all of the documents referred to in it, without any screening of them by the board to exclude those which are privileged or not arguably relevant, there would, to put it mildly, be a serious problem with respect to the validity of the order. However, as I have determined, the board's order should not be interpreted as providing for such unrestricted production. The requirement of an affidavit of documents, which contains a paragraph in which privilege may be claimed for specified documents (Form 30A, para. 3) and, by virtue of the board's order, a further section in which protection may be claimed for documents which are not arguably relevant, is in my view, within the powers of the board. Further, the requirement of the use of the procedure contemplated by the affidavit ensures that the order does not exceed the powers of the board. This procedure enables Dofasco to challenge the objections to production of identified documents on the basis of privilege and non-relevance, if it sees fit, and enables the board to deal with the challenges on a document by document basis. In carrying out this function the board, if it considers it to be helpful, could examine the document in question. Cf. rule 30.06(d) in the Rules of Civil Procedure.

58 The requirement merely to disclose the existence of a document in an affidavit of documents does not involve a breach of privilege (*MacPhayden v. Employers Liability Assurance Corporation*, [1933] O.W.N. 72 (H. Ct.) and *Williston and Rolls*, op. cit., at p. 897). It is an essential step to enable claims to privilege to be determined in an orderly and fair way.

59 In short, paragraph 5 in the order and those paragraphs related to it (paragraphs 1 and 3) do not involve an infringement of the complainant's right to privilege or to keep from Dofasco documents which are not arguably relevant. On the contrary, they afford protection for these rights.

60 I do not think that the same can be said for paragraph 2 in the order. It requires the complainant to furnish to counsel for the Dofasco a document setting forth all medical practitioners not mentioned in paragraph 1 who treated the complaint between March 22, 1990 and the present, their area of expertise or speciality, the dates of the visits, and the ailment or condition treated. It is not known what particular information would be set forth in this document but the requirement to produce it inevitably carries with it the grave risk that, in complying with the order, the complainant would be providing to Dofasco information of a most intimate nature relating to her physical and emotional condition that is completely unrelated to her claims in this proceeding from both Dofasco's and her point of view. In my view, this particular part of the order, which contains no terms or conditions to protect the privacy interests of the complainant, exceeds the board's power under s. 5.4(1) and (2) of the Statutory Powers Procedure Act and its own rules.

61 I appreciate that the board has, and should have, wide latitude in making procedural orders but, it appears to me, in paragraph 2, the board has made no attempt at all to balance the complainant's right to protect privileged or irrelevant information with Dofasco's right to obtain production of relevant material. In this respect, paragraph 2 stands in stark contrast to paragraphs 1, 3, and 5.

62 What is required to be produced by paragraph 2 may, of course, include information and material which is not privileged and is relevant to Dofasco's defence. If this be the case, the board has sufficient powers under s. 5.4(1) of the Statutory Powers Procedure Act, and its own rules, to make an order which would require the information to be produced after the complainant's claims respecting privilege and non-relevance have been resolved.

An Observation

63 I appreciate that the foregoing will make discouraging reading for those who value the speed and efficiency of the administrative process as an alternative to the cost, delay, and apparent red tape of the procedure which is generally thought to be part of the process in the ordinary courts. The discovery process in these courts has been subjected to severe criticism as a factor contributing to increased cost and delay (see Report of the Canadian Bar Association Task Force on Systems of Civil Justice (1996) at p. 43 and Andrews, *Principles of Civil Procedure* (1994) at para 21-041) and yet, in the present case, we have a serious example of discovery undoubtedly causing substantial delay and expense in the proceedings before an administrative tribunal.

64 No doubt, the discovery process cannot work effectively, in either civil or administrative proceedings, without substantial cooperation between the parties in voluntarily disclosing the existence of all relevant documents. This has been lacking in the present case but, in saying this, I wish to make it clear that I do not intend to criticize the parties or their counsel. This case arose relatively early in the history of a right to disclosure under the Statutory Powers Procedures Act and the Rules of the Board of Inquiry and it appears to me that the main cause of the difficulties has been growing pains with the new procedure.

Disposition

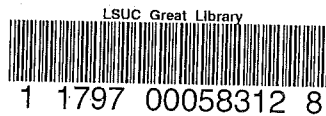
65 I would allow the appeal, in part, set aside the order of the Divisional Court, and in its place make an order setting aside paragraph 2 in the board's order but otherwise dismissing the commission's application. In the circumstances, I would not make any costs order with respect to the application, the motion for leave to appeal, or this appeal.

MORDEN J.A.

ABELLA J.A. -- I agree.

ROSENBERG J.A. -- I agree.

10



Intellectual Property: The Law in Canada

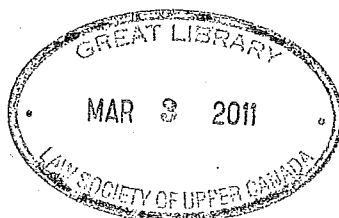
Second Edition

Elizabeth F. Judge

and

Daniel J. Gervais

CARSWELL®



Copyright, as the name indicates, literally is a right to copy, enabling the copyright owner to prevent others from reproducing the copyrighted intangible expression unless they secure the owner's consent. Early English copyright cases clearly described the subject matter of copyright as being not:¹

to ideas, but to the order of words, and this order has a marked identity and a permanent endurance. Not only are the words chosen by a superior mind peculiar to itself, but in ordinary life no two descriptions of the same fact will be in the same words. The order of each man's words is as singular as his countenance. It is true that the property in the order of words is a mental abstraction, but so are also many other kinds of property, as, for instance, the property in a stream of water, which is not in any of the atoms of water, but only in the flow of the stream. In other matters the law has been adapted to the progress of society according to justice and convenience, and by analogy it should be the same for literary works, and they would become property, with all its incidents, on the most elementary principles of securing to industry its fruits, and to capital its profits. ... The subject of property is the order of words in the author's composition, not the words themselves, they being analogous to the elements of matter which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation.

Various justifications derived from Lockean and Hegelian theory, among other theories, are offered to support copyright, including providing an incentive to create, rewarding the creator, and compensating the creator for intellectual labour and for foregone opportunities. A utilitarian view posits that copyright protects authors' original expression in order to further society's interests in the creation and dissemination of intellectual work. The full title of the first English copyright legislation, the 1710 Statute of Queen Anne, stated this purpose in its long title: *An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers*.² The Statute of Anne provided an incentive (vesting the copies) for a utilitarian purpose (the encouragement of learning) and is rooted in Lockean philosophy. Early English copyright cases confirmed this utilitarian or social dimension of copyright. By contrast, the civil law tradition of *droit d'auteur*, more closely aligned with Hegelian philosophy, views the work as an extension of the author's personality and provides extensive rights to protect the author's work. Interestingly, although copyright is

¹ *Jeffreys v. Boosey* (1854), 4 H. L.C. 815 per Erle J. at 867.

² *An Act for the Encouragement of Learning by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned*, 1709 [1710], 8 Anne, c. 19 [*Statute of Anne*] (emphasis added).

surprising because, in addition to s. 30.3 which provides a library exception for copies made by patrons, s. 30.2(2) specifically states photocopies made by the library staff on behalf of someone requesting it for the purpose of research or private study are not infringing. As provided for in s. 30.2(1), it is not infringing for the library (or archive or museum) "to do anything on behalf of any person that the person may do personally under section 29 or 29.1." If it is fair dealing for a library patron to make the copy, the library staff can make the copy for that person without infringing. Thus there were provisions apparently directly on point (though not yet in force at the time of the facts of the case), yet the Supreme Court considered the analysis of the library exemptions unnecessary.

Does this mean that specific exceptions are to be considered only as instances where Parliament chose to exempt conduct that was not otherwise "fair" under ss. 29, 29.1 or 29.2? In other words, does *CCH* suggest that the more specific copyright exceptions for particular user groups are intended to address acts that do not fit within the fair dealing sections? Indeed, the Act does define the three fair dealing sections not simply as exceptions, but also as "fair dealing," whereas ss. 29.4 to 32.2 and s. 80 are labelled *only* as "exceptions" ("It is not an infringement of copyright...") and are not referred to as fair dealing. The Chief Justice says that fair dealing "can perhaps more properly [be] understood as users' *rights*." "Research," she adds, "must be given a large and liberal interpretation in order to ensure that *users' rights* are not unduly constrained."³⁸⁷ Fair dealing may be considered as "upstream exceptions," and exceptions specific to a certain category of users (including the library exemptions in ss. 30.3 and 30.2) could thus be called "downstream exceptions."

It is important to note, however, that an analysis of s. 30.2 would also have required examining whether the copying was fair dealing (under s. 30.2(1)) or "research and private study" (under s. 30.2(2)). Under s. 30.2, the library's acts are non-infringing only if the person on whose behalf they are making the copy could have personally done so as fair dealing. In other words, the court would have had to decide whether the copying was for research and private study under either the general fair dealing provision or the specific library exemption. Yet, one should consider the potential impact of a different approach on the conclusions reached by the Court in *CCH*. One could have taken the view that the analysis of s. 30.2(2) should happen first because it was directly on point to library staff making a copy of an article for a patron who is requesting it for the purpose research or private study. Yet, s. 30.2(2) would not have been helpful to the Law Society for two reasons. First, it entered into force in September 1999, after the copying on which the publishers had based their infringement claim (some of which

³⁸⁷ *CCH*, *supra*, note 22 at paras. 12, 51 (emphasis added).

11

Case Name:

Canadian Solar Solutions Inc. v. RA Solar Leasing Inc.

**RE: Canadian Solar Solutions Inc., Applicant, and
RA Solar Leasing Inc., Respondent**

[2013] O.J. No. 390

2013 ONSC 671

225 A.C.W.S. (3d) 126

97 C.B.R. (5th) 119

2013 CarswellOnt 955

Court File No. CV-12-9861-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: January 25, 2013.

Judgment: January 29, 2013.

(48 paras.)

Creditors and debtors law -- Receivers -- Court appointed receivers -- Powers -- Motion by the Receiver for an order that Marshall deliver or provide access to the debtor's property and records allowed -- Marshall, a principal of the debtor, did not agree with the Receiver that he was required to provide access to a Valuation Model and an electronic database -- The database contained detailed, material information about the debtor's projects -- The Valuation Model contained information about the financial performance of the debtor's projects -- In both cases, the information constituted "records" within the meaning of the Appointment Order and that information was therefore to be provided to the Receiver.

Motion by the Receiver for an order that Marshall deliver or provide access to the debtor's property and records. Marshall was a principal of the debtor, Canadian Solar, and of a related company, the respondent RA Solar. The Receiver took the position that the Appointment Order required Marshall to provide access to a Valuation Model and an electronic database known as the Solstice Database. Marshall, on behalf of RA Solar, took the position that he was not required to deliver the Solstice Database or the Valuation Model to the Receiver.

HELD: Motion allowed. The Solstice Database contained detailed, material information about the debtor's projects. The Valuation Model contained and had generated information about the financial performance of the debtor's projects. In both cases, the information constituted "records" within the meaning of the Appointment Order and that information was therefore to be provided to the Receiver in accordance with the Appointment Order.

Statutes, Regulations and Rules Cited:

Copyright Act, R.S.C. 1985, c. C-42,

Counsel:

V. DaRe, for BDO Canada Limited, the Receiver of RA Solar Leasing Inc.

P. Guy and K. Montpetit, for the Applicant.

B. Morris, for RA Solar Ltd.

REASONS FOR DECISION

D.M. BROWN J.:--

I.

Receiver's motion to secure information relating to the debtor

1 On November 26, 2012, Newbould J. appointed BDO Canada Limited as receiver and manager of "all of the assets, rights, property and undertaking of RA Solar Leasing Inc. associated with, arising out of, or in any way or manner related to any and all of the Projects funded in whole or in part by Canadian Solar pursuant to the Master Purchase Agreement dated November 10, 2011 (the "Property")". By order made January 18, 2013, I approved a sales and marketing process for the Property.

2 A dispute has arisen between the Receiver and Steve Marshall, a principal of the debtor and of a related company, RA Solar Ltd., concerning the scope of the standard "duty to provide access and co-operation to the receiver" provisions of the Appointment Order which are found in the Model Receiver Appointment Order used on the Toronto Region Commercial List. Specifically, the Receiver and Mr. Marshall disagree about the extent of the Receiver's ability to access and to use a Solstice Database and Valuation Model which Mr. Marshall deposed are owned not by the Debtor, but by the related company, RA Solar Ltd.

3 The Receiver has brought this motion seeking an order that Mr. Marshall "forthwith deliver, make copies of or provide immediate, unfettered and continued access to the Debtor's Property and Records (as those terms are defined in the Appointment Order) in favour of the Receiver upon the Receiver's request including, without limitation, the Valuation Model (as defined in the First Report) and the Debtor's Solstice Database (as defined in the First Report)".

II.

Evidence

A. The business of the debtor and the appointment of the Receiver

4 Canadian Solar Solutions Inc. operated in the solar power business, concentrating on the solar photovoltaic market providing turnkey solar solutions for residential, commercial and farm markets in Canada. RA Solar Leasing Inc. leased rooftops from homeowners for the purpose of developing solar power generating facilities which complied with the requirements of the Ontario MicroFIT Program.

5 On November 10, 2011, Canadian Solar, RA Solar Leasing Inc. ("RA Leasing") and RA Solar Inc. ("RA Ltd.") entered into a Master Purchase Agreement. (Mr. Marshall clarified that RA Solar Inc. was a misnomer; the proper name was RA Solar Ltd.). Canadian Solar was the "Vendor", RA Leasing was the "Purchaser" and RA Ltd. was the "Manager". RA Leasing would originate projects and arrange for their management, while Canadian Solar would fund and construct the projects. As described by Newbould J. in his reasons dated November 26, 2012:

[4] The parties entered into a Master Purchase Agreement dated November 10, 2011 and amended on February 27, 2012. The term of the MPA was for 6 months expiring on May 10, 2012. The MPA provided, provided, among other things:

- * RA Solar was to source residential rooftop projects for development and construction of Rooftop Solar Photovoltaic Electricity Generation Facilities (section 4(a)).
- * Canadian Solar was required to fund the acquisition, development and construction of the projects, initially up to a maximum amount of \$5 million (section 6(a)).
- * Canadian Solar was to do all of the work on the projects, including providing the required engineering services, equipment procurement, labour, materials, equipment and tools and services and construct and install all equipment necessary to complete the projects (Sections 2.1 and 2.5 of EPC Terms and Conditions)
- * The parties would work to find a third party buyer for the portfolio of projects constructed and share in the net proceeds of such sale (section 7(b)).¹

Each rooftop leased by RA Leasing from a homeowner was described as a "project". Each Project was supported by an installation and lease agreement.

6 Canadian Solar terminated the MPA on April 30, 2012 as a result of alleged defaults by RA Leasing. At the time RA Leasing owed Canadian Solar approximately \$4.329 million. Last October Canadian Solar applied for the appointment of a receiver over RA Leasing. The latter opposed the application. By order made November 26, 2012, Newbould J. appointed the Receiver.

7 In its First Report dated January 9, 2013, the Receiver reported that it had identified 148 projects, of which 126 were fully funded by Canadian Solar, with the rest either partially-funded by Canadian Solar or funded by another provider, Heliene Inc. RA Leasing operated from premises shared with Hybrid Partners Ltd. Hybrid Partners owned both RA Leasing and RA Ltd. Two directors of RA Leasing, Mr. Marshall and Mr. G.F. Kym, were directors of both RA Leasing and Hybrid. RA Leasing did not employ any employees, but used the services of three individuals provided through a management agreement with Hybrid. The Receiver was not able to reach an agreement with Hybrid to continue the management of the projects of RA Leasing.

B. Receiver's requests for copies of the Valuation Model and Solstice Database

8 The Receiver learned from Canadian Solar that RA Leasing had developed a spreadsheet valuation model (the "Valuation Model") for due diligence purposes when RA Leasing was attempting to sell its project portfolio prior to the appointment of the Receiver. The Valuation Model calculated the present dollar value of each project in the portfolio based on various factors. The Receiver believed that the Valuation Model "will be of significant importance to

prospective purchasers of the Projects in the proposed marketing and sales process".

9 The Receiver also learned that RA Leasing was using an electronic database, called Solstice (the "Solstice Database"), which contained electronic copies of agreements and documents relating to the Projects.

10 On December 17, 2012 the Receiver wrote Marshall requesting the usernames and passwords needed to gain online access to the Solstice Database, a copy of the Solstice Database, and a copy of the Valuation Model for the projects.

11 On December 19 Marshall responded that the Solstice Database and Valuation Model did not belong to RA Leasing. He stated: "You have all of the information in the drop box [for the database], more than happy to sell it to cdn solar with the model if they want it".

12 The Receiver did not accept that response, and on January 4, 2013, the Receiver wrote to Marshall referring to paragraph 5 of the Appointment Order and stated:

[W]e hereby demand that you deliver to us, no later than 5 p.m. on Monday, January 7, 2013, the valuation model referred to in our Letter. We also hereby demand that you provide us with the usernames and passwords to access the RA Solar Solstice database, as well as provide us with access to obtain a full copy of same ...

13 Marshall did not comply with the Receiver's demand, but responded that the Receiver could buy the Solstice Database for \$75,000 and the Valuation Model for \$55,000. This motion then ensued.

C. The use of the Valuation Model and Solstice Database by RA Leasing

The Solstice Database

14 Several provisions of the Master Purchase Agreement imposed on RA Leasing, as Purchaser, and RA Ltd., as Manager, obligations to collect and maintain a broad range of information about each Project, and the MPA provided Canadian Solar, as Purchaser, with significant rights to access such information.

15 Section 4 of the Master Purchase Agreement described the project origination responsibilities of the Purchaser - i.e. RA Leasing. Section 4(a)(ix) provided that RA Leasing would undertake and perform all acts necessary to identify and procure viable projects, including "providing a customer relationship management system CRM to support the installation crews". Section 4(j) described, in some detail, the elements of the customer relationship management system:

4(j). The Purchaser shall provide the Vendor [Canadian Solar] with complete access to the Purchaser's database, customer relationship management system, or equivalent files or records, containing, in respect to each Project, at a minimum:

- (i) the Homeowner address and contact information;
- (ii) the Solar System size for the Site;
- (iii) aerial based photographs of the Site, with module and roof layout diagrams showing module orientation and spacing between the module array and roof lines, and locations of vents and other obstructions on the roof;
- (iv) the PVSyst (or equivalent) report applicable to the Site;
- (v) copies of relevant agreements with the Homeowner; and,
- (vi) records of any known Site-specific conditions that would reasonably be anticipated to be material to the access and construction of the Site.

16 Section 8(a) of the MPA provided that RA Ltd., as the Manager, "shall be responsible for managing, operating and maintaining the Project after the Substantial Completion Date". Pursuant to Section 8(b) RA Ltd. and RA Leasing were to "enter into a management agreement providing for the Manager's management, operation and maintenance of the Projects. Such agreement shall be subject to the prior written approval of the Vendor." The Manager's responsibilities included (i) "monitoring the generation of each system on a daily basis, and maintaining a database of initial bench marks and historical performance" (s. 8(b)(i)) and (ii) "maintaining a CRM system" (s. 8(b)(iv)). Significantly, section 8(e) of the MPA provided that neither RA Ltd. or RA Leasing could assign the management agreement without the prior written consent of Canadian Solar "which consent may be unreasonably withheld".

17 Section 11 of the MPA provided Canadian Solar with broad rights of access to information in the possession of RA Leasing and RA Ltd.:

The Purchaser [RA Leasing] and Manager [RA Ltd.] shall provide ... the Vendor [Canadian Solar] ... with continuous access at all reasonable times to all information, records, and data, including without limitation all corporate, financial, technical and other data, accounts, books and records of, and all policies of insurance, contracts, Leases, deeds and other documents in the possession or control of, the Purchaser or the Manager ... to enable the Purchaser (sic) to confirm or investigate any matter or circumstance relating to the Projects or this Agreement including without limitation ... the operations and maintenance of the Projects ... and any other matter the Vendor reasonably requires to be confirmed or investigated, and the Purchaser and Manager shall promptly furnish to the Vendor ... such information, records, and data as the Purchaser (sic) may reasonably request from (sic) time to time.

18 Section 10(d) of the MPA provided that "any obligations of the Parties arising prior to the effective date of the termination shall survive termination and be a fully binding and enforceable obligation of the relevant Party."

19 Patrick Pavlik, a project manager with Canadian Solar, deposed that up until the appointment of the Receiver, RA Leasing had complied with its obligations under the MPA to provide Canadian Solar with access to the Solstice Database. In December, 2011, RA Leasing sent Canadian Solar password information so that it could logon to the Solstice Database. At that time Rene Daoust of RA Leasing had written to Canadian Solar:

Using the RA Solar database, on each file you can find the google maps location. You can also find the customer information and all the files related to the projects but if you prefer, you can still use the Dropbox to access the customer files.

Trevor/Tom: As mentioned last week, if you want to use your CRM, we can generate you excel/CSV to load the info in your database.

Veronica will send to everyone Your Login Info.

Upon the appointment of the Receiver, RA Leasing revoked Canadian Solar's access to the Solstice Database.

20 An "Introduction to the Database" document sent in December, 2011 by RA Leasing to Canadian Solar included several screen shots of the database which showed the type of information recorded in the Solstice Database for each Project.

21 Marshall deposed that the Solstice Database is the property of RA Ltd. According to Marshall, hard costs of \$50,000 were spent to develop the Solstice Database. Marshall produced several invoices by which, he deposed, RA Ltd. had paid for the development of the Solstice Database. The invoices identified the purchaser of the Solstice Project as "RaSolar", but did not specify which RaSolar company was involved.

22 Marshall also filed a letter from the accountant for RA Ltd., Sloan Partners LLP, according to which, he deposed, the accountant had confirmed that the monies spent on the research to develop the Solstice Database were advanced by RA Ltd. I cannot draw such a conclusion from the letter. The Sloan Partners letter attached the unaudited financial statements of RA Ltd. for 2010 and 2011 and referred to, without attaching, a number of cheques which paid for the Solstice Database. But, the accountants stated that management had provided the information about what work the disbursements were spent on, and they had not performed an audit or a review engagement in respect of the financial statements. Accordingly, on the evidence before me, I cannot determine which RA entity owns the Solstice Database.

The Valuation Model

23 Marshall testified that one of the functions of the Valuation Model was to calculate the internal rate of return, as well as the profit and revenue measures, for each Project.² Information which reposed in the Solstice Database was used in the calculations performed with the Valuation Model.³ Marshall confirmed on cross-examination that prior to the appointment of the Receiver, Canadian Solar was given full access to the Valuation Model.⁴ Marshall believed that if all the information for the projects in the Valuation Model was printed, hundreds of pages would result, or "a huge amount of documentation".⁵

24 According to Pavlik, of Canadian Solar, the Valuation Model was used to evaluate power generation and unit cost, as well as the rate of return for a project, and the project information was culled, in part, from the Solstice Database. Hatch Ltd. approved the Valuation Model, a step which in the solar power industry is regarded as signifying that prospective buyers of a project could rely on the methodology used in the Valuation Model.

25 Pavlik deposed that when Canadian Solar decided to fund the projects, RA Leasing provided it with due diligence reports which contained representations about the rate of return for a project based upon the Valuation Model. Pavlik expressed the view that the Valuation Model would be critical to prospective buyers conducting their due diligence of the projects in receivership, and:

[I]t is hard to imagine that any third party would choose to invest or purchase the assets subject to the Receivership without the benefit of a Hatch-approved or similar valuation model and the information in the Solstice Database.

Marshall acknowledged that the RA companies gave Canadian Solar the IRR numbers for each project.

26 Pavlik also understood that when RA Leasing acquired solar system projects from third parties, it used the Valuation Model to inform the purchase decision. Pavlik further deposed that prior to the appointment of the Receiver:

RA Solar Leasing Inc. never differentiated between the ownership of the Valuation Model as between RA Solar Leasing Inc., RA Solar Inc. or RA Solar Ltd. In fact, in most of the correspondence to and from Canadian Solar and RA Solar Leasing Inc., RA Solar Leasing Inc. would identify themselves simply as "RA Solar", making it impossible to differentiate between the various affiliated RA Solar entities.

27 Marshall deposed that RA Ltd. spent about \$150,000 in hard costs to develop the Valuation Model. He filed some bank statements and cheques which he stated recorded payments of the Model's development costs. Most of those cheques and transactions recorded on the bank statements pre-dated the March 31, 2011 incorporation of RA Leasing. However, those statements and cheques identified the payor as Paradigm Energy Ventures Ltd., the previous name used by Hybrid Partners Inc.; they did not mention RA Ltd. even though that company had been incorporated by that point of time. Marshall testified that the payments by Hybrid were a loan by it to RA Ltd., and the co-owners of Hybrid and its subsidiary RA companies, had funded Hybrid. Marshall also pointed to the letter from Sloan Partners dealing with the 2010 and 2011 unaudited statements of RA Ltd. but, again, those were unaudited and the accountant simply relied on information provided by management. On the evidence before me, I cannot determine which RA entity owns the Valuation Model.

28 Marshall testified that the Valuation Model could be used for any solar project, not just those developed by RA Leasing. On cross-examination Marshall stated that the projects in this receivership amounted to only 800 kW of generating capacity out of 50 MW with which RA Ltd. was "involved right now". When pressed on this point, Marshall acknowledged that the only solar projects in which RA Ltd. has been involved which had reached substantial completion were those subject to the receivership.⁶

29 The Receiver believes that the Valuation Model will be of significant importance to prospective purchasers of the projects in the marketing and sales process for several reasons:

- (i) The Model contains detailed information regarding each project used to calculate the expected revenues and expenses over the term of the project, as well as each project's internal rate of return;
- (ii) The existence of the information will save the Receiver considerable time, effort and expense in compiling the same information for the sale process data room.

III.

Positions of the parties

30 The Receiver submitted that paragraphs 4, 5 and 6 of the Appointment Order dealing with the debtor's records require Marshall to provide immediate, unfettered and continued access to, as well as copies of, the Solstice Database and the Valuation Model.

31 Marshall, on behalf of RA Ltd., took the position that both the Solstice Database and Valuation Model were not owned by RA Leasing so therefore he was not required to deliver them to the Receiver. RA Ltd.'s counsel, in a January 22, 2013 letter, stated its position as follows:

To summarize my client's position, Ra Solar Ltd. is prepared to supply to the Receiver any and all information it has that belonged to the company currently in receivership. It would also allow an inspection of the Financial Model and the Solstice/Database to be made by a representative of the Receiver to allow the Receiver to ensure that there is no further information required by the Receiver regarding either the Financial Model or the Solstice/Database. That being said, to be clear, it is Ra Solar Ltd.'s position that any and all information pertaining to Canadian Solar and the projects has already been delivered to Canadian Solar. Indeed, without information, Canadian Solar would not have approved any of the projects.

... [I]f the Receiver still wishes to inspect the software to see if there is any more information, as stated previously, my client is agreeable to same. Of course, in this case, the Receiver shall be required to execute a confidentiality agreement.

...

The Receiver's Application is being contested on the basis that these items have been paid for and developed by Ra Solar Ltd., who has a copyright over the same ...

32 In a January 24, 2013 email to the Receiver counsel for RA Ltd. elaborated on his client's position:

Ra Solar Ltd. is prepared and has always been prepared to let the Receiver have access to past results calculated in the Financial Model and Solstice/Database (the "Program") that pertain in

any way to Leasing, provided that any party who views same sign a confidentiality agreement acknowledging Ra Solar Ltd.'s copyright ... What I am concerned about is that the Receiver wishes to use the Program, developed by Ra Solar Ltd., with potential new purchasers. It is this future use of Ra Solar Ltd.'s copyrighted programming that is objected to.

...

Ra Solar Ltd. is concerned that even with regards to the Receiver having access to the information regarding Leasing, there may be confidential information pertaining to parties other than those involved in the within litigation. My client requires that the Receiver execute a confidentiality agreement on this point.

33 Canadian Solar supported the position taken by the Receiver, and it also took the position that as a creditor of RA Leasing it was not waiving any rights which it might have over the Valuation Model and the Solstice Database.

IV.

Analysis

A. The Appointment Order and the governing legal principles

34 Paragraphs 4, 5 and 6 of the Appointment Order tracked the sections in the Model Order dealing with the duty to provide access and co-operation to the receiver:

4. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) *all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order* (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.
5. THIS COURT ORDERS that *all Persons* shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind *related to the business or affairs of the Debtor*, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and *shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto*, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.
6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, *all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or*

making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information. (emphasis added)

35 As I wrote in *GE Real Estate v. Liberty Assisted Living* about the scope of paragraph 5 of the Model Order:

As can be seen, the defined term "Records" is not limited to documents owned by 285. Instead, it encompasses documents "related to the business or affairs of 729285". As the Reports of the Receiver disclose, 285 and its principals have stated that some information relating to the business or affairs of 285 will be found on records owned by related companies. That state of affairs has resulted from a decision of the Liberty Group of companies to operate its affairs and maintain its records in an inter-connected and co-mingled fashion. Consequently, for the Receiver to exercise the powers granted to it under the Appointment Order, it is inevitable that the Receiver will have to inspect and consider documents owned by companies related to 285. If the Respondents have intermingled the records of their companies so that documents relating to the business or affairs of 285 are owned by, or are under the control of, other Liberty Group companies, that does not permit the Respondents to deny access to those documents or to a computer server on which they are stored. Paragraphs 8 and 9 of my Appointment Order are not limited to documents *owned* by 285; they encompass documents "*relating to the business or affairs of 729285*". With all due respect, nothing could be clearer.⁷

B. The Solstice Database

36 The evidence clearly established that the Solstice Database contains information "related to the business or affairs of the Debtor", specifically detailed, material information about each Project as well as material documentation for each Project. The information in the Solstice Database relating to the business of RA Leasing, including the projects which it originated and developed pursuant to the MPA, constitutes "Records" within the meaning of section 5 of the Appointment Order. That information must be provided to the Receiver in accordance with sections 5 and 6 of the Appointment Order.

37 On the evidence it is unclear which RA entity owns the Solstice Database - RA Leasing or RA Ltd. In the circumstances of this case, which entity owns the Solstice Database is irrelevant to the obligation of RA Ltd., RA Leasing and/or Marshall, as "Persons" within the meaning of the Appointment Order, to provide the Receiver with the information on that database regarding the business and projects of RA Leasing. Under the MPA, RA Leasing established a database CRM for the Projects and its affiliate, RA Ltd., managed the projects and information relating to the projects, once developed. Section 11 of the MPA gave Canadian Solar broad rights to access such information, whether it was in the possession of RA Leasing or RA Ltd. Under that agreement, the parties had agreed to maintain information about the debtor's business by placing that responsibility largely in the hands of RA Ltd., as Manager. Since that was the way the parties to the MPA agreed to manage RA Leasing's business-related information, it is not now open to RA Ltd. or Marshall to try to erect barriers to that information which never existed while the debtor carried on business prior to the receivership. The evidence showed that Canadian Solar had no difficulty accessing information on the Solstice Database until the date of the Appointment Order. I can only conclude that RA Ltd. and Marshall have delayed in helping the Receiver to obtain full access to, and copies of, the information stored on the Solstice Database in order to squeeze some money out of the Receiver.

38 I give no effect to RA Ltd.'s argument that because it may hold copyright in the Solstice Database software

program, that program and the information stored on it, do not fall within the ambit of section 5 of the Appointment Order because the *Copyright Act*, R.S.C. 1985 contains statutory provisions which prohibit such disclosure. First, I have concluded that the evidence filed is not sufficient to make a finding as to which RA entity owns the software program or might enjoy copyright in it. Second, RA Ltd.'s interpretation of the closing language of paragraph 5 of the Appointment Order is flawed. That portion of the Appointment Order reads:

provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication *or due to statutory provisions prohibiting such disclosure.*

RA Ltd. did not refer to any case law which has interpreted the phrase, "due to statutory provisions prohibiting such disclosure", as carving out from the obligation to disclose to a receiver Records which might constitute "works" in which copyright resides. Nor did RA Ltd. point to any provision in the *Copyright Act* which would prohibit disclosure of any such Record to a receiver. Indeed, in general terms copyright law prevents the unauthorized copying of a work, not its disclosure.⁸ Moreover, RA Ltd.'s proffered interpretation of the Model Order argument, if accepted, would seriously undermine the ability of receivers to access and copy electronic records relating to the operation of a debtor's business to the extent those records might constitute "works". In an age when most information is stored in electronic form, such an argument would deprive receivers of information necessary to perform their court-directed duties and enable debtors, or those related to them, to hold hostage vital information required by receivers. I see no basis in law, or in the practicalities of receiverships, for the argument advanced by RA Ltd.

39 The record reveals that RA Ltd. and Marshall are hindering the Receiver's efforts to obtain Records under the Appointment Order, most recently by trying to impose conditions on the Receiver's access to Records, such as entering into confidentiality agreements and acknowledgements of copyright. The Solstice Database is a "Record" within the meaning of sections 5 and 6 of the Appointment Order, and I order RA Ltd. and Marshall to comply with those sections of the Appointment Order forthwith - i.e. by 5 p.m., tomorrow, Wednesday, January 30, 2013.

40 Marshall contended that RA Leasing had provided the Receiver with all information on the Solstice Database via a Dropbox account, although he conceded that the Dropbox medium was not as easy to use as the Database.⁹ The Receiver was not satisfied that all information had been disclosed via the Dropbox. Pursuant to sections 5 and 6 of the Appointment Order it is for the Receiver to determine the method by which it wishes to access and obtain the Records. Accordingly, if the Receiver asks for a copy of the Solstice Database containing the Records, then RA Ltd. and/or Marshall must provide a copy. If the Receiver would prefer on-line access, then RA Ltd. and/or Marshall must comply with that request.

C. The Valuation Model

41 There is no doubt that the Valuation Model, whichever entity may own it, contains and has generated information about the financial performance of the Projects. The November 9, 2011 RA Solar Due Diligence report provided by RA Leasing to Canadian Solar contained information about the internal rate of return for certain Projects calculated by using the Valuation Model, as well as statements by RA Leasing confirming that certain Project portfolios met target IRRs "based on our proprietary model (approved by Hatch)". The Valuation Model therefore was used by RA Leasing to make the business case to Canadian Solar to provide funds to acquire additional Projects.

42 Although the use of the Valuation Model may have been more limited to the project-acquisition aspect of RA Leasing's business, the evidence disclosed that the Valuation Model contains and has produced information "related to the business or affairs of the Debtor", specifically the anticipated IRR of each Project, or portfolio of Projects. That data, and the Valuation Model computer program containing such data, constitute "Records" of the debtor. Consequently, paragraph 5 of the Appointment Order requires RA Ltd. and Marshall, as "Persons", to "provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered

access to and use of accounting, computer, software and physical facilities relating thereto ..."

43 RA Ltd. and Marshall contended that complying with paragraph 5 of the Appointment Order would work an unfair result because RA Ltd. had paid to develop the Valuation Model. I see no unfairness in the result. First, RA Leasing, in its November 9, 2011 RA Solar Due Diligence report to Canadian Solar described the Valuation Model as "our proprietary model". Such language would suggest to the reasonable reader that RA Leasing owned the Valuation Model. Second, at the January 18, 2013 hearing I adjourned the access to records portion of the motion for a week to afford RA Ltd. the opportunity to file evidence on "the issue of the ownership and/or inclusion of the valuation software + database in the debtor's assets". The evidence filed by RA Ltd. was insufficient to determine which RA entity owns the Valuation Model, as I set out in paragraph 27 above.

V.

Summary and Costs

44 For the reasons set out above, I grant the Receiver's motion. I conclude that the information, documents and data about the business of the debtor, RA Leasing, and its Projects contained in the Solstice Database and the Valuation Model, as well as both those computer programs which contain the information, constitute "Records" within the meaning of paragraph 5 of the Appointment Order. I order RA Ltd. and Marshall, as "Persons" within the meaning of the Appointment Order, to comply with paragraphs 4, 5 and 6 of the Appointment Order no later than 5 p.m. on Wednesday, January 30, 2013.

45 I wish to stress that the order the Receiver has sought, and which I have granted, is designed to ensure that RA Ltd. and Marshall comply with paragraphs 4, 5 and 6 of the Appointment Order so that the Receiver can secure possession of all information relating to the business and affairs of the debtor. However, I have stated that the evidence filed proved insufficient to make any finding as to which RA entity owned the Solstice Database and Valuation Model. From the submissions made at the hearing it was apparent that the Receiver had not yet decided precisely how it would use the Records obtained under paragraphs 4, 5 and 6 in the approved marketing and sales process, more specifically in its data room. Let me observe that the evidence clearly revealed that RA Leasing, through its management agreement with RA Ltd., maintained and managed the information about its Projects through the Solstice Database. That was the way in which it kept its business records on an on-going basis, and I am inclined to the view that the Receiver is entitled to present the information contained in the Solstice Database to potential purchasers through that database since that was the mode by which RA Leasing maintained its business records.

46 By contrast, the evidence revealed that the Valuation Model was used at discrete points in the past to generate IRR-related information about each Project, but the IRR numbers for each project were not updated on a regular basis. While the Receiver may decide that the most efficient way by which to secure the information on the Valuation Model related to the debtor's business would be to obtain a copy of that computer program, in my view the Receiver cannot grant access to the Valuation Model to potential purchasers without a determination of which entity owns the Valuation Model. Certainly the historic information about the Projects contained in the Valuation Model can form part of the data available to potential purchasers for due diligence purposes. But, I do not think it would be open to the Receiver or potential purchasers to use the Valuation Model to generate new calculations about the Projects without first securing a determination about which entity owns the Model.

47 I would encourage the parties to try to settle the costs of this motion. If they cannot, any party seeking costs shall serve and file with my office written cost submissions, together with a Bill of Costs, by Wednesday, February 6, 2013. Any party opposing costs may serve and file with my office responding written cost submissions by Friday, February 15, 2013. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

48 Such responding cost submissions should include a Bill of Costs setting out the costs which that party would have claimed on a full, substantial, and partial indemnity basis. If a party opposing a cost request fails to file its own Bill of

Costs, I shall take that failure into account as one factor when considering the objections made by the party to the costs sought by any other party. As Winkler J., as he then was, observed in *Risorto v. State Farm Mutual Automobile Insurance Co.*, an attack on the quantum of costs where the court did not have before it the bill of costs of the unsuccessful party "is no more than an attack in the air".¹⁰

D.M. BROWN J.

cp/e/qlqs/qlpmg/qljac

1 2012 ONSC 6699.

2 Transcript of cross-examination of Steven Marshall conducted January 22, 2013, Q. 84.

3 Marshall CX, QQ. 90-94.

4 Marshall CX, QQ. 5-6.

5 Marshall CX, Q. 198, 202.

6 Marshall CX, QQ. 218-232.

7 2011 ONSC 5741, para. 19.

8 David Vaver, *Intellectual Property Law* (Toronto : 2011, Irwin Law), at 59.

9 Marshall CX, Q. 31.

10 (2003), 64 O.R. (3d) 135 (S.C.J.), para. 10, quoted with approval by the Divisional Court in *United States of America v. Yemec*, [2007] O.J. No. 2066 (Div. Ct.), para. 54.

12

Case Name:
S.S. v. D.S.

Between
S.S., Petitioner, and
D.S., Respondent

[2008] N.S.J. No. 116

2008 NSSC 87

265 N.S.R. (2d) 1

52 R.F.L. (6th) 155

56 C.P.C. (6th) 156

2008 CarswellNS 147

171 A.C.W.S. (3d) 372

Docket: 1217-000619

Registry: Halifax

Nova Scotia Supreme Court Family Division
Port Hawkesbury, Nova Scotia

M.C. Legere-Sers J.

Heard: March 20, 2008.
Judgment: March 25, 2008.

(60 paras.)

Family law -- Child protection -- Protective agencies and institutions -- Investigations and assessments -- Practice and procedure -- Discovery -- Production and inspection of documents -- Mother of children who alleged father was sexually abusing them entitled to disclosure of entire file of psychologist who conducted assessment and concluded father not or copyright concerns -- Conditions imposed on disclosure, restricting persons who could view materials and limiting copies to be made, could reduce possibility disclosure would detract from utility of tests and preserve relationship between children and parents.

Health law -- Health care professionals -- Particular professions -- Psychiatrists, Psychologists and therapists -- Relationship with patient -- Disclosure -- Mother of children who alleged father was sexually abusing them entitled to disclosure of entire file of psychologist who conducted assessment and concluded father not a risk -- Child protection concerns ranked ahead of any privacy or copyright concerns -- Conditions imposed on disclosure, restricting persons who could view materials and limiting copies to be made, could reduce possibility disclosure would detract from utility of tests and preserve relationship between children and parents.

produce entire file relating to family law matter -- Psychologist provided parenting capacity assessment report in mother's emergency application for exclusive possession of family home, custody of two children and supervised access schedule -- Mother alleged children sexually abused by father -- Assessment stated there were no protection concerns with regards to father -- Psychologist expressed concerns disclosure of her interview with children would harm their relationships with parents -- Also claimed she had contract with publishers of testing materials she used, obliging her to take all measures possible to protect this copyrighted material -- Argued test results could be misinterpreted by lay persons -- Suggested disclosure of this file could set precedent compromising all future assessments, deterring psychologists from taking part in assessments -- HELD: Application allowed -- Mother entitled to full disclosure, on conditions no copies of materials to be made and only parties permitted to view interview tapes -- Because mother was challenging conclusions of assessment, she was entitled to test foundation upon which assessment based -- Process of allowing mother to examine foundations of conclusions could promote reliability and credibility of testing process -- Protection concerns regarding concerns -- Disclosure required by mother could be adequately protected by imposing conditions on disclosure to reduce possibility information might detract from utility of tests and preserve relationship between children and parents.

Statutes, Regulations and Rules Cited:

Personal Information Protection and Electronic Documents Act,

Court Summary:

Non Party Disclosure (Rule 20.06(2)).

Issues: Non party psychologist objected to disclosure of part of her file relating to raw test data, copyright materials, instructions and video interviews between herself and children.

In the course of preparing for the Divorce hearing, a psychological assessment was completed to address allegations of abuse. The psychologist sought to protect certain parts of her file materials.

Results: Disclosure ordered for entire file. The need to assess the reliability of the results in order to achieve the best interests of child outweighs legitimate confidentiality and copyright issues advanced by non-party.

[Note: This summary does not form part of the Court's judgment. Quotations must be from the judgment, not this summary.]

Hugh MacIsaac, for the Petitioner, S.S.

Coline Morrow, for the Respondent, D.S.

Timothy Daley, for Valerie Rule.

1 M.C. LEGERE-SERS J.:-- The Applicant seeks an order directing the psychologist to produce her entire file inclusive of raw data, answers to test questions, test results, instructions from test designers and the video interview between the children and the psychologist. Ms. Rule is a non party expert who has provided a Parental Capacity Assessment Report in this proceeding.

2 The matter commenced June 27th, 2007 with an emergency application by the mother. She requested exclusive possession of the matrimonial home, custody of the parties two children and a supervised access schedule.

3 An interim order issued. The interim hearing was continued on July 24th, 2007. Evidence was heard and directions given. The case was adjourned pending an assessment. This assessment was concluded by report dated October 24th, 2007. The parties are preparing for the final Divorce trial commencing April 15th, 2008.

4 The Psychologist, Ms. Rule, seeks to avoid disclosure of the interview with the children and the raw data test answers, as well as the brochures, relating to administration of the test.

5 Counsel for the psychologist consents to the release of all other file materials other than these exceptions. In essence, there are two reasons articulated for this proposed limitation on disclosure.

6 First, Ms. Rule is concerned that the disclosure of the interview between the children and the psychologist may impair the relationship between the children and the parents. Further, it may impair the ability of psychologists to enter into confidential discussions with children if there is not strict adherence to their right to confidentiality subject only to matters of disclosure of abuse.

7 Second, the psychologist refers to the contract entered into between the psychologist and the publishers regarding copyright of the testing materials. She agreed when purchasing the materials via a "Test User Agreement" to protect the copyright material and the items and scoring criteria as confidential, copyrighted and trade secret material under the publisher's non-disclosure policy. She referenced a test user agreement called MHS Test Disclosure Policy as follows:

We recognize that, given the nature of our legal system, compelling reasons for disclosure of secured testing material may arise. To abide by the terms of purchase, we expect purchasers to do all they can to protect copyright material and to protect the items and scoring criteria as confidential, copyrighted, and trade secret material in response to written requests and/or subpoenas. An exception to releasing test data by subpoena exists when the qualified purchaser obtains a court order extinguishing also known as quashing or modifying the subpoena. In this case, we require qualified purchasers to bring to the court's attention concerns regarding the test security and to take steps to resolve the conflict in a responsible manner. When faced with a subpoena or court order for the reproduction of test materials you should secure a court order or protective agreement (to the extent possible) contained in the following requirements:

- (A) Restrict access to materials and the testimony regarding materials to the most limited audience as possible, preferably only to individuals who satisfy the test publishers qualification policy.
- (B) Restricted copying of test materials
- (C) Assurance of the return or destruction of the materials at the conclusion of the proceeding (and confirmation of such return and destruction): and
- (D) The sealing of and/or removing from the record to the extent any portion of such materials are disclosed and pleadings, testimony, or other documents in order to safe guard the integrity of the assessments. It is critical that the test materials do not becomes part of the record.

8 The Psychologist argues that the test materials fall under the exception of release and access under the Canadian

Personal Information Protection and Electronic Documents Act (PIPEDA) and provincial legislation. Providing the items (ie the test scores and scoring criteria and other test protocols) would result in the release of confidential information on which the scores are based and would ultimately render the test materials useless.

9 Ms. Rule informed the Court the Canadian Psychological Association (CPA) put in place the Harcourt Assessment Test Disclosure policy to protect the validity and integrity of test materials. She specifically referenced the CPA Code of Ethics:

Principle II:2

Avoid doing harm to clients, research, participants, employees, supervises, students, trainees, colleagues and others.

Principle II:30 states in part as follows:

Be acutely aware of the need for discretion in the recording and communication of information, in order that the information not be misinterpreted or misused to the detriment of others. This includes, but is not limited to, not recording information that could lead to misinterpretation and misuse, avoiding conjecture, clearly labeling opinion, and communicating information in language that be understood clearly by the recipient of the information.

10 Ms. Rule argues that if the materials come into the hands of unqualified public, the test results may be misinterpreted. Ms Rule believes that requiring the release of the entire file will set a precedent and all future assessments may be compromised. This may deter psychologists from conducting assessments and may result in the public being assessed by individuals without the proper credentials.

11 The concern about the release of test results, specifically raw data, relates directly to a concern about the validity and utility of future tests. It is argued that once the public become aware of the strategy behind the questions they will be able to manipulate the answers to get the desired results.

12 The father's counsel does not argue for the release of the interview between Ms. Rule and the children nor insist on the test data. Since the assessment notes no child protection concerns it favors the father's position.

13 The mother's counsel does insist on full disclosure. It is the mother who must weigh the report against the allegations of sexually inappropriate behavior to determine how much weight she should put on the report and its conclusions to settle, as parent, whether to override the concerns raised in the disclosures in favor of unrestricted contact with the father.

14 Absent agreement between the parties, the Court must also weigh all the evidence and determine how much weight should be placed on the recommendations and whether there is a reliable foundation supporting the recommendations sufficient to discount the disclosures of the children. This risk evaluation is necessary and a precondition to determining the type of access or contact that should occur between the father and children.

15 Counsel have referred me to *Catholic Children's Aid Society of Toronto v. S.(A.)*, 2007 CarswellOnt 8280 (Ont. C.J.) where disclosure was ordered; and *Prince Edward Island (Director of Child Welfare)v. O.(M.)* in which the Court referred to *K. (S.D.) v. Alberta (Director of Child Welfare)*, 2002 ABQB 61, [2002] A.J. No. 70 (Alta. Q.B.) at para. 43:"

... disclosure procedure adopted should reflect the unique features of child protection matters, in

particular the addition of consideration of the rights of children which might be negatively affected by disclosure of all relevant information.

16 Counsel for the mother referred to the test for privilege of communications between a psychiatrist and patient in para. 24 to 38 of *M.A. v. Ryan*, 1997 CanLII 403 (S.C.C.):

1. The communication at issue have originated in a confidence that they will not be disclosed;
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties to the communication;
3. The relationship must be one which in the opinion of the community ought to be sedulously fostered, more precisely that "the relationship itself and the treatment it makes possible are of transcendent public importance (paras. 27, 28); and
4. That the interest served by protecting the communications from disclosure outweigh the interest of pursuing truth and disposing correctly of the litigation.

17 *M.A. v. Ryan* approved of partial disclosure as effective and appropriate in some circumstances.

18 In *Brown v. Capital Health Authority* 2006 NSSC 348 (CanLII) the Court considered *M.A. v. Ryan* and the four part Wigmore test. At para. 79, the Court distinguished the purpose of privilege as follows:

... privilege is not designed to facilitate truth finding, but rather to withhold probative evidence for public policy or social value reasons. For that reason courts have been very reluctant to recognize new categories of class privilege ...

Analysis

19 Sexual abuse allegations are complex issues that, once raised in practice, although certainly not in law, reverse the ordinary burden of proof, placing the accused parent in a position of trying to disprove them.

20 Often there is no absolute proof of guilt or innocence. One must collect all the data, all the evidence in the context of the children's lives; place it before the court to allow the court to draw conclusions that are based, not on certainty, but on probability. It is an uncertain science.

21 The more complex the case, the more circumstantial the evidence, the greater the reliance, it seems, on expert evidence.

22 The greater the expectation of reliance on expert testimony, the more transparent and accountable the expert must be.

23 In this somewhat elusive search for absolute knowledge, the expert must be able to justify the opinion.

24 In assessing this report and its recommendation, the mother articulates concerns that the psychologist referred to polygraph results.

25 In Canadian courts, these tests, in themselves, are not admissible as a forensic tool due to concerns about their reliability. This issue will be argued at a later date.

26 The assessor concluded, based on test results and other clinical interviews, data, etcetera, that there were no child protection concerns.

27 Without more evidence, the Court will be unable to determine the degree to which the psychologist was influenced by the results of the polygraph.

28 The recommendations of the assessor's report are being challenged by one party to this action. That is their right, to test by way of cross-examination, the foundation on which the report is based.

29 The conclusions of the assessment are only as valid as the facts supporting the report. That is established law.

30 Thus as in *Campagna v. Wong*, 2002 SKQB 97 (CanLII) the Court decided that:

to properly evaluate Dr. Shimps's conclusions, the defendant must have access to everything which played a role in the formation of those conclusions.

31 The mother, in this application, had indicated it is not her intention to challenge the expert by employing another expert for the purposes of giving evidence. Thus, we are not getting into a battle between experts.

32 Both parties and counsel for the psychologist have considered and reject the option of retaining multiple experts. They acknowledge it would not necessarily prove fruitful in the search of truth, it would delay the proceedings and escalate costs.

33 The mother's counsel must know the foundation upon which the conclusions were made, if only to better understand the results, understand and weigh the reliability of the testing and the validity of the results and determine whether she wishes to rely on the results to address in her own mind, the child's disclosures verses the findings of Ms. Rule.

34 This process may in fact promote the reliability and the credibility of the testing process.

35 While it is understandable that publishers and vendors exert pressure on psychologists to protect their copyright as a marketing strategy; this will not be an obstacle to the disclosure of this information in litigation. This is so particularly where the conclusions reached because of the testing, are proffered as a credible means of determining conclusions to support or deny a parent access to their child.

36 Protection of children ranks far superior to most privacy interests.

37 When the argument against disclosure is being offered to protect the future viability and utility of the test, there are strategies regarding disclosure; proper restrictions on disclosure that address to some extent these concerns. However, the best interests of children far outweigh the desire for secrecy.

38 In child protection litigation there is no place for secrecy.

39 The most compelling objection before the court is whether or not to release the video tapes of the interview between the psychologist and the children. Once a therapist gains the trust of a child, exposure of the child to parental pressure, intentional or otherwise due to the child's comments, is potentially destructive; depending on the maturity of the parents.

40 Therapists are already under the same obligations as all service providers and the public to report disclosures of child abuse regardless of confidentiality issues. This further erosion of confidentiality may render the promise of confidentiality a deadly blow. That may be a valid concern.

41 Does that need to create a forum for confidential discussion between child and therapist outweigh the right of a parent to full disclosure?

42 If a child is under the age of majority, ought we to protect the right of a medical health provider to have private discussions between children and themselves in order to diagnose, make recommendations to a court that may ultimately affect the life and relationships of that child. That creates a privilege that a doctor, nurse or social worker do not currently have.

43 There have to be checks against any intervention by professionals. There ought to be opportunities to weigh and analyze the input and foundation of a report in relation to the recommendations it produces. These recommendations can have significant effect on the lives of parents and children.

44 There is a possibility that the children may have said something that is less than complementary of a parent. There is a possibility that disclosure of the conversation may affect the relationship between a parent and child.

45 Yet the process of interviewing a child, as between a police officer, a social worker, a teacher, and other health professionals, is clearly open to scrutiny.

46 What principle would protect a psychologist (in this case agreed upon by both parties) from the same scrutiny. Parties can agree in advance not to seek this disclosure. These parties did not do that here.

47 An interview between police officer, social worker, psychologist depends on more than objective criteria and objective analysis. It depends on the skill and experience of the interviewer, on an assessment of not only the language of the child and interviewer, but the comportment and demeanor of the child. This is often analyzed in the global context, not only utilizing child development theory, but assessment arising out of the circumstances of the child's life. The analysis is objective, it is subjective, it is scientific, tangible and intangible.

48 Reviewing the tapes may lend credibility to the therapist and sustain the conclusions found in the report. This is the accountability that promotes transparency.

49 Historically in Nova Scotia, restrictions have been imposed on the release of confidential information in family and child protection proceedings. Just as the release of police files and medical records in this case have been subject to strict conditions of release, the disclosure required here can be adequately protected by the imposition of conditions.

50 These conditions can reduce the possibility that this information will detract from the utility of these test and preserve the relationship between parent and child.

51 Part of understanding the consequences of allegations of child abuse/sexual abuse or inappropriate sexual conduct is understanding the effect of the allegations and adult behavior after the allegations whether or not the allegations are true.

52 Assessing the truth of the allegations and the effect on the children, true or unsubstantiated, assists the court and counsel in devising a strategy of parental contact. Professionals need to know and understand how to repair the damage if true, and if not true, understand how to repair the relationship between parent and child affected because of the effect of unsubstantiated allegations.

53 The video taped interviews and the test results, raw data, and the full file shall be made available to counsel in the following manner:

54 1. Counsel for Ms. Rule has agreed to make available the uncontested parts of the file as soon as possible, whether by copying the file or providing the file to counsel for the mother for copying.

55 2. A copy of the interview and other test data, raw data and brochures shall be made available for review at the office of the Children's Aid Society for Inverness/Richmond or such other agreed upon site under the custody of counsel for Children's Aid Society for Inverness/Richmond. That is in close proximity to both counsel. They shall be able to view with their clients only, but not to copy the tape of the interview.

56 3. There shall be no further copy of the tapes made and both parties are under a duty not to disclose, disseminate, copy, or otherwise replicate the tapes of the interview or use the contents for any other purpose other than preparation for this divorce proceeding.

57 4. The written materials may be copied once only for each counsel. Counsel are not entitled to copy or replicate this material. Should an expert be retained to review the materials, the expert shall attend at the office of counsel for the purpose of reviewing the material in order to advise counsel. They shall maintain the copy in the office of their counsel only. As with all other material disclosed, it is to be used solely for the purpose of advising and obtaining instruction for this proceeding and for no other purpose.

58 5. Breach of these conditions may result in contempt of court.

59 At the end of this proceeding, subject to appeal, the contested raw data and interview, subject to this motion shall be sealed only to be unsealed by court order.

60 Counsel for the mother shall draft the order.

M.C. LEGERE-SERS J.

13

Case Name:

Tetefsky v. General Motors Corp.

Between

**Rhonda Tetefsky, David Bain, Harvey Erlich, Akiva Medjuk,
Daniel Berkowitz, Plaintiffs, and
General Motors Corporation, General Motors of Canada, Ltd.,
American Honda Motor Company, Inc., Honda Canada Inc.,
Chrysler Canada, Inc., Chrysler LLC, Nissan North America
Inc., Nissan Canada Inc., Canadian Automobile Dealers
Association and Ford Canada Inc. Ford Motor Company,
Defendants**

[2010] O.J. No. 1117

2010 ONSC 1675

Court File No. 07-CV-340633CP

Ontario Superior Court of Justice

P.M. Perell J.

Heard: March 12, 2010.

Judgment: March 18, 2010.

(56 paras.)

Civil litigation -- Civil procedure -- Discovery -- Production and inspection of documents -- Motion by Tetefsky and the other plaintiffs for an order that JATO, a third party, produce proprietary information dismissed -- The information would normally only be available if purchased from JATO but the plaintiffs submitted that it was relevant and necessary for their class action against General Motors for conspiracy to lessen competition in the automobile industry -- JATO submitted that disclosure would harm its business reputation -- The plaintiffs failed to establish necessity -- Furthermore, granting disclosure could amount to condoning a misappropriation of property as the plaintiffs' economist allegedly obtained the information by misappropriating JATO's intellectual property -- Rules of Civil Procedure, Rule 30.10.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, s. 12, s. 35

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 96, s. 96(1), s. 101(1)

Rules of Civil Procedure, Rule 30.10, Rule 30.10(1), Rule 31.10

Counsel:

Henry Juroviesky and Eliezar Karp for the Plaintiffs.

Howard Wolch for Jato Dynamics Ltd.

Eric Block and Adam Ship for Canadian Automobile Dealers Association.

Mahmud Jamal and Jean-Marc Leclerc for General Motors of Canada, Ltd.

Barry Bresner for Chrysler Canada Inc.

REASONS FOR DECISION

P.M. PERELL J.:--

Introduction and Overview

1 JATO Dynamics Ltd., which is not a party to this proposed class action, refuses to allow the Plaintiffs to disclose to the Defendants proprietary information that normally would be available only if purchased from JATO. The Plaintiffs allegedly need this proprietary information to obtain certification of their proposed class action, but JATO, possibly out of loyalty to the Defendants, who are customers, and admittedly out of fear of retaliatory shunning by the Defendants refuses to sell or release the information to the Plaintiffs.

2 Indeed, JATO submits that the Plaintiffs' expert witness, Dr. Johannes Van Biesebroeck, who was given the proprietary information, has already breached the contract with JATO, breached confidence, and violated copyright, and JATO threatens to sue Dr. Van Biesebroeck and the University of Toronto, the parties contracting with JATO.

3 In these circumstances, the Plaintiffs make a motion for an order that JATO produce the proprietary information or alternatively for a declaration that Dr. Biesebroeck may produce the proprietary information without fear of legal action by JATO.

4 For the reasons that follow, I dismiss the Plaintiffs' motion.

Factual Background

5 The factual background to this motion is as follows.

6 In October 2007, the Plaintiffs, Rhonda Tetefsky, David Bain, Harvey Erlich, Akiva Medjuk, Daniel Berkowitz, commenced a proposed class action against the defendants, General Motors Corporation, General Motors of Canada, Ltd., American Honda Motor Company, Inc., Honda Canada Inc., Chrysler Canada, Inc., Chrysler LLC, Nissan North America Inc., Nissan Canada Inc., Canadian Automobile Dealers Association and Ford Canada Inc. Ford Motor Company.

7 In their proposed class action, the Plaintiffs allege that the Defendants conspired to unreasonably enhance the price of motor vehicles and to unduly lessen competition in the manufacture, sale, or supply of motor vehicles in North America.

8 The Plaintiffs retained Dr. Van Biesebroeck, an economist and professor at the University of Toronto, to prepare a report for the purposes of the proposed class action, including its certification as a class proceeding.

9 In preparing his report, Dr. Van Biesebroeck used information that he had received from JATO, a British company with offices around the world. JATO is in the business of supplying automotive data to its customers, which include automobile manufacturers, including some of the Defendants in this proposed class action. The information from JATO was indispensable for Dr. Van Biesebroeck's opinion.

10 Dr. Van Biesebroeck had obtained the information under licence agreements between JATO and the University of Toronto. These agreements were entered into on July 22, 2008 and on March 13, 2009 for the purposes of Dr. Van Biesebroeck's work at the University of Toronto. The information was provided at a 33% discount on the understanding that the information was being provided for research purposes only and not for commercial use. After discounts, the university paid \$62,263.30 to JATO.

11 JATO was told and understood that Dr. Van Biesebroeck would provide his research to governments and to engineering departments at the university.

12 The licence agreement with JATO provided, among other things, that:

- * The client has no rights to rent, lease, sub-lease, distribute, assign, transfer, copy, reproduce, display, modify, store or timeshare the Products.
- * JATO reserves all rights not expressly granted to the Client.
- * Client shall take all reasonable steps to protect the Products from unauthorized access, copying or use.
- * The Product is provided only to allow the Client to exercise the rights expressly provided under the agreement.
- * JATO claims UK and foreign copyrights and database rights with respect to the Products including any adaptations or copies thereof.

13 On April 1, 2009, the Plaintiffs served their materials for the certification motion. The material included a report from Dr. Van Biesebroeck that opined that the Defendants had colluded and that their conduct had harmed purchasers of motor vehicles in Canada.

14 Dr. Van Biesebroeck's opinion was based on an econometric analysis of the data that he had obtained from JATO.

15 In June 2009, the Defendants served a request to inspect documents on the Plaintiffs and asked that the Plaintiffs produce the information upon which Dr. Van Biesebroeck's report and opinion were based.

16 The Plaintiffs asked JATO if the information could be produced. JATO said no, and it refused to provide a license to the Plaintiffs to obtain the information. JATO advised Dr. Van Biesebroeck that he and the University of Toronto would be sued.

17 The Plaintiffs unsuccessfully attempted to purchase the comparable information about automotive sale prices from JATO'S competitors, R.L Polk & Co. and J.D. Power and Associates, among others.

18 At this time, there may be no other ready way for the Plaintiffs to obtain the data supporting Dr. Van Biesebroeck's opinion.

19 Although the Defendants, in the case at bar, have not taken any position about the release of JATO's information other than they want to see it, JATO is concerned that it would harm its business' goodwill if it became known that it licensed the use of its proprietary information to facilitate litigation against its customers. It seems that JATO's competitors, R.L Polk & Co. and J.D. Power and Associates have similar concerns.

20 Mr. Walter Sawczak, JATO's manager in Canada, deposed in his affidavit for this motion that JATO would be harmed if its proprietary information were released for unauthorized purposes. He stated:

JATO has built its reputation as a supplier of market intelligence to the automotive industry based on its independence and impartiality, and has established a position as the trusted partner of choice. This abuse of JATO's name and data undermines the years of investment and the reputation of its business. As such, JATO is likely to suffer considerable harm from this misuse of the Product provided to Professor Van Biesebroeck for an unauthorized purpose.

21 During his cross-examination, Mr. Sawczak testified that JATO did not know precisely how Dr. Van Biesebroeck would use the data against some of its customers, but he said that it would harm JATO if it was seen to "bite the hand that feeds it."

Position of the Parties

22 It is the Plaintiffs' position that the court has the jurisdiction to grant the relief sought, and the Plaintiffs submit that JATO's information is indispensable and not otherwise available and that Dr. Van Biesebroeck's opinion, which is dependent upon the JATO information, is necessary and irreplaceable for their class action, both in terms of obtaining certification, and, also in terms of the Plaintiffs' goal of proving that the Defendants are wrongdoers.

23 The Plaintiffs submit that JATO's information is relevant and necessary for the class action and that it would be unfair to require the Plaintiffs to proceed in their proposed class action without having this information. They submit that the information is readily producible by JATO or Dr. Van Biesebroeck and that no undue financial burden would be placed on JATO if it was ordered to produce the information.

24 The Plaintiffs submit that Mr. Sawczak's evidence is inadequate and that he is not qualified to express a legal opinion that there has been a breach of contract, breach of confidence, or violation of copyright.

25 The Plaintiffs submit that JATO's opposition and concerns about the unauthorized use of its proprietary information are not relevant to whether the court should order production, but if JATO's opposition and concerns were relevant, then the opposition and concerns should be ignored because there is no basis in fact for concluding that JATO would be harmed by the disclosure of the information.

26 For its part, JATO submits that the court does not have the jurisdiction to make the order sought, and it submits that compelled disclosure of the information would expropriate JATO's property and harm JATO's goodwill with its suppliers and customers and harm JATO's business reputation.

27 JATO submits that its information is confidential, privileged, or subject to copyright protection and that its compelled disclosure would be a violation of its copyright and would be against public policy eroding principles of freedom of contract and free enterprise.

28 JATO further submits that ordering disclosure would be to condone and to immunize Dr. Van Biesebroeck from liability for breach of contract, breach of confidence, and violation of copyright and that ordering disclosure would be an improper exercise of jurisdiction that the court does not have.

Discussion

29 The Plaintiffs are requesting that a non-party be ordered to produce documentary information for the purposes of the proceeding. Notwithstanding JATO's arguments, I have no doubt that the court has jurisdiction to make such an order; however, notwithstanding the Plaintiffs' arguments, in my opinion, the court ought not to exercise that jurisdiction in the circumstances of this case.

30 The sources of the court's jurisdiction to order a non-party to disclose information are: (1) sections 96(1) and 101(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43; (2) s. 12 of the *Class Proceedings Act, 1992*, S.O. 1992, and (3) the *Rules of Civil Procedure*.

31 Section 96 the *Courts of Justice Act* provides that the court shall administer concurrently all rules of equity and the common law, and s. 101(1) of the Act empowers the court to grant an interlocutory injunction or make a mandatory order, where it appears to a judge of the court to be just or convenient to do so. In the case at bar, what the Plaintiffs are seeking is akin to a *Norwich* Order, which is derived from equity's bill of discovery and is injunctive in its nature. A *Norwich* Order is a way to obtain information needed to bring an action.

32 In the case at bar, what the Plaintiffs are seeking falls within the court's jurisdiction under rule 30.10, and the Plaintiffs argued for their entitlement to the relief requested largely within the confines of that rule, until during the argument of the motion, I pointed out that the principles associated with an *Norwich* Order appeared to be engaged.

33 Under a *Norwich* Order, a plaintiff may obtain discovery from a person including a person against whom there is no cause of action in order to identify a wrongdoer and to obtain information about wrongdoing so that the plaintiff may bring proceedings: *GEA Group AG v. Ventra Group Co.* (2009), 96 O.R. (3d) 481 (C.A.); *Isofoton S.A. v. Toronto Dominion Bank* (2007), 85 O.R. (3d) 780 (S.C.J.).

34 A *Norwich* Order takes its name from the *Norwich Pharmacal & Others v. Customs and Excise Commissioners*, [1974] A.C. 133 (H.L.). *Norwich Pharmacal* knew that a patent that it owned was being infringed, but it did not know the names of the infringers. It asked the Customs and Excise Commissioners in England, who did know, for the names. After the Commissioners refused to provide the information, exercising an equitable jurisdiction associated with the ancient equitable bill of discovery, the House of Lords held that the court had the discretion to order discovery from a non-party and the Law Lords ordered the Commissioners to provide the information.

35 The authority of *Norwich Pharmacal* has been adopted and approved in Canada: *GEA Group AG v. Ventra Group Co.* (2009), 96 O.R. (3d) 481 (C.A.); *Straka v. Humber River Regional Hospital* (2000), 51 O.R. (3d) 1 (C.A.); *Glaxo Wellcome PLC v. M.N.R.* (1998), 162 D.L.R. (4th) 433 (Fed. C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 422, 165 D.L.R. (4th) vii; *BMG Canada Inc. v. John Doe* (2005), 39 C.P.R. (4th) 97 (Fed. C.A.); *Alberta (Treasury Branches) v. Leahy*, [2000] A.J. No. 993 (Alta. Q.B.); *Kenny v. Loewen* (1999), 28 C.P.C. (4th) 179 (B.C.S.C.); *Isofoton S.A. v. Toronto Dominion Bank* (2007), 85 O.R. (3d) 780 (S.C.J.); *York University v. Bell Canada Enterprises*, [2009] O.J. No. 3689 (S.C.J.).

36 The general requirements for a *Norwich* Order are: (1) the plaintiff must have a *bona fide* claim or potential claim against a wrongdoer; (2) the defendant to the *Norwich* proceeding must have a connection to the wrong beyond being a witness to it; (3) the defendant to the *Norwich* proceeding must be the only practical source of the needed information; (4) the interests of the party seeking the disclosure must be balanced against the interests of the non-party, including his or her interest in privacy and confidentiality, and any public interest that would justify non-disclosure; and (5) the interests of justice must favour obtaining the information: *GEA Group AG v. Ventra Group Co.* (2009), 96 O.R. (3d) 481 (C.A.); *Alberta (Treasury Branches) v. Leahy*, [2000] A.J. No. 993 (Alta. Q.B.).

37 Turning now to the court's jurisdiction under the *Class Proceedings Act, 1992* and under the *Rules of Civil Procedure*, s. 12 of the *Class Proceedings Act, 1992* provides:

12. The court, on the motion of a party or class member may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and for the purpose, may impose such terms on the parties as it considers appropriate.

38 The court has the jurisdiction to order discovery for the purposes of a motion for certification of a class proceeding and may do so when the moving party shows that the discovery is necessary to inform the certification process: *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2007] B.C.J. No. 2443 (S.C.); *Murray v. Alberta (Minister of Health)*, [2007] A.J.

No. 428 (Q.B.); *Pardy v. Bayer Inc.*, [2003] N.J. No. 210 (T.D.); *Kimpton v. Canada (Attorney General)*, [2002] B.C.J. No. 87 (S.C.); *Hov v. Medtronic, Inc.*, [2000] B.C.J. No. 1490 (S.C.); *Samos Investments Inc. v. Pattison*, [2001] B.C.J. No. 578 (S.C.); *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Gen. Div.) at p. 320.

39 Section 35 of the *Class Proceedings Act, 1992* provides that the *Rules of Civil Procedure* apply to class proceedings. Under the *Rules*, there are numerous rules that govern the production of documents from parties and there is one rule, rule 30.10, that govern the production of documents from non-parties. There is also one rule, rule 31.10, for the discovery of non-parties. Generally speaking, it may be said that the policy of the rules is not to embroil non-parties in the dispute of the parties. Thus, unlike some jurisdictions, during the interlocutory stages of an action, Ontario's rules focus on obtaining discovery from the parties as opposed to obtaining depositions from witnesses.

40 For present purposes, the relevant rule from the *Rules of Civil Procedure* is rule 30.10(1), which provides for the production of documents and information from non-parties. Rule 30.10(1) states:

30.10(1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

- (a) the document is relevant to a material issue in the action; and
- (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

41 The case law associated with rule 30.10 establishes that the disclosure and production of a document from a non-party is a matter of fairness and necessity. The court determines whether it would be unfair to require the moving party to proceed to trial without a document in the possession of a non-party. Although production can be ordered from a non-party, it is not routinely sought and the threshold for granting it is high: *Olendzki v. W.A. Baker Trucking Ltd.* (2006), 27 C.P.C. (6th) 338 (Ont. S.C.J.). An order under rule 30.10 should not be made as a matter of course and should only be made in exceptional circumstances: *Morse Shoe (Canada) Ltd. v. Zellers Inc.*, [1997] O.J. No. 1524 (C.A.) at para. 19.

42 In making the determination of whether to order production from a non-party, the court may consider the following factors: (1) the importance of the document to the issues in the litigation; (2) whether production at the discovery stage as opposed to production at trial is necessary to avoid unfairness to the moving party; (3) whether the examination of the opposing party with respect to the issues to which the documents are relevant would be adequate to obtain the information in the document; (4) the availability of the document or its information from another source that is accessible to the moving party; (5) the relationship of the non-party from whom production is sought to the litigation and the parties to the litigation; and (6) the position of the non-party with respect to production: *Ontario (Attorney General) v. Ballard Estate* (1995), 26 O.R. (3d) 39 (C.A.); *Morse Shoe (Canada) Ltd. v. Zellers Inc.*, [1997] O.J. No. 1524 (C.A.).

43 Based on the above authorities, I thus have no doubt that the court has the jurisdiction to order JATO to turn over to the Plaintiffs the information that they say they need for their proposed class action. I do not, however, think it would be appropriate to exercise that jurisdiction in the circumstances of this case.

44 In order to obtain the relief requested -- which is extraordinary and intrusive on the rights of a non-party - the Plaintiffs must establish necessity. In my opinion, they have failed to do so. All they have proven is that they must find another way to prove that they have a way to satisfy some of the criteria for certification. Given the low evidentiary standard of some basis in fact that governs on a motion for certification and given that the certification hearing is not the time to prove the merits of the case, the Plaintiffs have not satisfied me that they absolutely must have JATO's information or comparable information in order to obtain certification. For instance, and I am not to be taken as

pre-judging the matter, it may be possible to show that once provided with the Defendants' sales data in the due course of normal examinations for discovery that Dr. Van Biesebroeck would be able to prove the Defendants' wrongdoing. I repeat that the certification hearing is not a merits test and it is not the time for the Plaintiffs to prove their case.

45 Notwithstanding my view that necessity for the purposes of the certification hearing has not been established, for the sake of argument I will assume that the Plaintiffs' need is genuine, and I shall move on to consider whether granting the relief requested can be justified.

46 Assuming the necessity of the information, I do not, however, find it unfair to require the Plaintiffs to proceed to certification without Dr. Van Biesebroeck's report and opinion assuming as may be expected that the Defendants will seek to have the report ruled inadmissible. Not having Dr. Van Biesebroeck's report may make it more difficult for the Plaintiffs to establish the criteria for certification, but I do not see any procedural unfairness given the norm in Ontario that non-parties are entitled to be left alone or to be partisans as they see fit, unless they are actual witnesses of the events and provided that they do not suppress evidence or otherwise interfere with the administration of justice.

47 In any event, the interests of the Plaintiffs are just one factor for the court to consider in the exercise of its discretion to compel non-parties to provide information. As may be noted from the law set out above, in exercising its jurisdiction to grant a *Norwich* Order and in exercising its jurisdiction under rule 30.10, the court must balance the situation and the interests of the party seeking disclosure against the position and the interests of the non-party, including then non-party's interest in privacy and confidentiality, and the court must also weigh any public interest that would justify non-disclosure. The *Norwich* Order or orders under rule 30.10 are extraordinary and exceptional orders to be rarely made precisely because of the court's concern not to impinge upon the property and privacy rights of non-parties.

48 In the case at bar, when I weigh the situation and the position of the Plaintiffs, I note that they are suing to recover a loss of property (money) that they say the Defendants car manufacturers wrongfully extracted from them and other consumers and to make their case against the wrongdoers, the Plaintiffs absolutely need information from JATO, which in no way was a party, accessory, or accomplice to the Defendants' wrongdoing. When I weigh the situation and the position of JATO, I note that it has valuable property that it has chosen not to provide to the Plaintiffs because JATO believes that doing so will harm its enterprise's goodwill and JATO does not wish to be seen to be even indirectly harming its clientele, who include the Defendants. I note also that JATO submits that it is has been a victim of wrongdoing because the Plaintiffs, through their witness Dr. Van Biesebroeck, have allegedly breached a contract and allegedly misappropriated JATO's intellectual property and used it for an unauthorized purpose. Thus, as I view it, the situation is one where for the greater good of a class proceeding, the Plaintiffs ask the court to expropriate JATO's property and also condone an alleged misappropriation of property.

49 I do not think that it would be in the public's interest, where the courts have a vital role in protecting property and privacy interests, or in the interests of justice to grant the Plaintiffs' utilitarian request.

50 Under the law, JATO has its own rights of property and privacy, and it has committed no wrongdoing in Canada, and it is under no duty to assist the Plaintiffs in their pursuit of access to justice against the car manufacturers, who happen to be JATO's clientele. Although I see irony, I do not see justice in allowing the Plaintiffs to take JATO's property rights in order to recover their own property.

51 I appreciate that the court has the power and has exercised it to take away a non-party's rights of property and privacy, but, in my opinion, the exercise of the power to compel production must be rare when a non-party wishes to assert its property and privacy rights as opposed to objecting merely on the grounds that the information it has is irrelevant to the proceedings or on the grounds that it would simply be bothered or inconvenienced by producing the information.

52 In some cases, a non-party may simply have the property right of possession over such things as banking records,

accounting records, medical records, minutes of meetings, contractual documents, deeds and certificates of ownership, etc., and in those instances a court may be more ready to exercise its power, but in the case at bar, JATO has valuable proprietary rights that go beyond possession and rather the property being sought is its stock in trade and its forced sale of its products may harm JATO's goodwill.

53 I do not think it lies in the mouths of the Plaintiffs to dispute that JATO has proprietary rights be they trade secrets, confidential information, contractual rights, or copyrights. Whatever they are, they are JATO's stock in trade and it is entitled to protect those rights.

54 For the above reasons, I dismiss the Plaintiffs' motion.

55 I assume that JATO will seek its costs for resisting successfully the Plaintiffs' motion. It may make costs submissions in writing within 20 days of the release of these Reasons for Decision followed by the Plaintiffs' submissions within a further 20 days.

56 Order accordingly.

P.M. PERELL J.

15

Case Name:

Millar v. Thunder Bay (City)

Between

**Sean Millar, Miranda Tulin, Kristopher Rose, Bonnie-Lynn
Ketchum, Zaker Hussain and Timothy Pile, Applicants, and
The Corporation of the City of Thunder Bay, Respondent**

[2009] O.J. No. 4255

2009 ONCJ 485

Court File Nos. 84297274, 1163780A, 1192195A, 1163635A,

89773333, 1163205A

Ontario Court of Justice
Thunder Bay, Ontario

B.I. Leaman J.P.

Heard: July 30, 2009.

Judgment: July 30, 2009.

(25 paras.)

Criminal law -- Procedure -- Crown's duties -- Disclosure -- Motion by the defendants for disclosure of the full user's and installation manual for the Genesis II radar device, and the full OPP radar Basic Operator Manual used to conduct initial and recertification courses allowed in part -- No evidence that Operator Manual was relevant -- Parts of the Genesis II Manual were ordered to be disclosed.

Transportation law -- Motor vehicles and highway traffic -- Liability -- Speeding and radar -- Motion by the defendants for disclosure of the full user's and installation manual for the Genesis II radar device, and the full OPP radar Basic Operator Manual used to conduct initial and recertification courses allowed in part -- No evidence that Operator Manual was relevant -- Parts of the Genesis II Manual were ordered to be disclosed.

Motion by the defendants for disclosure of the full user's and installation manual for the Genesis II radar device, and the full OPP radar Basic Operator Manual used to conduct initial and recertification courses. In the alternative, the motion requested the OPP disclose certain enumerated pages from those manuals.

HELD: Motion allowed in part. There had been no affidavit evidence led by the defence on this motion relating to any of the applicants that lead this Court to conclude that the Radar Basic Operator's Manual would be relevant and therefore

subject to an order for disclosure. The manual was thus not ordered to be disclosed. There was also no evidence that the entire Genesis II radar manual was relevant. The Genesis device was used only with respect to two of the defendants and thus only applied to those defendants. These defendants had established that in order to make full answer and defence to the charge each was facing, the prosecution should disclose the pages of the Genesis II User's and Installation manual relating to the testing and operation of the unit.

Statutes, Regulations and Rules Cited:

Provincial Offences Act, R.S.O. 1990, c. P.33, s. 5(2), s. 46(2)

Counsel:

Mr. V.R. Paddon, for the applicants.

Ms Lelsie Dack, for the respondent.

1 B.I. LEAMAN J.P.:-- Before the court is a motion for disclosure brought on behalf of six defendants, namely Sean Millar, Miranda Tulin, Kristopher Rose, Bonnie-Lynn Ketchum, Zaker Hussain and Timothy Pile. The motion requests this court to order the Ontario Provincial Police (hereafter "the OPP) to produce to the defendants' representative a certified copy of the full user's and installation manual for the Genesis II radar device, and the full OPP radar Basic Operator Manual used to conduct initial and recertification courses. In the alternative, the motion requests the OPP disclose certain enumerated pages from those manuals. Of course it is the prosecution, and not the OPP, from whom the disclosure flows.

2 I have reviewed the materials submitted by the representative of the applicants, including the Notice of Motion, Book of Authorities, Affidavit of William Teed and appended pages purportedly extracted from the manuals set out above (not attached as exhibits to Mr. Teed's affidavit). I have also reviewed the prosecution's materials, which include the respondent's Factum, Book of Authorities, and Affidavits of Sandy Axent and OPP Sgt. David Bel.

3 As set out in s. 46(2) of the Provincial Offences Act (hereafter "the Act"), it is fundamental that the applicants have the right to make full answer and defence. The ability to exercise that right depends, in large part, on disclosure of information relevant to the charge. The Supreme Court of Canada decision of Stinchcombe v. The Queen (1991), 68 C.C.C. (3d) 1 and the cases that followed it require the prosecution to disclose items relevant to the charges against defendants. Case law has developed that holds that the extent of disclosure required to be provided might depend on the seriousness of the charges before the court and the consequences of conviction.

4 It should be noted that, subject to review by a court, the decision regarding what should be disclosed is within the discretion of the prosecution. The motion before this Court has been necessitated by the prosecution's decision not to provide to the defence the items it had previously requested by way of disclosure. In essence, the prosecution has refused to disclose these items because it feels they are not relevant and that at least one of the manuals is copyright.

5 The issues to be determined on this motion are as follows:

- a) Does this court have jurisdiction to make an order for disclosure?
- b) Are the documents being requested relevant?
- c) Should the prosecution disclose the requested documents to the defence?
- d) What effect, if any, does the issue of copyright have on disclosure?

Does this court have jurisdiction to make a disclosure order?

6 The first issue to be determined is whether this court has jurisdiction to make the orders sought. Most of the case law presented by Mr. Paddon on behalf of the defendants and Ms Dack for the prosecution, as well as some other cases that the court has discovered during its research for this motion suggest it is the trial court that typically decides this type of motion. Indeed, only one case of which this court is aware suggests that it need not be the trial court that hears a motion for disclosure. In R. v. Foote, 2006 ONCJ 369, Madame Justice Duchesneau-McLachlan of the Ontario Court of Justice, sitting in appeal of His Worship Lecouteur's decision, [2006] O.J. No. 2561, at paragraph 23 stated: "These motions do NOT have to be heard by the trial justice. They are not the same as applications under the Charter. Indeed the rules simply indicate that they are to be brought before a justice of the same level of court" (emphasis in the original).

7 The Ontario Court of Appeal in the case of R. v. Shannon [1992] O.J. No. 2652 ruled that a motions court judge dealing with an application for prerogative remedies in the Superior Court of Justice erred in ordering disclosure of the manual for a radar detector detector as that issue should have been left for the trial justice of the peace. However, that case is distinguishable, in this court's opinion, because, unlike the situation in Shannon where the Crown could have tried to prove the presence of the radar detector by some means other than with evidence of the operation of the radar detector detector, in speeding cases such as the ones before the court, the prosecution almost invariably relies on the readings obtained using a speed measuring device to prove the charge.

8 Because in Part I matters, s. 5(2) of the Act requires that the clerk of the court send a Notice of Trial to a person who files a Certificate of Offence requesting a trial, and because no information is sent with that Notice of Trial respecting procedural matters such as requesting disclosure or adjournments, there is no preliminary appearance prior to the trial date at which a person charged or his or her representative could address the issue of Court-ordered disclosure. Practically, s. 5(2) requires a defendant to request of the Court on the scheduled trial date (that is, of the trial justice of the peace) the disclosure of any items the prosecution has seen fit not to disclose that the defence feels are relevant. This would, of necessity in many cases, require the hearing of a lengthy motion for disclosure, an adjournment of the matter on the scheduled trial date if the disclosure was ordered by the Court, and the inconvenience to witnesses who had been summonsed to attend the trial on the original date. The effect of mandating that only the trial justice of the peace may determine contested issues surrounding disclosure would be frequent delays and a loss of control by the Court over its process. Therefore, this Court prefers the approach taken in Foote that any justice of the peace -- not just the trial justice of the peace -- is able to hear a motion for disclosure and accepts that it has the jurisdiction to hear the motion before it today.

Are the documents being requested relevant?

9 The next issue to be decided is whether the items being requested are relevant. In this regard, the case law is consistent in holding that the obligation rests on the applicants to show, through acceptable evidence, the relevance of the items sought to be disclosed. The cases have held it is not enough for the defence to merely ask for disclosure, and there is no absolute right to the disclosure of an entire radar manual in speeding cases.

10 An excellent summary of the law in the area of disclosure of radar manuals is R. v. Oosterman, [1998] O.J. No. 5785. In that case Justice of the Peace Quon cites several decisions -- both within Ontario and without -- in which the issue has been addressed. His Worship Quon, at paragraph 18, quotes Her Worship Babcock in the case of R. v. Reybroek [1998] O.J. No. 2586 (O. C.J.), as follows:

At paragraph 10 in Reybroek, Babcock J. [sic] adopted the reasoning in R. v. Longmire [1993] N.S.J. No. 15 (N.S.C.A.) (January 18, 1993) and stated "the defendant has not laid a rational basis or factual foundation for the disclosure requested". The Nova Scotia Court of Appeal in Longmire found the appellant had not been deprived of the rights to a fair trial and to make full answer and defence because of the Crown's refusal to provide him with a copy of the radar

operation manual. The Court of Appeal did not find the trial judge had erred in declining to stay the charge, for the Crown's refusal to disclose the radar manual. The Court reasoned the appellant did not lay a rational basis or factual foundation for his request before the trial judge, and therefore was not entitled to the disclosure request.

11 At paragraph 21, His Worship Quon continues:

In Reybroek, the defendant had failed to demonstrate why the requested documents were relevant to his defence. Since there was not a factual foundation established, the court determined the radar manual or maintenance notes were not relevant and therefore would not order these documents be released to the defence.

12 His Worship concludes, at paragraph 22, "In determining relevance of the documents requested in the case before me, I used the following test for relevance: 'Is the material being sought reasonably possible of being useful to the defendant in making full answer and defence'." That seems, to this Court, to be a very reasonable test in assessing this motion.

13 In its material, the prosecution included an affidavit of Sgt. Bel of the OPP sworn July 22, 2009. Attached to that affidavit as exhibits are copies of officers' notes that make reference to testing, in accordance with manufacturer's specifications, the speed measuring devices they used in connection with the applicants they charged. Sgt. Bel's affidavit confirms that these notes were disclosed to the applicants' representative.

14 The decision reached by His Worship Quon in Oosterman on the issue of whether radar manuals should be disclosed reads as follows (paragraph 26):

I regard the radar manual being sought by the defendant to be relevant in that it contains information relating to the specifications referred to in the officer's notes. On a balance of probabilities, I am satisfied that the defendant's ability to make full answer and defence to the charge of speeding may be adversely affected if the radar manual is not disclosed to the defendant. Accordingly, the manual must be disclosed to the defence.

15 Generally speaking, this Court concurs with His Worship Quon's decision on the issue of the disclosure of radar manuals, based on the evidence contained in Sgt. Bel's Affidavit, namely the copies of the officers' notes that refer to testing the speed measuring devices in accordance with the manufacturer's specifications.

16 There has been no affidavit evidence led by the defence on this motion relating to any of the applicants that leads this Court to conclude that the OPP's Radar Basic Operator's Manual would be relevant and therefore subject to an order for disclosure. Nor was Sgt. Bel's affidavit or his oral testimony on the motion of assistance to the defence on this point. The only reference to the relevancy of the OPP manual was in Mr. Paddon's oral argument, which the Court did not find compelling. Consequently, that part of the disclosure motion is denied.

Should the Prosecution disclose the requested documents to the Applicants?

17 The next issue to be determined is whether the items requested should be ordered disclosed. On this point, it is unfortunate for some of the applicants that their representative chose to bring their motion in the form that he did -- that is, jointly. Based on Sgt. Bel's affidavit evidence, the Genesis II radar manual would be applicable to only the applicants Kristopher Rose and Sean Millar. Different speed measuring devices, that have their own distinct manuals, were used in the matters involving Bonnie-Lynn Ketchum, Zaker Hussain and Timothy Pile. This Court has no evidence what speed measuring device was used in the case of Miranda Tulin. Consequently, any order this court may make for the disclosure of some or all of the items requested in the motion must be limited to the applicants Rose and Millar, because it appears that only in their cases would the Genesis II manual be relevant. This remains true even in light of the oral evidence of Sgt. Bel respecting the common elements of all radar use, such as the Doppler Effect, tracking history,

target identification, effect of terrain and weather. Unless disclosed voluntarily by the prosecution as a result of this decision, if instructed by his clients, Mr. Paddon should, at his earliest opportunity, make a motion for disclosure of the manuals relating to the correct types of speed measuring devices involved in the remaining applicants' matters, the details of which have already been disclosed to the defence by the prosecution.

18 As the cases have stated, the Court need not order the disclosure of the entire manual if an order is made. As Justice Adams stated in R. v. Sequin, [2007] O.J. No. 382 at paragraph 18:

The Justice of the Peace may order that the radar unit manual be produced to the appellant. The decision is discretionary. The Justice may also order that only a part of the voluminous manual may be produced. The application for production either whole or in part, however, must have some material basis. The Justice of the Peace may then be in a position to determine the question of relevancy. If there is no relevance then no order is appropriate. If there is relevance relating only to a part of the manual, then only a part of the manual should be ordered. The onus, however, is on the applicant. And the decision, if necessary, must be made on the side of inclusion.

19 Because this Court has not been satisfied on the evidence before it that the entire Genesis II radar manual requested is relevant for the purposes of making full answer and defence, it will only consider making an order for disclosure of the parts of that manual relating to the testing and operation of the unit. The difficulty in the motion before the court as it relates to the applicants Rose and Millar is that although the defence included copies of some pages from what is purported to be the Genesis II radar manual, they are not exhibits to Mr. Teed's Affidavit sworn May 1, 2009. This Court, therefore, will not draw the inference that the pages referred to in his affidavit are the same pages included in the applicants' bound materials. This issue is further complicated by the fact that the list of pages sought in the alternative by the defence to be disclosed do not correspond with the pages in the bound materials since pages 21, 25 and 27 are missing.

20 It is clear, however, that the applicants Rose and Millar have satisfied this Court, through the affidavit and oral evidence of Sgt. Bel and the oral argument of Mr. Paddon, that in order to make full answer and defence to the charge each is facing, the prosecution should disclose the pages of the Genesis II User's and Installation manual relating to the testing and operation of the unit. An order is therefore made to that effect.

21 This Court adopts the reasoning in the decision of Justice Thomas in R. v. Vanier, [2005] O.J. No. 5466, at paragraph 16: "The photocopy of a portion of the unit manual, and the offer of access to the balance was enough to minimally satisfy the Prosecution's obligation regarding the manual disclosure." Therefore, it is hereby ordered that the prosecutor provide by way of disclosure in the matters of Mr. Rose and Mr. Millar, photocopies of the pages of the Genesis II User's and Installation Manual relating to testing procedures and operation of that model of radar unit.

What effect, if any does copyright have on Disclosure?

22 The issue of copyright can quickly be addressed. This court concurs with the conclusions reached by His Worship Quon in Oosterman, at paragraph 29:

Copyright as intellectual property protects the interest of the creator or owner in the manual and to ensure the right of the copyright owner to capitalize or benefit exclusively in the use of the writing or document. I fail to see how the defendant will be able to make full answer and defence without a copy of the manual. If the defendant's only intention is to obtain a copy in order to prepare its defence the manual should not be kept from the defendant because of some copyright interest. The underlying principle is the defendant's right to make full answer and defence, and in this particular case, that right is paramount to any interest that the owner of the manual may have in the copyright over the manual.

Miscellaneous matters

23 There are a few additional matters that the Court will address with respect to this motion and motions of this nature in general. In this Court's opinion, it is not reasonable for the prosecution to take the position that the radar manual in question today (or indeed any radar manual) or relevant parts thereof need not be disclosed because the manual may be purchased by the defendant from the manufacturer or its distributor. That would impose an unnecessary financial burden on any defendant, especially those self-represented.

24 That said, it would certainly be of assistance to this and other courts dealing with speeding charges where the testing or operation of the devices might be in issue to have available at trial a certified copy of the user's manual relating to the model of speed measuring device relating to that particular charge that could be referred to by the prosecution or the defence, or in appropriate circumstances, the Court. Obviously, from the comments above, this would best be done by the prosecution, with the assistance of the charging police service.

25 Finally, the Court feels compelled to comment further with respect to the need for this motion to have been brought at all. This Court hopes its decision today has made it clear that in this type of case, where the officer's testing and operation of the speed measuring device will almost always be challenged, it behoves the prosecution, bearing in mind the right of the person charged to make full answer and defence to err on the side of inclusion when considering what to disclose. The expense to the state in disclosing these extra pages from the appropriate manual is surely outweighed by fairness to the defendant and the enhancement of the administration of justice.

B.I. LEAMAN J.P.

cp/e/qlxlr/qljxr/qlced/qlaxw

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Indexed as:

R. v. Oosterman

Between

**Her Majesty the Queen, respondent, and
Gerry Oosterman, moving party (defendant)**

[1998] O.J. No. 5785

Ontario Court of Justice (Provincial Division)
Provincial Offences Court - Toronto, Ontario

Quon J.P.

Heard: July 22, 1998.

Oral judgment: July 29, 1998.

(12 pp.)

Criminal law -- Procedure -- Trial, special duties of Crown -- Duty to disclose evidence prior to trial -- Trial, motions -- To dismiss charge.

Motion by the accused to dismiss a speeding charge. After the accused was charged, she appeared in court to request an adjournment to obtain disclosure from the Crown. The adjournment was granted with a deadline to comply with disclosure, but with no specification as to what was to be disclosed. The defence requested maintenance notes and the operating manual for the radar device. The Crown refused, claiming that the items could be obtained by way of subpoena or under the Freedom of Information Act, and that there was copyright protection for the manual.

HELD: Motion dismissed. The maintenance notes were not relevant as there was no evidence that the maintenance of the device was at issue. However, the police officer's notes revealed that the radar device was tested according to manufacturer's specifications, so it was reasonable for the defence to have access to those specifications. The defendant's right to make full answer and defence was paramount to whatever copyright interest there might have been in the manual. Although the Crown was found to have improperly failed to disclose the manual, the request for dismissal was premature. The failure to disclose was not an abuse of process. The matter was adjourned and the Crown was ordered disclose the manual in accordance with the defence request.

Cases Considered and Referred to:

R. v. Longmire, [1993] N.S.J. No. 15 (N.S.C.A.) (January 18, 1993) per Jones, Matthews and Roscoe JJ.A.

R. v. Reybroek, [1998] O.J. No. 2586 (March 4, 1998) (Ont. Prov. Div.) per Babcock Prov. J.

R. v. O'Connor [1995] S.C.J. No. 98 (S.C.C.).

R. v. Shannon, [1992] O.J. No. 2652 (December 11, 1992) (O.C.A.) per Houlden, Arbour and Weiler JJ.A.

R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.).

Statutes, Regulations and Rules Cited:

Freedom of Information Act.

Highway Traffic Act.

Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 46(2), 60.

Counsel:

W. Ramroop, for the respondent.

D. Baker, for the defendant.

QUON J.P. (orally):--

INTRODUCTION

1 This is a motion brought by the defendant to have her charge dismissed as a result of her belief that the Prosecution has failed to provide her with full disclosure. The defendant had been charged under the Highway Traffic Act for speeding and sought disclosure of the radar manual and maintenance records pertaining to the radar device. The Prosecution did not disclose these documents to the defence, as they felt they were not obligated to, because of copyright over the manual, because of the Freedom of Information Act and because of the subpoena process that can be used to obtain these documents. If the manual and the maintenance notes are relevant, and the Prosecution is obliged to disclose these documents to the defendant, does the failure to do so, warrant the Court dismissing the charges?

2 The motion was argued before me on July 22, 1998. These are the written reasons of my ruling on the motion that was rendered orally on July 29, 1998.

FACTS

3 On June 6, 1997, the defendant was charged with speeding. The defendant filed a Notice of Intention to Appear on June 18, 1997. In August 1997, a clerk of the court issued a Notice of Trial for a March 9, 1998 trial date. On March 9, 1998, the trial was adjourned to May 12, 1998 at the defendant's request.

4 On May 12, 1998, the defendant and her legal counsel appeared before me and sought another adjournment in order to obtain disclosure from the prosecution. I granted the request for adjournment and set the trial for July 22, 1998 with a stipulation that the prosecutor's office satisfy its disclosure obligation by July 8, 1998. My stipulation did not specify that any particular document had to be disclosed. I was not sitting as the trial judge as the defendant had not entered a plea.

5 The defendant's counsel received disclosure from the police in June 1998 which consisted of the first three items from a five item list prepared and requested by the defendant's counsel. On June 11, 1998, Malcolm Murray, the Radar Coordinator for the Toronto Police Service, informed the defendant's counsel items #4 and #5 of the disclosure request would not be provided to the defence. However, the defendant's counsel was told that he could obtain the two non-disclosed items through the subpoena process, or by an application under the Freedom of Information Act.

6 The Defendant and her counsel appeared before me again on July 22, 1998. On this appearance, and after she had entered a not guilty plea, the Defendant made a motion to have her case dismissed on the grounds she had not received full disclosure. The defendant submitted that without this disclosure she would be unable to make "full answer and defence".

7 The two items not disclosed by the police or the prosecution to the defence were:

1. maintenance notes for the radar device used by the police officer on June 6, 1997.
2. radar manual or operating manual for the radar device used by the police officer on June 6, 1997.

Position of Parties

8 The defendant's counsel relies on *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.) and submits the prosecution must disclose all relevant information in its possession to the defendant.

9 The prosecution relies on three factors for not disclosing the radar manual and the maintenance notes to the defendant: The undisclosed items could be obtained by way of subpoena or under the Freedom of Information Act. In addition, the radar manual could not be disclosed because there is copyright protection on the manual.

10 The defendant's counsel points out the author of the manual is Malcolm Murray, the Radar Coordinator for the Toronto Police Service (the same person who informed the defendant's counsel that the manual and the maintenance notes would not be disclosed), which the manufacturer provides with the radar devices.

ISSUES

11 Is the radar manual and are the maintenance notes sought by the defence relevant?

12 Should the prosecution disclose the radar manual or the maintenance notes to the defendant?

13 Does copyright protection over the radar manual preclude the prosecution from disclosing the manual to the defence?

14 What remedies are available to the defendant if the court finds the prosecution has failed in its obligation to disclose either the radar manual or the maintenance notes to the defence?

15 Should these proceedings be dismissed for the prosecution's failure to give full disclosure to the defence?

ANALYSIS OF FACT AND LAW

16 Subsection 46(2) of the Provincial Offences Act R.S.O. 1990, c. P.33, provides:

The defendant is entitled to make full answer and defence.

17 In a recent speeding and disclosure of radar manual case, Babcock J. in *R. v. Reybroek* [1998] O.J. No. 2586 (Ont. Prov. Div.) (March 4, 1998) at paragraphs 8 and 9 of that judgment, found the defendant Reybroek was not entitled to disclosure simply by requesting it, and relied on a passage in *R. v. Anutooshkin*, [1994] B.C.J. No. 1871, [not cited by Babcock J.] which stated:

the accused was not entitled to disclosure merely upon demand. The right to have material disclosed is dependent upon whether it is relevant. The court must consider whether there is reasonable possibility that the material in question could assist the defence.

18 At paragraph 10 in *Reybroek*, Babcock J. adopted the reasoning in *R. v. Longmire* [1993] N.S.J. No. 15 (N.S.C.A.) (January 18, 1993) and stated "the defendant has not laid a rational basis or factual foundation for the disclosure requested". The Nova Scotia Court of Appeal in *Longmire* found the appellant had not been deprived of the rights to a fair trial and to make full answer and defence because of the Crown's refusal to provide him with a copy of the radar operation manual. The Court of Appeal did not find the trial judge had erred in declining to stay the charge, for

the Crown's refusal to disclose the radar manual. The Court reasoned the appellant did not lay a rational basis or factual foundation for his request before the trial judge, and therefore was not entitled to the disclosure request.

19 Also in Reybroek, Babcock J. at paragraph 11 refers to the general principles of disclosure enunciated in *R. v. Stinchcombe*, supra:

the Crown must disclose everything in its possession that's relevant to the charges; the Crown has no duty to disclose that which is clearly irrelevant; and that the Crown cannot disclose what it doesn't have.

20 At paragraph 15 of Reybroek, Babcock J. decided item #2 and item #7, as well as eight other items from a list of 12 items requested by the defendant for disclosure "to be frivolous, unreasonable and irrelevant" and "[n]one of these items are required to prepare a defence to this charge of speeding". Item #2 requested by the defendant was "a copy of radar manual and any amendments or addendum". Item #7 was "any and all service records or maintenance logs with respect to the radar device or any of its components".

21 In Reybroek, the defendant had failed to demonstrate why the requested documents were relevant to his defence. Since there was not a factual foundation established, the court determined the radar manual or maintenance notes were not relevant and therefore would not order these documents be released to the defence.

22 In determining relevance of the documents requested in the case before me, I used the following test for relevance: "Is the material being sought reasonably possible of being useful to the defendant in making full answer and defence".

Is Radar manual sought by the defence relevant?

23 The officer's notes as disclosed to the defendant revealed he tested the radar according to manufacturer's specifications. The officer's notes do not disclose what these specifications are. It would be reasonable then, for the defendant to have these specifications, in determining whether to challenge or cross-examine the officer's proposed testimony about the testing.

24 In *R. v. Shannon* [1992] O.J. No. 2652 (O.C.A.), rendered on December 11, 1992, the Court of Appeal affirmed the Crown's concession that it was necessary for the Crown to disclose a manual about the VG2 radar detecting device where the Crown intended to rely on evidence from the radar detecting device at trial. This finding in Shannon supports the defendant's position for disclosure of the radar manual to the defence.

25 In *Stewart and Macey on Provincial Offences Procedure in Ontario*, the authors at page 95 referred to *R. v. McCracken* (Ont. Prov. Div.), rendered on April 4, 1995 and concluded that:

If the prosecutor intends to rely upon technical equipment for which there is an operator's manual or other technical specifications, the disclosure obligation may be fulfilled by providing an opportunity for the defence to examine or reproduce the material.

26 I regard the radar manual being sought by the defendant to be relevant in that it contains information relating to the specifications referred to in the officer's notes. On a balance of probabilities, I am satisfied that the defendant's ability to make full answer and defence to the charge of speeding may be adversely affected if the radar manual is not disclosed to the defendant. Accordingly, the manual must be disclosed to the defence.

Copyright on manual

27 Additionally, the prosecution argues that it cannot provide a copy of the radar manual to the defendant as there is copyright protection on the manual. I find the issue of copyright not to be a persuasive argument in not disclosing the manual. The prosecution has not convinced me that there is an important interest belonging to the author, publisher or

owner of the copyright over the manual that ought to be protected.

28 Copyright is defined in Dukelow and Nuse's, *The Dictionary of Canadian Law* (2d), (Scarborough, Canada: The Carswell Company Limited, 1995), at page 259 as:

The sole right to produce or reproduce the work or any substantial part thereof in any material form whatever ...

...

[T]he exclusive right to make copies; and concomittant right to restrain others from making copies.

...

It is, in effect, a right to prevent the appropriation of the expressed result of the labours of an author by other persons.

29 Copyright as intellectual property protects the interest of the creator or owner in the manual and to ensure the right of the copyright owner to capitalize or benefit exclusively in the use of the writing or document. I fail to see how the defendant will be able to make full answer and defence without a copy of the manual. If the defendant's only intention is to obtain a copy in order to prepare its defence the manual should not be kept from the defendant because of some copyright interest. The underlying principle is the defendant's right to make full answer and defence, and in this particular case, that right is paramount to any interest that the owner of the manual may have in the copyright over the manual. However, there may exist a situation when there may arise the need to protect the copyright interest. If the defendant made any use of the manual other than for its defence then I find the prosecution has a strong argument for protecting the copyright interest.

Are maintenance notes sought by the defence relevant?

30 There is no evidence before me that the officer carries out maintenance on the radar device or that the maintenance of the radar is at issue. Therefore, I will not order that the maintenance notes be disclosed to the defendant. However, if after the radar manual is disclosed to the defendant and maintenance of the radar device becomes an issue, then the defendant may seek an order for disclosure of the maintenance notes. Otherwise, as suggested by the prosecution, the defendant may seek the notes by way of an application under the Freedom of Information Act.

Request for Dismissal

31 In the most drastic cases concerning a lack of disclosure, I may, sitting as the trial judge, declare a mistrial, exclude the non-disclosed evidence, dismiss the case, or stay the proceedings as a remedy under section 24 of the Charter or as a common law remedy for an abuse of process. I must be satisfied that a particular case, concerning a lack of disclosure of relevant information, be one of the most drastic or exceptional cases of abuse before I would grant a stay of proceedings. Madam Justice L'Heureux-Dubé of the Supreme Court of Canada in *R. v. O'Connor* [1995] S.C.J. No. 98, referred to this principle at paragraphs 76 and 77 of the judgment:

As I have stated, non-disclosure will generally violate s. 7 only if it impairs the accused's right to full answer and defence. Although it is not a precondition to a disclosure order that there be a Charter violation, a disclosure order can be a remedy under s. 24(1) of the Charter. Thus, where

the adverse impact upon the accused's ability to make full answer and defence is curable by a disclosure order, then such a remedy, combined with an adjournment where necessary to enable defence counsel to review the disclosed information, will generally be appropriate.

There may, however, be exceptional situations where, given the advanced state of the proceedings, it is simply not possible to remedy through reasonable means the prejudice to the accused's right to make full answer and defence. In such cases, the drastic remedy of a stay of proceedings may be necessary.

32 Other remedies available for inadequate disclosure for a Provincial Offences matter include: adjournment with or without an order for disclosure or an order for costs for defendant's witnesses pursuant to section 60 of the Provincial Offences Act, R.S.O. 1990, c. P.33.

33 The defendant's request in this matter, to have her case dismissed, is premature. I find the prosecution's failure to disclose at this stage, not to be an abuse of process. The prosecution exercised their discretion, and believed they had no obligation to disclose the manual or the maintenance notes. The defence is entitled to seek an order for disclosure from the trial judge, if the defence declines to disclose certain items. The Supreme Court of Canada in *R. v. O'Connor* [1995] S.C.J. No. 98, at paragraph 5 of the judgment affirmed the discretion of the prosecution in determining relevance of documents or items requested for disclosure:

The Crown's duty to disclose information in its possession is triggered when a request for disclosure is made by the accused. When such a request is made, the Crown has a discretion to refuse to make disclosure on the grounds that the information sought is clearly irrelevant or privileged. Where the Crown chooses to exercise this discretion, the Crown bears the burden of satisfying the trial judge that withholding the information is justified on the grounds of privilege or irrelevance.

34 I do not find the action of the prosecution at this stage to be abusive. And to reiterate, I am bound by precedent not to grant a remedy of a stay, or to dismiss the case, except under the clearest of cases of prosecutorial abuse. In the situation before me, I do not find the evidence supports a finding that this case is one of the clearest of cases of abuse of process or avoidance of disclosure.

CONCLUSION

35 I have not found a ruling by a higher court, nor am aware of a higher court decision that has ruled the radar manual must be disclosed without a request from the defendant for the manual. That is, I have not found a ruling that the radar manual must be disclosed automatically to the defendant whether the defendant seeks it or not. However, when the defendant requests the manual from the prosecution, and the officer's notes reveal that the officer had tested the radar according to manufacturer's specifications, then the manual should be disclosed to the defendant, as I have found in the instant case. Otherwise, how does the defendant know what those specifications were that the officer was guided by?

36 The obligation by the prosecution to disclose will be triggered by a request by or on behalf of the defendant for the manual, if supported by the officer's notes that tests were performed on the radar device according to manufacturer's specifications. In this instant case, the request for disclosure had been made by the defendant to the prosecution, and therefore, obligates the prosecution to disclose the requested radar manual.

37 Prosecutorial discretion over disclosure to the defendant is reviewable by the trial judge. On review, the prosecutor must justify its refusal to disclose or reasons why only certain items were disclosed. In the case before me, I have reviewed the reasons of refusal by the prosecution to disclose the radar manual, and I have determined that the prosecution's reasons are not a justification for not disclosing.

38 The Prosecution's explanations to the defendant, of having to seek the manual by subpoena (which does not disclose but only brings the document to court), or by applying under the Freedom of Information process, or that copyright over the manual prevents it from being disclosed, are not convincing or valid arguments in this case for non-disclosure.

39 In this present case, in which the police refused to disclose the radar manual and the maintenance notes, I find the defendant's case not to be one in which an order to dismiss the case or stay the proceeding is warranted. Instead of granting the most exceptional of remedies, I find the appropriate remedy is to grant a further adjournment and to order the radar manual disclosed to the defence. In this case, the defendant has established a rational basis or factual foundation of relevance for the radar manual to be disclosed, but not for the disclosure of the maintenance notes. As the officer's notes disclosed that he had tested the radar according to manufacturer's specifications, the defendant is entitled to the radar manual, if the defendant makes the proper request for disclosure.

ORDER

40 This matter will be adjourned to September 28, 1998 for trial and the Prosecution must disclose the radar manual by August 17, 1998 to the defence in order for the defendant to prepare its defence.

QUON J.P.

cp/d/bbd/DRS

16

ICLR: King's/Queen's Bench Division/1981/HOME OFFICE v. HARMAN - [1981] Q.B. 534

[1981] Q.B. 534

[COURT OF APPEAL]

HOME OFFICE v. HARMAN

1980 Nov. 19, 20, 21; 27

Park J.

1981 Jan. 28, 29, 30; Feb. 6

Lord Denning M.R., Templeman and Dunn L.JJ.

Contempt of Court - Solicitor - Disclosure of documents - Solicitor's implied undertaking not to use documents disclosed on discovery except for purposes of litigation - Confidential documents disclosed and read in court at trial - Solicitor allowing journalist access to documents after trial for purpose of writing feature article - Whether breach of implied undertaking - Whether serious contempt

The respondent, a solicitor and legal officer of the National Council for Civil Liberties ("N.C.C.L."), was acting as solicitor for the plaintiff in an action against the Home Office arising out of his treatment in prison in an experimental "control unit." During the course of the action the Home Office disclosed a large number of documents. The solicitor for the Home Office, in a letter dated October 17, 1979, stated the Home Office did not wish the documents to be used for the general purposes of the N.C.C.L. outside the respondent's function as solicitor for the plaintiff in the action. The respondent replied to that letter on the same day, saying that she was well aware of the rule that documents obtained on discovery should not be used for any purposes other than for the case in hand. The Home Office was later ordered to disclose six confidential documents which they objected to produce on the ground of public interest immunity. The respondent selected from the documents disclosed those required for use at the trial of the plaintiff's action, and in due course they were read out by counsel at the hearing. A few days after the hearing the respondent allowed a journalist whom she knew to be a feature writer, and who had been present during part of the hearing, to have access to the documents that had been read out, including the confidential documents, for the purpose of writing a newspaper article. The article was highly critical of Home Office ministers and civil servants. The Home Office applied under R.S.C., Ord. 52, r. 9 for an order against the respondent for contempt of court, alleging that she was in breach of the undertaking, implied by law and affirmed in her letter of October 17, not to use documents obtained on discovery for purposes other than those of the action in which they were disclosed. Park J. held that the respondent was in contempt of court, but accepted that she had acted in good faith and imposed no penalty.

On appeal by the respondent:-

Held, dismissing the appeal, that although the right to privacy and respect for confidential documents could be

overridden in the interests of justice, and a party to litigation might be ordered to disclose all the documents in his possession relevant to the issues in the action, the court implied an undertaking by the party to whom disclosure had been made that he would make use of the documents only for the

[1981] Q.B. 534 Page 535

purposes of the action; that such an undertaking was not destroyed by reading out the documents in open court, nor did the public interest require that it should be so destroyed; and that there could be no further use of the documents or dissemination of their contents without the consent of the owner (post, pp. **557D-G, 558H - 559A, E-F, 561D-E, G-H, 562C, E**); that, in the present case the inference could be drawn that the respondent had induced the belief that she had obtained disclosure of the documents on behalf of the N.C.C.L., and since she had used them or authorised their use for the purpose of reproduction in the press, she had not confined her use of them to use in the action brought by the plaintiff against the Home Office, and accordingly, she had committed a serious contempt of court (post, pp. **556D-E, G-H, 557H - 558B, E-F, 562D-E, 564B-C**).

Scott v. Scott [1913] A.C. 417, H.L.(E.) and *Riddick v. Thames Board Mills Ltd.* [1977] Q.B. 881, C.A. considered.

Per Dunn L.J. If a reporter wishes to check the date of a document or its exact wording, he or she can always ask counsel or solicitor for the party who has disclosed the document. There is no reason why such a request should be refused (post, p. **563D-E**).

Decision of Park J. post, p. **536H** *et seq.* affirmed.

The following cases are referred to in the judgments in the Court of Appeal:

Baker v. Bethnal Green Borough Council [1945] 1 All E.R. 135, C.A.

Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England [1979] 1 W.L.R. 473; [1979] 2 All E.R. 461, C.A.; [1980] A.C. 1090; [1979] 3 W.L.R. 722; [1979] 3 All E.R. 700, H.L.(E.).

Conway v. Rimmer [1968] A.C. 910; [1968] 2 W.L.R. 998; [1968] 1 All E.R. 874, H.L.(E.).

Gammell v. Wilson [1981] 2 W.L.R. 248; [1981] 1 All E.R. 578, H.L.(E.).

Pickett v. British Rail Engineering Ltd. [1980] A.C. 136; [1978] 3 W.L.R. 955; [1979] 1 All E.R. 744, H.L.(E.).

Rex v. Wilkes (1770) 4 Burr. 2527.

Riddick v. Thames Board Mills Ltd. [1977] Q.B. 881; [1977] 3 W.L.R. 63; [1977] 3 All E.R. 677, C.A.

Schering Chemicals Ltd. v. Falkman Ltd. [1981] 2 W.L.R. 848; [1981] 2 All E.R. 321, C.A.

Scott v. Scott [1913] A.C. 417, H.L.(E.).

Williams v. Home Office (No. 2) [1981] 1 All E.R. 1211.

The following additional cases were cited in argument in the Court of Appeal:

ALAE v. BEA [1973] I.C.R. 601, N.I.R.C.

Alterskye v. Scott [1948] 1 All E.R. 469.

Church of Scientology of California v. Department of Health and Social Security [1979] 1 W.L.R. 723; [1979] 3 All E.R. 97, C.A.

Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd. [1975] Q.B. 613; [1974] 3 W.L.R. 728; [1975] 1 All E.R. 41.

National Sulphuric Acid Association's Agreement, In re (No. 2) (1966) L.R. 6 R.P. 210, R.P.Ct.(E. & W.).

The following cases are referred to in the judgment of Park J.:

Alterskye v. Scott [1948] 1 All E.R. 469.

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Attorney-General v. New Statesman and Nation Publishing Co. Ltd. [1981] Q.B. 1; [1980] 2 W.L.R. 246; [1980] 1 All E.R. 644, D.C.

Halcon International Inc. v. Shell Transport and Trading Co. [1979] R.P.C. 97, Whitford J. and C.A.

Riddick v. Thames Board Mills Ltd. [1977] Q.B. 881; [1977] 3 W.L.R. 63; [1977] 3 All E.R. 677, C.A.

Scott v. Scott [1913] A.C. 417, H.L.(E.).

Williams v. Home Office [1981] 1 All E.R. 1151.

Williams v. Home Office (No. 2) [1981] 1 All E.R. 1211.

The following additional cases were cited in argument before Park J.:

ALAE v. BEA [1973] I.C.R. 601, N.I.R.C.

Attorney-General v. Leveller Magazine Ltd. [1979] A.C. 440; [1979] 2 W.L.R. 247; [1979] 1 All E.R. 745, H.L.(E.).

Attorney-General v. Times Newspapers Ltd. [1974] A.C. 273; [1973] 3 W.L.R. 298; [1973] 3 All E.R. 54, H.L.(E.).

Church of Scientology of California v. Department of Health and Social Security [1979] 1 W.L.R. 723; [1979] 3 All E.R. 97, C.A.

Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd. [1975] Q.B. 613; [1974] 3 W.L.R. 728; [1975] 1 All E.R. 41.

Lonrho Ltd. v. Shell Petroleum Co. Ltd. [1980] 1 W.L.R. 627, H.L.(E.).

Mileage Conference Group of the Tyre Manufacturers' Conference Ltd.'s Agreement, In re (1966) L.R. 6 R.P. 49; [1966] 1 W.L.R. 1137; [1966] 2 All E.R. 849, R.P.Ct.(E. & W.).

National Sulphuric Acid Association's Agreement, In re (No. 2) (1966) L.R. 6 R.P. 210, R.P.Ct.(E. & W.).

Motion

By a notice of motion dated June 12, 1980, the Home Office applied for an order against the respondent, Harriet Harman, a solicitor, under R.S.C., Ord. 52, r. 9, for relief other than committal to prison for contempt of court in supplying to "The Guardian" newspaper copies of documents disclosed by the Home Office in the action numbered 1975 W. No. 465 by herself her servants or agents, in breach of an undertaking implied by law and affirmed in a letter from her to the Treasury Solicitor dated October 17, 1979, that documents obtained on discovery would not be used otherwise than in, and solely for the purposes of, the action in which they were disclosed.

The facts are stated in the judgment.

Simon D. Brown and **Philip Vallance** for the Home Office.

Leolin Price Q.C. and **Geoffrey Robertson** for the respondent.

Cur. adv. vult.

November 27, 1980. PARK J. read the following judgment. In these proceedings Mr. Simon Brown, on behalf of the Home Office, moves for an order against the respondent, Harriet Harman, a solicitor and legal officer, under R.S.C., Ord. 52, r. 9 for relief, other than committal to prison, for contempt of this court in supplying to "The Guardian" newspaper

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copies of 800 pages of documents disclosed to her in her capacity as the solicitor for her client, Mr. Williams, in his action against the Home Office.

The basis of the case against her is that in supplying these documents, in the circumstances about to be related, to a Mr. David Leigh, who is an experienced reporter and writer of feature articles for "The Guardian" newspaper, she broke the

undertaking which, as a matter of law, is impliedly given by all those to whom documents are vouchsafed by discovery in legal proceedings, that undertaking being not to make use of such documents except for the purpose of the action in which they have been disclosed.

The matter came to light on the publication of the edition of "The Guardian" newspaper for April 8, 1980. It contained an article by Mr. David Leigh entitled, "How Ministry hardliners had their way over prison units." The article made quotations from, or references to, a number of the Home Office internal documents which had been disclosed in *Williams v. Home Office (No. 2)* [1981] 1 All E.R. 1211. That action had lasted for five weeks from February 25, 1980 to March 28, 1980. Mr. Williams's counsel took five days to open the case and, in the course of doing so, all the 800 documents were read out in court.

The questions to be decided in the present proceedings are whether the reading out of the documents operated to destroy the undertaking implied by law and, if not, whether what was done by the respondent nevertheless constituted a breach of the undertaking.

The contempt alleged is a civil contempt not a criminal contempt. Accordingly, it is not suggested that the respondent's conduct prejudiced a fair trial of the action or interfered with the course of justice either in the action or as a continuing process, or that the judge could have been in any way affected by the article which appeared before he had delivered his judgment. It is accepted that the reporters from "The Guardian" newspaper or anyone else who happened to be in court during the hearing and had the facilities for doing so, could have made such notes as they were able to make or obtained a transcript and that, had such material been used for the writing of the article, no contempt would have been committed.

The facts are these. In the action Mr. Williams claimed damages because he had spent six months of a substantially longer prison sentence in what was called a special control unit, that being a form of imprisonment for particularly disruptive prisoners. As a result of three separate orders for discovery, the Home Office disclosed a total of 6,800 pages of documents. Because of the volume of disclosed minutes and memoranda relating to the formulation and discussion of policy, the Home Office was concerned that Mr. Williams and his expert witnesses should be aware of the rule of law that documents offered on discovery should not be used for any other purpose than that of the action in which they were disclosed. The Home Office was also concerned that documents so obtained should not inadvertently be allowed to be put to some other use at some future date.

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So just before the second order for discovery on October 25, 1979, there was some correspondence between the Treasury Solicitor and the respondent, beginning with a letter dated October 17, 1979. In that letter the Treasury Solicitor sought assurances that the documents disclosed would be used solely for the purposes of the action. The letter concludes:

"My client does, however, require that inspection of the disclosed documents and dissemination of their contents should be limited to the legal officers of N.C.C.L. and their assistants at any time concerned with the conduct of this action, except insofar as wider inspection or dissemination is strictly necessary for the conduct of the action. In other words my client would not wish the documents to be used for the general purposes of the N.C.C.L. outside your function as solicitor for the plaintiff."

In the last two paragraphs of her reply the respondent wrote:

"As far as the documents which have been shown to potential expert witnesses are concerned, we have in the normal way warned

those witnesses that the only purpose for which the documents are to be used is for preparing their evidence in this case. As far as 'the general purposes of N.C.C.L.' is concerned you may rest assured that, as a solicitor, I am well aware of the rule that requires that documents obtained on discovery should not be used for any other purpose except for the case in hand."

Her assurance did not differ in any material respect for the undertaking implied by law. The Treasury Solicitor's answer included these sentences:

"As to your last paragraph my client department is happy to accept the assurance which you give and I shall accordingly not pursue the matter further. ... So far as the potential expert witnesses are concerned, I have noted the warning which you have given them as to the use of the documents and am grateful for this. I am not in any way doubting their good faith in adhering to the warning. However, with the best will in the world it is possible for other people to forget the purpose for which the documents were originally supplied; entirely without blameworthiness on the part of the original recipients, it is possible for these documents to change hands and as a result fall into the custody of people who may be entirely ignorant of the background In these circumstances I still require an assurance that the documents supplied to potential expert and other witnesses should be returned as soon as reasonably practical after the trial."

By her letter dated December 18, 1979, that assurance was given by the respondent:

"As far as the documents that have been disclosed in this case are concerned I undertake to ask the expert witnesses who have been sent

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copies of the documents to return them to me when the action has been completed."

At the time of this correspondence public interest immunity was claimed in respect of 23 disclosed documents. On Mr. Williams's application, McNeill J., on January 29, 1980, ordered production of five of those documents, which included a submission to Sir Arthur Peterson and Minister of State, Lord Colville, a submission to the Secretary of State and others, and a note of a meeting with the Secretary of State. Mr. David Leigh's article contained quotations from these documents.

The respondent was present when McNeill J. delivered a careful judgment in *Williams v. Home Office* [1981] 1 All E.R. 1151. At p. 1159 McNeill J. cited the passage in the speech of Lord Reid in *Conway v. Rimmer* [1968] A.C. 910, where Lord Reid said, at p. 952:

"The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind."

Towards the end of his judgment, McNeill J. said [1981] 1 All E.R. 1151, 1160-1161:

"The risks attendant upon inspection and production as postulated by Lord Reid (see [1968] A.C. 910, 952) are in any event minimised in two ways. Firstly, if after inspection the court orders production, the order may provide for production of part only of a document, the remainder being sealed up or otherwise obscured. Secondly, it is plain from the decision of the Court of Appeal in *Riddick v. Thames Board Mills Ltd.* [1977] Q.B. 881, if it was not plain before, that a party who disclosed a document was entitled to the protection of the court against any use of the document otherwise than in the action in which it is disclosed: as Lord Denning M.R. put it, at p. 896D: 'The courts should, therefore, not allow the other party - or anyone else - to use the documents for any ulterior or alien purpose. ... In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed.' Undoubtedly this applied to litigants and their legal advisers; see also the references in *Church of Scientology v. Department of Health and Social Security*

[1979] 1 W.L.R. 723, 729 and 746G. Much of the reservation expressed by Lord Reid to which I have referred would in my view be met by adherence to what was said by the Court of Appeal in *Riddick's case*, reasserting what indeed had been the law previously. Having weighed all these various factors in the balance, I have come to the conclusion that the public interests of justice, including as they do here the rights of the citizen, and that liberty of a prisoner preserved for him by the statute and rules, must be the prevailing interest and that I should

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inspect the withheld documents. Accordingly, I have asked the Treasury Solicitor to provide the documents for that purpose."

Mr. Brown referred to these letters and to the subsequent history for the purpose of underlining two things: first, the great importance attached by the Home Office to compliance with the implied undertaking and, second, the legal officer's awareness of the importance being attached to it and of their reliance upon her good faith.

In her affidavit the respondent says that following press reports of the decision of McNeill J. she received a number of inquiries from persons describing themselves as reporters, requesting either a sight of the documents or general information as to their contents. She denied each request saying that she was not at liberty to make any such disclosures.

Mr. David Leigh was known to her as an experienced and respected reporter who had specialised in home affairs features for "The Times" and, more recently, "The Guardian" newspapers. During the hearing he had attended the court on some occasions when documentary exhibits were being read and he had written news stories about the action. Shortly before the hearing concluded Mr. Leigh approached her and told her that he was writing a feature article about some of the issues raised in the course of the case. He explained that he had not been in court throughout the whole of the proceedings and asked whether he could inspect the documents which had been read out in open court in order to refresh his memory and to obtain an accurate note of their contents. She did not think that Mr. Leigh's request was either unusual or inappropriate and saw no reason why she should refuse it.

Accordingly, at some date between March 28, 1980, and April 8, 1980, Mr. Leigh called by appointment at her office. She does not say on how many occasions he called. She permitted him under her surveillance to inspect and make notes of the contents of the two bundles comprising the 800 documents. Shortly before taking his leave Mr. Leigh asked about two photographs of the control unit produced by the Home Office for the convenience of the court and the parties. She allowed Mr. Leigh to take away the photographs, which do not form part of the contempt, because they were not disclosed documents.

The respondent says that she played no part in the writing of Mr. Leigh's article nor did she see it prior to its publication. On the other hand, it is contended, rightly as I think, that her conduct has to be judged in the light of all the circumstances in which the disclosure of the 800 documents came to be made, namely: (i) the correspondence with the Treasury Solicitor between October and December, 1979; (ii) the fact that the sensitive category of the five documents disclosed in consequence of the order of McNeill J. was not thereby altered; (iii) her acquiescence in arrangements for a reporter, who had been only occasionally in court, to inspect and take notes from a very large number of documents at her office, not for the purpose of preparing a law report or an account of the

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trial but for the purpose of a feature article which she must have known would have little concern with the legal issues which had arisen in the *Williams* action; it would be a spin-off from those proceedings, and (iv) her failure to seek the consent of the Home Office to the proposed disclosure, unquestionably due to the fact that she knew that any hint of her intention would have resulted in an immediate application to the trial judge for an injunction which would have been granted.

There is no dispute that at least until the hearing of this motion the law has been that a party to whom documents are disclosed on discovery in an action is under an implied obligation not to make use of them except for the purposes of the action in which they have been disclosed: *Alterskye v. Scott* [1948] 1 All E.R. 469 and, more recently, *Riddick v. Thames Board Mills Ltd.* [1977] Q.B. 881, cited by McNeill J. in the passages from his judgment to which I earlier referred.

Mr. Price, however, contends that in the absence of any previous decision of the court as to the duration of the obligation, the words "for the purposes of the action" in this statement of the law have to be qualified to the extent that, as regards any document read out in open court, the ordinary implied obligation to protect the confidentiality of that document is at an end because of the publicity necessarily attendant on the proceedings. What is said in open court can be reported without infringing the implied obligation.

I can summarise his argument in this way. Discovery is an invasion of a person's private right to keep his documents to himself. The effect of the implied obligation is to protect the confidentiality and privacy of such documents pendent lite. But in the words of Lord Halsbury in *Scott v. Scott* [1913] A.C. 417, 440, "every court of justice is open to every subject of the King." Thus, the public has an interest in the openness of justice in our courts. In those circumstances, once a document, however private or confidential, is read out in court there is, as he put it, something comical about the proposition that there is still some confidentiality attaching to it. So from that moment confidentiality is at an end. He cited a passage from *Goff and Jones, The Law of Restitution*, 2nd ed. (1978), at p. 512:

"The courts will not restrain a confidant from making use of information which is not confidential. 'Something which is public property and public knowledge' cannot per se provide any foundation for proceedings for breach of confidence ... [T]here can be no breach of confidence in revealing to others something which is already common knowledge.' It is irrelevant how the information became common knowledge ..."

Mr. Price points out that the courts provide ample protection for a party who wishes to ensure that the confidentiality of his documents will not be damaged at the trial. He can apply to a master or to a judge for a special

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order to ensure non-disclosure of a document's contents. For example, the document can be kept out of the bundle to be read in open court so that the judge and counsel can read it to themselves; or the judge can hear part of the case in camera; or special orders on the lines of those sometimes made in trade secrets cases and the like can be made. Mr. Price relies on the fact that no such application was made on behalf of the Home Office in the *Williams* action.

For these reasons Mr. Price says that as all the 800 documents were read out in open court they all lost their confidentiality and, in those circumstances, the respondent was at liberty to re-publish their contents without infringing the implied obligation.

It may at first seem absurd that, although the confidentiality of a disclosed document has been destroyed by the measure of publicity given to it when it is read in open court, yet the party obtaining a copy of it for the purposes of the civil action may not thereafter publish it again outside the court without committing a contempt. But I think that the explanation for the apparent absurdity is to be found by examining the reason for an order for discovery and its consequences. The reason was spelt out by Lord Denning M.R. in *Riddick v. Thames Board Mills Ltd.* [1977] Q.B. 881 in one sentence, at p. 895:

"The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties."

Therefore documents disclosed on discovery are those to be used by one party or the other in support of his claim or in support of his defence to a claim or in any other way thought right for the purpose of determining or assisting in the determination of the issues between them and discovering where the truth lies so that justice may be done. It is as if each document disclosed bears a warning in some such words as: "Disclosed in the action *A. v. B.* NOT to be used for any other purposes except with the leave of the court or the owner." All the objects of discovery have been achieved by the time disclosed documents have been produced, put in evidence and read in open court.

The question in these proceedings is, when once a document has been read in open court is the party who did not disclose it free to make such use of it as he likes, subject only to the restraints imposed by the law of defamation or of copyright and the like?

As I have said, I think that the answer to the question is to be found in the reason why he had possession of it in the first place, that is, by virtue of an order for discovery made for the purpose of determining the issues between himself and his opponent and of discovering where the truth lies. In my judgment that reason for his possession of it never changes. It must continue throughout the period of his possession of the document however long that may be. If, during that period, he were to be asked

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how the document came to be in his possession he would have to reply that he received it by virtue of an order for discovery in the proceedings against its owner. In those circumstances, is it necessary in the interests of justice that the implied obligation in relation to the documents should run concurrently with his possession of it?

Mr. Brown draws attention to the consequences if the obligation ceased at the moment when the document was read in open court. In that event there would be nothing to prevent him from sending to the press or to anyone else not only that document but all the documents of his opponent read out in court. In the instant case the respondent would be able to make available, whenever she pleased and to whomsoever she pleased, the contents of the highly confidential documents in her possession. Indeed, judging from remarks alleged to have been made by her to Frances Gibb, the writer of an article in "The Times" of May 10, 1980, that is what she probably intends to do.

Of course, a litigant in a civil action has to accept the possibility that his confidential documents, if read out in court in the proceedings, might well receive much wider publicity than he foresaw. If his case happened to raise some interesting point of law, they might be recorded in a law report; if the case aroused public interest newspaper reporters would be present in court throughout most of the proceedings for the purpose of reporting on the facts which might well include references to confidential documents. But in the ordinary way the risk of publicity outside the court to the contents of documents read inside the court is small. That risk, however, would be immeasurably increased if his opponents were able to publish his documents once they had been read in open court. In *Riddick v. Thames Board Mills Ltd.* [1977] Q.B. 881, Lord Denning M.R. said, at p. 896:

"Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires."

I think that if one of the consequences of an order for discovery were to make it possible for a party to make free use of his opponent's documents once such documents had been read in court, the fact that such a right existed would convert the order into an even greater invasion of privacy than it now is and would also operate as a powerful disincentive to the making of proper discovery, for at this stage there could be no certainty that the court would make any order giving

special protection to confidential documents.

The most recent case to which I was referred on this subject was *Halcon International Inc. v. Shell Transport and Trading Co.* [1979] R.P.C. 97. Of the somewhat complicated facts I need say only that the documents referred to in the judgment had not been read in court. I read the whole of the passage from the judgment of Megaw L.J. at p. 121 because [1981] Q.B. 534 Page 544

it summarises the effect of all the cases cited to me in argument and, in addition, refers to the fact that there is no breach of the implied obligation if the court permits a party who has obtained documents on discovery to use them for a purpose other than the purposes for which they have been produced. Megaw L.J. said, at p. 121:

"The general provision of English law with regard to the use of documents which have been made available by a party in discovery in an English action is, I think, not in dispute. I am quite content to accept it as it is set out in passages in *Bray on Discovery*, 1st ed. (1885). It is an old book, published in 1885; but, so far as concerns the principles which I am going to quote, they are, in my judgment, still applicable and they are accurately set out. At p. 238 it is said: 'A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit.' The reasons for that have been stated in a number of cases in the courts. One of them is, to my mind, an obvious reason: documents belonging to a party are their own property. It is perfectly right, in accordance with English procedure, that, where litigation is involved in which that party is either the plaintiff or the defendant, he should be obliged to disclose documents which are in his possession, even though they may tell against his own interest, subject always, of course, to particular rules as to certain documents being privileged (which does not arise in this case). But it is in general wrong that one who is thus compelled by law to produce documents for purposes of particular proceedings should be in peril of having these documents used by the other party for some purpose other than the purpose of those particular legal proceedings and, in particular, that they should be made available to third parties who might use them to the detriment of the party who has produced them on discovery. And there is the further, practical, reason which has been stressed recently in the case of *Riddick v. Thames Board Mills Ltd.* [1979] Q.B. 881, by Lord Denning M.R.: that it is important, for the administration of justice, that there should not be a disincentive to parties to make proper discovery, so that they are minded to hold back, and seek to avoid the disclosure of documents which may tell against themselves in litigation. One substantial disincentive would be if there was the danger that those documents, being disclosed, might be used for purposes outside the purposes of the particular action.

"Mr. Bray in his book at p. 239 says: 'The principle, however' - that is, the principle in the passage which I have recently quoted - 'is not that the party cannot be compelled to divulge them for any other purpose even if the court should in any case so think fit, but that they cannot be used except under the authority of the court: ...' It is open to the court, if the court sees fit, to give permission to a party who has obtained documents or copies of documents on discovery

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in an action, to use those documents for a purpose other than the purposes of the action in respect of which they have been produced."

To the instance referred to in the last paragraph there can be added another: there would be no breach by a party who used his opponent's documents for another purpose with his consent.

For these reasons I have come to the conclusion that the implied obligation binds the party throughout the period his opponent's documents are in his possession. That period will vary considerably from case to case. In some cases the documents may not be preserved for long after the final hearing in the court; in other cases, such as matrimonial causes and actions in the Chancery Division relating to wills and trusts, they may well have to be kept for a very long time indeed.

Mr. Price says that if his first submission goes too far, then he submits in the alternative that the implied obligation is subject to the limitation that any disclosed document which at the trial is read out in open court can be disclosed to reporters, journalists and others for the purposes of reporting or commenting on the trial or the matters in issue in the

proceedings.

As I have said earlier, documents are disclosed for the purpose of assisting in the determination of the issues between the parties. They are not disclosed for the purpose of assisting reporters, journalists and others in the business of reporting or commenting on the trial or the matters in issue in the proceedings. In my view, the implied obligation is not subject to a the limitation contended for by Mr. Price in his alternative submission.

On the other hand, a person who permits a reporter or a journalist to study a disclosed document read out in open court does not thereby inevitably commit a contempt: see *Alterskye v. Scott* [1948] 1 All E.R. 469, 471. His conduct would certainly be capable of constituting a contempt but whether it was in fact a contempt would have to be judged in the light of all the circumstances in which the disclosure was made: see *Attorney-General v. New Statesman and Nation Publishing Co. Ltd.* [1981] Q.B. 1, 10.

In my opinion it is very unlikely that a person who disclosed the document, for example, to a reporter or a journalist or the writer of an article for a law journal so that he might use it in the ordinary way for the purpose of his work would commit a contempt of court. But in deciding whether any disclosure amounted to a contempt the court would have to take into consideration all the circumstances, including such matters as the purpose and the extent of the disclosure; its date in relation to the trial and the action; whether the opposite party's consent to the disclosure was sought and, if so, the reason for the refusal; whether the leave of the court should have been obtained before the disclosure was made, and generally all the circumstances surrounding the making of the request for disclosure and the compliance therewith.

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In the present case the respondent was bound by the implied obligation at the time when she disclosed the Home Office documents to Mr. Leigh. In thus disclosing them she was not making use of them for the purpose of the action by Mr. Williams against the Home Office. Having regard to all the circumstances in which she made the disclosure, I have no doubt that she was guilty of a serious contempt of court.

The Home Office believes that she acted in good faith. I am willing to regard myself as bound by that opinion. For these reasons I will impose no penalty.

Application granted.

No penalty imposed.

No order as to costs.

Solicitors: *Treasury Solicitor; Seifert, Sedley & Co.*

[Reported by ISOBEL COLLINS, Barrister-at-Law]

APPEAL from Park J.

The respondent appealed on the grounds that (1) the judge erred in law in finding the respondent in contempt of court by reason of her grant of permission to a journalist to peruse documents discovered by the Home Office after the entire contents of the documents had been read aloud in open court; (2) the obligation upon a solicitor to protect the confidentiality of the contents of a document delivered into his or her possession by virtue of an order for discovery terminated when, and to the extent that, the contents were read out in open

court in proceedings unaffected by any order or rule of law restricting reports thereof; (3) further, or in the alternative, a solicitor was entitled to make use of a discovered document, the contents of which had been read in open court, for the purpose of assisting journalists or others to report or comment on the trial or matters raised in the proceedings; (4) the judge's ruling that a solicitor who disclosed the contents of discovered documents after they had been read in open court might or might not be held in contempt, depending upon the view taken by the particular court of all the circumstances surrounding the disclosure, was unsatisfactory because it set an unclear and unpredictable standard for liability for contempt; (5) the judge, in determining that the public interest served by facilitating press reports and comments relating to the respondent was guilty of contempt, failed to give adequate weight to the matters heard in open court, particularly those which touched upon the liberty of subject or the activities of departments or government.

The facts are stated in the judgment of Lord Denning M.R.

Leolin Price Q.C., Geoffrey Robertson and Andrew Nicol for the respondent. This is the first case concerned with the content of the implied undertaking not to use documents disclosed by a party to litigation for purposes other than those of the litigation.

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The first submission for the respondent is that, as regards any document read out in open court, the ordinary implied obligation to protect the confidentiality of that document is at an end, because of the publicity necessarily attendant on the proceedings. What is said in open court can be repeated without infringing the implied obligations. Alternatively, if that submission is too strong, the obligation is subject to the limitation that any discovered document which, at the trial, is read out in open court can be disclosed to reporters, journalists and others for the purpose of enabling or helping them to report or comment on the trial or the matters in issue in the proceedings.

Extreme importance has attached for the last 300 years to the openness of the judicial process in England, although there is a residual power for a court to sit in camera if the interests of justice require it: see *Scott v. Scott* [1913] A.C. 417, 442, *per* Lord Halsbury; *In re National Sulphuric Acid Association's Agreement (No. 2)* (1966) L.R. 6 R.P. 210, 221, *per* Megaw J. and *Baker v. Bethnal Green Borough Council* [1945] 1 All E.R. 135, 144. Justice must be done, and the public interest in publicity must be protected unless there are reasons to the contrary. Compulsory discovery is an invasion of a private right to keep one's documents private unless they are read out in open court: see *Riddick v. Thames Board Mills Ltd.* [1977] Q.B. 881, 888, 895. Once they are read out in open court they are no longer confidential, but they still could not be used as the basis of a new action. That does not depend on the continuation of the undertaking. *Riddick's case* was one where the purposes of the action in which the documents were discovered did not include the conduct of that case in open court and did not involve the actual reading of the documents in open court; it would be wrong to apply to Lord Denning M.R.'s words at p. 895-896 a "Parliamentary" interpretation and treat them as applicable where the purposes have included the reading of the documents in open court. The publicity attendant on a document being read out in open court is such that the public is entitled to know, through the press if it wishes, what went on in court. Once it is accepted that the purposes of an action comprehend the publicity attendant on the proceedings, what happens as serving that publicity cannot fall within the prohibition contained in the implied obligation. The implied obligation applies unless and until the document is read out in open court, which terminates it. It is wrong to say that the undertaking is in the terms of *Riddick's case*. The alternative way of putting the undertaking may give rise to difficulties in respect of the extent of comment on a trial. That might prove impracticable in operation and undesirably lacking in certainty. If that test were adopted, would the propriety of disclosure depend on the reporter having been in court at the time the document was read out?

For observations on making use of material obtained on discovery for improper purposes, see *Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England* [1979] 1 W.L.R. 473, 489, *per* Lord Denning M.R.; [1980] A.C. 1090,

1134, *per* Lord Keith of Kinkel and *Church of Scientology of California v. Department of Health and Social Security* [1979] 1 W.L.R. 723, 746, *per* Templeman L.J.

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Practical difficulties would be involved in inquiring the purpose for which a person wanted a copy of a document read out in court. That may dispose the court in favour of the first submission. Reading out in open court must have a decisive influence on the content of the undertaking, and logic, common sense and simplicity favour that submission. It is not the case that the consequences of either proposition would be that the respondent would be at liberty to have documents printed and circulated widely; the ordinary protections of the law of copyright and defamation remain. Nothing in *Riddick's case* [1977] Q.B. 881 suggests that the result would have been different if the documents had been read out in open court.

Simon D. Brown and **Philip Vallance** for the Home Office. The questions raised are the extent of the undertaking and the policy of the law. The answer to the first question is that documents may be used in and for the direct purposes of the action in which they were discovered. They must not be used for an improper or collateral purpose. The question particularly raised by this appeal is the extent to which the undertaking is affected by the reading out of a document in open court. There are five possible answers. First, the respondent's first submission. Second, reading out has no effect at all. Third, the answer given by Park J. in the present case. Fourth, the respondent's alternative submission. Fifth, the permitted use of discovered documents should embrace the bona fide use by those concerned in fair, accurate and contemporaneous reporting of judicial proceedings.

Reading out of documents in open court has no effect on the undertaking, but it is then necessary to interpret and apply the undertaking in the light of fresh circumstances. It can fairly be said that an integral part of the purpose of an action is that those who are concerned to report it fairly and accurately as it proceeds should be able to do so. Therefore, if it is necessary for fair and accurate reporting that the reporter should have sight of documents used at the hearing, the person to whom those documents have been disclosed on discovery can show them to him. Normally it does not matter in fact whether it is the person to whom the documents are discovered or the owner of them who is asked, since there is probably an implied consent that they can be used for that purpose. Where there is any issue whether the documents were genuinely provided for that purpose it would be right to look at all the surrounding circumstances to resolve that issue. The criterion is whether the documents are used at the hearing, not whether they are read out. Thus if a judge says "Don't bother to read the rest of that document out, I have read it," it can still be disclosed for the purpose of a fair and accurate report. This is not confined to a law reporter, but applies to any reporter making a fair and accurate report. Reading out has no effect at all. Writing a feature article which is not even about the case itself is a collateral purpose.

At the heart of the respondent's first submission is the proposition that the purposes of the action include the widest possible publicity for the proceedings. That is disputed; but to dispute it in no way detracts from the principle of open justice. Legal proceedings take place in

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may be made into public ones. It is not sought to restrict reporting, merely to deny those to whom documents are disclosed by virtue of their privileged position the special opportunities, quite often for reasons other than of fair reporting, of causing the wider dissemination of documents and the inevitable loss of privacy thereby involved. If the respondent's submissions are right the consequence would be to obstruct open litigation because parties would be bound to take steps to prevent documents being read out in court, and special orders relating to discovery would have to be sought. In fact, the documents in question in the present case were held by the judge to be inadmissible. If it was not thought right to make a special order in a particular case, the *Riddick* principle could not thereafter be invoked as an additional reason for ordering discovery of sensitive material. The two ends of the spectrum can be seen in *Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England* [1980] A.C. 1090, 1136, 1145, *per* Lord Keith of Kinkel and

Lord Scarman and at p. 1112 *per* Lord Wilberforce (dissenting).

It is not enough to say that the discoveror is protected by the law of defamation and the law of copyright. If it is a good point there is no need for the *Riddick* principle at all. The respondent's first submission is inconsistent with *Riddick's case* on its facts. The reason he could not bring the third action in that case was not because the document had not been read out in court (the document must have been read out in the course of the second proceedings) but because you cannot use a discovered document for an ulterior purpose.

ALAE v. BEA [1973] I.C.R. 601 contains useful dicta by Sir Hugh Griffiths at p. 606, although it is remote on the facts. *Alterskye v. Scott* [1947] 1 All E.R. 469 shows that it was then thought sensible to treat the undertaking as implied because of the difficulty of formulating any other principle.

The respondent's alternative submission has no sound jurisprudential basis at all. It clearly does not depend on confidentiality, because the documents retain their confidentiality for purposes outside the scope of the proposition. It is uncertain in its effect because it relates to "reporters, journalists and others," and to "purposes of report or comment" on the trial or "matters in issue."

The only reason for saying that the person to whom documents are disclosed on discovery can give permission for them to be used is to avoid being too rigid in the law of contempt, thus giving rise to technical contempts: see *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.* [1975] Q.B. 613.

The trouble with Park J.'s solution is that it is too uncertain. The reporting in "The Guardian" was not fair and accurate; the matters set out in Park J.'s judgment are relied on: see ante, pp. 540F - 541B. The article was patently for other reasons than a balanced account of the proceedings.

The process of discovery and the *Riddick* principle present a resolution of two conflicting aims - privacy and facilitating the due administration of justice. The undertaking ensures that privacy is overridden only in

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so far as necessary to achieve the due administration of justice. The ultimate question whether documents can be shown to reporters goes beyond the due administration of justice and calls for a policy decision.

Price Q.C. in reply. Discovery causes limited invasion of privacy. It is not necessary or relevant to consider whether the documents involved are trivial or important, or "confidential" in another branch of law. The administration of justice is of public interest and to be conducted in public, with the consequence that there can be nothing private which has passed in open court. The public interest is wider than simply ensuring that justice is seen to be done, and extends to matters raised in court. The press is not restricted to fair and accurate reports, but may bring to the attention of the public matters raised in court. The openness is not simply to ensure that justice is seen to be done. Reading out in court is part of the contemplated use of discovery. The Home Office could have sought special restrictions.

The first submission is right and logical. The second submission is not illogical; once it is accepted that the public interest served is not only justice between the parties, then what passes in open court is properly the subject of comment in the press. Nothing in *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.* [1975] Q.B. 613 affects the issue before the court.

It is often difficult to say from where a particular document comes, and to have to go back to the original proprietor is impracticable.

Cur. adv. vult.

February 6. The following judgments were read.

LORD DENNING M.R. Miss Harriet Harman, the respondent, is a solicitor of the Supreme Court. The judge made a finding of grave import against her. He found that she had been guilty of a "serious contempt of court." His decision was at once criticised in the press. "The Times" next morning flatly contradicted the judge. It said that her offence was "extremely trivial." Later on Lord Gifford - the sixth baron whose ancestor, the first Lord Gifford, was the Master of the Rolls in 1824 - thought that the decision was so wrong that he moved an amendment to the Contempt of Court Bill. It is set out in Hansard for January 20, 1981, col. 351. He added "that if in the course of the discussion, the Court of Appeal may be in no doubt about what I think they ought to do in the particular case, that will be merely incidental to the discussion." Other peers followed suit. They felt no inhibitions about sub judice. Nor did the Lord Chancellor advise them to desist. Nor can we question their proceedings. It is so declared in the Bill of Rights. In answer to all these protestations I would say with Lord Mansfield in *Rex v. Wilkes* (1770) 4 Burr. 2527, 2562-2563:

"We are to say, what we take the law to be: if we do not speak our real opinions, we prevaricate with God and our own consciences. ... Once for all, let it be understood, that no endeavour of this kind will influence any man who at present sits here."

I wish that people who criticise the decisions of the judges would

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study the facts first: because every rule of law is stated in relation to the facts of the instant case. It is by its application to the facts that the rule is to be justified or condemned. That was shown strikingly only yesterday when the House of Lords in *Gammell v. Wilson* [1981] 2 W.L.R. 248 deplored the effect of their decision the previous year in *Pickett v. British Rail Engineering Ltd.* [1980] A.C. 136.

The story starts with an arch-criminal, Michael Sidney Williams. He was guilty of the armed robbery of a bank in Cardiff. In 1971 he was sentenced to 14 years' imprisonment. He was placed in "Category A" as being a man whose escape would be highly dangerous to the public or the police. After three years, the Governor of Hull Prison described him as a "high notoriety Category A prisoner" and as "a totally subversive and dedicated trouble-maker." He used to move from group to group of prisoners sowing seeds of discontent. It was he who "contributed largely to changing a composed wing to a seething mass of resentment and rebellion."

Such being his character, he was the very man to qualify for entry to a newly-formed "control unit." This had been recommended by a highly qualified committee and approved by the Secretary of State. One of the objects was to remove a troublemaker from ordinary prison routine and put him in a separate unit on his own - where he would not be able to exert an evil influence on other prisoners. The first of such units was at Wakefield. Michael Williams was a very suitable candidate. He was transferred to that unit on August 23, 1974. He left it after 180 days on February 18, 1975, and was transferred to another prison.

Now here is the point. The "control unit" was found not to have been a success. It was closed in October 1975. The experiment, however well-intentioned, had failed. This gave the "dedicated trouble-maker" a grand opportunity to make

further trouble - for many innocent people. He made complaints against the Home Office and the prison service. With the assistance of lawyers, he asserted that the setting up of the "control unit" was illegal. He alleged that he had been subjected to "cruel and unusual punishments" contrary to article 10 of the Bill of Rights. He said that he had been unfairly treated contrary to the dictates of natural justice. Those complaints did not come well from his mouth - seeing that he had been such an enemy of society himself. His complaints were taken up by the National Council for Civil Liberties. He got legal aid: he sued the Home Office for damages. The writ was issued in 1975 whilst he was still in prison. It was numbered 1975 W. No. 465 and entitled *Williams v. Home Office*. The case was tried for 4½ weeks by Tudor Evans J. On May 9, 1980, the judge gave a judgment covering 132 pages: see *Williams v. Home Office (No. 2)* [1981] 1 All E.R. 1211. He rejected the evidence of Michael Williams. He held that the control unit was not unlawful; that Michael Williams was transferred to it quite properly; that the punishments were not cruel and unusual; and that the action for damages failed.

Legal Representation

Here I must mention a point which lies at the root of his case. Michael

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Williams got legal aid. All the fees and expenses were being paid for by the legal aid fund, that is, by the taxpayers of this country. Miss Harman took over the case on his behalf in 1978, at the same time as she entered the employment of the National Council for Civil Liberties ("N.C.C.L.") as their solicitor. But in the action she was solicitor only for Michael Williams. If and in so far as she acquired information in confidence for the purposes of this action, she was not at liberty to use it for the purposes of the N.C.C.L. I would emphasise *not*.

Discovery In The Action

It is one of the rules of our English law that a party to litigation must disclose to the other all his confidential documents relevant to the issue in the case. This is done so that the trial judge can get at the truth and do justice between the parties. In the action brought by Michael Williams, his solicitor, Miss Harman, took advantage of this rule. She required the Home Office to disclose all their documents relating to the setting up of the control unit, and to the treatment of Michael Williams and other prisoners in it, and many other matters. The Treasury Solicitor for the Home Office tried to limit the scope of discovery but without much success. The documents were in a huge pile of 6,800 pages - over a foot high. The Treasury Solicitor was very concerned that these documents should be kept confidential and should not be used for any collateral or ulterior purpose. On October 17, 1979, he wrote to Miss Harman:

"However, having regard to the very large number of policy documents intended for internal use which have been disclosed, my client is concerned at the risk of improper use of the documents ... my client [the Home Office] would not wish the documents to be used for the general purposes of the N.C.C.L. outside your function as solicitor for the plaintiff."

On October 17, 1979, Miss Harman replied:

"As far as 'the general purposes of N.C.C.L.' is concerned you may rest assured that, as a solicitor, I am well aware of the rule that requires that documents obtained on discovery should not be used for any other purpose except for the case in hand."

On October 23, 1979, the Treasury Solicitor replied: "My client department is happy to accept the assurance which you give."

Besides that big pile of documents, there was however a small bundle of special documents in respect of which the

Home Secretary gave a certificate that "the production of them would be injurious to the public interest." This certificate was challenged by the legal adviser for Michael Williams. The point was fully argued before McNeill J. and he gave a considered judgment on January 29, 1980. He inspected the documents and ordered the production of six of them. These were records of high-level meetings reporting to the Secretary of State or the Minister of State for decision. I have no doubt that until very recently these documents would have been held privileged from production. They come within the words of Lord Reid in *Conway v. Rimmer* [1968] A.C. 910, 952:

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"To my mind the most important reason [for the privilege] is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all documents concerned with policymaking within departments ..."

Although these six documents came within that category, nevertheless McNeill J. ordered production of them. He did this because of the more recent ruling of this court in *Riddick v. Thames Board Mills Ltd.* [1977] Q.B. 881. We there held that "documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed" (see p. 896). McNeill J. thought that, if confined to use in the action, they could not be used, in the way feared by Lord Reid, "to create or fan ill-informed or captious public or political criticism."

So the judge ordered disclosure of these documents, relying on the implied undertaking of Miss Harman that the documents would not be used for any other purpose than the case in hand, an undertaking of which, on her own showing, she was well aware.

The Use At The Hearing

One week before the trial commenced, Miss Harman selected 800 pages and bound them in two bundles and made nine copies for the use of the judge and counsel. She says that "all material parts of the documents in the two bundles were read out in open court by counsel for the plaintiff." Note her words "all material parts." She does not identify those parts. Probably she does not know what they were. She was not in the court all the time. I should imagine that no one except the short-hand-writer or the tape could tell what parts were read and what were not. I should be very surprised if every word of every one of the 800 documents was read out. Counsel would himself select what parts to read. He would say, "I do not think it necessary to read this page or this paragraph." Or the judge would say, "I have already read it. Do get on." The reading of documents is very much a selective process in which all concerned take part.

The Use After The Hearing

Now I come to the crucial part of the case. A day or two after the hearing Miss Harman allowed Mr. David Leigh to have access to all the documents in the two bundles. I feel it desirable to let her describe her part in it in her own words:

"One of the reporters who had attended court on some occasions when the documentary exhibits were being read and who had written news stories about the action was a Mr. David Leigh: Mr. Leigh is known to me as an experienced and respected reporter who has specialised in home affairs features for The Times and more recently

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The Guardian. On a day shortly before the case concluded after all the exhibits had been read out, Mr. Leigh approached me in the court room and informed me that he was writing a feature article about some of the issues raised in the course of the case: he explained that he had not been in court throughout all the proceedings and asked whether he could inspect the documents which had been read out in open court in order to refresh his memory and to obtain an accurate note of their contents: I saw no reason at

all subject to considerations of my own convenience to refuse this reasonable and limited request: it seemed to me to be in the interests of justice that the case should be reported fully and accurately while it was fresh in the public mind: I was of course aware that Mr. Leigh could achieve his purpose by ordering transcripts of the evidence but it seemed unreasonable to put him to the expense and delay involved in adopting that course: I was aware of other cases in which press reporters had been shown exhibits by counsel or instructing solicitors in order to make a full and complete note of evidence delivered inaudibly or at speed or in order to record material introduced into evidence in their absence: Mr. Leigh's request was neither unusual nor inappropriate and I saw no reason why I should refuse it.

"At some time after the evidence had been concluded and [before] April 8 (when the article appeared) Mr. Leigh call by appointment at my office: I permitted him at all times under my surveillance to inspect and to make notes of the contents of documents in exhibit bundles P1 and P2 which had been read out in open court: ... at no time did I supply any of these documents to Mr. Leigh nor did I permit Mr. Leigh to make photocopies of any of these documents: ... at no time did I surrender possession of any copy of the documents referred to in The Guardian article by handing them over to Mr. Leigh: at no time when Mr. Leigh was in my office or at any other time did I give him any access to the master set of 17 files containing some 6,600 pages of documents which had not been placed in evidence.

"Shortly before taking his leave Mr. Leigh asked about photographs which he had seen in court during the hearing. These photographs of the site of the control unit at H.M. Prison Wakefield ... were the only documents which I allowed Mr. Leigh to take out of my office."

In What Capacity Did Miss Harman Act?

Such being her own account, I would ask: in what capacity was Miss Harman acting when she allowed David Leigh to have access to these documents? Was she acting as solicitor for Michael Williams? Or as solicitor for the N.C.C.L.? She does not say herself. But she certainly led David Leigh to believe that she was acting as solicitor for the N.C.C.L. Indeed he believed that, in conducting this very action, she was acting as solicitor for the N.C.C.L. On this point I let David Leigh speak for himself. He wrote an article which was published in "The Guardian" newspaper on April 8, 1980 - ten days after the hearing concluded - and

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4½ weeks before the judge gave judgment. The article throws such a light on the use of these documents that I set out here some extracts from it.

The Article

At the top there are the two photographs of Wakefield control unit which had been handed by Miss Harman to David Leigh. Then the article goes on:

"Papers released through a court case - brought by a civil rights group and in which judgment is awaited - have raised questions about the running of the Home Office after its blunder in setting up in secrecy control units for inmates. David Leigh reports

"How Ministry hardliners had their way over prison units

"A major Whitehall blunder, involving internal bureaucratic intrigue and ministerial attempts to prevent disclosure, has been revealed in rare detail by documents released to the National Council for Civil Liberties by a court order. It is the story of how the Home Office invented special 'control units' for prisoners; set one up amid bureaucratic infighting; swept aside all protests, hastily altered it when its apparently harsh and pointless regime was exposed; and finally abandoned the whole notion, admitting its ineffectiveness. It is a story of muddle and recriminations, in which civil servants experimented with psychological techniques for punishing 'subversives' which were quite different from those originally approved by ministers. A prison regime was established which was arguably illegal and which is now, five years later, awaiting judgment after a long and expensive High Court case which finished last week ... The documents were obtained, despite protests by ministers that disclosure was not in the public interest, by the N.C.C.L. who used them in evidence in the court case brought through them by one of the control unit inmates, Michael

Williams, against the Home Office ... And the documents obtained by the N.C.C.L. - including minutes, reports, and advice to ministers containing normally well-guarded official secrets - raise further questions about the way the Home Office is administered."

The article goes on to give extracts from top level documents and to use them for criticising Ministers of the Crown and high civil servants. These are named in the article. Contrary to the well understood convention in Parliament that civil servants should not be attacked individually but only the Minister who is responsible for them. Civil servants cannot answer back.

Note that when the article was published the case was still sub judice - whilst the judge was considering his judgment. But that does not seem to have produced any inhibitions in David Leigh or the newspaper.

The Position Of Miss Harman

Mr. Leolin Price told us that Mr. David Leigh had got it all wrong when he said in the article that "the documents were released to the N.C.C.L. by a court order." Mr. Price said that Mr. Leigh said this

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without the authority of Miss Harman at all. But if so, "The Times" reporter, Frances Gibb, got it wrong also. For on the day after the judgment was given "The Times" May 10, 1980, said:

"The National Council for Civil Liberties (N.C.C.L.) took up the case of one of the prisoners who had been in the control unit, Mr. Michael Williams, and embarked on a five-year struggle to obtain the necessary documents to enable it to bring an action. The Home Office unsuccessfully resisted handing over the papers. 'Quite apart from the case,' Miss Harriet Harman, N.C.C.L.'s legal officer, says, 'we achieved a milestone ruling when the court said it was in the public interest for us to have those papers. There has been no previous case involving the disclosure of papers at that level of decision-making and we now have a case study as to how much high-level policy is arrived at.' The papers, which provide details of discussions between Home Office officials, showed how the idea of a control unit came about."

The Inference

It is all very well for Miss Harman to disclaim the statements made by those reporters, but I draw the inference that she led them to believe that she, on behalf of the N.C.C.L., had obtained the disclosure of these documents, that it was a legal milestone on disclosure, that it was "in the public interest" for the N.C.C.L. to have them, and that the N.C.C.L. could use them as "a case study as to how such high-level policy is arrived at."

Note that there is no hint in the newspapers that the documents were read out in open court. The reporters inferred that, by the disclosure, the N.C.C.L. were at liberty to use the documents as they wished - by showing them to reporters or by using them themselves as a case study.

Now if that be the right inference it seems to me that Miss Harman was under a grave misapprehension. She treated herself as bringing this action for N.C.C.L. whereas she was bringing it for Michael Williams. She was being paid by the legal aid fund. The documents were disclosed to her, as solicitor for Michael Williams, not as solicitor for the N.C.C.L. She ought to have confined the use of the documents to him and his action and not to have handed them over - from herself as his solicitor - to herself as solicitor to the N.C.C.L. It was the very thing that the Treasury Solicitor had feared in his letter of October 17, 1979:

"My client would not wish the documents to be used for the general purposes of the N.C.C.L. outside your function as a solicitor for the plaintiff."

On the facts thus far I am clearly of opinion that Miss Harman did not confine her use of the documents to use in the action - she used or authorised their use for the purposes of reproduction in the press.

Her Defence

The defence of Miss Harman is simple: these documents were read

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out in open court by counsel whom she instructed for the plaintiff. Once read out in court, they became in the public domain. If the shorthand-writer had taken down the words and reproduced them in a transcript, they would have been available for all the world to use. So why should they not be available from the documents themselves in her office?

That is the argument which has been put forward by the press and by some peers in the House of Lords. It has been reinforced by affidavits by some of the most distinguished men of our time: Lord Goodman, the Master of University College, Oxford; Lord Hutchinson of Lulling-ton, whom we all hold in high esteem; and Mr. Harold Evans, the Editor of "The Sunday Times." Each says that there is a long-standing practice of showing documents to members of the press which have been read out in open court - so as to verify what has been said or to assist accurate reporting.

This contention is said to be derived from the principle stated by Lord Halsbury in *Scott v. Scott* [1913] A.C. 417, 440: "... every court of justice is open to every subject of the King." So it is said that every document read out aloud in a court of justice is available to every subject of the Queen, in the court at the time, or outside it anywhere at any time thereafter: or if not to everyone, at any rate to every reporter or journalist. The document, however confidential beforehand, loses all confidentiality once it is read aloud in court. The owner of it retains his copyright: and any person defamed retains his action for libel. But the owner of the confidentiality loses all claim for breach of confidence.

I cannot accept this argument for one moment. It is one of our fundamental human rights that everyone has a right to privacy: included in which is a right to respect for his confidential documents. This can be overridden in the interests of justice. It was so overridden in our present case when the court ordered the Home Office to disclose these thousands of documents to Michael Williams - so that justice might be done in the action he had brought. This overriding meant that the documents could be read in open court to the judge who had to try the case. It meant that those present could listen: that the reporters could take down what was said: and could make from their notes a fair and accurate report of the proceedings. But nothing more. It did not mean that there could be any further use of the confidential documents or any further dissemination of their contents without the consent of the owner. It is of no use to plead the freedom of the press. That freedom is itself subject to restriction. The press is not free to publish confidential documents without the consent of the owner. Save when the interest of the owner in keeping them confidential is outweighed by the public interest in having the matter made public: see *Schering Chemicals Ltd. v. Falkman Ltd.* [1981] 2 W.L.R. 848. I can see no public interest whatever in having these highly confidential documents made public. Quite the other way. It was in the public interest that these documents should be kept confidential. They should not be exposed to the ravages of outsiders. I regard the use made by the journalist in this case of these documents to be highly detrimental to the good ordering of our society. They were used so as to launch a wholly unjustified attack on Ministers of State and high civil

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servants - who were only doing their very best to deal with a wicked criminal who had harassed society and was serving a long sentence for armed robbery. For this use I think Miss Harman was herself responsible. It was a gross breach of

the undertaking which she impliedly gave to the court and affirmed in writing to the Treasury Solicitor. That undertaking was to use the documents solely for the purposes of the action of Michael Williams against the Home Office. Instead, she used them for the purposes of this organisation called the National Council for Civil Liberties: and that organisation made them available for use by a journalist - and he, whilst the case was still sub judice, wrote an article prejudging the outcome most unfairly. It makes me regret that the court ever ordered disclosure of the documents. The "legal milestone" will have to be taken up and set back a bit.

Conclusion

I would follow the wise words of Lord Wilberforce in *Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England* [1980] A.C. 1090, 1112G-H. When Ministers and high civil servants are forming important governmental policy, their discussions and their memoranda are, and should be, treated as highly confidential. No court should order the disclosure of these confidential documents to outsiders, even in the interests of justice, except under the most stringent safeguards against abuse. The danger of disclosure is that critics - of one political colour or another - will seize on this confidential information so as to seek changes in governmental policy, or to condemn it. So the machinery of government will be hampered or even thwarted. In our present case it was thought that the implied understanding, as confirmed in *Riddick's case* [1977] Q.B. 881, provided a sufficient safeguard against abuse. Unfortunately events have proved otherwise. The disclosure of confidential documents was abused. It was abused by Miss Harriet Harman. She allowed a journalist to have free access to the confidential documents, not caring how he would use them. To my mind her part in this - her conduct - was not "extremely trivial," as "The Times" described it. It was a "serious contempt," as the judge said. It was a serious contempt by a solicitor of the Supreme Court, which is much to be regretted. The criticisms directed against the judge and his judgment were quite unfounded. I would dismiss the appeal.

TEMPLEMAN L.J. A person who owns a document may keep that document and its contents secret and private. A person who owns the copyright in the contents of a document may prevent the re-publication of those contents. The owner of the document and the owner of the copyright are not necessarily the same person. Both the right to privacy and copyright are only exercisable subject to laws of disclosure which, for example, require publication of copies of the accounts of limited companies, and copies of wills which have been proved, and copies of minutes of certain public authorities.

The laws of procedure relating to litigation also require limitations on the right to privacy and copyright. Every party to an action must

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disclose all documents in his possession or power relating to the matters in issue in the action, must allow the other parties to inspect those documents and to take copies of them and to make use of the documents and the copies and the contents for the purposes of the action in which they are revealed. As Lord Denning M.R. said in *Riddick v. Thames Board Mills* [1977] Q.B. 881, 895:

"The reason for compelling discovery of documents ... lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e., in making full disclosure."

But once discovery has enabled the relevant action to be disposed of, the public interest "has served its purpose." Discovery

"was obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party - or anyone else - to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice. ... In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not be made use of except for the purposes of the action in which they are disclosed." *Per* Lord Denning M.R. in *Riddick's case*, at p. 896.

The court therefore implies an undertaking by a litigant that he will make use of his opponent's documents only for the purpose of the action and for no other purpose: see *Riddick's case* and the authorities there cited at p. 896.

The question raised on this appeal is whether the undertaking by a litigant not to make use of his opponent's documents save for the purposes of the action in which they are revealed ceases to bind the litigant if and as soon as and to the extent that the contents of a document thus disclosed are spoken aloud in open court.

Mr. Williams sued the Home Office for false imprisonment and other torts. The Home Office disclosed 6,800 pages of documents. The material parts of some 800 pages were quoted in the course of the trial. So far as the 6,000 pages which were not quoted are concerned, it is conceded that any copies made to assist Mr. Williams in the course of the action must be returned to the Home Office or must be destroyed or at any rate must be kept safely so that the contents can never be referred to or summarised or used in any way by anybody without the permission of the Home Office. So far as the 800 pages are concerned, it is contended that the copies in the possession of Mr. Williams may, subject to the law of copyright and defamation, be used by anybody for any purpose.

It is common ground that the 800 pages of documents have been used

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for purposes other than use in Mr. Williams's action. If Mr. Price's submissions are correct, the purpose for which the copies of the 800 Home Office pages obtained by Mr. Williams could be used or were used are quite irrelevant. It does not matter that the plaintiff Mr. Williams to whom discovery was made was a former convict, or that the defendants to that action who gave discovery were the Home Office, or that the documents disclosed included official memoranda and not love letters, or that Miss Harman the solicitor acting for Mr. Williams was also legal adviser to the National Council for Civil Liberties, or that Miss Harman, with or without the consent of her client, showed copies of the 800 pages to a journalist with or without the hope or expectation that the journalist would write an article attacking the Home Office, or that the journalist wrote an article without waiting to see the judgment then undelivered in the action, or that Mr. Williams failed in the action.

If the undertaking was automatically released when the contents of the documents were spoken aloud in court, then, subject to the laws of copyright and defamation, Mr. Williams can do as he pleases with the copies of the relevant Home Office documents obtained on his behalf for the purposes of the action and quoted in court. Mr. Williams could, for example, sell his copies to the highest bidder and that possibility is also irrelevant if the undertaking ceased to have effect when the documents were read. If quotation in open court totally destroys privacy, the result must be the same in any action and in any circumstances, subject to the right of the court to forbid the dissemination of any particular piece of information which on grounds of national security or on any other exceptional grounds the court decides to conceal.

On behalf of Miss Harman it is submitted that the undertaking implied by a litigant who receives copies of his opponent's documents on discovery is that "I will only use this document and its contents for the purposes of this action unless and until and to the extent that the contents are read in open court."

It is not contended that the undertaking is released in respect of any document which is not read in open court or in respect of any part of a document which is not read in open court. If the judge reads the whole or part of a document to himself, the undertaking is not thereby released. The undertaking, it is said, ceases to apply, but only ceases to apply, to every word which is spoken aloud in court by counsel, witness or judge and which consists of a direct quotation from a document disclosed on discovery.

This submission is sought to be justified by three alternative but cumulative reasons, first on idealistic grounds, secondly on cynical grounds, and thirdly on grounds of convenience.

The idealistic ground is based on the undoubted principle that, subject to limited exceptions not here relevant, it is a cardinal rule of the administration of justice in this country that trials should be held in

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public: see *Scott v. Scott* [1913] A.C. 417, 442 and *Baker v. Bethnal Green Borough Council* [1945] 1 All E.R. 135, 144. Proceedings in open court ensure that justice is done and is seen to be done and that the public may be able to ponder whether justice has in fact been done. Not only are proceedings held in open court but, for similar reasons, anyone can attend and memorise and make notes and obtain transcripts of the proceedings if any be available. The court does not, save in exceptional circumstances, impose any restrictions on publicity, or dissemination of information or comment, good or bad.

Therefore, it is said, a party to an action is freed from any undertaking with regard to his opponent's documents once they have been quoted in open court. It is not suggested that a litigant is under a duty to make freely available documents or copies of documents or to give any information concerning documents which are quoted in open court, whether those documents belong to the litigant himself or to his opponent. Quotation of a document in open court, it is said, confers a power but not a duty on a litigant to make his opponent's documents available to the public and also confers on the litigant, subject to the limitations of defamation and copyright, powers to exploit his copies of his opponent's documents for purposes far removed from the administration of justice.

In my judgment, if the public interest does not require the parties to private litigation to make their documents freely available, then the public interest does not require a party to private litigation to be freed from an undertaking that he will not use his opponent's documents save for the purposes of the action. The rule that court proceedings must be held in public should not be exploited for purposes which have nothing to do with the administration of justice, even if an air of respectability is claimed for that exploitation by the argument, good or bad, that the public interest requires the invention of some method of enforcing the principle of freedom of information against public authorities. That is an argument for Parliament, not for the courts.

The cynical ground is based on the undoubted fact that the contents of any document quoted in court may, so far as they are quoted in court, be obtainable by personal attendance or by means of a transcript. Therefore, it is said, there is no point in continuing the undertaking by a litigant that he will not use that document save for the purposes of the action. But in my judgment the litigant is in a special position. Successful or unsuccessful, he has been enabled to break down the barriers of privacy for one limited purpose only, namely to assist him in obtaining justice in the action. For that purpose and for no other purpose he has been able to obtain copies of documents and he should not be able to exploit those documents for his own purposes. He is entitled at his discretion to read documents in open court even though they may later be held to be irrelevant or inadmissible. He is given a powerful weapon which enables him to invade privacy in the interests of justice. He should not be free to use that weapon himself for any other purposes. Once a document has

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been used to win or lose an action, a litigant should be in no different position from any other members of the public.

The ground of convenience is limited to journalists and reporters. It is suggested that, in the interests of ensuring that accurate information is available to journalists and reporters to enable them to inform and comment, a litigant should be entitled but not bound to disclose his own and his opponent's documents, limited, so far as the opponent's documents are concerned, to such of them or such parts of them as have been read in open court. In the course of the argument in this court a distinction was sought to be drawn between journalists and reporters in general, and feature writers and law reporters in particular. For present purposes I find it impossible to make any logical or identifiable distinction. Again it is accepted that no party to litigation can be obliged to assist a journalist or a reporter. If permission to use a document or a copy of a document must, as is conceded, be obtained from one party to the litigation, I see no reason why permission should not be required from the party who owns the document. Permission will rarely be refused, especially if the information can be obtained from a transcript, but, if the permission of the owner of the document is withheld, I cannot accept that permission can be granted by his opponent who is only in possession of a copy of the document for a limited purpose which has been fulfilled.

I have dealt with this appeal as a matter of principle; but, on the merits of this particular appeal, I agree with Lord Denning M.R. that this was a serious contempt especially in the light of the earlier correspondence with the Home Office. I think Miss Harman ought to have consulted the Home Office and taken advice before acting as she did. She presented the Home Office with a *fait accompli*. I too would dismiss the appeal.

DUNN L.J. I agree with both judgments. To my mind this case has nothing whatsoever to do with the freedom of the press or the freedom of communication. The *Williams* trial was a public trial, and anything said in open court was available for publication or comment subject to the law. Every word was recorded and the public including the press were fully entitled to be present, to take notes, and to buy a copy of the transcript of the whole trial if they wished. This case is, however, very much concerned with the conduct of a solicitor engaged in litigation on behalf of a client. Such a solicitor is in a powerful and privileged position. He or she has in his possession private and confidential documents belonging to the other party to the litigation, which have only come into his possession in his capacity as an officer of the court because of the Rules of the Supreme Court, or because the court has ordered that they shall be disclosed. The fact that some or all of those documents may be read out in open court is neither here nor there so far as the solicitor is concerned. It is no part of the duty of a solicitor to assist the press or anyone else by providing information from documents which have been disclosed to him

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in his capacity as a solicitor. He is the agent of his client and the documents came into the possession of the client on the same basis and for the same reason.

If after documents have been read out in open court the client to whom they have been disclosed or his solicitor were free to make such use of them as he pleased the public would soon lose confidence in the administration of justice and the process of discovery, an essential adjunct to civil proceedings in this country, would be likely to fall into disrepute and become more difficult and less effective. Parties would have a strong disincentive to disclose their own documents.

None of this affects the right of any member of the public, including the press, if they are sufficiently interested to take notes of documents read out in court or, as I have said, buy a copy of the transcript. But the party to whom they are disclosed and his solicitor in return for their special right to the disclosure of the documents in the first place have the corresponding obligation not to use them at any time except for the purposes of the action.

It is said that the ruling of Park J. as to the extent of the implied obligation on the person to whom the discovery is given would inhibit law reporting and the bona fide reporting of fair and accurate reports of the trial. I do not believe that for one moment, and I think that this part of the case has been much exaggerated in the affidavits we have read and at the Bar. If a reporter wishes to check the date of a document referred to in evidence, or the exact wording of a document, he or she can always ask the counsel or solicitor for the party who has disclosed the document. I have never known such a request to be refused even in respect of private and confidential documents. And there is no reason why such a request should be refused. It is said that it would be undesirable and confusing if counsel or solicitor for the person to whom a document had been disclosed were by showing it to a law reporter to commit a contempt of court. I do not foresee any such problem in practice. The mere showing of a document which has been used in court to a reporter for the purpose of checking it would in my view either be subject to the de minimis principle or would at most be a technical contempt. But that is not what we are dealing with. We are dealing here with a solicitor who quite deliberately allowed a journalist to inspect and make notes of 800 documents.

The Home Office believes Miss Harman acted in good faith in disclosing the documents to Mr. Leigh, and the judge was willing to regard himself as bound by that opinion, although in contempt proceedings all matters are for the court and not for the party bringing the contempt proceedings. It depends of course what one means by good faith. If in the context of this case it means that when she gave the assurance in her letter of October 17, 1979, Miss Harman honestly believed that the assurance was limited to documents which were not read out in court,

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and ceased to operate as soon as any document was read out in court, then I find it extraordinarily naive. I agree with the finding of the judge, ante, p. 541A-B. He said:

"[Miss Harman's] failure to seek the consent of the Home Office to the proposed disclosure, unquestionably due to the fact that she knew that any hint of her intention would have resulted in an immediate application to the trial judge for an injunction which would have been granted."

I agree with the judge that this was a serious contempt of court by a solicitor in breach not only of the implied obligation relating to discovery but also of an express assurance that she had given in her capacity as a solicitor. She acted unprofessionally and irresponsibly. I would dismiss this appeal.

Appeal dismissed with costs.

Leave to appeal refused.

February 19. The Court of Appeal (Lord Denning M.R., Templeman and Dunn L.JJ.) certified under section 1 (2) of the Administration of Justice Act 1960) that "a point of law of general public importance" was "involved in the decision," the point of law being

"Whether a litigant's obligation or undertaking, implied by law in respect of the use which may be made of any of his opponent's documents disclosed on discovery in the action, is correctly defined as terminating if and when and to the extent that any such document is read out in open court in the course of proceedings in that action, or is otherwise affected by such reading out."

Solicitors: *Seifert, Sedley & Co.; Treasury Solicitor.*

R. C. W.

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Indexed as:

CCH Canadian Ltd. v. Law Society of Upper Canada

**Law Society of Upper Canada, appellant/respondent on
cross-appeal;**

v.

**CCH Canadian Limited, respondent/appellant on
cross-appeal.**

And between

**Law Society of Upper Canada, appellant/respondent on
cross-appeal;**

v.

**Thomson Canada Limited c.o.b. as Carswell Thomson
Professional Publishing, respondent/appellant on
cross-appeal.**

And between

**Law Society of Upper Canada, appellant/respondent on
cross-appeal;**

v.

**Canada Law Book Inc., respondent/appellant on
cross-appeal, and
Federation of Law Societies of Canada, Canadian
Publishers' Council and Association of Canadian
Publishers, Société québécoise de gestion collective des
droits de reproduction (COPIBEC) and Canadian Copyright
Licensing Agency (Access Copyright), interveners.**

[2004] 1 S.C.R. 339

[2004] S.C.J. No. 12

2004 SCC 13

[page340]

File No.: 29320.

Supreme Court of Canada

Heard: November 10, 2003;

Judgment: March 4, 2004.

**Present: McLachlin C.J. and Iacobucci, Major,
Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish
JJ.**

(90 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

Copyright -- Infringement -- Photocopying -- Fax transmissions -- Law Society providing custom photocopy service and maintaining self-service photocopiers in library for use by patrons -- Legal publishers bringing copyright infringement actions against Law Society -- Whether publishers' headnotes, case summary, topical index and compilation of reported judicial decisions "original" works covered by copyright -- If so, whether Law Society breached publishers' copyright -- Whether Law Society's fax transmissions of publishers' works constitute communications "to the public" -- Copyright Act, R.S.C. 1985, c. C-42, s. 3(1)(f).

Copyright -- Infringement -- Exception -- Fair dealings -- Law Society providing custom photocopy service and maintaining self-service photocopiers in library for use by patrons -- Legal publishers bringing copyright infringement actions against Law Society -- Whether Law Society's dealings with publishers' works "fair dealings" -- Copyright Act, R.S.C. 1985, c. C-42, s. 29.

Copyright -- Works in which copyright may subsist -- Meaning of "original" work -- Whether headnotes, case summary, topical index and compilation of reported judicial decisions "original" works covered by copyright -- Copyright Act, R.S.C. 1985, c. C-42, s. 2 "every original literary, dramatic, musical and artistic work".

Summary:

The appellant Law Society maintains and operates the Great Library at Osgoode Hall in Toronto, a reference and research library with one of the largest collections of legal materials in Canada. The Great Library provides a request-based photocopy service for Law Society members, the judiciary and other authorized researchers. Under this "custom photocopy service", legal materials are reproduced by Great Library staff and delivered in person, by mail or by facsimile transmission to [page341] requesters. The Law Society also maintains self-service photocopiers in the Great Library for use by its patrons. In 1993, the respondent publishers commenced copyright infringement actions against the Law Society, seeking a declaration of subsistence and ownership of copyright in specific works and a declaration that the Law Society had infringed copyright when the Great Library reproduced a copy of each of the works. The publishers also sought a permanent injunction prohibiting the Law Society from reproducing these works as well as any other works that they published. The Law Society denied liability and counterclaimed for a declaration that copyright is not infringed when a single copy of a reported decision, case summary, statute, regulation or a limited selection of text from a treatise is made by the Great Library staff, or one of its patrons on a self-service copier, for the purpose of research. The Federal Court, Trial Division allowed the publishers' action in part, finding that the Law Society had infringed copyright in certain works; it dismissed the Law Society's counterclaim. The Federal Court of Appeal allowed the publishers' appeal in part, holding that all of the works were original and therefore covered by copyright. It dismissed the Law Society's cross-appeal.

Held: The appeal should be allowed and the cross-appeal dismissed. The Law Society does not infringe copyright when

a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its access policy. Moreover, the Law Society does not authorize copyright infringement by maintaining a photocopier in the Great Library and posting a notice warning that it will not be responsible for any copies made in infringement of copyright.

The headnotes, case summary, topical index and compilation of reported judicial decisions are all original works in which copyright subsists. An "original" work under the *Copyright Act* is one that originates from an author and is not copied from another work. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be "original" and covered by copyright, creativity is not required to make a work "original". This conclusion is supported by the plain meaning of "original", the history [page342] of copyright law, recent jurisprudence, the purpose of the *Copyright Act* and the fact that this constitutes a workable yet fair standard. While the reported judicial decisions, when properly understood as a compilation of the headnote and the accompanying edited judicial reasons, are "original" works covered by copyright, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright.

Under s. 29 of the *Copyright Act*, fair dealing for the purpose of research or private study does not infringe copyright. "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained, and is not limited to non-commercial or private contexts. Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29. The following factors help determine whether a dealing is fair: the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing, and the effect of the dealing on the work. Here, the Law Society's dealings with the publishers' works through its custom photocopy service were research-based and fair. The access policy places appropriate limits on the type of copying that the Law Society will do. If a request does not appear to be for the purpose of research, criticism, review or private study, the copy will not be made. If a question arises as to whether the stated purpose is legitimate, the reference librarian will review the matter. The access policy limits the amount of work that will be copied, and the reference librarian reviews requests that exceed what might typically be considered reasonable and has the right to refuse to fulfill a request.

The Law Society did not authorize copyright infringement by providing self-service photocopiers for use by its patrons in the Great Library. While authorization can be inferred from acts that are less than direct and positive, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement. Here, there was no evidence that the copiers had been used in a manner that was not consistent with copyright law. Moreover, the Law Society's posting of a notice warning that it will not be responsible for any copies made in infringement of copyright does not constitute an [page343] express acknowledgement that the copiers will be used in an illegal manner. Finally, even if there were evidence of the copiers having been used to infringe copyright, the Law Society lacks sufficient control over the Great Library's patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement.

There was no secondary infringement by the Law Society. The Law Society's fax transmissions of copies of the respondent publishers' works to lawyers in Ontario were not communications to the public. While a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright, there was no evidence of this type of transmission having occurred in this case. Nor did the Law Society infringe copyright by selling copies of the publishers' works. Absent primary infringement, there can be no secondary infringement. Finally, while it is not necessary to decide the point, the Great Library qualifies for the library exemption.

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Applied: Muzak Corp. v. Composers, Authors and Publishers Association of Canada, Ltd., [1953] 2 S.C.R. 182; De Tervagne v. Beloeil (Town), [1993] 3 F.C. 227; not followed: Moorhouse v. University of New South Wales, [1976] R.P.C. 151; referred to: Moreau v. St. Vincent, [1950] Ex. C.R. 198; Goldner v. Canadian Broadcasting Corp. (1972), 7 C.P.R. (2d) 158; Grignon v. Roussel (1991), 38 C.P.R. (3d) 4; Théberge v. Galerie d'Art du Petit Champlain inc., [2002] 2 S.C.R. 336, 2002 SCC 34; Bishop v. Stevens, [1990] 2 S.C.R. 467; Compo Co. v. Blue Crest Music Inc., [1980] 1 S.C.R. 357; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42; University of London Press, Ltd. v. University Tutorial Press, Ltd., [1916] 2 Ch. 601; U & R Tax Services Ltd. v. H & R Block Canada Inc. (1995), 62 C.P.R. (3d) 257; Feist Publications Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991); Tele-Direct (Publications) Inc. v. American Business Information, Inc., [1998] 2 F.C. 22; Édutitle Inc. v. Automobile Protection Assn., [2000] 4 F.C. 195; Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co. (1984), 3 C.P.R. (3d) 81; Ladbrooke (Football) Ltd. v. William Hill (Football) Ltd., [1964] 1 All E.R. 465; Composers, Authors and Publishers Association of Canada Ltd. v. CTV Television Network Ltd., [1968] S.C.R. 676; CBS Inc. v. Ames Records & Tapes Ltd., [1981] 2 All E.R. 812; Hubbard v. Vosper, [1972] 1 All E.R. 1023; Associated Newspapers Group plc v. News Group Newspapers Ltd., [1986] R.P.C. 515; [page344] Sillitoe v. McGraw-Hill Book Co. (U.K.), [1983] F.S.R. 545; Beloff v. Pressdram Ltd., [1973] 1 All E.R. 241; Pro Sieben Media AG v. Carlton UK Television Ltd., [1999] F.S.R. 610.

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History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal, [2002] 4 F.C. 213, 212 D.L.R. (4th) 385, 289 N.R. 1, 18 C.P.R. (4th) 161, [2002] F.C.J. No. 690 (QL), 2002 FCA 187, reversing in part a judgment of the Trial Division, [2000] 2 F.C. 451, 169 F.T.R. 1, 179 D.L.R. (4th) 609, 2 C.P.R. (4th) 129, 72 C.R.R. (2d) 139, [1999] F.C.J. No. 1647 (QL). Appeal allowed and cross-appeal dismissed.

Counsel:

R. Scott Joliffe, L. A. Kelly Gill and Kevin J. Sartorio, for the appellant/respondent on cross-appeal.

Roger T. Hughes, Q.C., and Glen A. Bloom, for the respondents/appellants on cross-appeal.

Kevin L. LaRoche, for the intervener the Federation of Law Societies of Canada.

Thomas G. Heintzman, Q.C., and Barry B. Sookman, for the interveners the Canadian Publishers' Council and the Association of Canadian Publishers.

Claude Brunet, Benoît Clermont and Madeleine Lamothe-Samson, for the interveners Société québécoise de gestion collective des droits de reproduction (COPIBEC) and the Canadian Copyright Licensing Agency (Access Copyright).

The judgment of the Court was delivered by

McLACHLIN C.J.:--

I. Introduction -- The Issues To Be Determined

1 The appellant, the Law Society of Upper Canada, is a statutory non-profit corporation that has regulated the legal profession in Ontario since 1822. Since 1845, the Law Society has maintained and operated the Great Library at Osgoode Hall in [page346] Toronto, a reference and research library with one of the largest collections of legal materials in Canada. The Great Library provides a request-based photocopy service (the "custom photocopy service") for Law Society members, the judiciary and other authorized researchers. Under the custom photocopy service, legal materials are reproduced by Great Library staff and delivered in person, by mail or by facsimile transmission to requesters. The Law Society also maintains self-service photocopiers in the Great Library for use by its patrons.

2 The respondents, CCH Canadian Ltd., Thomson Canada Ltd. and Canada Law Book Inc., publish law reports and other legal materials. In 1993, the respondent publishers commenced copyright infringement actions against the Law Society, seeking a declaration of subsistence and ownership of copyright in eleven specific works and a declaration that

the Law Society had infringed copyright when the Great Library reproduced a copy of each of the works. The publishers also sought a permanent injunction prohibiting the Law Society from reproducing these eleven works as well as any other works that they published.

3 The Law Society denied liability and counterclaimed for a declaration that copyright is not infringed when a single copy of a reported decision, case summary, statute, regulation or a limited selection of text from a treatise is made by the Great Library staff or one of its patrons on a self-service photocopier for the purpose of research.

4 The key question that must be answered in this appeal is whether the Law Society has breached copyright by either (1) providing the custom photocopy service in which single copies of the publishers' works are reproduced and sent to patrons upon their request or by (2) maintaining self-service photocopiers and copies of the publishers' works in the Great Library for use by its patrons. To answer this question, the Court must address the following sub-issues:

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- (1) Are the publishers' materials "original works" protected by copyright?
- (2) Did the Great Library authorize copyright infringement by maintaining self-service photocopiers and copies of the publishers' works for its patrons' use?
- (3) Were the Law Society's dealings with the publishers' works "fair dealing[s]" under s. 29 of the *Copyright Act*, R.S.C. 1985, c. C-42, as amended?
- (4) Did Canada Law Book consent to have its works reproduced by the Great Library?

5 The publishers have filed a cross-appeal in which they submit that, in addition to infringing copyright by reproducing copies of their works, the Law Society infringed copyright both by faxing and by selling copies of the publishers' copyrighted works through its custom photocopy service. The publishers also contend that the Great Library does not qualify for the library exemption under the *Copyright Act* and, finally, that they are entitled to an injunction to the extent that the Law Society has been found to infringe any one or more of their copyrighted works. The four sub-issues that the Court must address on this cross-appeal are:

- (1) Did the Law Society's fax transmissions of the publishers' works constitute communications "to the public" within s. 3(1)(f) of the *Copyright Act* so as to constitute copyright infringement?
- (2) Did the Law Society infringe copyright by selling copies of the publishers' works contrary to s. 27(2) of the *Copyright Act*?
- (3) Does the Law Society qualify for an exemption as a "library, archive or museum" under ss. 2 and 30.2(1) of the *Copyright Act*?

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- (4) To the extent that the Law Society has been found to infringe any one or more of the publishers' copyrighted works, are the publishers entitled to a permanent injunction under s. 34(1) of the *Copyright Act*?

6 With respect to the main appeal, I conclude that the Law Society did not infringe copyright by providing single copies of the respondent publishers' works to its members through the custom photocopy service. Although the works in question were "original" and thus covered by copyright, the Law Society's dealings with the works were for the purpose

of research and were fair dealings within s. 29 of the *Copyright Act*. I also find that the Law Society did not authorize infringement by maintaining self-service photocopiers in the Great Library for use by its patrons. I would therefore allow the appeal.

7 On the cross-appeal, I conclude that there was no secondary infringement by the Law Society; the fax transmissions were not communications to the public and the Law Society did not sell copies of the publishers' works. In light of my finding on appeal that the Law Society's dealings with the publishers' works were fair, it is not necessary to decide whether the Great Library qualifies for the library exemption. This said, I would conclude that the Great Library does indeed qualify for this exemption. Finally, in light of my conclusion that there has been no copyright infringement, it is not necessary to issue an injunction in this case. I would dismiss the cross-appeal.

II. Analysis on Appeal

8 Copyright law in Canada protects a wide range of works including every original literary, dramatic, musical and artistic work, computer programs, translations and compilations of works: see ss. 5, 2 and 2.1 of the *Copyright Act*. Copyright law protects the expression of ideas in these works; it does not protect ideas in and of themselves. Thorson P. explained it thus in *Moreau v. St. Vincent*, [1950] Ex. C.R. 198, at p. 203:

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It is, I think, an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own.

It flows from the fact that copyright only protects the expression of ideas that a work must also be in a fixed material form to attract copyright protection: see s. 2 definitions of "dramatic work" and "computer program" and, more generally, *Goldner v. Canadian Broadcasting Corp.* (1972), 7 C.P.R. (2d) 158 (F.C.T.D.), at p. 162; *Grignon v. Roussel* (1991), 38 C.P.R. (3d) 4 (F.C.T.D.), at p. 7.

9 In Canada, copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive: see *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34, at para. 5; *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at p. 477; *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357, at p. 373. In interpreting the scope of the *Copyright Act*'s rights and remedies, courts should apply the modern approach to statutory interpretation whereby "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

10 Binnie J. recently explained in *Théberge*, *supra*, at paras. 30-31, that the *Copyright Act* has dual objectives:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator

The proper balance among these and other public policy objectives lies not only in recognizing the [page350] creator's rights but in giving due weight to their limited nature.

In interpreting the *Copyright Act*, courts should strive to maintain an appropriate balance between these two goals.

11 Canada's *Copyright Act* sets out the rights and obligations of both copyright owners and users. Part I of the Act specifies the scope of a creator's copyright and moral rights in works. For example, s. 3 of the Act specifies that only copyright owners have the right to copy or to authorize the copying of their works:

3.(1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof

...

and to authorize any such acts.

12 Part III of the *Copyright Act* deals with the infringement of copyright and exceptions to infringement. Section 27(1) states generally that "[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do." More specific examples of how copyright is infringed are set out in s. 27(2) of the Act. The exceptions to copyright infringement, perhaps more properly understood as users' rights, are set out in ss. 29 and 30 of the Act. The fair dealing exceptions to copyright are set out in ss. 29 to 29.2. In general terms, those who deal fairly with a work for the purpose of research, private study, criticism, review or news reporting, do not infringe copyright. Educational institutions, libraries, archives and museums are specifically exempted from copyright infringement in certain circumstances: see ss. 29.4 to 30 (educational institutions), and ss. 30.1 to 30.5. Part IV of the *Copyright Act* specifies the remedies that may be awarded in cases where [page351] copyright has been infringed. Copyright owners may be entitled to any number of different remedies such as damages and injunctions, among others.

13 This case requires this Court to interpret the scope of both owners' and users' rights under the *Copyright Act*, including what qualifies for copyright protection, what is required to find that the copyright has been infringed through authorization and the fair dealing exceptions under the Act.

(1) *Are the Publishers' Materials "Original Works" Covered by Copyright?*

(a) The Law

14 Section 5 of the *Copyright Act* states that, in Canada, copyright shall subsist "in every original literary, dramatic, musical and artistic work" (emphasis added). Although originality sets the boundaries of copyright law, it is not defined in the *Copyright Act*. Section 2 of the *Copyright Act* defines "every original literary ... work" as including "every original production in the literary ... domain, whatever may be the mode or form of its expression". Since copyright protects only the expression or form of ideas, "the originality requirement must apply to the expressive element of the work and not the idea": S. Handa, *Copyright Law in Canada* (2002), at p. 209.

15 There are competing views on the meaning of "original" in copyright law. Some courts have found that a work that originates from an author and is more than a mere copy of a work is sufficient to ground copyright. See, for example, *University of London Press, Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601; *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257 (F.C.T.D.). This approach is consistent with the "sweat of the brow" or "industriousness" standard of originality, which is premised on a natural rights [page352] or Lockean theory of "just desserts", namely that an author deserves to have his or her efforts in producing a work rewarded. Other courts have required that a work must be creative to be "original" and thus protected by copyright. See, for example, *Feist*

Publications Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991); *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, [1998] 2 F.C. 22 (C.A.). This approach is also consistent with a natural rights theory of property law; however it is less absolute in that only those works that are the product of creativity will be rewarded with copyright protection. It has been suggested that the "creativity" approach to originality helps ensure that copyright protection only extends to the expression of ideas as opposed to the underlying ideas or facts. See *Feist*, *supra*, at p. 353.

16 I conclude that the correct position falls between these extremes. For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.

17 In reaching this conclusion, I have had regard to: (1) the plain meaning of "original"; (2) the history [page353] of copyright law; (3) recent jurisprudence; (4) the purpose of the *Copyright Act*; and (5) that this constitutes a workable yet fair standard.

(i) *The Plain Meaning of "Original"*

18 The plain meaning of the word "original" suggests at least some intellectual effort, as is necessarily involved in the exercise of skill and judgment. The *Concise Oxford Dictionary* (7th ed. 1982), at p. 720, defines "original" as follows:

1. *a.* existing from the first, primitive, innate, initial, earliest; ... 2. that has served as pattern, of which copy or translation has been made, not derivative or dependant, first-hand, not imitative, novel in character or style, inventive, creative, thinking or acting for oneself.

"Original"'s plain meaning implies not just that something is not a copy. It includes, if not creativity *per se*, at least some sort of intellectual effort. As Professor Gervais has noted, "[w]hen used to mean simply that the work must originate from the author, originality is eviscerated of its core meaning. It becomes a synonym of 'originated,' and fails to reflect the ordinary sense of the word": D. J. Gervais, "*Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*" (2002), 49 *J. Copyright Soc'y U.S.A.* 949, at p. 961.

(ii) *History of Copyright*

19 The idea of "intellectual creation" was implicit in the notion of literary or artistic work under the *Berne Convention for the Protection of Literary and Artistic Works* (1886), to which Canada adhered in 1923, and which served as the precursor to Canada's first *Copyright Act*, adopted in 1924. See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (1987), at p. 900. Professor Ricketson has indicated that in adopting a sweat of the brow or industriousness approach to deciding what is original, common law countries such as England have "depart[ed] from the spirit, if not the letter, of the [Berne] Convention" since works that have taken time, labour or money to produce but are not truly artistic or literary [page354] intellectual creations are accorded copyright protection: Ricketson, *supra*, at p. 901.

20 In the international context, France and other continental civilian jurisdictions require more than mere industriousness to find that a work is original. "Under the French law, originality means both the intellectual contribution of the author and the novel nature of the work as compared with existing works": Handa, *supra*, at p. 211. This understanding of originality is reinforced by the expression "*le droit d'auteur*" -- literally the "author's right" -- the

term used in the French title of the *Copyright Act*. The author must contribute something intellectual to the work, namely skill and judgment, if it is to be considered original.

(iii) *Recent Jurisprudence*

21 Although many Canadian courts have adopted a rather low standard of originality, i.e., that of industriousness, more recently, some courts have begun to question whether this standard is appropriate. For example, the Federal Court of Appeal in *Tele-Direct*, *supra*, held, at para. 29, that those cases which had adopted the sweat of the brow approach to originality should not be interpreted as concluding that labour, in and of itself, could ground a finding of originality. As Décary J.A. explained: "If they did, I suggest that their approach was wrong and is irreconcilable with the standards of intellect and creativity that were expressly set out in NAFTA and endorsed in the 1993 amendments to the *Copyright Act* and that were already recognized in Anglo-Canadian law." See also *Édutile Inc. v. Automobile Protection Assn.*, [2000] 4 F.C. 195 (C.A.), at para. 8, adopting this passage.

22 The United States Supreme Court explicitly rejected the "sweat of the brow" approach to originality in *Feist*, *supra*. In so doing, O'Connor J. explained at p. 353 that, in her view, the "sweat of the brow" approach was not consistent with the underlying tenets of copyright law:

The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright [page355] protection in a compilation beyond selection and arrangement -- the compiler's original contributions -- to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information previously published," but rather had to "independently wor(k) out the matter for himself, so as to arrive at the same result from the same common sources of information." ... "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law -- that no one may copyright facts or ideas.

As this Court recognized in *Compo*, *supra*, at p. 367, U.S. copyright cases may not be easily transferable to Canada given the key differences in the copyright concepts in Canadian and American copyright legislation. This said, in Canada, as in the United States, copyright protection does not extend to facts or ideas but is limited to the expression of ideas. As such, O'Connor J.'s concerns about the "sweat of the brow" doctrine's improper extension of copyright over facts also resonate in Canada. I would not, however, go as far as O'Connor J. in requiring that a work possess a minimal degree of creativity to be considered original. See *Feist*, *supra*, at pp. 345 and 358.

(iv) *Purpose of the Copyright Act*

23 As mentioned, in *Théberge*, *supra*, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation. See J. Litman, "The Public Domain" (1990), 39 Emory L.J. 965, at p. 969, and C. J. Craig, "Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002), 28 *Queen's L.J.* [page356] 1. By way of contrast, when an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.

(v) *Workable, Yet Fair Standard*

24 Requiring that an original work be the product of an exercise of skill and judgment is a workable yet fair standard. The "sweat of the brow" approach to originality is too low a standard. It shifts the balance of copyright protection too

far in favour of the owner's rights, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creativity standard implies that something must be novel or non-obvious -- concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy objectives of the *Copyright Act*.

(vi) *Conclusion*

25 For these reasons, I conclude that an "original" work under the *Copyright Act* is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be "original" and covered by copyright, creativity is not required to make a work "original".

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(b) Application of the Law to These Facts

26 At trial, the respondent publishers claimed copyright in eleven works: three reported judicial decisions; the three headnotes preceding these decisions; the annotated *Martin's Ontario Criminal Practice 1999*; a case summary; a topical index; the textbook *Economic Negligence* (1989); and the monograph "Dental Evidence", being chapter 13 in *Forensic Evidence in Canada* (1991). Gibson J. held that the publishers' works should be judged against a standard of intellect and creativity in order to determine if they were original. Based on this standard of originality, the trial judge found that the publishers only had copyright in the annotated *Criminal Practice*, the textbook and the monograph. He concluded that the remaining eight works were not original and, therefore, were not covered by copyright ([2000] 2 F.C. 451).

27 On appeal, the Law Society did not challenge the trial judge's findings with respect to the three works in which he found copyright did exist, with the exception of questioning whether the monograph constituted a "work" within the meaning of the *Copyright Act*. The Federal Court of Appeal adopted the "sweat of the brow" approach to originality and found that if a work was more than a mere copy, it would be original. On this basis, Linden J.A., writing for the majority, held that all of the remaining works were original and therefore covered by copyright ([2002] 4 F.C. 213). The Law Society appeals, contending that the headnotes, case summary, topical index and reported judicial decisions are not "original" within the meaning of the *Copyright Act* and, therefore, are not covered by copyright.

28 As stated, in order to be original, a work must have originated from the author, not be copied, and must be the product of the exercise of skill and judgment that is more than trivial. Applying this test, all of the works in question are original and therefore covered by copyright.

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(i) *Headnotes*

29 The Federal Court of Appeal held that "headnotes", defined as including the summary of the case, catchlines,

statement of the case, case title and case information, are more than mere copies and hence "original" works in which copyright subsists. It found that the headnotes are more than simply an abridged version of the reasons; they consist of independently composed features. As Linden J.A. explained, at para. 73, the authors of the headnotes could have chosen to make the summaries "long or short, technical or simple, dull or dramatic, well written or confusing; the organization and presentation might have varied greatly".

30 Although headnotes are inspired in large part by the judgment which they summarize and refer to, they are clearly not an identical copy of the reasons. The authors must select specific elements of the decision and can arrange them in numerous different ways. Making these decisions requires the exercise of skill and judgment. The authors must use their knowledge about the law and developed ability to determine legal *ratios* to produce the headnotes. They must also use their capacity for discernment to decide which parts of the judgment warrant inclusion in the headnotes. This process is more than just a mechanical exercise. Thus the headnotes constitute "original" works in which copyright subsists.

(ii) *Case Summary*

31 For substantially the same reasons as given for headnotes, the case summary is also covered by copyright. A summary of judicial reasons is not simply a copy of the original reasons. Even if the summary often contains the same language as the judicial reasons, the act of choosing which portions to extract and how to arrange them in the summary requires an exercise of skill and judgment.

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(iii) *Topical Index*

32 The topical index is part of the book *Canada GST Cases* (1997). It provides a listing of cases with short headings to indicate the main topics covered by the decision and very brief summaries of the decisions. The Federal Court of Appeal held that the index was original in that it required skill and effort to compile. I agree. The author of the index had to make an initial decision as to which cases were authorities on GST. This alone is a decision that would require the exercise of skill and judgment. The author also had to decide which headings to include and which cases should fall under which headings. He or she had to distill the essence of the decisions down to a succinct one-phrase summary. All of these tasks require skill and judgment that are sufficient to conclude that the topical index is an "original" work in which copyright subsists.

(iv) *Reported Judicial Decisions*

33 The reported judicial decisions, when properly understood as a compilation of the headnote and the accompanying edited judicial reasons, are "original" works covered by copyright. Copyright protects originality of form or expression. A compilation takes existing material and casts it in a different form. The arranger does not have copyright in the individual components. However, the arranger may have copyright in the form represented by the compilation. "It is not the several components that are the subject of the copyright, but the over-all arrangement of them which the plaintiff through his industry has produced": *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81 (B.C.S.C.), at p. 84; see also *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 (H.L.), at p. 469.

34 The reported judicial decisions here at issue meet the test for originality. The authors have arranged the case summary, catchlines, case title, case information (the headnotes) and the judicial reasons in a specific manner. The arrangement of these different [page360] components requires the exercise of skill and judgment. The compilation, viewed globally, attracts copyright protection.

35 This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright. The changes made to judicial reasons are relatively trivial; the publishers add only basic factual information about the date of the judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations. The publishers also correct minor grammatical errors and spelling mistakes. Any skill and judgment that might be involved in making these minor changes and additions to the judicial reasons are too trivial to warrant copyright protection. The changes and additions are more properly characterized as a mere mechanical exercise. As such, the reported reasons, when disentangled from the rest of the compilation -- namely the headnote -- are not covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons.

36 In summary, the headnotes, case summary, topical index and compilation of reported judicial decisions are all works that have originated from their authors and are not mere copies. They are the product of the exercise of skill and judgment that is not trivial. As such, they are all "original" works in which copyright subsists. The appeal of these findings should be dismissed.

(2) *Authorization: The Self-Service Photocopiers*

(a) The Law

37 Under s. 27(1) of the *Copyright Act*, it is an infringement of copyright for anyone to do anything that the Act only allows owners to do, including authorizing the exercise of his or her own rights. It does not infringe copyright to authorize a person [page361] to do something that would not constitute copyright infringement. See *Composers, Authors and Publishers Association of Canada Ltd. v. CTV Television Network Ltd.*, [1968] S.C.R. 676, at p. 680. The publishers argue that the Law Society is liable for breach of copyright under this section because it implicitly authorized patrons of the Great Library to copy works in breach of the *Copyright Act*.

38 "Authorize" means to "sanction, approve and countenance": *Muzak Corp. v. Composers, Authors and Publishers Association of Canada, Ltd.*, [1953] 2 S.C.R. 182, at p. 193; *De Tervagne v. Beloeil (Town)*, [1993] 3 F.C. 227 (T.D.). Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, "[g]ive approval to; sanction, permit; favour, encourage": see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference: *CBS Inc. v. Ames Records & Tapes Ltd.*, [1981] 2 All E.R. 812 (Ch. D.), at pp. 823-24. However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law: *Muzak, supra*. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement: *Muzak, supra*; *De Tervagne, supra*; see also J. S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at p. 21-104, and P. D. Hitchcock, "Home Copying and Authorization" (1983), 67 C.P.R. (2d) 17, at pp. 29-33.

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(b) Application of the Law to These Facts

39 For several decades, the Law Society has maintained self-service photocopiers for the use of its patrons in the Great Library. The patrons' use of the machines is not monitored directly. Since the mid-1980s, the Law Society has posted the following notice above each machine:

The copyright law of Canada governs the making of photocopies or other reproductions of copyright material. Certain copying may be an infringement of the copyright law. This library is not responsible for infringing copies made by the users of these machines.

At trial, the Law Society applied for a declaration that it did not authorize copyright infringement by providing self-service photocopiers for patrons of the Great Library. No evidence was tendered that the photocopiers had been used in an infringing manner.

40 The trial judge declined to deal with this issue, in part because of the limited nature of the evidence on this question. The Federal Court of Appeal, relying in part on the Australian High Court decision in *Moorhouse v. University of New South Wales*, [1976] R.P.C. 151, concluded that the Law Society implicitly sanctioned, approved or countenanced copyright infringement of the publishers' works by failing to control copying and instead merely posting a notice indicating that the Law Society was not responsible for infringing copies made by the machine's users.

41 With respect, I do not agree that this amounted to authorizing breach of copyright. *Moorhouse, supra*, is inconsistent with previous Canadian and British approaches to this issue. See D. Vaver, *Copyright Law* (2000), at p. 27, and McKeown, *supra*, at p. 21-108. In my view, the *Moorhouse* approach to authorization shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.

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42 Applying the criteria from *Muzak, supra*, and *De Tervagne, supra*, I conclude that the Law Society's mere provision of photocopiers for the use of its patrons did not constitute authorization to use the photocopiers to breach copyright law.

43 First, there was no evidence that the photocopiers had been used in a manner that was not consistent with copyright law. As noted, a person does not authorize copyright infringement by authorizing the mere use of equipment (such as photocopiers) that could be used to infringe copyright. In fact, courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. Although the Court of Appeal assumed that the photocopiers were being used to infringe copyright, I think it is equally plausible that the patrons using the machines were doing so in a lawful manner.

44 Second, the Court of Appeal erred in finding that the Law Society's posting of the notice constitutes an express acknowledgement that the photocopiers will be used in an illegal manner. The Law Society's posting of the notice over the photocopiers does not rebut the presumption that a person authorizes an activity only so far as it is in accordance with the law. Given that the Law Society is responsible for regulating the legal profession in Ontario, it is more logical to conclude that the notice was posted for the purpose of reminding the Great Library's patrons that copyright law governs the making of photocopies in the library.

45 Finally, even if there were evidence of the photocopiers having been used to infringe copyright, the Law Society lacks sufficient control over the Great Library's patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement. The Law Society and Great Library patrons are not in a master-servant or employer-employee relationship such that the Law Society can be said to exercise control over the patrons who might commit infringement: see, for example, *De Tervagne, supra*. Nor does the Law Society exercise control over which works the patrons [page364] choose to copy, the patron's purposes for copying or the photocopiers themselves.

46 In summary, I conclude that evidence does not establish that the Law Society authorized copyright infringement by providing self-service photocopiers and copies of the respondent publishers' works for use by its patrons in the Great

Library. I would allow this ground of appeal.

(3) *The Law Society and Fair Dealing*

47 The Great Library provides a custom photocopy service. Upon receiving a request from a lawyer, law student, member of the judiciary or authorized researcher, the Great Library staff photocopies extracts from legal material within its collection and sends it to the requester. The question is whether this service falls within the fair dealing defence under s. 29 of the *Copyright Act* which provides: "Fair dealing for the purpose of research or private study does not infringe copyright."

(a) The Law

48 Before reviewing the scope of the fair dealing exception under the *Copyright Act*, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p. 171: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair [page365] and balanced reading that befits remedial legislation."

49 As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.

50 In order to show that a dealing was fair under s. 29 of the *Copyright Act*, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair.

51 The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research." Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.

52 The *Copyright Act* does not define what will be "fair"; whether something is fair is a question of fact and depends on the facts of each case. See McKeown, *supra*, at p. 23-6. Lord Denning explained this eloquently in *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.), at p. 1027:

[page366]

It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts

and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.

53 At the Court of Appeal, Linden J.A. acknowledged that there was no set test for fairness, but outlined a series of factors that could be considered to help assess whether a dealing is fair. Drawing on the decision in *Hubbard, supra*, as well as the doctrine of fair use in the United States, he proposed that the following factors be considered in assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.

(i) *The Purpose of the Dealing*

54 In Canada, the purpose of the dealing will be fair if it is for one of the allowable purposes under the *Copyright Act*, namely research, private study, criticism, review or news reporting: see ss. 29, 29.1 and 29.2 of the *Copyright Act*. As discussed, these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights. This said, courts should attempt to make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work. See McKeown, *supra*, at p. 23-6. [page367] See also *Associated Newspapers Group plc v. News Group Newspapers Ltd.*, [1986] R.P.C. 515 (Ch. D.). Moreover, as the Court of Appeal explained, some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes.

(ii) *The Character of the Dealing*

55 In assessing the character of a dealing, courts must examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing. If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness. It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair. For example, in *Sillitoe v. McGraw-Hill Book Co. (U.K.)*, [1983] F.S.R. 545 (Ch. D.), the importers and distributors of "study notes" that incorporated large passages from published works attempted to claim that the copies were fair dealings because they were for the purpose of criticism. The court reviewed the ways in which copied works were customarily dealt with in literary criticism textbooks to help it conclude that the study notes were not fair dealings for the purpose of criticism.

(iii) *The Amount of the Dealing*

56 Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. If the amount taken from a work is trivial, the fair dealing analysis need not be undertaken at all because the court will have concluded that there was no copyright infringement. As the passage from *Hubbard* indicates, the quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work. As Vaver points out, there might be no other way to criticize or [page368] review certain types of works such as photographs: see Vaver, *supra*, at p. 191. The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.

(iv) *Alternatives to the Dealing*

57 Alternatives to dealing with the infringed work may affect the determination of fairness. If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be

considered by the court. I agree with the Court of Appeal that it will also be useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose. For example, if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness.

(v) *The Nature of the Work*

58 The nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work -- one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair. See *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241 (Ch. D.), at p. 264.

(vi) *Effect of the Dealing on the Work*

59 Finally, the effect of the dealing on the work is another factor warranting consideration when courts are determining whether a dealing is fair. If [page369] the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair. Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair. See, for example, *Pro Sieben Media AG v. Carlton UK Television Ltd.*, [1999] F.S.R. 610 (C.A.), *per* Robert Walker L.J.

60 To conclude, the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could help determine whether or not a dealing is fair. These factors may be more or less relevant to assessing the fairness of a dealing depending on the factual context of the allegedly infringing dealing. In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.

(b) Application of the Law to These Facts

61 In 1996, the Law Society implemented an "Access to the Law Policy" ("Access Policy") which governs the Great Library's custom photocopy service and sets limits on the types of requests that will be honoured:

Access to the Law Policy

The Law Society of Upper Canada, with the assistance of the resources of the Great Library, supports the administration of justice and the rule of law in the Province of Ontario. The Great Library's comprehensive catalogue of primary and secondary legal sources, in print and electronic media, is open to lawyers, articling students, the judiciary and other authorized researchers. Single copies of library materials, required for the purposes of research, review, private study and criticism, as well as use in court, tribunal and government proceedings, may be provided to users of the Great Library.

This service supports users of the Great Library who require access to legal materials while respecting the copyright of the publishers of such materials, in keeping with the fair dealing provisions in Section 27 of the Canadian Copyright Act.

Guidelines to Access

1. The Access to the Law service provides single copies for specific purposes, identified in advance to library staff.
2. The specific purposes are research, review, private study and criticism, as well as use in court, tribunal and government proceedings. Any doubt concerning the legitimacy of the request for these purposes will be referred to the Reference Librarian.
3. The individual must identify him/herself and the purpose at the time of making the request. A request form will be completed by library staff, based on information provided by the requesting party.
4. As to the amount of copying, discretion must be used. No copies will be made for any purpose other than that specifically set out on the request form. Ordinarily, requests for a copy of one case, one article or one statutory reference will be satisfied as a matter of routine. Requests for substantial copying from secondary sources (e.g. in excess of 5% of the volume or more than two citations from one volume) will be referred to the Reference Librarian and may ultimately be refused.
5. This service is provided on a not for profit basis. The fee charged for this service is intended to cover the costs of the Law Society.

When the Access Policy was introduced, the Law Society specified that it reflected the policy that the Great Library had been following in the past; it did not change the Law Society's approach to its custom photocopy service.

62 At trial, the Law Society claimed that its custom photocopy service does not infringe copyright because it is a fair dealing within the meaning of s. 29 of the *Copyright Act*. The trial judge held that the fair dealing exception should be strictly construed. He concluded that copying for the custom photocopy service was not for the purpose of either research or study and therefore was not within the ambit of fair dealing. The Court of Appeal rejected the argument that the fair dealing exception should be interpreted restrictively. The majority held that [page371] the Law Society could rely on the purposes of its patrons to prove that its dealings were fair. The Court of Appeal concluded, however, that there was not sufficient evidence to determine whether or not the dealings were fair and, consequently, that the fair dealing exception had not been proven.

63 This raises a preliminary question: is it incumbent on the Law Society to adduce evidence that every patron uses the material provided for in a fair dealing manner or can the Law Society rely on its general practice to establish fair dealing? I conclude that the latter suffices. Section 29 of the *Copyright Act* states that "[f]air dealing for the purpose of research or private study does not infringe copyright." The language is general. "Dealing" connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.

64 The Law Society's custom photocopying service is provided for the purpose of research, review and private study. The Law Society's Access Policy states that "[s]ingle copies of library materials, required for the purposes of research, review, private study and criticism ... may be provided to users of the Great Library." When the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary [page372] conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process. There is no other purpose for the copying; the Law Society does not profit from this service. Put simply, its custom photocopy service helps to ensure

that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law. In sum, the Law Society's custom photocopy service is an integral part of the legal research process, an allowable purpose under s. 29 of the *Copyright Act*.

65 The evidence also establishes that the dealings were fair, having regard to the factors discussed earlier.

(i) *Purpose of the Dealing*

66 The Access Policy and its safeguards weigh in favour of finding that the dealings were fair. It specifies that individuals requesting copies must identify the purpose of the request for these requests to be honoured, and provides that concerns that a request is not for one of the legitimate purposes under the fair dealing exceptions in the *Copyright Act* are referred to the Reference Librarian. This policy provides reasonable safeguards that the materials are being used for the purpose of research and private study.

(ii) *Character of the Dealing*

67 The character of the Law Society's dealings with the publishers' works also supports a finding of fairness. Under the Access Policy, the Law Society provides single copies of works for the specific purposes allowed under the *Copyright Act*. There is no evidence that the Law Society was disseminating multiple copies of works to multiple members of the legal profession. Copying a work for the purpose of research on a specific legal topic is generally a fair dealing.

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(iii) *Amount of the Dealing*

68 The Access Policy indicates that the Great Library will exercise its discretion to ensure that the amount of the dealing with copyrighted works will be reasonable. The Access Policy states that the Great Library will typically honour requests for a copy of one case, one article or one statutory reference. It further stipulates that the Reference Librarian will review requests for a copy of more than five percent of a secondary source and that, ultimately, such requests may be refused. This suggests that the Law Society's dealings with the publishers' works are fair. Although the dealings might not be fair if a specific patron of the Great Library submitted numerous requests for multiple reported judicial decisions from the same reported series over a short period of time, there is no evidence that this has occurred.

(iv) *Alternatives to the Dealing*

69 It is not apparent that there are alternatives to the custom photocopy service employed by the Great Library. As the Court of Appeal points out, the patrons of the custom photocopying service cannot reasonably be expected to always conduct their research on-site at the Great Library. Twenty percent of the requesters live outside the Toronto area; it would be burdensome to expect them to travel to the city each time they wanted to track down a specific legal source. Moreover, because of the heavy demand for the legal collection at the Great Library, researchers are not allowed to borrow materials from the library. If researchers could not request copies of the work or make copies of the works themselves, they would be required to do all of their research and note-taking in the Great Library, something which does not seem reasonable given the volume of research that can often be required on complex legal matters.

70 The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's [page374] decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of

the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act's* balance between owner's rights and user's interests.

(v) *Nature of the Work*

71 I agree with the Court of Appeal that the nature of the works in question -- judicial decisions and other works essential to legal research -- suggests that the Law Society's dealings were fair. As Linden J.A. explained, at para. 159: "It is generally in the public interest that access to judicial decisions and other legal resources not be unjustifiably restrained." Moreover, the Access Policy puts reasonable limits on the Great Library's photocopy service. It does not allow all legal works to be copied regardless of the purpose to which they will be put. Requests for copies will be honoured only if the user intends to use the works for the purpose of research, private study, criticism, review or use in legal proceedings. This further supports a finding that the dealings were fair.

(vi) *Effect of the Dealing on the Work*

72 Another consideration is that no evidence was tendered to show that the market for the publishers' works had decreased as a result of these copies having been made. Although the burden of proving fair dealing lies with the Law Society, it lacked access to evidence about the effect of the dealing on the publishers' markets. If there had been evidence that the publishers' markets had been negatively affected by the Law Society's custom photocopying service, it would have been in the publishers' interest to tender it at trial. They did not do so. The only evidence of market impact is that the publishers have continued to produce new reporter series and legal publications during the period of the custom photocopy service's operation.

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(vii) *Conclusion*

73 The factors discussed, considered together, suggest that the Law Society's dealings with the publishers' works through its custom photocopy service were research-based and fair. The Access Policy places appropriate limits on the type of copying that the Law Society will do. It states that not all requests will be honoured. If a request does not appear to be for the purpose of research, criticism, review or private study, the copy will not be made. If a question arises as to whether the stated purpose is legitimate, the Reference Librarian will review the matter. The Access Policy limits the amount of work that will be copied, and the Reference Librarian reviews requests that exceed what might typically be considered reasonable and has the right to refuse to fulfill a request. On these facts, I conclude that the Law Society's dealings with the publishers' works satisfy the fair dealing defence and that the Law Society does not infringe copyright.

(4) *Canada Law Book's Consent*

74 Under s. 27(1) of the *Copyright Act*, a person infringes copyright if he or she does something that only the owner of the copyright has the right to do without the owner's consent. On appeal to this Court, the Law Society submits that six of the items that the respondent publishers have claimed were copied in infringement of copyright were copied at the request of Jean Cummings, a lawyer who had been asked by Canada Law Book's Vice-President to obtain copies of these works from the Law Society. As such, the Law Society contends that the copies were made with the consent of Canada Law Book and therefore were not an infringement of copyright.

75 This issue was not really addressed in the courts below. In light of my findings on the issue of fair dealing, it is not necessary to answer this question to dispose of this appeal, and I decline to do so.

(5) *Conclusion on Main Appeal*

76 I would allow the appeal and issue a declaration that the Law Society does not infringe copyright [page376] when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its Access Policy. I would also issue a declaration that the Law Society does not authorize copyright infringement by maintaining a photocopier in the Great Library and posting a notice warning that it will not be responsible for any copies made in infringement of copyright.

III. Analysis on Cross-Appeal

(1) *Are the Law Society's Fax Transmissions Communications to the Public?*

77 At trial, the publishers argued that the Law Society's fax transmissions of copies of their works to lawyers in Ontario were communications "to the public by telecommunication" and hence infringed s. 3(1)(f) of the *Copyright Act*. The trial judge found that the fax transmissions were not telecommunications to the public because they "emanated from a single point and were each intended to be received at a single point" (para. 167). The Court of Appeal agreed, although it allowed that a series of sequential transmissions might constitute an infringement of an owner's right to communicate to the public.

78 I agree with these conclusions. The fax transmission of a single copy to a single individual is not a communication to the public. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright. However, there was no evidence of this type of transmission having occurred in this case.

79 On the evidence in this case, the fax transmissions were not communications to the public. I would dismiss this ground of cross-appeal.

[page377]

(2) *Did the Law Society Infringe Copyright in the Publishers' Works by Selling Copies to Section 27(2) of the Copyright Act?*

80 Under s. 27(2)(a) of the *Copyright Act*, it is an infringement of copyright to sell a copy of a work that the person knows or should have known infringes copyright, a practice known as secondary infringement. The majority at the Court of Appeal rejected the allegation of secondary infringement on the ground that it was not established that the Law Society knew or should have known it was dealing with infringing copies of the publishers' works. The publishers appeal this finding on cross-appeal.

81 At the Court of Appeal, Rothstein J.A., in his concurring judgment, properly outlined the three elements that must be proven to ground a claim for secondary infringement: (1) the copy must be the product of primary infringement; (2) the secondary infringer must have known or should have known that he or she is dealing with a product of infringement; and (3) the secondary dealing must be established; that is, there must have been a sale.

82 In the main appeal, I have concluded that the Law Society did not infringe copyright in reproducing the publishers' works in response to requests under its custom photocopy service. Absent primary infringement, there can be no secondary infringement. I would dismiss this ground of cross-appeal.

(3) *Does the Law Society's Great Library Qualify for an Exemption as a "Library, Archive or Museum" Under Sections 2 and 30.2(1) of the Copyright Act?*

83 In 1999, amendments to the *Copyright Act* came into force allowing libraries, archives and museums to qualify for

exemptions against copyright infringement: S.C. 1997, c. 24. Under s. 30.2(1), a library or persons acting under its authority may do anything on behalf of any person that the person may do personally under the fair dealing exceptions to copyright infringement. Section 2 of the *Copyright [page378] Act* defines "library, archive or museum". In order to qualify as a library, the Great Library: (1) must not be established or conducted for profit; (2) must not be administered or controlled by a body that is established or conducted for profit; and (3) must hold and maintain a collection of documents and other materials that is open to the public or to researchers. The Court of Appeal found that the Great Library qualified for the library exemption. The publishers appeal this finding on the ground that the Law Society, which controls the library, is indirectly controlled by the body of lawyers authorized to practise law in Ontario who conduct the business of law for profit.

84 I concluded in the main appeal that the Law Society's dealings with the publishers' works were fair. Thus, the Law Society need not rely on the library exemption. However, were it necessary, it would be entitled to do so. The Great Library is not established or conducted for profit. It is administered and controlled by the Benchers of the Law Society. Although some of the Benchers, when acting in other capacities, practise law for profit, when they are acting as administrators of the Great Library, the Benchers are not acting as a body established or conducted for profit. The Court of Appeal was correct in its conclusion on this point. I would dismiss this ground of cross-appeal.

(4) *Are the Publishers Entitled to a Permanent Injunction Under Section 34(1) of the Copyright Act?*

85 Under s. 34(1) of the *Copyright Act*, the copyright owner is entitled to all remedies, including an injunction, for the infringement of copyright in his or her work. An injunction is, in principle, an equitable remedy and, thus, it is within the Court's discretion to decide whether or not to grant an injunction. See P. E. Kierans and R. Borenstein, "Injunctions -- Interlocutory and Permanent", in R. E. Dimock, ed., *Intellectual Property Disputes: [page379] Resolutions & Remedies* (2002), vol. 2, 15-1, at p. 15-4.

86 Given my finding on the main appeal that the Law Society did not infringe copyright in the publishers' works, it is unnecessary to consider whether the Court of Appeal erred in choosing not to issue an injunction in this case. I would dismiss this ground of appeal.

(5) *Conclusion on Cross-Appeal*

87 In the result, I would dismiss the cross-appeal.

IV. Conclusion

88 On the main appeal, I conclude that the Law Society did not infringe copyright through its custom photocopy service when it provided single copies of the publishers' works to its members. The publishers' headnotes, case summary, topical index and compilation of reported judicial decisions are all "original" works covered by copyright. They originated from their authors, are not mere copies and are the product of the exercise of skill and judgment that is not trivial. That said, the Great Library's dealings with the works were for the purpose of research and were fair dealings within the meaning of s. 29 of the *Copyright Act* and thus did not constitute copyright infringement. I also conclude that the Law Society did not authorize copyright infringement by maintaining self-service photocopiers in the Great Library for use by its patrons. I would therefore allow the appeal.

89 My conclusions on the cross-appeal follow from those on the main appeal. No secondary infringement of copyright by the Law Society is established. The Law Society's fax transmissions did not constitute communications to the public and it did not sell copies of the publishers' works. Were it necessary, I would conclude that the Great Library qualifies for a library exemption under the *Copyright Act*. Finally, in light of my finding that there has been no copyright infringement in this case, an injunction should [page380] not be issued in this case. I would dismiss the cross-appeal.

90 In the result, the appeal is allowed and the cross-appeal dismissed. I would issue a declaration that the Law

Society does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its "Access to the Law Policy". I would also issue a declaration that the Law Society does not authorize copyright infringement by maintaining a photocopier in the Great Library and posting a notice warning that it will not be responsible for any copies made in infringement of copyright. Given the appellant's success on the appeal and cross-appeal, it is entitled to costs throughout.

* * * * *

APPENDIX

Legislative Provisions

Copyright Act, R.S.C. 1985, c. C-42

2... .

"every original literary, dramatic, musical and artistic work" includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science;

...

"library, archive or museum" means

(a) an institution, whether or not incorporated, that is not established or conducted for profit or that does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents and other materials that is open to the public or to researchers, or

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(b) any other non-profit institution prescribed by regulation;

3.(1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied,

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and to authorize any such acts.

5.(1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met: ...

27.(1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

(2) It is an infringement of copyright for any person to

- (a) sell or rent out,
- (b) distribute to such an extent as to affect prejudicially the owner of the copyright,
- (c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,
- (d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), or
- (e) import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c),

a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

29. Fair dealing for the purpose of research or private study does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or

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- (iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and

(b) if given in the source, the name of the

- (i) author, in the case of a work,
- (ii) performer, in the case of a performer's performance,
- (iii) maker, in the case of a sound recording, or
- (iv) broadcaster, in the case of a communication signal.

30.2 (1) It is not an infringement of copyright for a library, archive or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 or 29.1.

34.(1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

Solicitors:

Solicitors for the appellant/respondent on cross-appeal: Gowling Lafleur Henderson, Toronto.

Solicitors for the respondents/appellants on cross-appeal: Sim Hughes Ashton & McKay, Toronto.

Solicitors for the intervener the Federation of Law Societies of Canada: Borden Ladner Gervais, Ottawa.

Solicitors for the interveners the Canadian Publishers' Council and the Association of Canadian Publishers: McCarthy Tétrault, Toronto.

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Solicitors for the interveners Société québécoise de gestion collective des droits de reproduction (COPIBEC) and the Canadian Copyright Licensing Agency (Access Copyright): Ogilvy Renault, Montréal.

18

Case Name:

**Manitoba v. Canadian Copyright Licensing Agency (c.o.b. Access
Copyright)**

Between

**The Governments of the Provinces of Manitoba, New Brunswick,
Nova Scotia, Prince Edward Island and Saskatchewan,**

Applicants, and

**The Canadian Copyright Licensing Agency, Operating as "Access
Copyright", Respondent**

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358 D.L.R. (4th) 563

225 A.C.W.S. (3d) 1102

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2013 CarswellNat 785

Docket A-119-12

Federal Court of Appeal
Ottawa, Ontario

Sharlow, Gauthier and Mainville JJ.A.

Heard: February 12, 2013.

Judgment: April 3, 2013.

(52 paras.)

Intellectual property -- Copyright -- Copyright Board -- Judicial review -- Jurisdiction -- Application by provincial governments for judicial review of decision of Copyright board dismissing objection that Board had no jurisdiction to

establish tariff dismissed -- Access Copyright filed proposed tariffs with Copyright board relating to reproduction of works in its repertoire by provincial and territorial government employees -- Provincial governments objected to Board's jurisdiction on basis of Crown immunity -- While there were no expressly binding words that established Crown was bound by Copyright Act, certain references in Act pointed to conclusion Parliament intended to bind Crown.

Statutory interpretation -- Statutes -- Crown immunity -- Application by provincial governments for judicial review of decision of Copyright board dismissing objection that Board had no jurisdiction to establish tariff dismissed -- Access Copyright filed proposed tariffs with Copyright board relating to reproduction of works in its repertoire by provincial and territorial government employees -- Provincial governments objected to Board's jurisdiction on basis of Crown immunity -- While there were no expressly binding words that established Crown was bound by Copyright Act, certain references in Act pointed to conclusion Parliament intended to bind Crown.

Application by the provincial governments of Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan for judicial review of a decision of the Copyright Board of Canada. In March 2004 and March 2009, the Canadian Copyright Licensing Agency, operating as "Access Copyright", filed with the Board proposed tariffs relating to the reproduction of published works in its repertoire by employees of all provincial and territorial governments. All of the provinces filed objections with the Board. The Board agreed to hear a preliminary challenge to its statutory power under the Copyright Act to consider the proposed tariffs. The applicants, and a number of other provinces, argued that, by virtue of s. 17 of the Interpretation Act, the applicants were entirely immune from the Copyright Act and would not be subject to the proposed tariffs Access Copyright filed for Board certification. The Board dismissed the applicants' objection that the Board had no jurisdiction to establish the tariff. The Board found that while there were no expressly binding words that established the Copyright Act bound the Crown, the Copyright Act must have bound the Crown as otherwise there would be a significant gap in the enforcement of copyrights by rights holders. Further, the Act would otherwise make no sense given the reach of government action in the copyright market and the extent to which governments must rely on the Act to enforce their own copyrights. The applicants sought judicial review of the Board's decision on the basis the Board misapplied the case law and erred by finding the presence of exceptions that benefitted the Crown necessarily implied the Act bound the Crown. The applicants also sought review on the basis the Board erred by reading words into s. 12 of the Act to restrict the introductory words of that section to a Crown prerogative relating to the printing and publishing of works and that the Board erred by considering the possible consequence of a finding the Crown was immune to the Act.

HELD: Application dismissed. There were no expressly binding words that established the Crown was bound by the Copyright Act. Section 12 of the Copyright Act, in its overall context, including the structure of the Act, its legislative history and evolution and other provisions, was intended to refer to and preserve the Crown's rights and privileges of the same general nature as copyright that might not fall within the meaning of the rest of the provision, and could otherwise be excluded by the general principle set out in s. 89. The references in the Act to very strict conditions, tariffs the Board fixed, the consent of copyright owners and the power of the court when the defendant was an educational institution all pointed to the conclusion the intent of parliament was to bind the Crown.

Statutes, Regulations and Rules Cited:

Copyright Act, R.S.C. 1985, c. C-42, s. 2, s. 3, s. 12, s. 15, s. 18, s. 21, s. 29.4(2), s. 29.7, s. 29.7(1), s. 29.8, s. 30.3, s. 30.3(1), s. 30.3(2), s. 32.1(1), s. 41.1(1), s. 41.2, s. 45.1(b), s. 70.15(1), s. 89

Interpretation Act, R.S.C. 1985, c. I-21, s. 17

Patent Act, R.S.C. 1985, c. P-4, s. 2.1

Counsel:

Aidan O'Neil, for the Applicants.

Wanda Noel, for the Applicants.

Randall Hofley, Nancy Brooks, for the Respondent.

The judgment of the Court was delivered by

1 GAUTHIER J.A.:-- The governments of the Provinces of Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan (the Applicants) seek judicial review of the decision of Copyright Board of Canada (the Board) dismissing their objection that the Board has no jurisdiction to establish a tariff that would apply to them in respect of the reprographic reproduction of copyrighted works in the repertoire of the Canadian Copyright Licensing Agency, operating as 'Access Copyright' (Access).

2 Before the Board, the Applicants and a number of other provinces and territories who are not parties to this application argued that by virtue of section 17 of the *Interpretation Act*, R.S.C. 1985, c. I-21, they are entirely immune from the *Copyright Act*, R.S.C. 1985, c. C-42 (the *Act*) and therefore would not be subject to the proposed tariffs for the years 2005-2009 and 2010-2014 filed by Access for certification by the Board pursuant to section 70.15(1) of the *Act*. Section 17 of the *Interpretation Act* reads as follows:

17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

* * *

17. Sauf indication contraire y figurant, nul texte ne lie Sa Majesté ni n'a d'effet sur ses droits et prérogatives.

3 The Board concluded that the *Act*, construed contextually, is intended to bind the Crown, and on that basis rejected the Applicants' claim of Crown immunity.

4 The Applicants challenge this finding. For the reasons that follow, I have concluded that their application should be dismissed.

BACKGROUND

5 On March 31, 2004 and March 31, 2009 Access filed with the Board proposed tariffs relating to the reproduction of published works in its repertoire by employees of all provincial and territorial governments (with the exception of Quebec). All these provinces and territories filed timely written objections with the Board.

6 Further to a joint request by all those concerned, the Board agreed to hear a preliminary challenge to its statutory power under the *Act* to consider the proposed tariffs. In the course of this challenge, the Applicants argued that the presumption of Crown immunity applies and the *Act* does not bind them.

7 The Board released its decision dismissing this challenge on January 5, 2012, with accompanying reasons on March 15, 2012 (Reasons). Since then, the Board has proceeded to hear the parties' representations on the merits, and the Applicants have participated in the said hearing on a without prejudice basis.

8 As mentioned, some of the original objectors before the Board have decided not to challenge the decision under

review. Also, Access did not seek the Board's approval for a tariff in respect of the federal government or the provinces of Ontario, British Columbia, and Quebec. Ontario, British Columbia and the federal government have each made an agreement with Access. The province of Quebec has done the same with the parallel collective societies in Quebec.

9 The factual underpinning of the Applicants' claim for Crown immunity is set out in a jointly filed Statement of Agreed Facts.

10 At this stage, it is worth noting that the Applicants have long standing policies and practices whereby they abide by the provisions of the *Act* by seeking authorization and paying royalties to copyright holders. They emphasize that they intend to continue these practices, which they consider to be voluntary.

The Board's decision

11 First, the Board rejected the argument of Access that the Applicants' claim for Crown immunity conflicts with the common law principle that there can be no expropriation without just compensation. It held that the common law cannot overcome the clear statutory language of section 17 of the *Interpretation Act*. In its view, the fact that the Applicants would be prejudiced if the proposed tariffs were approved and imposed on them is sufficient to entitle them to assert their claim to Crown immunity.

12 Relying in part on *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551 (*Eldorado*), the Board noted at paragraph 23 of the Reasons that section 17 of the *Interpretation Act* creates a presumption that the Crown is not bound by any statute, but that presumption is rebutted where it can be demonstrated that there exists a contrary intention to bind the Crown.

13 After agreeing with the parties that 'there are no expressly binding words which establish that the Crown is bound by the *Act*' (paragraph 28 of the Reasons), the Board proceeded with a contextual analysis of the *Act*, as required by the modern rule of statutory interpretation, to determine whether there are other provisions from which it might be inferred that the Crown is intended to be bound by the *Act*.

14 The Applicants relied on section 12 of the *Act*, which reads as follows:

12. Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

* * *

12. Sous réserve de tous les droits ou privilèges de la Couronne, le droit d'auteur sur les oeuvres préparées ou publiées par l'entremise, sous la direction ou la surveillance de Sa Majesté ou d'un ministère du gouvernement, appartient, sauf stipulation conclue avec l'auteur, à Sa Majesté et, dans ce cas, il subsiste jusqu'à la fin de la cinquantième année suivant celle de la première publication de l'oeuvre.

15 Section 12 appears in Part I of the *Act*, which defines the rights of copyright holders. After carefully and thoroughly considering the legislative history and evolution of section 12, the Board rejected the Applicants' argument that section 12 should be read as expressly providing for Crown immunity from the *Act*. The Board's analysis began with a recognition of the history of Crown copyright under the Crown prerogative particularly its right to print and publish. This right goes back hundreds of years, and includes the right to print and publish statutes, court decisions, and authorized versions of the Bible, among other things. The Board expressed the view that, 'Crown copyright under the Crown prerogative is wider in scope and duration than what section 12 provides' (see paragraph 50 of the Reasons). It

then reasoned that section 12 must be read in context with section 89, which provides in part that '[n]o person is entitled to copyrights otherwise than under and in accordance with this *Act*'. In the absence of the opening phrase of section 12, section 89 would operate to eliminate all remaining common law copyright held by the Crown. The Board concluded that the words 'without prejudice to any right or privilege of the Crown' in section 12 of the *Act* are necessary to maintain that common law Crown prerogative, and the scope of section 12 should be limited accordingly.

16 The Board noted that Parliament introduced an exception targeting an emanation of the federal Crown in 1987, and added a large number of very specific exceptions for both the federal and provincial Crowns in 1997 (see paragraph 66 of the Reasons). Thus, apart from section 12, the *Act* contains a score or more of exceptions that expressly benefit the Crown such as those that benefit the Crown at large (for example, paragraph 45.1(b) and subsection 32.1(1); see paragraph 60 of the Reasons), those that benefit educational institutions (for example, subsection 29.4(2) and section 30.3; see paragraphs 61-63 of the Reasons) and those that concern Library and Archives Canada (for example, section 30.3; see paragraphs 64-65 of the Reasons).

17 The Board then held at paragraph 66 of its Reasons:

The number and the detailed nature of these exceptions seem to indicate a purposeful, explicit intention on the part of Parliament to identify and circumscribe activities that do not infringe copyright. If the Crown benefited from an overall immunity from the *Act*, why would Parliament spend so much time and effort in crafting these exceptions?

18 The Board rejected the Applicants' argument that these exceptions were adopted out of an abundance of caution or as historical incidents, as in *Alberta Government Telephones v. Canadian Radio-Television & Telecommunications Commission*, [1989] 2 S.C.R. 225 (*AGT*). The Board distinguished *AGT*, where a single, somewhat unclear reference to 'government railways' could be explained away in this manner.

19 The Board then drew upon *R. v. Ouellette*, [1980] 1 S.C.R. 568 (*Ouellette*), and concluded at paragraph 68 of the Reasons:

[...] when analysing the whole of the *Act* contextually, we are irresistibly drawn to a logical conclusion that the *Act* generally binds the Crown.

20 The Board went on to consider the implications of a finding that the Crown is immune from the *Act*. In its view, this would mean that the Board would have to reject on its own motion any tariff filed in respect of any emanation of the Crown, unless immunity had been waived. This would also mean that Crown corporations such as Telefilm, the National Film Board, and the CBC could use copyrighted works without regard to the rights of their authors or copyright holders. This would leave a significant gap in the enforcement of copyright by rights holders which, in the Board's view, supports the logical implication that the Crown must be bound (paragraph 73 of the Reasons).

21 The Board added at paragraph 75 of the Reasons that the *Act* would make no sense unless it bound the Crown, given the reach of government action in the copyright market and the extent to which governments must rely on the *Act* to enforce their own copyrights. That said, the Board noted that excluding the Crown and its agents from the reach of the *Act* would not totally frustrate the *Act* (See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (*Oldman River*)). This finding should, however, be considered together with the Board's statement at paragraph 28 of the Reasons that 'it will not be necessary to decide whether there would be a resulting absurdity were the Crown not so bound', given that Parliament's intention is revealed when the provisions are read in the context of other provisions.

22 Having so concluded, the Board stated that no further analysis would be required to dismiss the preliminary objection. Nevertheless, given the importance of the legal issues involved, the Board explained that it would be useful to comment on whether in any event the Applicants had waived their immunity either in relation to the totality of the provisions contained in the *Act*, or alternatively, in relation to certain of its provisions.

23 The Board considered the applicable legal principles set out in *Sparling v. Québec (Caisse de dépôt & placement)*, [1988] 2 S.C.R. 1015 (*Sparling*), and then noted that the conduct of the Applicants since the first adoption of the *Act* spoke volumes. The Applicants' behaviour, coupled with the fact that they have enjoyed benefits under sections 3, 15, 18 and 21 of the *Act* and exercised their rights in relation to a number of related provisions, showed that they had waived Crown immunity (see paragraph 82 of the Reasons). This did not mean that, in the future, the Applicants could not reclaim their immunity if any, but that simply, at this stage, they could not do so.

THE ISSUES

24 The Applicants submit that the Board erred in law when it concluded that the *Act* binds them by necessary implication. In that respect, they advance four main points:

- a. the Board misapplied *AGT* by failing to abide by the Supreme Court of Canada's direction that the necessary implication exception should be narrowly confined (*AGT* at page 277);
- b. the Board erred by finding that the presence of exceptions that benefit the Crown necessarily imply that the Crown is bound by the *Act*;
- c. the Board erred by reading words into section 12 of the *Act* in order to restrict the introductory words of that section to a Crown prerogative relating to the printing and publishing of works; and
- d. the Board erred by considering the possible consequences of a finding that the Crown is immune to the *Act*.

25 With respect to the Board's *obiter* that the Applicants had waived their immunity, if indeed they were immune from the *Act*, the Applicants claim that the Board misunderstood the test to be applied. They argue that the Board failed to appreciate that there must be a sufficient nexus between the benefits and the burdens involved to apply this doctrine. They advance that the Board misapplied the said test to the facts of this matter, failing to appreciate that the Applicants' practice of voluntarily respecting the rights of copyright holders was simply the result of the Crown trying to act as a good citizen, as was found by the Ontario Court of Appeal in *Collège d'arts appliqués & de technologie La Cité collégiale v. Ottawa (City)* (1998), 37 O.R. (3d) 737 (OCA) at paragraph 19. Given the conclusion I have reached on the other grounds of appeal, I do not consider it necessary to consider this issue, and I have not done so.

ANALYSIS

26 As this application for judicial review concerns a question of law of general application in respect of the *Act*, the standard of review is correctness (*Rogers v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at paragraphs 10 and 20).

27 Before considering the issues, it is worth noting that, at the hearing, the Applicants confirmed that they are not relying on any constitutional argument in this case. They also confirmed that despite what appears in paragraph 69 of the Board's Reasons, they were and still are seeking a declaration that they are immune from the *Act* as a whole, not only in respect of the proposed tariffs in the current proceeding before the Board.

28 The principles to be applied in determining whether the Crown is immune from a particular statute on the basis of section 17 of the *Interpretation Act* are now well established. In *Oldman River*, the most recent pronouncement of the Supreme Court on this issue, Laforest J. summarized the situation as follows, at pages 52-53:

However, any uncertainty in the law on these points was put to rest by this Court's recent decision in *Alberta Government Telephones*, *supra*. After reviewing the authorities, Dickson C.J. concluded, at p. 281:

In my view, in light of *PWA [Her Majesty in right of the Province of Alberta v. Canadian*

Transportation Commission, [1978] 1 S.C.R. 61] and *Eldorado* [*supra*], the scope of the words "mentioned or referred to" must be given an interpretation independent of the supplanted common law. However, the qualifications in *Bombay* [*Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58] are based on sound principles of interpretation which have not entirely disappeared over time. It seems to me that the words "mentioned or referred to" in s. 16 [now s. 17 of the *Interpretation Act*] are capable of encompassing: (1) expressly binding words ("Her Majesty is bound"); (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette*, *supra*; and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.

In my view, this passage makes it abundantly clear that a contextual analysis of a statute may reveal an intention to bind the Crown if one is irresistibly drawn to that conclusion through logical inference.

29 Thus, once the Board acknowledged in its analysis that there is no section stating clearly that 'this *Act* shall bind her Majesty' (first prong of the exception), it had to consider, through a purposive and contextual statutory analysis, whether it could discern a clear parliamentary intention to bind the Crown (second prong of the exception). Only if it were unable to find such a clear intention would it have to proceed to the next step of determining whether the third prong of the exception provided for in relation to section 17 applies (frustration or absurdity).

30 To rebut the presumption in section 17 of the *Interpretation Act*, there must be a clear parliamentary intention to bind the Crown, or, to use the words of La Forest J. in *Oldman River*, one must be irresistibly drawn, through logical inference, to the conclusion that there is an intention to bind the Crown. The search for parliamentary intention must be undertaken through a contextual interpretation of the statute. In my view, the Board understood this and applied the proper approach when it undertook its task.

31 As always, context matters. *AGT* did not change the law in *Ouellette*. On the contrary, it confirmed it (see *AGT* at pages 279-280). Different results occur when the courts interpret different statutes within their different contexts. I do not agree with the applicants that the Board gave too much weight to the exceptions targeting the Crown or its agents in this case.

32 I turn now to a detailed consideration of the provisions of the *Act* which are relevant to the issues in this case. I begin with the objectives of the *Act* which were described in *Reference re Broadcasting Act*, *S.C. 1991 (Canada)*, 2012 SCC 68 at paragraph 36 as follows:

36 The Copyright Act is concerned both with encouraging creativity and providing reasonable access to the fruits of creative endeavour. These objectives are furthered by a carefully balanced scheme that creates exclusive economic rights for different categories of copyright owners in works or other protected subject matter, typically in the nature of a statutory monopoly to prevent anyone from exploiting the work in specified ways without the copyright owner's consent. It also provides user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions. (See, e.g., *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at paras. 11-12 and 30; *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772, at para. 21; D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at pp. 34 and 56). ...

33 Section 12 of the *Act* is an important part of the contextual analysis. As mentioned above, it is found in Part I of the *Act*. Part I is entitled 'Copyright and Moral Rights in Works'. It deals with the rights attached to copyrighted works, the owners, and the duration of said copyright. Part III of the *Act* is entitled 'Infringement of Copyright and Moral Rights and Exceptions to Infringement', and it is where one finds a score or more of exceptions that quite explicitly relate or apply to the Crown (federal and provincial).

34 Having carefully examined the wording of section 12 in its overall context, including the structure of the *Act*, its legislative history and evolution, and other provisions, such as section 89, I agree with the Board that the words '[w]ithout prejudice to any right or privilege of the Crown' set out in section 12 are intended to refer to and preserve the Crown's rights and privileges of the same general nature as copyright that may not fall within the meaning of the rest of this provision. These rights and privileges could otherwise be excluded by the general principle set out in section 89 which provides that no person is entitled to copyright otherwise than under and in accordance with the *Act* or any other Act of Parliament.

35 I turn now to the various exceptions or user rights set out in Part III in favour of the Crown and its agents. However, a few preliminary comments are appropriate.

36 First, the Applicants appear to say that these exceptions should all be disregarded as the Court should deduce the legislator's intention from the first version of the *Act*, adopted in 1921.

37 Like the Board, I believe that section 17 must be applied to construe the *Act* as it now stands. In fact, the Applicants included in Volume IV of their record the most recent amendments to the *Act*, which came into force in June of 2012. These include a number of additional exceptions dealing with new technologies, among other things, as well as detailed provisions in respect of available remedies that, in my view, confirm Parliament's intention as expressed by the Board when construing the *Act* before them.

38 Second, the Board noted that the parties felt that the parliamentary debates shed little light on the meaning of section 12 or on the immunity issue *per se*. However, I observe that the debates indicate that there was a strong opposition to the large number of exceptions targeting the Crown or its agents included in Bill C-32 which was adopted in 1997. These exceptions were seen to be an unwarranted limitation of rights of copyright holders under the *Act* in favour of governmental organizations (*House of Commons Debates*, (4 June 1997) at 3442-3443 (Mr. Louis Plamondon (Richelieu, BQ)), at 3460 (Mrs. Suzanne Tremblay (Rimouski-Témiscouata, BQ)), and at 3461-3462 (Mrs. Christiane Gagnon (Québec, BQ))). There is no reference anywhere to the fact that these exceptions did not really constitute a restriction on the rights of copyright holders given that, in any event, the federal and provincial Crowns and their agents were immune, and these provisions were included out of an abundance of caution. This would certainly have quelled all protest. Instead, the Parliamentary Secretary to the Deputy Prime Minister and the Minister of Canadian Heritage responsible for the Bill stated early on that the exceptions were proposed for reasons of public interest and that they responded to real concerns (*House of Commons Debates*, (13 March 1997) at 9031 (Mr. Guy H. Arseneault (Parliamentary Secretary to Deputy Prime Minister and Minister of Canadian Heritage, Lib.))).

39 That said, aside from the high number of exceptions noted by the Board, many are very detailed. They are also subject to conditions which would be illogical in the absence of a clear intent to otherwise bind the Crown. A few illustrations will suffice to clarify what I mean here.

40 For my first illustration I will use one of the exceptions dealing with educational institutions. The definition of 'educational institution' (at section 2 of the *Act*) is particularly clear. It includes:

'educational institution' means

...

(c) a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraph (a) or (b), or

* * *

'établissement d'enseignement' :

[...]

c) ministère ou organisme, quel que soit l'ordre de gouvernement, ou entité sans but lucratif qui exerce une autorité sur l'enseignement et la formation visés aux alinéas a) et b);

41 The exception set out in subsection 29.7 provides:

29.7 (1) Subject to subsection (2) and section 29.9, it is not an infringement of copyright for an educational institution or a person acting under its authority to

(a) make a single copy of a work or other subject-matter at the time that it is communicated to the public by telecommunication; and

(b) keep the copy for up to thirty days to decide whether to perform the copy for educational or training purposes.

(2) An educational institution that has not destroyed the copy by the expiration of the thirty days infringes copyright in the work or other subject-matter unless it pays any royalties, and complies with any terms and conditions, fixed under this Act for the making of the copy.

(3) It is not an infringement of copyright for the educational institution or a person acting under its authority to perform the copy in public for educational or training purposes on the premises of the educational institution before an audience consisting primarily of students of the educational institution if the educational institution pays the royalties and complies with any terms and conditions fixed under this Act for the performance in public.

[Emphasis added]

* * *

29.7 (1) Sous réserve du paragraphe (2) et de l'article 29.9, les actes ci-après ne constituent pas des violations du droit d'auteur s'ils sont accomplis par un établissement d'enseignement ou une personne agissant sous l'autorité de celui-ci :

a) la reproduction à des fins pédagogiques, en un seul exemplaire, d'une oeuvre ou de tout autre objet du droit d'auteur lors de leur communication au public par télécommunication;

b) la conservation de l'exemplaire pour une période maximale de trente jours afin d'en déterminer la valeur du point de vue pédagogique.

- (2) L'établissement d'enseignement qui n'a pas détruit l'exemplaire à l'expiration des trente jours viole le droit d'auteur s'il n'acquitte pas les redevances ni ne respecte les modalités fixées sous le régime de la présente loi pour la reproduction.
- (3) L'exécution en public, devant un auditoire formé principalement d'élèves de l'établissement, de l'exemplaire dans les locaux de l'établissement et à des fins pédagogiques, par l'établissement ou une personne agissant sous l'autorité de celui-ci, ne constitue pas une violation du droit d'auteur si l'établissement acquitte les redevances et respecte les modalités fixées sous le régime de la présente loi pour l'exécution en public.

[mon souligné]

42 Further on, the legislator provides that the institution will not have the right to the exception set out in subsection 29.7(1) where the communication to the public by telecommunication was obtained by illegal means (section 29.8 of the *Act*).

43 This is only one of many similar exceptions targeting emanations of the Crown, but it is sufficient to show how far we are from the scenario described by Dickson C.J.C. in *AGT* at pages 281-282. In our case, the exceptions cannot be explained away.

44 A further illustration is found in the additional provisions added to the *Act* in 2012. The legislator provides at subsection 41.1(1) that no person shall attempt to circumvent technological protection measures relating to copyrighted works. Further, subsection 41.2 provides that:

41.2 If a court finds that a defendant that is a library, archive or museum or an educational institution has contravened subsection 41.1(1) and the defendant satisfies the court that it was not aware, and had no reasonable grounds to believe, that its actions constituted a contravention of that subsection, the plaintiff is not entitled to any remedy other than an injunction.

[Emphasis added]

41.2 Dans le cas où le défendeur est une bibliothèque, un musée, un service d'archives ou un établissement d'enseignement et où le tribunal est d'avis qu'il a contrevenu au paragraphe 41.1(1), le demandeur ne peut obtenir qu'une injonction à l'égard du défendeur si celui-ci convainc le tribunal qu'il ne savait pas et n'avait aucun motif raisonnable de croire qu'il avait contrevenu à ce paragraphe.

[Mon souligné]

45 Then, in a totally different context, paragraph 45(1)(b) of the *Act* provides that it is lawful for a person to do the following:

- 45. (1) Notwithstanding anything in this Act, it is lawful for a person

...

(b) to import for use by a department of the Government of Canada or a province copies of a work or other subject-matter made with the consent of the owner of

the copyright in the country where it was made;

...

[Emphasis added]

* * *

45. (1) Malgré les autres dispositions de la présente loi, il est loisible à toute personne :

[...]

b) d'importer, pour l'usage d'un ministère du gouvernement du Canada ou de l'une des provinces, des exemplaires -- produits avec le consentement du titulaire du droit d'auteur dans le pays de production -- d'une oeuvre ou d'un autre objet du droit d'auteur;

[...]

[Mon souligné]

46 Turning back to the 1997 additions to the *Act*, subsection 30.3(1) sets out another scenario where an educational institution, library, archive or museum's actions will not constitute infringement. However, this scenario is subject to strict conditions set out in subsection 30.3(2):

30.3 (1) An educational institution or a library, archive or museum does not infringe copyright where

...

(2) Subsection (1) only applies if, in respect of a reprographic reproduction,

(a) the educational institution, library, archive or museum has entered into an agreement with a collective society that is authorized by copyright owners to grant licences on their behalf;

(b) the Board has, in accordance with section 70.2, fixed the royalties and related terms and conditions in respect of a licence;

(c) a tariff has been approved in accordance with section 70.15; or

(d) a collective society has filed a proposed tariff in accordance with section 70.13.

[Emphasis added]

* * *

30.3 (1) Un établissement d'enseignement, une bibliothèque, un musée ou un service d'archives ne viole pas le droit d'auteur dans le cas où :

[...]

(2) Le paragraphe (1) ne s'applique que si, selon le cas, en ce qui touche la reprographie :

a) ils ont conclu une entente avec une société de gestion habilitée par le titulaire du droit d'auteur à octroyer des licences;

b) la Commission a fixé, conformément à l'article 70.2, les redevances et les modalités afférentes à une licence;

c) il existe déjà un tarif pertinent homologué en vertu de l'article 70.15;

d) une société de gestion a déposé, conformément à l'article 70.13, un projet de tarif.

[Mon souligné]

47 In my view, the references in the *Act* to very strict conditions, to tariffs fixed by the Board, to the consent of the copyright owners, and to the power of the court when the defendant is an 'educational institution', including a federal or provincial government department, all point to only one logical and plausible conclusion as to the intent of Parliament: the Crown is bound.

48 I have considered that the *Act*, unlike other statutes such as the *Patent Act*, R.S.C., 1985, c. P-4, s.2.1, does not contain an 'expressly binding' clause at the beginning, as was recommended in the 1985 report entitled *A Charter of Rights for Creators*. I am still irresistibly drawn to the conclusion that Parliament clearly intended to bind the federal and provincial Crowns by the express language of the *Act* and through logical inference.

49 It is not necessary in my view to consider the argument advanced by Access regarding whether any other interpretation of the *Act* would result in a breach of Canada's international obligations under NAFTA, TRIPS or any other international convention ratified and implemented in Canada. This is especially so when one considers that this argument was not fully developed before us.

50 In the circumstances, there is also no need to consider whether granting immunity would result in a frustration of the *Act* as a whole or in an absurdity.

51 Access had argued that Crown immunity should not even be in play, as immunity from the *Act* and the tariffs would constitute expropriation without compensation. As noted earlier, the Board rejected this argument. Given that I have found that the Crown is bound by the *Act*, I express no opinion on this point.

52 In light of the foregoing, I propose that this application be dismissed with costs.

GAUTHIER J.A.

SHARLOW J.A.:-- I agree.

MAINVILLE J.A.:-- I agree.

cp/e/qlccl/qlpmg/qlcas/qlced/qlhcs/qljac

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**** Preliminary Version ****

Case Name:

**Alberta (Education) v. Canadian Copyright Licensing Agency
(Access Copyright)**

**Province of Alberta as represented by the Minister of
Education, et al., Appellants;**

v.

**Canadian Copyright Licensing Agency Operating as "Access
Copyright", Respondent, and
Canadian Publishers' Council, Association of Canadian
Publishers, Canadian Educational Resources Council, Canadian
Association of University Teachers, Canadian Federation of
Students, Association of Universities and Colleges of Canada,
Association of Canadian Community Colleges, CMRRA-SODRAC Inc.,
Samuelson-Glushko Canadian Internet Policy and Public Interest
Clinic, Canadian Authors Association, Canadian Freelance
Union, Canadian Society of Children's Authors, Illustrators
and Performers, League of Canadian Poets, Literary
Translators' Association of Canada, Playwrights Guild of
Canada, Professional Writers Association of Canada, Writers'
Union of Canada and Centre for Innovation Law and Policy of
the Faculty of Law University of Toronto, Intervenors**

[2012] S.C.J. No. 37

[2012] A.C.S. no 37

2012 SCC 37

[2012] 2 S.C.R. 345

[2012] 2 R.C.S. 345

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432 N.R. 134

347 D.L.R. (4th) 287

216 A.C.W.S. (3d) 215

102 C.P.R. (4th) 255

38 Admin. L.R. (5th) 214

2012 CarswellNat 2419

File No.: 33888.

Supreme Court of Canada

Heard: December 7, 2011;

Judgment: July 12, 2012.

**Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella,
Rothstein, Cromwell, Moldaver and Karakatsanis JJ.**

(60 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Reasonableness -- Appeal by Alberta's Minister of Education from decision upholding Copyright Board's finding that copies created by teachers for student reading were not fair dealing and required royalty payment allowed -- Board's decision was unreasonable -- Board misapplied CCH factors -- Teachers did not have commercial motives in giving students copies -- Symbiotic purpose existed between copier and user engaged in research or private study -- "Amount of dealing" factor required assessment of proportion between copy excerpt and whole work -- Not realistic to require textbook purchase -- Decline in textbook sales was more likely caused by other factors.

Administrative law -- Bodies under review -- Nature of body -- Types -- Boards, tribunals and commissions -- Appeal by Alberta's Minister of Education from decision upholding Copyright Board's finding that copies created by teachers for student reading were not fair dealing and required royalty payment allowed -- Board's decision was unreasonable -- Board misapplied CCH factors -- Teachers did not have commercial motives in giving students copies -- Symbiotic purpose existed between copier and user engaged in research or private study -- "Amount of dealing" factor required assessment of proportion between copy excerpt and whole work -- Not realistic to require textbook purchase -- Decline in textbook sales was more likely caused by other factors.

Intellectual property law -- Copyright -- Protected subject matter -- Literary works -- Books and other writings --

Defences to Infringement -- Statutory defences -- Fair dealing -- Appeal by Alberta's Minister of Education from decision upholding Copyright Board's finding that copies created by teachers for student reading were not fair dealing and required royalty payment allowed -- Board's decision was unreasonable -- Board misapplied CCH factors -- Teachers did not have commercial motives in giving students copies -- Symbiotic purpose existed between copier and user engaged in research or private study -- "Amount of dealing" factor required assessment of proportion between copy excerpt and whole work -- Not realistic to require textbook purchase -- Decline in textbook sales was more likely caused by other factors -- Copyright Act, s. 29.

Appeal by the Alberta Minister of Education from a Federal Court of Appeal decision that upheld the Copyright Board's finding that copies created by teachers for student reading were not fair dealing and required payment of royalties. Access Copyright represented publishers and authors of artistic and literary works in printed materials that might be copied. In 2004, Access Copyright attempted to renew without success royalty agreements it had with each Canadian province and territory (except for Quebec) relating to reproduction of Access Copyright's repertoire used in secondary and elementary schools. Access Copyright filed a proposed tariff relating to the materials reproduced by teachers. The Copyright Board found that copies made through teachers' initiative containing instructions that students read the works were permitted under the "research or private study" purpose in s. 29 of the Copyright Act. The Board also found that the copies were subject to a royalty as the copies did not fit under the fair dealing exception. The Minister of Education applied for judicial review of the Board's decision and the Federal Court of Appeal upheld the Board's decision.

HELD: Appeal allowed. The Board's decision about whether the copies constituted fair dealing was to be reviewed using a reasonableness standard. The Board's decision was unreasonable because the Board misapplied the factors laid out in *CCH Canadian Ltd. v. Law Society of Upper Canada* ("CCH"). CCH laid out a two-step test to establish fair dealing. Step one of the test required the court to determine if the dealing occurred for "research or private study", "criticism or review" or "new reporting". Step two of the test required the court to determine if the dealing was "fair". The focus of the current dispute was the test's second step as the photocopying occurred for the allowable purpose of "research or private study". The purpose, character and amount of dealing, alternatives to the dealing, the dealing's effect on the work, as well as the nature of the work, were assessed as part of the test's second step. The copier's purpose was relevant in step two of the test, even though the user's perspective was the relevant perspective in step one. The dealing became unfair if the copier hid behind the user's allowable purpose to engage in a separate purpose. The teachers' purpose was not separate, as teachers did not have ulterior or commercial motives in giving students copies. The copied materials enabled students' research and private study. A symbiotic purpose existed between the copier and the user engaged in research or private study. The purposes of research/private study and instruction were unified. Consequently, the Board's decision drove an artificial wedge between the purposes by distinguishing between teacher-made copies requested by a student and teacher-made copies not requested by a student. Copyrighted works were not to be viewed in isolation by users simply because "private" was part of the "private study". The Board's "amount of dealing" approach was flawed. The "amount of dealing" factor was not a quantitative assessment but rather an assessment of the proportion between the copy excerpt and the whole work. It was not realistic to require teachers to purchase textbooks for each student as an alternative to copying short excerpts to provide supplemental materials. No evidence existed showing a connection between decreased textbook sales and photocopying short excerpts. Any decline in textbook sales was more likely caused by other factors. The Board's finding that only short excerpts were copied made it unlikely that teacher copying competed with textbook markets. The matter was remitted to the Board.

Statutes, Regulations and Rules Cited:

Copyright Act, R.S.C. 1985, c. C 42, s. 29, s. 29.1, s. 29.2, s. 29.4, s. 70.13(2)

Copyright, Designs and Patents Act 1988 (U.K.), 1988, c. 48, s. 178

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Intellectual property -- Copyright -- Infringement -- Exception -- Fair dealing -- Teachers making photocopies of excerpts of textbooks and other copyrighted works to distribute to students as part of class instruction -- Collective society seeking to collect royalties for photocopies of excerpts -- Whether elementary and secondary schools can claim the benefit of "fair dealing" exception for copies of works made at the teachers' initiative with instructions to students that they read the material -- Copyright Act, R.S.C. 1985, c. C-42, s. 29.

Administrative law -- Judicial review -- Standard of review -- Copyright Board deeming that photocopies of excerpts of textbooks and other copyrighted works did not constitute fair dealing -- Whether decision reviewable on standard of reasonableness or correctness -- Whether Board made reviewable error.

Court Summary:

Access Copyright represents authors and publishers of printed literary and artistic works. It filed a proposed tariff with the Copyright Board with respect to the reproduction of its repertoire for use in elementary and secondary schools in all the provinces and territories other than Quebec. The Copyright Board concluded that copies made at the teachers' initiative with instructions to students that they read the material were made for the allowable purpose of "research or private study" under s. 29 of the *Copyright Act*. They did not, however, constitute fair dealing and were therefore subject to a royalty. On judicial review, the Federal Court of Appeal upheld the Copyright Board's conclusion that the copies were not fair dealing.

Held (Deschamps, Fish, Rothstein and Cromwell JJ. dissenting): The appeal should be allowed and the matter remitted to the Board for reconsideration.

Per McLachlin C.J. and LeBel, **Abella**, Moldaver and Karakatsanis JJ.: Fair dealing allows users to engage in activities that might otherwise amount to copyright infringement. The test for fair dealing was articulated in *CCH Canadian Ltd. v. Law Society of Upper Canada* as involving two steps. The first is to determine whether the dealing is for the allowable purpose of "research or private study" under s. 29, "criticism or review" under s. 29.1, or "news reporting" under s. 29.2 of the *Copyright Act*. The second step assesses whether the dealing is "fair".

There is no dispute that the first step of the test set out in *CCH* was met and that the dealing -- photocopying -- was for the allowable purpose of research or private study. The dispute in this case centres on the second step of the test, namely, whether the copies were "fair" according to the factors set out in *CCH*: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.

The Board concluded that the predominant purpose was that of the teacher as the copier. This meant that the purpose was instruction, not research or private study. When considering the first stage of *CCH* -- whether the dealing is for an allowable purpose -- the relevant perspective is that of the user. This does not mean, however, that the copier's purpose is irrelevant at the second stage. The copier's purpose will be relevant to the fairness analysis if the copier hides behind the shield of the user's allowable purpose in order to engage in a separate purpose -- such as a commercial one -- that can make the dealing unfair. There is no separate purpose on the part of the teachers in this case. They have no ulterior or commercial motive when providing copies to students. They are there to facilitate the students' research and private study and to enable the students to have the material they need for the purpose of studying. The teacher/copier shares a symbiotic purpose with the student/user who is engaging in research or private study. The Copyright Board's approach drives an artificial wedge into these unified purposes of instruction and research/private study by drawing a distinction between copies made by the teacher at the request of a student and copies made by the teacher without a prior request from a student. The word "private" in "private study" should not be understood as requiring users to view copyrighted

works in isolation.

The Copyright Board's approach to the "amount of the dealing" factor was also flawed. Having found that teachers only copied short excerpts of each textbook, the Board was required to determine whether the proportion of each of the short excerpts in relation to the whole work was fair. This factor is not a quantitative assessment based on aggregate use, but an examination of the proportion between the excerpted copy and the entire work.

With respect to the "alternatives to the dealing" factor, contrary to the Copyright Board's conclusion, buying books for every student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks. Purchasing a greater number of original textbooks to distribute to students is unreasonable in light of the Board's finding that teachers only photocopy short excerpts to complement existing textbooks.

As for the "effect of the dealing on the work" factor, there was no evidence of a link between photocopying short excerpts and a decline in textbook sales. There were several factors, in fact, other than photocopying, that were more likely to have contributed to any such decline. Moreover, the Board's finding that the teachers' copying was limited to short excerpts of complementary texts, makes it difficult to see how the teachers' copying competes with the market for textbooks.

The Copyright Board's decision as to whether the photocopies amount to fair dealing is to be reviewed on a reasonableness standard. Because its finding of unfairness was based on a misapplication of the *CCH* factors, its outcome was unreasonable.

Per Deschamps, Fish, **Rothstein** and Cromwell JJ. (dissenting): Whether a dealing is fair is a question of fact. The *CCH* factors help assess whether a dealing is fair but they are not statutory requirements. The Copyright Board's application of these factors to the facts of a case should be treated with deference and a reasonableness standard should be applied on judicial review. In this case, the Board made no reviewable error in principle.

It was neither artificial nor unreasonable to conclude that the photocopies mainly serve the teacher's purpose of teaching and that this was the relevant and predominant purpose of the dealing. The Board did not draw an artificial distinction between copies made at the request of a student and at the teacher's own initiative. The Board did not err by equating "instruction" with "non-private study". The word "private" in s. 29 of the *Copyright Act* cannot be stripped of meaning. A copy made on a teacher's own initiative may be for private study if, for example, the material is tailored to the particular learning needs or interests of a single or small number of students but "private study" cannot include large quantities of copies made as part of an organized program of instruction.

It is important not to look to the same aspect of the dealing under more than one *CCH* factor. The Board's analysis of the amount of the dealing remained focused on the overall proportion of the copied pages of a work in relation to the entire work over a period of time. Its analysis of the character of the dealing focused on the fact that multiple copies of the same excerpt are made, at any one time, to be disseminated to a whole class. There is no basis to disturb the Board's assessments of these factors.

The Board's analysis of alternatives to the dealing was not unreasonable. Furthermore, in a case where numerous short excerpts of the work are taken, the fact that there are no non-copyrighted alternatives will not automatically render a dealing fair. The Board's conclusion that the dealing competes with the original work to an extent that makes the dealing unfair is unsupported by evidence and unreasonable. However, no one *CCH* factor is determinative and the Board considered the purpose of the dealing and the amount of the dealing to be the most important factors, therefore this error is not sufficient to render the Board's decision unreasonable. The Board's decision was intelligible, transparent and justifiable and cannot be said to fall outside of a reasonable range of outcomes.

Cases Cited

By Abella J.

Referred to: *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, rev'g 2002 FCA 187, [2002] 4 F.C. 213; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36; *Sillitoe v. McGraw-Hill Book Company (U.K.) Ltd.*, [1983] F.S.R. 545; *University of London Press, Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601; *Copyright Licensing Ltd. v. University of Auckland*, [2002] 3 N.Z.L.R. 76; *Hubbard v. Vosper*, [1972] 1 All E.R. 1023.

By Rothstein J. (dissenting)

CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, [2004] 1 S.C.R. 339, rev'g 2002 FCA 187, [2002] 4 F.C. 213; *Hubbard v. Vosper*, [1972] 1 All E.R. 1023; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

Statutes and Regulations Cited

Copyright Act, R.S.C. 1985, c. C-42, ss. 29, 29.1, 29.2, 29.4, 70.13(2).

Copyright, Designs and Patents Act 1988 (U.K.), 1988, c. 48, s. 178 "private study".

Authors Cited

D'Agostino, Giuseppina. "Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use" (2008), 53 McGill L.J. 309.

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Blais C.J. and Noël and Trudel JJ.A.), 2010 FCA 198, [2011] 3 F.C.R. 223, 405 N.R. 354, 85 C.P.R. (4) 349, [2010] F.C.J. No. 952 (QL), 2010 CarswellNat 2481, reversing in part a decision of the Copyright Board, www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf, [2009] C.B.D. No. 6 (QL). Appeal allowed, Deschamps, Fish, Rothstein and Cromwell JJ. dissenting.

Counsel:

Wanda Noel, James Aidan O'Neill and Ariel A. Thomas, for the appellants.

Neil Finkelstein and Claude Brunet, for the respondent.

Barry B. Sookman and Daniel G. C. Glover, for the interveners the Canadian Publishers' Council, the Association of Canadian Publishers and the Canadian Educational Resources Council.

Written submissions only by Wendy Matheson, Andrew Bernstein and Alexandra Peterson, for the interveners the Canadian Association of University Teachers and the Canadian Federation of Students.

Marcus A. Klee, for the interveners the Association of Universities and Colleges of Canada and the Association of Canadian Community Colleges.

Timothy Pinos, Casey M. Chisick and Jason Beitchman, for the intervener CMRRA-SODRAC Inc.

Written submissions only by David Fewer and Jeremy de Beer, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Written submissions only by Marian Hebb, Warren Sheffer and Brendan van Niejenhuis, for the interveners the Canadian Authors Association, the Canadian Freelance Union, the Canadian Society of Children's Authors, Illustrators

and Performers, the League of Canadian Poets, the Literary Translators' Association of Canada, the Playwrights Guild of Canada, the Professional Writers Association of Canada and the Writers' Union of Canada.

Written submissions only by Howard P. Knopf and Ariel Katz, for the intervener the Centre for Innovation Law and Policy of the Faculty of Law University of Toronto.

The judgment of McLachlin C.J. and LeBel, Abella, Moldaver and Karakatsanis JJ. was delivered by

1 ABELLA J.:-- Many authors create textbooks and other literary works to sell to primary and secondary level educational institutions across Canada. Photocopying short excerpts of these works is a common practice in Canadian schools, and is often used as an important administrative and teaching tool by teachers. The issue in this appeal is whether photocopies made by teachers to distribute to students as part of class instruction can qualify as fair dealing under the *Copyright Act*, R.S.C. 1985, c. C-42.

Background

2 Access Copyright represents authors and publishers of literary and artistic works in printed materials which are subject to copying. It administers the reproduction of published materials by issuing licences and collecting and distributing royalties to affiliated copyright owners. When Access Copyright does not reach a licensing or royalty agreement with users who photocopy published works in its repertoire, it can apply to the Copyright Board to certify a royalty in the form of a tariff.

3 At elementary and secondary schools across Canada, teachers often make photocopies of portions of textbooks or other published works which are part of Access Copyright's repertoire. Between 1991 and 1997, Access Copyright reached royalty agreements with each of the provinces and territories (other than Quebec) with respect to the reproduction of its repertoire for use in these schools. In 1999, all the provincial parties and the Ontario School Boards (the "Coalition") signed a five- year agreement, providing for royalty increases based on a per student calculation, not on the number of pages copied.

4 When the time came to renew the royalty agreement in 2004, Access Copyright wanted the royalties revised to reflect the volume and content of what was being copied. The parties were unable to reach an agreement, based largely on the fact that they could not agree on how a "volume study" was to be conducted. Access Copyright therefore filed a proposed tariff with the Copyright Board in accordance with s. 70.13(2) of the *Copyright Act*.

5 During the course of the proceedings before the Board, the parties eventually agreed to the terms of a volume study. It was carried out between February 2005 and March 2006. In accordance with the agreed-upon terms, information was recorded by observers on stickers posted next to each photocopier, including who made the copy, who would be using the copy, and the purpose of the copy.

6 Based on information collected from the stickers, each incident of photocopying was divided into one of four categories. The first three dealt with copies made by teachers either for themselves or at the request of a student. All parties agreed that copies falling under these categories -- about 1.7 million pages -- constituted fair dealing.

7 The fourth category (Category 4) dealt with copies of works made at the teachers' initiative with instructions to students that they read the material. Teachers would photocopy short excerpts from textbooks and distribute those copies to students as a complement to the main textbook the students used.

8 At a hearing before the Board, Access Copyright argued that the Category 4 copies did not meet the test for fair

dealing identified by McLachlin C.J. in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339. The Coalition countered with the argument that the approximately 16.9 million pages in Category 4 should be excluded from any tariff because the copies constituted fair dealing under ss. 29 or 29.1 of the *Copyright Act*.

9 Based on the evidence from the stickers used in the volume study, the Board concluded that the Category 4 copies were made for the allowable purpose of "research or private study" under s. 29 of the *Act*, but found, applying the *CCH* fairness factors, that the Category 4 copies did not constitute fair dealing and were therefore subject to a royalty. The Board also rejected the Coalition's argument that the Category 4 copies fell within the exception for educational institutions under s. 29.4 of the *Act* ([2009] C.B.D. No 6 (QL)).

10 On judicial review, the Federal Court of Appeal remitted the s. 29.4 issue back to the Board, stating that the Board failed to address an aspect of the "educational institutions" test. But the court found the Board's conclusion that the Category 4 copies were not fair dealing to be reasonable (2010 FCA 198, [2011] 3 F.C.R. 223).

11 The Coalition appealed only the fair dealing issue to this Court, maintaining that the Board's conclusion was not in accordance with the *CCH* test and was therefore unreasonable. I agree and would therefore remit the matter to the Board for reconsideration in accordance with these reasons.

Analysis

12 As discussed in the companion appeal *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (*SOCAN v. Bell*) the concept of fair dealing allows users to engage in some activities that might otherwise amount to copyright infringement. The test for fair dealing was articulated in *CCH* as involving two steps. The first is to determine whether the dealing is for the allowable purpose of "research or private study" under s. 29, "criticism or review" under s. 29.1, or "news reporting" under s. 29.2 of the *Copyright Act*. The second step of *CCH* assesses whether the dealing is "fair". The onus is on the person invoking "fair dealing" to satisfy all aspects of the test. To assist in determining whether the dealing is "fair", this Court set out a number of fairness factors: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.

13 The Board accepted that where the photocopier stickers indicated that the copying was for an allowable purpose -- "research" or "private study" -- no further inquiry under the first step of the *CCH* test was required. The Board also found that where the sticker indicated that the purpose of the copy was "criticism or review", the purpose was also to be treated as "research or private study".

14 Before this Court, there was generally no dispute that the first step in *CCH* was met and that the dealing -- photocopying -- was for the allowable purpose of research or private study. The dispute essentially centred on the second step of the test: whether the Category 4 copies were "fair" in accordance with the *CCH* factors. I have concerns over how the Board applied several of those factors.

15 In my view, the key problem is in the way the Board approached the "purpose of the dealing" factor. The Board concluded that since the Category 4 copies were not made as a result of a student request, they were no longer for the purpose of research or private study at the second stage. This was based on its observation that in *CCH*, the Great Library was making copies at the request of lawyers. Because there was no such request for Category 4 copies, the Board concluded that the *predominant* purpose was that of the teacher, namely, "instruction" or "non-private study". The Board therefore found that this factor tended to make the Category 4 copies unfair. The Federal Court of Appeal, agreeing with the Board, stated that the real purpose or motive behind the copies was instruction, not private study.

16 Access Copyright argued that the purpose of the dealing should be seen, as it was by the Board and the Federal Court of Appeal, from the copier's, or teacher's perspective. It relied particularly on three key Commonwealth cases which found the copier's purpose in reproducing the work to be determinative. In *Sillitoe v. McGraw-Hill Book Company (U.K.) Ltd.*, [1983] F.S.R. 545 (Ch. D.), an importer and seller of "study notes" which reproduced a

substantial part of a literary work, argued that the notes were intended as a supplementary aid for students engaging in research and private study. The court held that the seller was unable to invoke the fair dealing exception since it was not *itself* engaged in private study or research, but was merely facilitating this activity for others (p. 558).

17 The court in *Sillitoe* relied on *University of London Press, Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601, where a publisher issued a publication reproducing old exams and sold it to students who were preparing for their own exams. The publisher argued that the publication amounted to fair dealing "for the purposes of private study" by university students preparing for exams. The court held that the company could not bring itself within the fair dealing exception, rejecting the argument that the purpose of the publication was "private study":

It could not be contended that the mere republication of a copyright work was a "fair dealing" because it was intended for purposes of private study; nor, if an author produced a book of questions for the use of students, could another person with impunity republish the book with the answers to the questions. Neither case would, in my judgment, come within the description of "fair dealing." [p. 613]

18 In the New Zealand case *Copyright Licensing Ltd. v. University of Auckland*, [2002] 3 N.Z.L.R. 76 (H.C.), several universities provided copies of copyrighted works to students as part of course packs, and charged the students for these materials through various school fees. The universities argued that the copying constituted fair dealing for the purposes of research or private study. The court held that the "purpose" must be that of the person "doing the copying" (paras. 43 and 52). Since the copiers -- the universities -- were not themselves dealing with the work for the purposes of research or private study, the copying did not amount to fair dealing.

19 With respect, I do not find these authorities particularly helpful. Firstly, courts in the U.K. have tended to take a more restrictive approach to determining the "purpose" of the dealing than does *CCH*. Based on s. 178 of the *Copyright, Designs and Patents Act 1988* (U.K.), 1988, c. 48, for example, which defines "private study" to exclude "a commercial purpose", courts in the U.K. have asserted that both research and private study must be for a non-commercial purpose: see G. D'Agostino, "Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use" (2008), 53 McGill L.J. 309, at p. 339. This expressly contradicts the statement in *CCH* that the allowable purposes must be given a "large and liberal interpretation", and that "research" is not limited to non-commercial or private contexts (para. 51).

20 More importantly, as noted by Linden J.A. of the Federal Court of Appeal in *CCH*, 2002 FCA 187, [2002] 4 F.C. 213, at para. 132 (reversed on other grounds), these "course pack" cases involved copiers with demonstrably ulterior -- i.e. commercial -- motives. They invoked the allowable purposes of "research" or "private study", in effect, in order to appropriate their customers' or students' purposes as their own and escape liability for copyright infringement.

21 These cases, then, to the extent that they are germane, do not stand for the proposition that "research" and "private study" are inconsistent with instructional purposes, but for the principle that copiers cannot camouflage their own distinct purpose by purporting to conflate it with the research or study purposes of the ultimate user.

22 As noted in the companion appeal *SOCAN v. Bell*, fair dealing is a "user's right", and the relevant perspective when considering whether the dealing is for an allowable purpose under the first stage of *CCH* is that of the user (*CCH*, at paras. 48 and 64). This does not mean, however, that the copier's purpose is irrelevant at the fairness stage. If, as in the "course pack" cases, the copier hides behind the shield of the user's allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair, that separate purpose will also be relevant to the fairness analysis.

23 In the case before us, however, there is no such separate purpose on the part of the teacher. Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of "instruction"; they are there to facilitate the students' research and private study. It seems to me to be

axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.

24 The Board's approach, on the other hand, drives an artificial wedge into these unified purposes by drawing a distinction between copies made by the teacher at the request of a student (Categories 1-3), and copies made by the teacher without a prior request from a student (Category 4). Nowhere in *CCH* did the Court suggest that the lawyer had to "request" the photocopies of legal works from the Great Library before those copies could be said to be for the purpose of "research". On the contrary, what the Court found was that the copies of legal works were "necessary conditions of research and thus part of the research process":

The reproduction of legal works is for the purpose of research in that it is an *essential element of the legal research process*... . Put simply, [the Great Library's] custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law. [Emphasis added; para. 64.]

25 Similarly, photocopies made by a teacher and provided to primary and secondary school students are an essential element in the research and private study undertaken by those students. The fact that some copies were provided on request and others were not, did not change the significance of those copies for students engaged in research and private study.

26 Nor, with respect, do I accept the statement made by the Board and endorsed by the Federal Court of Appeal, relying on *University of London Press*, that the photocopies made by teachers were made for an unfair purpose -- "non-private study" -- since they were used by students as a group in class, and not "privately". As discussed above, the holding was simply that the publisher could not hide behind the students' research or private study purposes to disguise a separate unfair purpose -- in that case, a commercial one. The court did *not* hold that students in a classroom setting could never be said to be engaged in "private study".

27 With respect, the word "private" in "private study" should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of classroom instruction rather than on the *concept* of studying, the Board again artificially separated the teachers' instruction from the students' studying.

28 The Board's skewed characterization of the teachers' role as being independent and differently motivated from that of the student users, also led to a problematic approach to the "amount of the dealing" factor. In considering this factor, the Board accepted that teachers generally limit themselves to reproducing relatively short excerpts of each textbook. Having found that the teachers only copied "short excerpts", the Board was required to determine whether the proportion of each of the short excerpts in relation to the whole work was fair. Instead, it then cited a passage from *CCH*, at para. 68, that said "if a specific patron ... submitted numerous requests for multiple reported judicial decisions from the same reported series over a short period of time", the dealing might not be fair. Relying on this quote, the Board concluded that a teacher was analogous to a specific patron, and that the repeated copying of the same "class set" of books -- that is, a set shared by more than one class or by many students in the same class -- tended to make the dealing unfair.

29 This, with respect, was a flawed approach. First, unlike the single patron in *CCH*, teachers do not make multiple copies of the class set for their own use, they make them for the use of the *students*. Moreover, as discussed in the companion case *SOCAN v. Bell*, the "amount" factor is not a quantitative assessment based on aggregate use, it is an examination of the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated. The quantification of the total number of pages copied, as the Court noted in *CCH*, is considered under a

different factor: the "character of the dealing".

30 The Board had, in fact, already considered the quantification of the dissemination when it assessed the character of the dealing, finding that multiple copies of the texts were distributed to entire classes. In reapplying this same quantitative concern when assessing the "amount of the dealing", it conflated the two factors, which had the effect of erasing proportionality from the fairness analysis.

31 I also have difficulty with how the Board approached the "alternatives to the dealing" factor. A dealing may be found to be less fair if there is a non-copyrighted equivalent of the work that could have been used, or if the dealing was not reasonably necessary to achieve the ultimate purpose (*CCH*, at para. 57). The Board found that, while students were not expected to use only works in the public domain, the educational institutions had an alternative to photocopying textbooks: they could simply buy the original texts to distribute to each student or to place in the library for consultation.

32 In my view, buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks. First, the schools have already purchased originals that are kept in the class or library, from which the teachers make copies. The teacher merely facilitates wider access to this limited number of texts by making copies available to all students who need them. In addition, purchasing a greater number of original textbooks to distribute to students is unreasonable in light of the Board's finding that teachers only photocopy short excerpts to complement existing textbooks. Under the Board's approach, schools would be required to buy sufficient copies for every student of every text, magazine and newspaper in Access Copyright's repertoire that is relied on by a teacher. This is a demonstrably unrealistic outcome. Copying short excerpts, as a result, is reasonably necessary to achieve the ultimate purpose of the students' research and private study.

33 The final problematic application of a fairness factor by the Board was its approach to the "effect of the dealing on the work", which assesses whether the dealing adversely affects or competes with the original work. Access Copyright pointed out that textbook sales had shrunk over 30 percent in 20 years. However, as noted by the Coalition, there was no evidence that this decline was linked to photocopying done by teachers. Moreover, it noted that there were several other factors that were likely to have contributed to the decline in sales, such as the adoption of semester teaching, a decrease in registrations, the longer lifespan of textbooks, increased use of the Internet and other electronic tools, and more resource-based learning.

34 Despite this evidentiary vacuum, the Board nonetheless concluded that the impact of photocopies, though impossible to quantify, was "sufficiently important" to compete with the original texts to an extent that made the dealing unfair. The Board supported its conclusion with the finding that the schools copy "more than a quarter of a billion textbook pages each year", even though this total number included the pages for which the schools *already* pay a tariff. The Category 4 copies in dispute account for under 7% of those pages.

35 In *CCH*, the Court concluded that since no evidence had been tendered by the publishers of legal works to show that the market for the works had decreased *as a result* of the copies made by the Great Library, the detrimental impact had not been demonstrated. Similarly, other than the bald fact of a decline in sales over 20 years, there is no evidence from Access Copyright demonstrating any link between photocopying short excerpts and the decline in textbook sales.

36 In addition, it is difficult to see how the teachers' copying competes with the market for textbooks, given the Board's finding that the teachers' copying was limited to short excerpts of complementary texts. If such photocopying did not take place, it is more likely that students would simply go without the supplementary information, or be forced to consult the single copy already owned by the school.

37 This Court in *CCH* stated that whether something is "fair" is a question of fact and "a matter of impression" (para. 52, citing *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.), at p. 1027). As a result, the Board's decision as to whether the photocopies amount to fair dealing is to be reviewed, as it was by the Federal Court of Appeal, on a reasonableness

standard. Because the Board's finding of unfairness was based on what was, in my respectful view, a misapplication of the *CCH* factors, its outcome was rendered unreasonable.

38 I would therefore allow the appeal with costs and remit the matter to the Board for reconsideration based on these reasons.

The reasons of Deschamps, Fish, Rothstein and Cromwell JJ. were delivered by

ROTHSTEIN J. (dissenting):--

I. Introduction

39 This appeal is about fair dealing under s. 29 of the *Copyright Act*, R.S.C. 1985, c. C-42 ("Act"). Whether something is fair is a question of fact (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 52 ("*CCH*"). Fair dealing is "a matter of impression" (*CCH*, at para. 52, citing *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.), at p. 1027). In *CCH*, this Court found that the factors proposed by Linden J.A., at the Federal Court of Appeal (2002 FCA 187, [2002] 4 F.C. 213, at para. 150), to help assess whether a dealing is fair, provided a "useful analytical framework to govern determinations of fairness in future cases" (para. 53). While useful for purposes of the fair dealing analysis, the factors are not statutory requirements.

40 The application of these factors to the facts of each case by the Copyright Board should be treated with deference on judicial review. A principled deferential review requires that courts be cautious not to inadvertently slip into a more intrusive, correctness review.

41 Justice Abella finds that the Copyright Board misapplied several of the *CCH* factors and that its conclusion is, as a result, unreasonable. I respectfully disagree. In my view, the Board made no reviewable error in principle in construing the *CCH* factors and, with one relatively minor exception, its factual analysis, application of the *CCH* factors to the facts and its conclusions were not unreasonable. I would therefore dismiss the appeal.

II. Fair Dealing

A. *Purpose of the Dealing*

(1) Whose Purpose Is Relevant

42 In my respectful opinion, it was not unreasonable for the Board to have considered that the teacher's purpose was relevant and *predominant on the facts in this case*. At para. 98 of its reasons ([2009] C.B.D. No. 6 (QL)), the Board stated:

Conversely, with respect to copies of excerpts made on the teacher's initiative for his or her students or at the student's request with instructions to read them, we consider that the teacher's stated purpose must predominate. Most of the time, this real or predominant purpose is instruction or "non-private" study. We attribute a certain degree of importance to the fact that the teacher's role is scarcely comparable to that of staff at the Great Library, the subject of *CCH*. That staff makes copies at the clients' request. A teacher, in deciding what to copy and for whom, just as when directing students' conduct, is doing his or her job, which is to instruct students. According to this criterion, the dealing therefore tends to be unfair.

43 In my view, even if the selecting of passages and photocopying them carried out by teachers for their students were to be seen as an integral part of the students' private study, the teacher also has a purpose. It is to utilize the photocopied excerpts in the process of instructing and educating the students, the essence of the job of teaching. This

purpose cannot be ignored and was not by the Board. The teacher's role in selecting and photocopying excerpts of works is significantly different from the role of the Great Library staff in *CCH*, which was completely passive. The Board noted this difference at para. 98 of its reasons and concluded that, *on the facts*, the teacher's purpose predominated in these circumstances. There is nothing unreasonable in this *factual* conclusion.

44 Nor do I think that the Board's approach draws an artificial distinction between copies made by the teacher at the request of a student and those made at the teacher's own initiative. In my opinion, the distinction drawn by the Board remains consistent with and reasonable in light of *CCH*. It was quite clear in *CCH* that the photocopies made by the staff of the Great Library were made at the request of the lawyers. That is, without that request from the lawyers, there would have been no photocopies. Considering, as the Board did, that the fact that the initiative for a copy came from a teacher was an indicator that the photocopy would mainly serve the teacher's purpose of teaching is not artificial or unreasonable. This is a realistic assessment of the facts and circumstances of classroom teaching.

45 At para. 88 of its reasons, the Board explained that since the dealing in issue was for more than one purpose, it would look, under the first step of *CCH*, at whether any one of the purposes was an allowable purpose for fair dealing under the Act; if so, it would proceed to assess the *predominant* purpose of the dealing in the analysis of whether the dealing is fair. The parties agreed that this appeal should be decided solely on the assessment of the Board's analysis of fairness under the second step of *CCH*. In these circumstances, there is no basis for the suggestion that the finding by the Board under the "purpose of the dealing" factor -- that the copies were made predominantly for the teacher's purpose of instruction -- contradicts its finding under the first step of the analysis -- that Category 4 copies were made for an allowable purpose.

(2) The Meaning of "Private Study"

46 I do not think that the Board and the Federal Court of Appeal erred in equating "instruction" with "*non-private* study", and that this tended to make the purpose of the dealing unfair (Board, at para. 98; 2010 FCA 198, [2011] 3 F.C.R. 223, at paras. 37-38).

47 While I agree with Justice Abella that "[s]tudying and learning are essentially personal endeavours" (para. 27), in the sense that each individual applies his or her own mind to the acquisition of knowledge, studying may occur in different settings. The *Copyright Act* itself requires that to be fair dealing, use of a copyrighted work must be for "private study", which indicates that the Act foresees private and non-private study (s. 29). This point was made in *CCH* by the majority of the Federal Court of Appeal at paras. 128-29. Parliament does not speak in vain (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 110). Words used by the legislator should be construed to give them *some* meaning. The section cannot be interpreted to strip the word "private" in "private study" of *any* meaning.

48 The Board relied on prior jurisprudence on this point (para. 90). The Federal Court of Appeal upheld the Board's conclusion as reasonable because

"[p]rivate study" presumably means just that: study by oneself... . A large and liberal interpretation means that the provisions are given a generous scope. It does not mean that the text of a statute should be given a meaning it cannot ordinarily bear. When students study material with their class as a whole, they engage not in "private" study but perhaps just "study". [para. 38]

49 I agree with the distinction made by the Federal Court of Appeal. When included in the *Copyright Act*, the expression "private study" arguably refers to the situation of a scholar or student dealing with a work for his individual study. This does not mean that the scholar or student may not collaborate with others. I would hesitate to endorse the Board's apparent view at para. 90 of its reasons, that a copy made at the request of a teacher can *never* be for the purpose of private study. In my view, a copy made on a teacher's own initiative would indeed be for private study if, for example, the material is tailored to the particular learning needs or interests of a single or small number of students.

However, "private study" cannot have been intended to cover situations where tens, hundreds or thousands of copies are made in a school, school district or across a province as part of an organized program of instruction. The Board's conclusion at para. 98 that, in the case of Category 4 copies, "[m]ost of the time, [the] real or predominant purpose is instruction or 'non-private' study" is reasonable on the facts of this case.

B. Amount of the Dealing and Character of the Dealing

50 I agree with my colleague that as a matter of analytical coherence, the "amount of the dealing" factor is concerned with "the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated" (para. 29). The number of copies and the extent of the dissemination are properly considered under the "character of the dealing" factor (*CCH*, at para. 55). I also agree that it is important to avoid double counting in assessing the fairness of a dealing by looking to the same aspect of the dealing under more than one factor.

51 However, in my opinion, the Board's analysis under the "amount of the dealing" factor remained focused on the proportion of the photocopied excerpt to the entire work. In its factual assessment of the "amount of the dealing" factor, the Board found "that class sets will be subject to 'numerous requests for [...] the same [...] series'" (para. 104, citing *CCH*, at para. 68). I do not read the Board's reliance on this finding as indicating that it improperly considered the overall number of copies of the same excerpt distributed to a whole class.

52 As I understand the Board's reasons, while teachers usually made short excerpts at any one time, this was offset by the fact that the teachers would return to copy other excerpts from the same books -- the ones contained in class sets -- thereby making the *overall proportion* of the copied pages unfair in relation to the entire work *over a period of time*. The Board found:

With respect to the copies made on the teacher's initiative for his or her students, there are factors weighing on each side... . [I]t seems that teachers generally limit themselves to reproducing relatively short excerpts from a work to complement the main textbook. On the other hand, in our view, it is more than likely that class sets will be subject to "numerous requests for [...] the same [...] series", which would tend to make the amount of the dealing unfair on the whole. [Emphasis added.]

The Board's conclusion is consistent with the *CCH* direction that "the [amount of the] dealings might not be fair if a specific patron ... submitted numerous requests for multiple reported judicial decisions from the same reported series over a short period of time" (*CCH*, at para. 68). In this context, it was not unreasonable for the Board to compare a teacher with a specific patron of the Great Library, given its earlier conclusion that the teacher's purpose must predominate.

53 Under the "character of the dealing" factor, the Board focused its analysis on the fact that multiple copies of the *same* excerpt are made, at any one time, to be *disseminated to the whole class* (Board, at para. 100). Accordingly, on my reading of the Board's reasons, there was no double counting; the Board's conclusions of unfairness under the "character of the dealing" and the "amount of the dealing" factors were arrived at independently, taking into consideration different aspects of the dealing.

54 On the whole, unless it is shown that the Board's conclusion of fact that the books from the "class sets will be subject to 'numerous requests...'" was unreasonable -- and I would observe that the appellants specifically state in their factum that "the Board's findings of fact are not in dispute" (para. 50) -- I would not disturb the Board's assessment under the "amount of the dealing" and "character of the dealing" factors.

C. Alternatives to the Dealing

55 According to my colleague's analysis, at para. 32, the Board also unreasonably assessed whether there were any alternatives to the dealing, because "buying books for each student is not a realistic alternative to teachers copying short

excerpts to supplement student textbooks". I agree that buying books to distribute to all students does not seem like a realistic option if we are speaking of photocopies of short excerpts only, used to supplement the main textbooks already in possession of the students.

56 However, on the premise that the same class sets of books will be subject to numerous requests for short excerpts, as found by the Board at para. 104 of its reasons, it was not unreasonable for the Board to consider, at para. 107, that from a practical standpoint, the schools had the option of buying more books to distribute to students or to place in the library or in class sets instead of photocopying the books. While buying books may not be a non-copyrighted alternative such as those envisaged in *CCH*, these were relevant facts for the Board to consider in a case where it found systematic copying from the same books. In addition, the Board considered the schools' resources and found that in this case, "[t]he fact that the establishment has limited means does not seem to bar the recognition of this point" (para. 107). In a case where numerous short excerpts of the work are taken, the fact that there are no non-copyrighted alternatives to the dealing does not automatically render the dealing fair. Therefore, I am not persuaded that the Board's analysis under the "alternatives to the dealing" factor was unreasonable.

D. Effect of the Dealing on the Work

57 I agree with Justice Abella that the Board's conclusion that the photocopying of Category 4 copies "compete[s] with the original to an extent that makes the dealing unfair" (Board, at para. 111) seems unsupported by evidence. Even accepting that it was reasonable for the Board to conclude, based on the evidence of declining book sales, that photocopying had a negative impact on the work, it appears from para. 111 of its reasons that the Board came to this conclusion by referring to the *total* amount of photocopying across Canada -- 250 million pages, the bulk of which is already paid for through the tariff -- and not the 16.9 million Category 4 copies. Determining the effect of the Category 4 dealing on the work required relating *those* photocopies to the work and determining whether the effect of those copies was sufficiently important to "compete with the market of the original work" (*CCH*, at para. 59). I would be inclined to find this conclusion unreasonable.

58 However, I do not think that an unreasonable observation under this one factor is sufficient to render the Board's overall assessment unreasonable. As noted in *CCH*, no one factor is determinative (paras. 59-60) and the assessment of fairness remains fact specific. In the appellants' own submission, the Board in this case considered the "purpose of the dealing" and the "amount of the dealing" factors to be the most important (A.F., at para. 45). In light of my conclusion that the Board's assessment under those and other factors was reasonable, I would not find the entire decision unreasonable because of this one finding.

III. Conclusion

59 Tribunal decisions can certainly be found to be unreasonable (see e.g. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471). However, I do not think it is open on a deferential review, where a tribunal's decision is multifactored and complex, to seize upon a few arguable statements or intermediate findings to conclude that the overall decision is unreasonable. This is especially the case where the issues are fact-based, as in the case of a fair dealing analysis.

60 This Court has stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, that reviewing courts are to look for "justification, transparency and intelligibility within the decision-making process" of the tribunal and with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (para. 47). In my respectful view, the Board's detailed and extensive analysis and decision in this case were intelligible, transparent and justifiable. Its conclusion cannot be said to fall outside of a reasonable range of outcomes. For these reasons, I would dismiss the appeal with costs.

Appeal allowed with costs, DESCHAMPS, FISH, ROTHSTEIN and CROMWELL JJ. dissenting.

Solicitors:

Solicitors for the appellants: Wanda Noel, Ottawa; Fasken Martineau DuMoulin, Ottawa.

Solicitors for the respondent: McCarthy Tétrault, Toronto; Norton Rose Canada, Montréal.

Solicitors for the interveners the Canadian Publishers' Council, the Association of Canadian Publishers and the Canadian Educational Resources Council: McCarthy Tétrault, Toronto.

Solicitors for the interveners the Canadian Association of University Teachers and the Canadian Federation of Students: Torys, Toronto.

Solicitors for the interveners the Association of Universities and Colleges of Canada and the Association of Canadian Community Colleges: Osler, Hoskin & Harcourt, Ottawa.

Solicitors for the intervener CMRRA-SODRAC Inc.: Cassels Brock & Blackwell, Toronto.

Solicitor for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: University of Ottawa, Ottawa.

Solicitors for the interveners the Canadian Authors Association, the Canadian Freelance Union, the Canadian Society of Children's Authors, Illustrators and Performers, the League of Canadian Poets, the Literary Translators' Association of Canada, the Playwrights Guild of Canada, the Professional Writers Association of Canada and the Writers' Union of Canada: Hebb & Sheffer, Toronto; Stockwoods, Toronto.

Solicitors for the intervener the Centre for Innovation Law and Policy of the Faculty of Law University of Toronto: Macera & Jarzyna, Ottawa.

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ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
LANE, PITT and MOLLOY JJ.

B E T W E E N:)
)
GRAYWOOD INVESTMENTS LIMITED) Robert J. Howe and David S. Cherepacha,
) for the Applicant
)
)
Applicant)
)
- and -)
)
)
)
ONTARIO ENERGY BOARD and) F.J.C. Newbould, for the Respondent
TORONTO HYDRO-ELECTRIC SYSTEM) Toronto Hydro-Electric System Limited
LIMITED)
) M. Philip Tunley, for the Respondent
) Ontario Energy Board
Respondents)
)
)
) **HEARD:** November 15, 2004

REASONS FOR JUDGMENT

MOLLOY J.:

A. INTRODUCTION

[1] Graywood Investments Limited (“Graywood”) seeks to judicially review, or alternatively, appeal from a decision of the Ontario Energy Board (the “OEB” or “the Board”) dated July 25, 2001, in which the OEB dismissed Graywood’s complaint that the Toronto Hydro-Electric System Limited (“Toronto Hydro”) had failed to comply with certain provisions of its licence and the *Ontario Energy Board Act, 1999* (“the Act”). In particular, Graywood argued

before the OEB that the subdivision project it was developing was governed by new rules which came into force on September 29, 2000 and that it was entitled to hire a contractor at competitive rates to install the electrical distribution system for the subdivision. Toronto Hydro took the position that the old monopolistic regime applied and that Graywood was obliged to retain Toronto Hydro at the rates applicable under the old system. The OEB dismissed Graywood's complaint based on its finding that Graywood and Toronto Hydro had entered into an agreement before November 1, 2000 such that an exception applied and the subdivision project did not fall within the new regime.

B. BACKGROUND FACTS

[2] Graywood is a real estate developer. In 1999, Graywood commenced development of a residential subdivision in north Scarborough. At that time, Toronto Hydro enjoyed a monopoly on the provision of new electrical supply facilities to developers in that geographic area. Accordingly, on November 1, 1999 Graywood consulted Toronto Hydro about the underground electrical distribution system for the subdivision.

[3] Toronto Hydro replied by letter dated November 9, 1999 that it would proceed with the "design" of the electrical distribution system upon payment of a "deposit fee" of \$110.00 per lot, which fee would later be "credited against the overall electrical charges which will be detailed in the project invoice". Graywood paid the requested design fee of \$63,140.00 on December 23, 1999. Both parties obviously anticipated that Toronto Hydro would eventually be doing the installation work as at that time Toronto Hydro enjoyed a monopoly position in the market.

[4] Toronto Hydro completed the design work and sent its design drawings to Graywood's engineers on June 27, 2000. At this point, Graywood was under no contractual obligation with Toronto Hydro to proceed any further.

[5] It is clear that by the fall of 2000 Graywood was committed to proceeding with the development of this subdivision. In September, October and November 2000 sewers, water mains and roads were being constructed. In November 2000 Graywood contacted Toronto Hydro with respect to the installation of the electrical distribution system it had designed. Toronto Hydro refused to install the electrical system without a written contract.

[6] By November 2000 a new regime had come into force with respect to the provision of certain electrical services, which regime was designed to end the monopoly electrical providers had previously enjoyed. Graywood took the position that the new regime applied to its subdivision and that Toronto Hydro should comply with the new scheme by making an offer to connect which Graywood could then consider and possibly exercise its option to obtain alternative bids from other electrical suppliers. Toronto Hydro disagreed, taking the position that the new regime did not apply to this subdivision and refusing to provide an offer to connect under the new scheme. Toronto Hydro insisted that it would only provide installation services pursuant to its pricing structure and policies in place prior to the new regime.

[7] Ultimately, Graywood agreed to proceed with Toronto Hydro, but under protest with respect to the pricing structure. Toronto Hydro drafted a contract entitled “Agreement for the Installation of an Underground Electrical Distribution System in a Residential Subdivision” and forwarded it to Graywood in mid December 2000. Although executed by the parties in December 2000, the agreement stipulates that it is “made this 8th day of November, 2000”. Schedule B to the agreement was a preliminary invoice for a full contract amount of \$1,772,867.34. Against this, Toronto Hydro applied a credit of \$63,140.00 being the “deposit” paid for the design work, such that the price to be paid by Graywood was \$1,709,727.34. Toronto Hydro stipulated that the full contract price would have to be paid before it proceeded with any installation work. Graywood paid the invoice in full but stated this was without prejudice to its rights to challenge Toronto Hydro’s position before the OEB and/or the courts.

C. ENDING THE MONOPOLY: CHANGES TO THE LEGISLATIVE SCHEME

[8] On July 14, 2000, the OEB published a Distribution System Code (“the Code”) which sets out minimum conditions with which distributors of electricity must comply. A “distributor” is defined as a person who owns or operates a system for distributing electricity, which includes Toronto Hydro. The Code’s object was to end Toronto Hydro’s monopoly and open the field to competition. Different aspects of the Code came into force at different times. Chapter 3 of the Code, dealing with “Connections and Expansions” came into force on September 29, 2000 with one key exception. The Code provided in Article 1.7 that its provisions would “not apply to projects that are the subject of an agreement entered into before November 1, 2000”. That exception provision is central to the determination of the proceeding now before this Court.

[9] Article 1.7 does not specifically define what type of “agreement” would trigger the exception to the application of Chapter 3 of the Code, nor is the term “agreement” included in the general definition section of the Code. However, Chapter 3 relates to Connections and Expansions of electrical distribution systems. The general definition section of the Code refers to only one type of agreement, that being a “Connection Agreement”, which is defined as follows:

“Connection Agreement” means an agreement entered into between a distributor and a person connected to its distribution system that delineates the conditions of the connection and delivery of electricity to that connection;

[10] Under the Conditions of Service attached to its licence, Toronto Hydro is required to enter into a contract of service with any customer before it connects a building for a new or modified supply of electricity (Conditions of Service, section 2.1.7.1). Further, in the absence of a written agreement, the Conditions of Service provide that an agreement will be implied “with any Customer who is connected to Toronto Hydro’s distribution system and receives distribution services from Toronto Hydro”. The terms of such an implied agreement are stipulated to be embedded in various sources, including the Conditions of Service and the Distribution System Code (section 2.1.7.2). These provisions are mirrored in the Code. Article 2 of the Code (dealing with standards of business practice and conduct) provides;

A distributor shall ensure that it has an appropriate Connection Agreement in place with any customer prior to commencement of service. If a Connection Agreement is not entered into once service has commenced, the provision of service by the distributor shall imply acceptance of the distributor's Conditions of Service and the terms of any applicable Connection Agreement.

[11] Article 3.2.2 of the Code provides that if an expansion of a distributor's main distribution system is needed in order to connect a customer, the distributor is required to make an offer to the customer that must include a description of the material and labour required to build the expansion required to connect the customer, an estimate of the amount that would be charged for construction of the system by the distributor and an estimate of what the distributor will charge for the connection of the new system to its main system. The distributor is also required to inform the customer of the option of obtaining alternative bids from qualified contractors. This is the provision relied upon by Graywood, but which Toronto Hydro took the position did not apply to Graywood's subdivision because of the exception in Article 1.7 for projects subject to an agreement entered into before November 1, 2000.

[12] Article 3.2.3 provides that, "A distributor shall be responsible for the preliminary planning, design and engineering specifications of the work required for the distribution system expansion and connection." However, under the new regime, it does not necessarily follow that the distributor will obtain the contract to construct the distribution system expansion and connection. The consumer may elect to proceed with an approved private contractor for that portion of the work.

D. PROCEEDINGS BEFORE THE ONTARIO ENERGY BOARD

[13] Graywood wrote to the Ontario Energy Board on March 9, 2001 alleging that Toronto Hydro was in breach of its licence by failing to comply with the provisions of the Code. Toronto Hydro outlined its position in a letter dated April 4, 2001, indicating that the Code did not apply to the Graywood subdivision because of the design work undertaken by Toronto Hydro prior to November 1, 2000. Graywood requested the OEB to schedule a hearing to consider whether Toronto Hydro was in breach of its obligations.

[14] The OEB advised Graywood in May 2001 that it would be treating Graywood's letter as a complaint and would conduct an investigation. The OEB's letter in that regard states, in part:

While in your letter you requested a hearing to determine whether Toronto Hydro is in compliance with the Code, the Board will treat the matters raised in your letter as a complaint. Under the licensing provisions of the Ontario Energy Board Act, 1998, parties do not have a right to obtain a hearing on matters of non-compliance. Rather, where the Board believes a licensee is in non-compliance, it may issue a notice setting out its intention to issue a non-compliance order or suspend or revoke the licence. Where parties raise issues of non-compliance, the Board has adopted the practice of referring

such complaints to the Director of Licensing to investigate and make recommendations regarding further action by the Board.

[15] Graywood did not at the time object to the manner in which the OEB proposed to deal with its complaint, other than to take the position that a hearing should be held.

[16] Section 75 of the *Ontario Energy Board Act, 1988*, provides:

75 (1) If the Board is satisfied that a licensee is contravening or is likely to contravene any licence, the Board may order the licensee to comply with its licence.

(2) The Board shall give written notice to the licensee that it intends to make an order under subsection (1).

(3) Notice under subsection (2) shall set out the reasons for the proposed order and advise the licensee that, within 15 days after the day that notice was given, the licensee may request the Board to hold a hearing.

(4) If no request for hearing is made within the time permitted by subsection (3), the Board may make an order.

(Emphasis added)

[17] The OEB conducted an investigation and obtained extensive written submissions and documentation from Graywood. The investigation included a consideration of all of the dealings between Graywood and Toronto Hydro from the inception of the subdivision project as well as Graywood's own work within the project. Toronto Hydro was given the opportunity to provide further documentation or submissions, but did not do so.

[18] Following its investigation, the OEB concluded that Toronto Hydro was not in breach of its licence and was not required to comply with the requirements of Chapter 3 of the Code for the Graywood subdivision project. Essentially, the OEB concluded that there was an agreement between Graywood and Toronto Hydro prior to November 1, 2000 such that the exception provision in Article 1.7 applied. The OEB's reasons for this determination are set out in a letter from the Board Secretary, the operative portion of which states:

Based on the information provided, the Board finds that an implied agreement had been reached prior to November 1, 2000.

The Board finds that in past industry practice, there was often no formal offer to connect and associated written connection agreement between parties on a specific project. The evidence indicates that Graywood had agreed to Toronto Hydro undertaking preliminary design work with respect to the Project. The

evidence further demonstrates that Toronto Hydro had been included in the Project for approximately a year prior to November 1, 2000 and that Graywood was committed to the Project proceeding as municipal servicing had commenced prior to October of 2000.

Further, the Board finds that no unfairness has resulted as clearly the Graywood Project was costed based on past industry practice.

E. PROCEDURAL FAIRNESS

[19] Graywood raises two issues of procedural fairness. First, it argues that the OEB breached its duty of fairness in failing to conduct a hearing before making its findings. Second, Graywood objects to the Board taking into account evidence of past industry practice without giving Graywood notice of its intent to do so and an opportunity to respond to it.

[20] With respect to the first point, Graywood requested the OEB to hold a hearing and the OEB refused, based on its conclusion that there had been no breach by Toronto Hydro. I do not agree with the applicant's contention that the Board was required to hold a hearing before concluding there had been no breach.

[21] The language used in s. 75 of the Act is instructive. Subsections (2) and (3) provide that the Board "shall" give written notice to the licensee if it intends to make a compliance order and "shall" provide reasons for the proposed order. However, mandatory language is not used in other parts of this provision. Thus, even if the Board finds there has been non-compliance, it "may" order the licensee to comply, but is not required to do so: ss. 75(2) and (4). Given the structure of these provisions, it cannot be the case that the legislature contemplated the Board would be required to hold a hearing before deciding the licensee had complied with its licence. If the Board was required to hold a hearing with respect to every complaint of non-compliance, clearly the licensee whose rights are directly affected would have to be given notice. However, ss. 75(2) and (3) contemplate notice to the licensee only if the Board intends to make an order and, at that point, the licensee is entitled to "request" a hearing. This provision would be meaningless if the Board had already been required to hold a hearing simply by virtue of the fact that a complaint had been filed.

[22] There is no requirement that the Board hold a hearing every time a complaint is referred to it. Rather, the right to a hearing arises only where, after its initial investigation, the Board is inclined to issue a notice of non-compliance. Even then, it is the licensee rather than the complainant who is entitled to request a hearing. Apart from that, it is entirely within the discretion of the Board whether to hold a formal hearing in this type of situation. Unless that discretion is exercised improperly (which is not alleged here), this court will not interfere. The mere decision not to hold a formal hearing is not in itself a denial of procedural fairness: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817.

[23] Likewise, I find no procedural unfairness in the OEB taking into account industry practice. The Board is a highly specialized tribunal. It has considerable knowledge and

experience as to the nature of this particular industry and how it operates. The Board noted that it is not uncommon in the industry for there to be no formal written connection agreement. The Board was fully entitled to draw on its expertise in this regard. That is one of the distinct advantages of having these types of matters decided by a specialized tribunal. I also note that both the Toronto Hydro operating licence and the legislation contemplate this very situation and provide that an agreement consistent with the distributor's conditions of licence and the legislation will be implied in the absence of a written agreement. The Board also noted that the subdivision project had been costed based on past industry practice. Again, the Board is uniquely positioned to draw such a conclusion based on its expertise. While evidence of past industry practice might be necessary before a court or in areas outside the expertise of the tribunal, no such evidence was necessary before the Board here. The matters taken into account were within the special expertise of the Board. The Board was entitled to draw on that expertise and was not required to give any notice of such to the complainant before making a decision.

[24] Accordingly, I find no breach of procedural fairness by the OEB in its handling of this matter.

F. STANDARD OF REVIEW

Is the OEB Decision an Order?

[25] Section 33(1) of the Act provides that an appeal lies to the Divisional Court from an "order of the Board", the making of a rule under section 44 or the issuance of a code under section 70.1. Section 33(2) stipulates that the appeal may be made solely upon a question of law or jurisdiction. The first issue to be determined is whether the decision of the Board in this case is an "order" within the meaning of s. 33(1) and therefore subject to an automatic right of appeal.

[26] Sections 19 (1) and (2) provide:

19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact.

(2) The Board shall make any determination in a proceeding by order.

[27] The applicant also relies upon Section 21(2) of the Act, which prohibits the Board from making an "order" unless it has conducted a hearing on notice to the appropriate parties. However, this provision is stated to be "subject to any provision to the contrary in this or any other Act".

[28] Section 75(4) of the Act is an example of a situation in which an "order" may be made without a hearing. It provides that where the Board is of the view that a licensee has failed to comply with the conditions of its licence, has given notice to the licensee of its intention to make a compliance order and has not received a request for a hearing from the licensee within the 15 day time limit, the Board "may make an order". However, the fact that some determinations made by the Board under s. 75 are "orders" subject to the appeal right, does not mean that every

decision made by the Board in the administration of that section will necessarily be an “order”. The Board performs many functions under the Act. Some are judicial, or quasi-judicial, in nature; others are more administrative. In my view, a decision by the Board that it is not appropriate to initiate the process leading up to a hearing under s. 75 is more administrative than judicial. That is not to say that important interests of other parties are not affected. Often they will be. However, in my opinion, a decision not to proceed further under s. 75 is simply a decision not to make an order. It is not itself an order, and is not subject to the appeal right set out in s. 33 of the Act.

Judicial Review

[29] The OEB supervises the terms upon which electrical power is supplied to Ontario residents. Graywood was not able to simply retain somebody other than Toronto Hydro to connect electricity to its subdivision. Graywood attempted to obtain relief from the civil courts in respect of its contract with Toronto Hydro, but its case was dismissed on the grounds that the OEB had exclusive jurisdiction to deal with the matter: *Graywood Investments v. Toronto Hydro-Electric System Ltd.*, [2003] O.J. No. 2091 (S.C.J.), aff’d [2004] O.J.No.193, 181 O.A.C. 265 (C.A.). Whether or not Graywood was required to proceed with Toronto Hydro on its terms under the old monopoly regime, as opposed to the new regime, is a matter of considerable financial consequence for Graywood. Therefore, although the Board’s decision not to proceed against Toronto Hydro was not an “order” subject to appeal, it clearly affected the legal rights, powers and liabilities of Graywood. As such, it is a statutory power of decision and subject to judicial review by this Court.

Standard of Review

[30] The Supreme Court of Canada ruled in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 that a “pragmatic and functional approach” should be taken in determining the level of deference to be accorded an administrative tribunal. The reviewing court is required to evaluate each situation taking into account four factors: (1) whether there is a privative cause; (2) the expertise of the tribunal; (3) the purpose of the legislation as a whole and the particular provision in issue; and (4) the nature of the question before the tribunal: *Pushpanathan, supra*, at paras 28-38.

[31] There is no privative clause in the Act. There is a right of appeal, but limited to questions of law and jurisdiction. As noted by the Divisional Court in *Consumer’s Gas Co. v. Ontario (Energy Board)*, [2001] O.J.No. 5024 (Div.Ct.) at para 3, that is a factor which places the Board “on a continuum short of patent unreasonableness”.

[32] The OEB is a highly specialized tribunal with considerable expertise. *Consumer’s Gas Co. v. Ontario (Energy Board)*, *supra*, was a judicial review of an OEB decision permitting Consumers Gas to use the value of past ratepayer benefits to pay deferred taxes amounting to \$50 million. The Divisional Court applied a “reasonableness” standard of review, emphasizing

the importance of deference due to the Board's high level of expertise. Carnwath J. noted, at para 2:

The standard of review is reasonableness. In applying a pragmatic and functional approach, we have considered the high level of expertise the Board brings to its mandate – the balancing of a reasonable price to the consumer with the necessity of ensuring a viable monopolistic utility that earns a reasonable return on its capital investment. The following are but some of the activities of the Board requiring expertise:

- * economic forecasting
- * familiarity with accounting and income tax principles
- * special features and requirements of a monopolistic utility

[33] While the expertise brought to bear by the OEB in the case at bar is somewhat different from the situation before the Court in the *Consumer's Gas* case, it is no less complex or specialized. The Board was required to balance the interests of the consumer with those of electricity distributors, suppliers and contractors, all within the context of a market that was moving from a monopolistic structure to one with some aspects of competition, but still with supervision and controls. The OEB's expertise includes not just the provision of electricity but many other aspects of construction, engineering and subdivision planning and control. The specialized nature of the OEB's expertise demands a relatively high degree of deference to its decisions.

[34] The nature of the legislation involved also supports a deferential standard of review. The subject matter is specialized and complex, involving the balancing of many different levels of public and private interests. Further, the particular provision before the Board in this case dealt with the phasing in of a new competitive regime and was squarely within the public interest mandate and expertise of the Board.

[35] The matter decided by the OEB was whether the Graywood subdivision project fell within the new competitive regime. This required the Board to decide whether the project was "subject to an agreement" with Toronto Hydro prior to November 1, 2000. This involves questions of law as to contract formation and statutory interpretation. However, it is not a pure question of law. To answer the question before it, the Board was also required to consider the dealings between the parties and make findings of fact. Accordingly, the question decided by the Board was one of mixed fact and law. As such, it is less likely to be held to the standard of correctness often applied to pure questions of law. On the other hand, although there are factual aspects to the question, they did not involve determinations of disputed questions of fact or findings of credibility.

[36] Taking all of these factors into account, I am of the view that the appropriate standard to be applied is one of reasonableness. The OEB is not required to be "correct" in its decision. It is not the court's role, therefore, to substitute its own determination for that of the Board. Rather,

the court must only interfere with the OEB's decision if it is an unreasonable construction of the law when considered in light of the established facts.

G. ANALYSIS

[37] The OEB found there was no unfairness to Graywood in requiring it to proceed under the old monopolistic regime, such that it was obliged to have Toronto Hydro construct and install its electrical system at prices fixed by Toronto Hydro. This finding was based on the Board's review of the construction plans and industry practice and its conclusion that Graywood had costed the subdivision based on the projected electrical prices under the old regime. This was a reasonable conclusion on the Board's part and I would not interfere with it.

[38] However, the OEB's decision cannot be based solely on its view of what is fair in the circumstances. There was a system in place with established rules for the transition. The OEB was required to apply those rules. If Graywood's project was not subject to "an agreement" with Toronto Hydro prior to November 1, 2000, then Graywood was entitled to the benefit of the new regime even if that resulted in an unforeseen economic benefit to Graywood.

[39] The central and dispositive finding made by the OEB was that an "implied agreement had been entered into prior to November 1, 2000". The Board does not set out the terms of that implied agreement, nor the operative date of the agreement. However, in the very next sentence following the finding of an implied agreement, the Board notes that in past industry practice there is often "no formal offer to connect and associated written connection agreement". The logical inference is that the Board was of the view that even though there was no written connection agreement prior to November 1, 2000, it is often the case that projects would not have such a written agreement and the Board therefore found there was an "implied" connection agreement prior to that date.

[40] The basis for the OEB coming to that conclusion was the fact that Toronto Hydro had been involved with the project from 1999, having undertaken the preliminary design work for the electrical distribution system. Further, Graywood had committed to proceeding with the project prior to October 2000 as evidenced by the installation of municipal services. Once again, there is no issue with respect to these findings. The fact that Toronto Hydro did the design work in 1999/2000 is uncontroverted. Likewise, the OEB's conclusion on the evidence before it that Graywood had committed to going ahead with the project prior to October 2000 was a reasonable one.

[41] If that had been the entire evidence and Toronto Hydro had proceeded with the construction and installation of the electrical distribution system in the absence of a written connection agreement, I would take no issue with the OEB's conclusion of an "implied" connection agreement, nor with the reasonableness of the Board's conclusion as to the timing of that implied agreement. However, that was not the entire evidence. The OEB was aware of, but did not refer to, the fact that Graywood and Toronto Hydro had an actual written connection agreement with respect to this project. The evidence is clear that Toronto Hydro was not

contacted with respect to doing the installation until after November 1, 2000. Toronto Hydro then insisted on a formal written connection agreement before proceeding. The contract was drafted by Toronto Hydro and Toronto Hydro dated the contract November 8, 2000, even though it was actually drafted and signed a month or so later. The question therefore is whether the OEB's finding of an implied connection agreement prior to November 1, 2000 is reasonable in light of the existence of an actual written connection agreement dated November 8, 2000. In my view, it is not.

[42] There are many situations in which it may be appropriate to find an implied agreement in the absence of a formal written contract. The Conditions of Service attached to Toronto Hydro's license and the Distribution Code provide for such an agreement being implied. However, both contemplate that the agreement will be implied only once services have been connected and if there is no written agreement in place (see paragraph 10 above). This is consistent with basic contract law. A contract comes into existence only when its essential terms have been agreed upon by the parties. While such an agreement may be implied from the conduct of the parties, there must nevertheless be some indication of a meeting of the minds and an intention to be legally bound. The principle is succinctly stated by the British Columbia Court of Appeal in *Arding v. Buckton* (1956), 20 W.W.R. 487, 6 D.L.R. (2d) 586 (B.C.C.A) as follows (at para 12):

From the authorities it would follow that a contract may be implied only when the conduct of the parties indicates that they are proceeding on the basis of some legal relation so that the function of the court is merely to find as a fact that relation with its attendant obligations and rights which the parties have so indicated by implication but have failed to express: *Falcke v. Scottish Imperial Insur. Co., supra*, [(1886) 34 Ch D 234]; *McKissick, Alcorn, Magnus & Co. v. Hall*, [1928] 3 W.W.R. 509; *Leigh v. Dickeson* (1884) 15 Q.B.D. 60, 54 LJQB 18.
(emphasis added)

[43] The parties here chose to date their contract November 8, 2000. This was not inadvertent. Toronto Hydro drafted the contract in December 2000. It was deliberately back-dated to November 8, 2000 to reflect the point at which Toronto Hydro was first contacted by Graywood with respect to the installation of the distribution system. In the face of that evidence, it is simply not reasonable to find that the agreement arose by implication earlier than November 1, 2000.

[44] Chapter 3 of the Code came into force on September 29, 2000. At that time, there was no existing contract between Toronto Hydro and Graywood. Toronto Hydro had completed its contract for the design of the distribution system in June 2000. Graywood had paid for the design work in advance in December 1999. In 1999 when Toronto Hydro was retained to do the design work, it may well have been the expectation of the parties that Toronto Hydro would also be doing the installation. At the time, Toronto Hydro had a monopoly and, absent a change in the legislation, Graywood would have had no choice but to retain Toronto Hydro for the installation. However, an intention to enter into a contract, or even the shared expectation that a contract would eventually be formed, does not mean there is an agreement until those intentions

coalesce into a meeting of the minds and the formation of a contract. Absent such a meeting of the minds, the contract does not arise, whether by implication or otherwise. As of September 29, 2000, the new regime was in force and it applied to all ongoing projects unless they were “subject to an agreement entered into prior to November 1, 2000”. The exception provision is not framed to exclude all projects in which preliminary design work has already been done or where the parties have had discussions about entering into a contract. The exemption is clearly stated to apply to situation in which an agreement as been “entered into”. The Board’s finding that Graywood and Toronto Hydro had by implication entered into agreement prior to November 1, 2000 is unsustainable on the evidence and is an unreasonable construction of the scope of the exemption provision.

[45] I have considered whether the OEB’s finding of an implied agreement is a reference to the agreement for the design of the distribution system, rather than the connection agreement. I do not believe the Board’s decision can reasonably be construed as referring to an implied design agreement. The design agreement had been entered into the year before, had been fully performed by Toronto Hydro and had been paid for by Graywood. If the OEB meant that the existence of the design agreement prior to November 1, 2000 triggered the exemption provision, it surely would have simply said so. There would be no need to “imply” such an agreement prior to November 1, 2000. The design agreement clearly existed prior to that time. Indeed, it had been fully performed by then. In my view, it is clear from the Board’s reasons that the agreement it implied was a connection agreement. It may well be the case that the exemption provision is capable of a broader construction than that, such that other types of agreements might also result in exempting a particular project from the new regime. However, it is not surprising that in the context of this case the Board interpreted Article 1.7 as referring to a connection agreement. It is the contract for the connection of services which Graywood sought to have to have governed by the new regime. Chapter 3 of the Code deals with connection agreements. The agreement at issue between Graywood and Toronto Hydro is a connection agreement. The central issue is whether that connection agreement is governed by the new regime. It makes perfect sense, therefore, that it is the timing of that connection agreement that governs which regime will apply.

H. CONCLUSION AND ORDER

[46] As I have already noted, the OEB is a tribunal with specialized expertise. The interpretation and application of the transition provisions in the Distribution Code falls squarely within that expertise and is entitled to deference. I have no difficulty accepting all of the factual and policy considerations noted by the Board. However, the question of when this particular contract was entered into is not really dependant upon findings of fact, or policy, or statute interpretation. The question is whether an agreement can be implied prior to the date upon which the parties actually entered into it, based on the fact that the parties had a prior contract in relation to the same project. That is more a straightforward question of law and less within the special expertise of the Board. All that existed prior to November 1, 2000 was an already fully performed design agreement and the expectation prior to September 29, 2000, based on the then existing monopolistic regime, that Toronto Hydro would eventually be retained to install the

system as well. In my view, the Board's finding of an implied agreement prior to November 1, 2000 was an error of law and unreasonable. It cannot stand.

[47] The Board's decision is quashed.

[48] The applicant also sought a declaration that its subdivision project is governed by the new Code, the issuance of a notice of intention to suspend or revoke Toronto Hydro's licence and ancillary relief by way of an accounting. These are matters within the sole jurisdiction of the OEB. It is not appropriate for this Court to usurp the function of the tribunal by making such orders.

[49] This matter is remitted to the OEB for its further consideration, based on this Court's finding that the connection agreement between Toronto Hydro and Graywood was entered into on November 8, 2000.

[50] If the parties cannot agree upon costs, written submissions may be forwarded to the court within 30 days.

MOLLOY J.

I agree: _____
LANE J.

Released: February 3, 2005

COURT FILE NO.: 724/02

DATE: : 20050203

**ONTARIO
SUPERIOR COURT OF JUSTICE**

DIVISIONAL COURT

B E T W E E N:

GRAYWOOD INVESTMENTS LIMITED

Applicant

- and -

ONTARIO ENERGY BOARD and TORONTO
HYDRO-ELECTRIC SYSTEM LIMITED

Respondents

REASONS FOR JUDGMENT

Released: February 3, 2005

21

COURT OF APPEAL FOR ONTARIO

CITATION: Power Workers' Union (Canadian Union of Public Employees, Local 1000) v. Ontario (Energy Board), 2013 ONCA 359

DATE: 20130604

DOCKET: C55602, C55641 and C55633

Rosenberg, Goudge and Blair JJ.A.

BETWEEN

Power Workers' Union, Canadian Union of Public Employees, Local 1000

Appellants

and

The Ontario Energy Board, and Ontario Power Generation Inc.

Respondents

AND BETWEEN

Ontario Power Generation Inc.

Appellant

and

Ontario Energy Board

Respondent

AND BETWEEN

Society of Energy Professionals

Appellant

and

The Ontario Energy Board and Ontario Power Generation Inc.

Richard Stephenson and Emily Lawrence, for the appellant Power Workers' Union

John B. Laskin and Crawford Smith, for the appellant Ontario Power Generation

Paul Cavalluzzo, for the appellant Society of Energy Professionals

Mark Rubenstein, for the intervenor Ontario Education Services Corporation

Robert B. Warren, for the intervenor Consumers Council of Canada

Glen Zacher and Patrick Duffy, for the respondent Ontario Energy Board

Heard: January 29, 2013

On appeal from the order of the Divisional Court (Justice Catherine D. Aitken, Justice Katherine E. Swinton and Justice Alexandra Hoy), dated February 14, 2012.

By the Court:

Introduction

[1] This is an appeal from the order of the Divisional Court dismissing the appeal from a decision of the respondent Ontario Energy Board (the OEB) in which the OEB reduced by \$145,000,000 the revenue requirements sought by the appellant Ontario Power Generation Inc. (OPG) to cover its nuclear compensation costs for 2011 and 2012.

[2] The sole issue is whether the OEB's decision was reasonable or not. The majority of the Divisional Court found that it was.

[3] In dissent, Aitken J. found that it was not. For the reasons that follow, we agree with her. We would therefore allow the appeal.

Background

[4] OPG is Ontario's largest electricity generator. Its three nuclear generating stations comprise two-thirds of its generation capacity. The remainder comes from six hydro-electric stations.

[5] OPG employs approximately 10,000 people in its regulated business, about 95 percent of whom are associated with its nuclear generation business.

[6] Some 90 percent of OPG's regulated workplace is unionized. The appellant Power Workers' Union (the PWU) represents approximately two-thirds of the unionized staff. The appellant Society of Energy Professionals (the Society) represents the remainder of its unionized workforce.

[7] The *Ontario Labour Relations Act*, S.O. 1995, c. 1, sched. A, s. 17 compels OPG and its unions to bargain in good faith and make every reasonable effort to reach a collective agreement. Once reached, a collective agreement is legally binding on the parties to it for the duration of its term.

[8] OPG entered into a collective agreement with the PWU for the period April 1, 2009 to March 31, 2012. OPG also has a collective agreement with the Society for the period January 1, 2011 to December 31, 2011. These agreements prescribe the compensation rates for each staff position held by its represented employees. They also provide strict terms regulating the staff levels at OPG's stations. Under these agreements OPG is not free to reduce compensation rates unilaterally. Nor can it reduce staffing levels unilaterally, as it wishes. For example, the PWU collective agreement provides that no employee will be involuntarily laid off during the term of the collective agreement.

[9] Independent of the collective agreements, the Canadian Nuclear Safety Commission has also imposed staffing requirements on OPG to ensure safe and reliable operation of its nuclear stations.

[10] On May 26, 2010, OPG filed an application seeking approval of the rates its customers must pay for its electricity. The rates sought provide the revenue required by OPG to cover its projected costs for operating and maintaining its assets, for making new investments, and for earning a fair rate on invested capital.

[11] The application was for the period from January 1, 2011 to December 31, 2012. The terms of the two collective agreements cover the same period, save for nine months, in the case of the PWU contract. The application was for a future period, in other words a "forward test period" in the language used by the OEB.

[12] In the application, OPG's single largest projected cost related to the operation, maintenance and administration of its nuclear facilities. By far the biggest share of this was the compensation to OPG's unionized staff in its nuclear operations. That compensation is a product of both compensation rates and staffing levels.

[13] OPG's application was filed under s. 78.1 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, sched. B ("the Act"). It empowers the OEB to fix the rates that OPG is entitled to charge its customers. Section 78.1(5) requires that those rates be "just and reasonable". In such an application, s. 78.1(6) places the burden of proof on the applicant. As long ago as 1929, the Supreme Court of Canada established that just and unreasonable rates are "rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested". See *Northwestern Utilities Ltd. v. Edmonton (City)*, [1929] S.C.R. 186 at pp. 192-3.

[14] The OEB heard OPG's application over 16 days in the fall of 2010. It issued its decision on March 10, 2011.

[15] At pp. 18 and 19 of that decision, the OEB described two approaches it uses to determining rates that are just and reasonable. In the case of forecast costs that can be managed by the applicant going forward, the OEB can and does have regard to a wide variety of considerations including current economic conditions, analyses of economic trends and benchmarking data comparing other entities.

[16] On the other hand, when committed costs are at issue, that is costs that cannot be reduced by the applicant in the test period, the OEB undertakes a prudence review. In *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2006), 210 O.A.C. 4 (C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 208, this court accepted that approach and outlined what it entails at p. 5:

The Board agrees that a review of prudence involves the following:

- Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
- To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
- Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
- Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time.

[17] The OEB summarized these two approaches at p. 19 of its decision in this case:

The benefit of a forward test period is that the company has the benefit of the Board's decision in advance regarding the recovery of forecast costs. To the extent costs are disallowed, for example, a forward test period provides the company with the opportunity to adjust its plans accordingly. In other words, there is not necessarily any cost borne by shareholders (unless the company decided to continue to spend at the higher level in any event). Somewhat different considerations will come into play when undertaking an after-the-fact prudence review. In the case of an after-the-fact prudence review, if the Board disallows a cost, it is necessarily borne by the shareholder. There is no opportunity for the company to take action to reduce the cost at that point. For this reason, the Board concludes there is a difference between the two types of examination, with the after-the-fact review being a prudence review conducted in the manner which includes a presumption of prudence.

[18] In the end, the OEB reduced by \$145,000,000 the nuclear compensation costs applied for by OPG: \$55,000,000 for the 2011 year, and a further \$90,000,000 for the 2012 year. The OEB did so because it concluded that OPG's compensation rates and its staffing levels were both too high.

[19] In reaching this conclusion, the OEB relied on information, including staffing and compensation comparison reports, that was not in existence at the time OPG entered into the collective agreements with the PWU and the Society.

[20] The OEB decided that OPG should manage its projected nuclear compensation costs downward over the two years by this total of \$145,000,000. OPG should achieve this reduction by reducing the compensation rates it pays to its unionized staff positions sufficiently to move these costs from the 75th to the 50th percentile in the benchmarking study of comparator employees, and by reducing the number of its staff positions.

[21] The OEB treated both compensation rates and staffing levels as forecast costs that OPG could manage downward. Neither was treated as committed costs. Nowhere did the OEB engage in a prudence review. It did not inquire into whether OPG's decision to enter the collective agreements was prudent based on the information that was known or ought to have been known at the time.

[22] The majority of the Divisional Court found that both the OEB's use of hindsight in determining the reasonableness of OPG's nuclear compensation costs as well as its ultimate decision to require a reduction of \$145,000,000 were reasonable, and should therefore not be disturbed on appeal. The majority agreed with the OEB that OPG could manage these costs downward within the framework of the collective agreements. The majority of the Divisional Court concluded that a prudence review was not required, would not permit the OEB to fulfill its statutory objective of promoting cost effectiveness in the generation of electricity, and would not allow the OEB to act as a market proxy.

[23] The dissent, on the other hand, concluded that the collective agreements imposed compensation costs on OPG that are committed costs. Rates proposed to recover these costs should therefore be subject to a prudence review to determine whether they are just and reasonable. The OEB did not undertake such an analysis, but assessed the reasonableness of those costs using information that came into existence after the collective agreements were made. The dissent found the OEB's approach to contravene both the principles of the prudence review and the decision of this court in *Enbridge*.

Analysis

[24] As in the Divisional Court, the parties all take the position that the appropriate standard of review is one of reasonableness. We agree.

[25] The issue, therefore, is simply whether the OEB's decision of March 20, 2011, including its reasoning and analysis, was reasonable.

[26] The appellants say that it was not. They all argue that the OEB impermissibly used hindsight in relying on current information that was not available when the collective agreements were made, and in not conducting a prudence review of the nuclear compensation costs proposed by OPG,. The appellants argue that the compensation costs applied for are committed costs because of the collective agreements and that the OEB unreasonably evaluated these costs without a prudence review.

[27] The OEB's position, supported by the two intervenors, is that a prudence review was not needed because such a review does not apply to forecast compensation costs, and in any event is simply a regulatory tool developed for past capital expenditures. The OEB says that these compensation costs can be managed by OPG regardless of the collective agreements. It argues that it was entitled to rely on current information in finding these compensation costs excessive and that its decision that these costs must be reduced by \$145,000,000 over the two years was reasonable.

[28] In resolving the issue in appeal, it is important to reiterate the difference between committed costs and forecast costs, a difference well-known in the regulation of utilities such as OPG and well-described in the decision of the OEB in this very case in the passage quoted above.

[29] When an application is made by a utility for the approval of rates for a timeframe to cover the costs in that time frame, its committed costs are those that it is committed to pay in that time frame. Those costs cannot be managed or reduced by the utility in that time frame, usually because of contractual obligations. When, as in this case, the timeframe of the application stretches into the future, costs that have been contractually incurred to be paid over the timeframe are nonetheless committed even though they have not yet been paid.

[30] The OEB's assessment of the reasonableness of committed costs is by way of a prudence review. The OEB's jurisprudence says as much. Moreover, this approach was sanctioned by this court in *Enbridge*, at para. 8.

[31] A prudence review of committed costs is not confined to capital costs or to costs that have been paid at the date of the application. In *Enbridge*, no one contested that a prudence review was warranted even though the case involved operating costs rather than capital costs, as well as costs that had not yet been paid as of the date of the application.

[32] Moreover, the rationale behind the prudence review is inconsistent with confining the approach to a certain subset of committed costs. All committed costs must be paid during the time frame under review. The regulator is required to maintain a balance of fairness between the utility and the consumer. It would upset that balance to evaluate the reasonableness of these costs with the benefit of hindsight using current information that had not been available to the utility when it made the commitment to pay them,

[33] Forecast costs, on the other hand, are costs that the utility can alter by managing them during the timeframe under consideration. The regulator is free to assess the reasonableness of these costs using current information. This approach is sensible because the utility may act on that same information if it chooses to alter these costs during the timeframe under consideration.

[34] In this case, the OEB found that OPG's nuclear compensation costs for 2011 and 2012 were forecast costs and, because of current information, must be reduced by \$145,000,000 through a reduction in the compensation rates for unionized positions and a reduction in the number of staff positions over these two years. The OEB did so without conducting a prudence review of these costs.

[35] In our view, the compensation costs at issue before the OEB were committed costs. Compensation rates for unionized staff positions are, save for several months for the PWU, fixed for 2011 and 2012 by OPG's collective agreements. OPG is legally bound to pay them. It could not reduce the rates, or compel a re-opening of the agreements. OPG is also constrained by safety requirements. Equally, the number of staff positions is strictly regulated by the collective agreements. OPG could not unilaterally reduce that number, nor could it compel unionized staff to retire.

[36] We would conclude, therefore, that the OEB acted unreasonably in two respects. First, the OEB unreasonably assessed the reasonableness of these committed costs using the hindsight of current information unavailable when the collective agreements were made. Second, the OEB unreasonably failed to conduct a prudence review of these costs. Its resulting decision is therefore also unreasonable.

[37] We say this for two reasons. First, the Board's approach to these committed costs is contrary to the approach required by its own jurisprudence and accepted by this court. Second, it is unreasonable to require that OPG manage costs that, by law, it cannot manage.

[38] Our conclusion does not mean that the OEB is powerless to review the compensation rates for OPG's unionized staff positions or the number of those positions. In a prudence review, the evidence may show that the presumption of prudently incurred costs should be set aside, and that the committed compensation rates and staffing levels were not reasonable; however, the OEB cannot resort to hindsight, and must consider what was known or ought to have been known at the time. A prudence review allows for such an outcome, and permits the OEB both to fulfill its statutory mandate and to serve as a market proxy, while maintaining a fair balance between OPG and its customers.

Disposition

[39] As a result, we conclude that the OEB acted unreasonably. The appeal must be allowed and the OEB's decision set aside. OPG's application is remitted to the OEB to be heard in accordance with the principles in these reasons.

[40] The parties have not sought costs. None are ordered.

Released: June 4, 2013 ("S.T.G.")

"M. Rosenberg J.A."

"S.T. Goudge J.A."

“R.A. Blair J.A.”

22

Case name:
AltaLink Management Ltd. (Re)

**AltaLink Management Ltd. and
TransAlta Utilities Corporation
2007 and 2008 Transmission Facility Owner Tariff
AltaLink Management Ltd.
Settlement of Self Insurance Reserve Account
for Period May 1, 2004 to December 31, 2005**

[2007] A.E.U.B.D. No. 12

Decision 2007-012;

Application Nos. 1456797 and 1468229

Alberta Energy and Utilities Board

**R.G. Lock (Presiding Member), J.I. Douglas (Member)
and M.W. Edwards (Acting Member)**

Decision: February 16, 2007.

(873 paras.)

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2

to the following recommendation of the Board on page 61 of Decision 2005-019:

... for the purpose of reducing the administrative burden associated with the capitalization of relatively small amounts of expenditures, the board strongly urges AltaLink to consider incorporating into its current capitalization framework the notion that expenditures a below certain dollar amount, for example \$5,000, should be expenses regardless of the life of the asset. The actual threshold dollar amount could be set at a point where the benefits of capitalization outweigh the costs.

594 After undergoing an internal analysis, AltaLink proposed to revise its capitalization policy to include a threshold of \$3,000 below which point all amounts would be expensed. AltaLink's analysis was based upon a review of the administrative costs associated with accounting for capital expenditures versus the benefits received.

595 CG did not object to AltaLink's capitalization policy or proposed threshold limit.

Views of the Board

596 The revised capitalization policy responds to the Board's suggested course of action for AltaLink in Decision 2005-019 as noted above. The Board accepts AltaLink's revised capitalization policy as presented in Appendix I of the Application.

6.5 System Performance and Reliability

597 AltaLink discussed the performance of its transmission system and the company's performance using a number of reliability, safety and operational efficiency measures and indices. Concerns were raised about the amount of data measures and information provided for operational efficiency or benchmarking purposes, and the observed increasing reliability trends (decreasing system reliability).

6.5.1

Benchmarking

598 In Decision 2005-019, the Board directed AltaLink to file annually all benchmarking information the Canadian Electricity Association (CEA) collects from AltaLink and its peers. The Board also directed AltaLink to file this information with the Board, regardless of whether AltaLink chose to file it with the CEA¹⁵⁵.

599 AltaLink advised that the CEA instructed its member utilities that they may use the CEA's composite value benchmarking data in 2006. After 2006, member utilities are not authorized to release any of the CEA's benchmarking data to external parties outside of the utility. The CEA is concerned that the data collected for operational benchmarking is not reported accurately or consistently enough by all members to be released for use in a regulatory setting which may then be used inappropriately for determining revenue requirement.

600 In discussing its operational efficiency, AltaLink proposed the following two benchmarking measures that could be used to assess how efficiently AltaLink operates facilities once they are put in service, and the sustaining costs to manage those assets once in service. These measures are the following:

Operating (operations and maintenance) expenses

Gross Plant Assets

Operating (operations and maintenance) expenses +
Sustaining Capital

Gross Plant Assets

601 AltaLink viewed these measures as being good indicators of overall operating efficiency over time and indicated that it would provide the EUB with operational benchmark data information using these measures in its annual Report on Finance and Operations.

602 IPCAA noted that AltaLink's proposed measures related to the efficiency of operating expenses and neglected to measure what IPCAA described as capital efficiency, which is the cost of constructing facilities relative to costs incurred by other utilities. IPCAA requested that the Board direct AltaLink to provide all benchmarking results from the CEA when they are available.

603 CG argued that AltaLink had not adequately responded to the Board's Direction. CG noted that AltaLink discussed its two operational efficiency measures without reference to the benchmarking measures CEA would collect data on. CG contended that the information reported to CEA, which is referenced in the Board's direction, would extend beyond the two measures contained in AltaLink's Application. CG asserted that a utility should be able to prepare benchmarking data to allow interested parties to review its operating efficiency from year to year and over GTA periods based on its own operations. In CG's view, these measures should be the industry measures provided to CEA and should be available to be included in the GTA application. CG concluded that the data provided by AltaLink in this GTA was insufficient for benchmarking purposes and the assessment of operational efficiency. CG submitted that the Board should direct that data such as the costs per FTE and costs per kilometre of transmission line¹⁵⁶ (measures of costs based on activity levels) provided in AltaLink's 2004-07 GTA should be provided as part of each GTA. CG further submitted that AltaLink should be directed to report all measures provided to CEA and which CEA tracks for the industry, regardless of whether AltaLink actually files such information with CEA.

Views of the Board

604 Now that the CEA has restricted its member utilities from releasing any of the CEA's benchmarking data to external parties outside of the utility, the Board recognizes that AltaLink is not in a position to fully comply with the Board's direction in Decision 2005-019 which stated:

" ... the Board is interested in reviewing peer comparative data and directs AltaLink to file with the Board on an annual basis, all of the AltaLink benchmarking information that the CEA is attempting to collect from AltaLink and its peer group, regardless as to whether AltaLink chooses to file such information with the CEA on an annual basis."

605 Therefore, the Board relieves AltaLink from complying with this direction.

606 The Board considers that the data AltaLink provides to the CEA is outside of the CEA's prohibition on its member utilities with respect to the release of the composite value benchmarking data. The Board continues to believe that there is merit in receiving the information that AltaLink provides to the CEA composite value benchmarking process and agrees with CG that the filing of such information would contribute to the development of a useful database of benchmarking measures that could form part of an overall framework for assessing AltaLink's productivity/ and cost efficiency.

607 Accordingly, the Board directs AltaLink to file with the Board on an annual basis, all of the AltaLink benchmarking information that the CEA is attempting to collect from AltaLink and to report all measures provided to CEA and which CEA tracks for the industry, regardless of whether AltaLink chooses to file such information with the CEA on an annual basis. AltaLink should also file all information necessary to assist in the understanding of the filed information.

608 The Board views the inclusion of information on AltaLink's proposed operational efficiency measures in

AltaLink's annual Report on Finance and Operations as a useful addition to that report. Moreover, the Board considers that similar types of measures, which are determined in the future to add value to this report, should also be included as they are identified and approved. Accordingly, the Board directs AltaLink to include in future annual Reports on Finance and Operations information related to the two operational efficiency measures discussed in this Decision.

609 It is not clear from the current record what the Operating Expenses, Gross Plant Assets and Sustaining Capital components of AltaLink's proposed operational efficiency indices are comprised of. Therefore, for clarity, the Board directs AltaLink to include in its Refiling an example using historical data which illustrates how the proposed operational efficiency measures would be computed. The example should clearly show the major cost components that make up each of the Operating Expenses, Gross Plant Assets and Sustaining Capital amounts used in the formulae.

610 The Board further directs AltaLink to include the major components that make up each of the Operating Expenses, Gross Plant Assets and Sustaining Capital components of the operation efficiency benchmark indices when these measures are reported on in the Annual Report on Operations.

611 While the filing of measures such as the costs per FTE and costs per kilometre of transmission line as proposed by CG may be of some assistance, the Board is not convinced at this time that it is necessary to direct that this information be provided as part of each GTA. The Board considers that the requirement to file this information for each GTA could be more appropriately addressed in the context of the Minimum Filing Requirements process. In any event, if these metrics are considered to be necessary for the proper evaluation of the GTA, they can be requested through the interrogatory process.

6.5.2

Transmission System Reliability

612 In response to Board Directions 2 and 3 in Decision 2005-019 which requested that AltaLink submit past performance levels for safety and reliability and historical levels of performance deemed to be acceptable, AltaLink provided the following information:

Table 11. Reliability and Performance Targets

Reliability Targets – All kV	2000 Actual	2001 Actual	2002 Actual	2003 Actual	2004 Actual	2005 Actual	2007 - 2008 Target
SAIFI							
System Average Interruption Frequency Index	1.15	0.77	0.90	1.29	1.42	1.15	0.94 – 1.34
SAIDI							
System Average Interruption Duration Index	0.63	0.36	0.89	1.19	1.01	1.73	0.37 – 1.22
SARI							
System Average Restoration Index	1.12	1.31	2.20	1.92	1.64	3.82	0.80 - 2.52

Source: Table 6.7.4b, Application p. 6-98

613 AltaLink acknowledged that although the transmission delivery point reliability statistics showed AltaLink's transmission system performance remains favourable relative to North American and Canadian utilities, the indices (SAIDI, SAIFI and SARI) have trended upward during the past five years. AltaLink indicated that it is continuing to make the necessary investments in its facilities to turn this trend around and noted that many factors are at play in causing power outages, some of which are within AltaLink's scope of control, while others are outside AltaLink's control. AltaLink stated that it has generally found that, as the system is aging, disturbances have tended to be more

23

Case Name:
ATCO Electric Ltd. (Re)

**ATCO Electric Ltd.
2002 and 2003 Interim Regulated Rate
Option Tariff Riders**

[2003] A.E.U.B.D. No. 42

Decision 2003-044; Application No. 1300792;

File No. 1109-14

Alberta Energy and Utilities Board

**A.J. Berg (Presiding Member), J.R. Nichol and
G.J. Miller (Member)**

June 10, 2003.

(204 paras.)

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AE has complied with this direction and posts on their website the current flow-through energy price for all rate classes consuming energy for the most current billing periods. The Board also notes that on their website, AE discusses the contributing factors that are used to derive daily flow-through energy prices for the various rate classes:

How is my energy price calculated?

Basically, our computer system calculates an average daily price for each customer group. This average price takes into account several factors:

How much energy the group as a whole uses during the day.

How customers in that group typically use energy from hour to hour. (Some customer groups tend to use a greater percentage of their energy during high-price periods of the day.)

A share of the energy required to move electricity through the transmission system and other costs related to buying energy.

Then the system adds up the daily prices and combines them to come up with an average price for your customer class and your particular billing period.⁶⁹

185 The Board considers that AE has provided customers with a high level overview of how the flow-through rate is calculated. The Board agrees with the REAs/AAMDC that the flow-through rate is a new calculation and that it may be helpful to have a clear understanding of how the rate is derived. However, the Board is not convinced that further detail regarding calculation of the flow-through price is warranted at this time. The Board considers that AE's current description of how daily flow-through energy prices are calculated as detailed on the website to be sufficient.

10

COMMUNICATION

10.1 Views of the Parties

AE

186 AE noted that the REAs/AAMDC argues that AE has not complied with the Board's Direction regarding providing information on forward prices. During the IR process, AE explained in EESAI-ATCORRO-2 (a-c) that it does not forecast energy prices, but that it has a subscription to the Chase Canada website for this information. This information is copyright protected, so AE is not able to publish this information.

187 For the assistance of parties, day ahead forecast information is available on the Power Pool of Alberta website, www.powerpool.ab.ca. AE noted that any party wishing to obtain forward prices on a regular basis could subscribe to Chase Canada or a similar information service. AE submitted that it has provided adequate information for customers to understand pool price issues.

AUMA

188 AUMA recommended that the Board direct AE to continue a customer education program to inform customers

of the options available to mitigate increased rates (i.e., budget plan and/or any other rate mitigation alternatives).

REAs and AAMDC

189 The REAs/AAMDC noted that in Decision 2002-106 for AE 2003 Energy Procurement, the Board directed AE to provide customers with the current and forecast pool prices. In Decision 2002-106, the Board stated:

The Board also considers that AE should endeavor to provide current and forward price information to customers as part of this education process and that such information should be provided on an ongoing basis to customers who remain on the RRO in the year 2003. To this end, the Board expects AE to identify how it will provide RRO customers whose eligibility expires at the end of 2005 with current and forward price information when it files its recommended January to March 2003 deferral account disposition.⁷⁰

190 The REAs/AAMDC noted that AE has provided current flow-through rates on its website starting April 1 for Residential and Farm customers. However, AE has noted that no information has been provided and that no process has been developed to provide forecast data.⁷¹ In the view of the REAs/AAMDC, AE has not complied with the Board's direction in this matter.

10.2 Views of the Board

191 The Board notes the concerns that were raised by the REAs/AAMDC regarding communications to customers with respect to energy costs and other energy related issues. Further, the Board notes AE's response to EESAL.ATCORRO-2(a,b,c) that it has not been able to develop a process to provide forward price information to customers as directed in Decision 2002-106, since the forward price information received by AE is copyright protected and cannot be published.

192 The Board maintains its view that AE should provide forward price information to customers on an ongoing basis to customers who remain on the RRO. The Board also considers that the other energy related elements as noted by the REAs/AAMDC would also be beneficial to RRO customers.

193 Therefore, the Board directs AE to develop a process to provide forward price information to the appropriate RRO customers, and to communicate this process to the Board and interested parties. The Board considers that AE should be able to provide forward price information to RRO customers within two months following the release date of this Board Decision, that being August 15, 2003. If AE takes longer than two months to provide forward price information to RRO customers, then the Board directs AE to provide an update regarding its progress to the Board and interested parties by August 15, 2003, including the expected time frame that this information will be made available to RRO customers.

11

AUDIT

11.1 Views of the Parties

AE

194 AE submitted that if the Board deems it appropriate to go above and beyond the reporting procedures that AE currently employs with the Board through various filings, a full accounting and audit of final collection of the 2002 and 2003 deferral accounts could be done. AE noted that such a procedure would involve additional costs, which AE assumes would be paid by RRO customers.

24

Case name:
ENMAX Power Corp. (Re)

**ENMAX Power Corporation
2006-2007 Distribution Tariff Phase II
and
Revised Interim 2007 Distribution Tariff**

[2007] A.E.U.B.D. No. 22

Decision 2007-022; Application No. 1460995

Alberta Energy and Utilities Board

**N.W. MacDonald (Presiding Member), R.G. Lock and
J.I. Douglas (Members)**

Decision: March 20, 2007.

(572 paras.)

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Future Phase II Application Agreed Issues (Category 2 List 1)

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Future Phase II Application Not Agreed Issues (Category 2 List 2)

3 DISTRIBUTION COS

3.1 Description of EPC's Distribution System

1 INTRODUCTION

1 ENMAX Power Corporation (EPC) filed a 2006-2007 Distribution Tariff (DT) Phase II Application (the Application) dated May 12, 2006 with the Alberta Energy and Utilities Board (the Board). On June 14, 2006, EPC resubmitted certain sections and schedules of the Application to correct for errors that had been discovered.

2 On May 24, 2006, the Board e-mailed interested parties from EPC's 2005-2006 DT Phase I proceeding, Notice of the Application (the Notice). The Notice was also published on May 30, 2006 in the following daily newspapers: *Edmonton Journal*, *Edmonton Sun*, *Calgary Herald*, and *Calgary Sun*.

3 The Board subsequently issued process letters on June 12, 2006, August 25, 2006, October 2, 2006 and November 9, 2006.

4 The Application was heard by way of an oral hearing which commenced November 20, 2006 and adjourned November 22, 2006. The Panel assigned to consider and decide the Application consisted of Mr. N. W. MacDonald, P.Eng. as Presiding Member, Mr. R. G. Lock, P.Eng., and Mr. J. I. Douglas, FCA. Those who participated in the proceeding are listed in Appendix 1.

5 Written argument was received from the parties on December 11, 2006, and written reply was received on December 22, 2006. On February 27, 2007, the Board requested that EPC send in a revised set of rate schedules which reflected its final proposed rate design as contained in Exhibit 110-12(R), and also a set of terms and conditions which reflected changes agreed to by EPC. EPC submitted a set of rate schedules and terms and conditions on March 1, 2007. The Board therefore considers that the record closed on March 1, 2007.

2 BACKGROUND

2.1

EPC Phase II Application

6 In the Application, EPC noted that the Phase I component of its 2005-2006 DT Application had been approved by the Board in Decisions 2006-002 and 2006-023¹. The Application sought approval from the Board a finalized rate structure for 2006 and 2007, which EPC requested be approved effective as of January 1, 2006². EPC did not propose to change its 2005 rate structure.

7 EPC noted that its current rate design was implemented in November, 2004. Given that its rate design was implemented late in 2004, EPC did not consider it necessary to submit a 2005 DT application. Rather, it considered it appropriate to continue its 2004 rate design into 2005. EPC considered that this would eliminate the need for further adjustments to 2005 rates and avoid introducing a rate adjustment rider that related back to a period that would have occurred as much as two years in the past, assuming that a decision on the Application would not be issued until early 2007. In order to address the lag in rate design implementation, EPC proposed that the rate design resulting from the Board's decision also apply to 2007.

8 Accordingly, in the Application EPC requested Board approval of its DT Phase II Tariff, to be final for the period January 1, 2006 to December 31, 2006. EPC also proposed that these rates be interim refundable for 2007, subject to any adjustments that may be required once the 2007 DT revenue requirement has been approved.

9 EPC discovered that a correction to one of the cost of service (COS) schedules (schedule 3.2.5) was required, which impacted several other tables and schedules. On June 14, 2006 EPC resubmitted Sections 2, 3 and 5 of the Application, as well as the Section 3.2 schedules, Section 5 schedules, Schedule 7.1, Appendix 1 Attachment BD23 and Appendix 5 schedules.

10 Prior to filing the Application, EPC held a stakeholder meeting where interested parties were given the opportunity to comment on EPC's filing³, and a technical meeting on July 6, 2006, as a result of which EPC made available additional information⁴.

11 On October 6, 2006, EPC requested approval to commence a negotiated settlement process (NSP) with customers in respect of all outstanding issues in respect of the Application. On October 11, 2006, the Board granted approval to commence the NSP in Order U2006-260⁵. The parties failed to reach a negotiated settlement by the Board imposed deadline of October 27, 2006, as set out in Order U2006-260. Although the parties were unable to reach a negotiated settlement, the parties were able to significantly narrow the issues the parties agreed were to be dealt with in the oral hearing phase of the Application.

12 On November 8, 2006, EPC submitted a letter to the Board which outlined possible agreement regarding issues to be dealt with at the oral hearing. These issues were subdivided into two categories: the first category was issues arising out of the current Application as noted in Section 2.2 below.

2.2

Oral Hearing Issues (Category 1)

13 Specifically, the parties agreed that the following five issues remained to be dealt with in the hearing:

1. Allocation of non-technical line losses
2. Allocation of transformers (non-network COS)
3. Allocation of primary feeders and primary taps (non-network COS).
4. Whether the "rate shock" principle applies to both rate increases and rate decreases.
5. The 12 CP allocation of secondary network (network COS).

14 The Board has fully considered the above five issues in the body of this Decision.

15 The second category included matters that interveners wished EPC to deal with in its next DT Phase II application. EPC further subdivided the second category into two lists: List 1 contained items that EPC agreed to deal with in its next DT Phase II application while List 2 were items that EPC did not agree to deal with in its next DT Phase II application. The Category 2 lists are described in the following sections.

2.3

Future Phase II Application Agreed Issues (Category 2 List 1)

16 The following is the list of matters that EPC agreed to address in its next Phase II application:

1. Determine contributions to feeder peaks by customer classes using data from more than one year.
2. Provide a rate comparison between EPC and EPCOR Distribution Inc⁶. (EDI) rates, using publicly available data.
3. Undertake further study regarding the appropriate allocator for D500 (network streetlighting).
4. Undertake further study regarding allocation of metering activity for larger three phase demand energy and interval meters.
5. Consider weather normalizing class load profiles.
6. Study the possibility of including spot and primary preferred/alternate systems in network.
7. Study whether the allocation of First Line Response costs can be allocated on a basis other than on number of customers.

8. Consider transitioning the few remaining D300 primary service customers to D410, in light of the elimination of the 150 kVA (kilovolt ampere) boundary.
9. Consider whether customer classes that are served by primary/preferred alternates receive a preferred quality of service, and if so, whether that should be reflected in rate design.
10. Consider introducing time-of-use (TOU) rates for D100, D200 and D300 rate classes.
11. Review investment policy and levels.
12. Create a terms and conditions review process to review proposed terms and conditions with customers.
13. Continue to review network and non-network costs and the appropriateness of the rate structure that applies to network and non-network.
14. Study the allocation of transformers by rate class, including an examination of diversity in transformer peaking patterns.
15. Include a fully allocated COS study in EPC's next Phase II Application.

17 The Board has dealt with the matters set out in Category 2 List 1 in this Decision to the extent they were the subject of discussion at the oral hearing and addressed in argument and reply. The Board expects EPC, as agreed with interveners, to address any outstanding issues in Category 2 List 1 in its next Phase II Application.

2.4

Future Phase II Application Not Agreed Issues (Category 2 List 2)

18 EPC did not agree to address the following matters in its next Phase II application, and included its reasons (in brackets) as set out below:

1. Charging a customer contribution for TOU meters. (In EPC's submission, the cost of TOU meters should be considered as part of a TOU rate, if such a rate were implemented.)
2. Apply a minimum contract demand to all D300, D310 and D410 customers, not just for new customers (since 2002) that require an investment level greater than \$10,000.
3. Provide Canadian Electricity Association (CEA) statistics regarding planned and unplanned outages. (EPC's understanding is that the CEA will not permit utilities to disclose CEA statistical data.)
4. Study possible means of reducing non-technical losses. (In EPC's submission, this is a Phase I issue.)
5. Allocate costs of dedicated feeders directly to those D410 customers that have such feeders. (The data to conduct such an allocation are not available.)
6. Explain the relative differences between EPC and EDI rates. (As set out above, EPC has agreed to provide a rate comparison between EPC and EDI rates. However, EPC does not have sufficient information regarding EDI rates to be able to explain any differences between the two utilities' rates.)
7. Use weather normalized class load profiles. (As set out above, EPC has agreed to consider weather normalizing class load profiles. It is unable to commit to using weather normalized class load profiles at this time. It is not clear whether the data to weather normalize class load profiles are available. If the data are available, the cost of weather normalizing class load profiles relative to the benefits of doing so are not presently known.)
8. Allocation of the secondary network system costs to rate classes, considering voltage differences and diversity in transformer peaking patterns. (EPC has agreed to study the allocation of transformers by rate class, including an examination of diversity in transformer peaking patterns, and has agreed to continue to review network and non-network costs and the appropriateness of the rate structure that applies to network and

non-network. However, EPC does not have the voltage difference data that would be required to perform the requested allocation⁷.)

19 EPC noted that it understood and agreed that the items in Category 1 as well as the items in Category 2 List 2 of the second category may be the subject of cross-examination at the hearing.

20 The Board has dealt with the matters set out in Category 2 List 2 in this Decision to the extent they were the subject of discussion at the oral hearing and addressed in argument and reply. The Board does not make any finding or direction respecting the remaining matters on Category 2 List 2 and accepts EPC's reasons for not addressing these matters as set out above.

21 On December 13, 2006, EPC applied to the Board for approval for its proposed 2007 interim DT, interim refundable system access service (SAS) rate rider (which it proposed be effective February 1, 2007), and equity funding refund rider (which it proposed be effective from April 1, 2007 to May 31, 2007). EPC requested that the DT rates approved in Decision 2006-023 continue to apply effective January 1, 2007 on an interim refundable basis. In Order U2006-327,⁸ dated December 18, 2006, the Board approved the continuation of EPC's DT rates on an interim refundable basis, effective January 1, 2007. In Order U2007-39,⁹ the Board declined to approve the proposed interim refundable SAS rate rider but approved the equity funding refund rider.

22 The Board will provide its findings on the EPC Application in the following sections.

3 DISTRIBUTION COS

3.1

Description of EPC's Distribution System

23 Supplied by 34 transmission points of delivery (PODs), EPC's electric distribution system is made up of circuits operating at primary voltages of 4 kilovolts (kV), 13 kV and 25 kV, as well as a number of secondary voltages. The main three-phase electrical circuits that make up the backbone of the system are referred to as primary feeders¹⁰.

24 The non-network system comprises that portion of the distribution system that is fed from all PODs except substations 1, 5 and 8. The non-network system includes a number of configurations, the most common of which is the open loop radial field. Other configurations include spot networks and primary preferred/alternate systems¹¹.

25 The network system comprises that part of the distribution system in downtown Calgary that is connected to substations 1, 5 and 8. The network system supplies a total load greater than 300 megavolt ampere (MVA), and consists principally of a 25 kV primary preferred/alternate system and a secondary network¹².

26 EPC considered a number of network/non-network configurations. Specifically, EPC considered the following alternatives for defining the network system:

- * primary services sites (all D410 sites);
- * secondary network sites (all sites in the downtown area served from the secondary network);
- * sites larger than a threshold size;
- * the downtown core geographic area;
- * voltage; and
- * the system served from the three downtown PODs¹³.

27 EPC reviewed the various potential means of defining the two systems in order to determine the best way to respond to stakeholder concerns about the cost to serve large sites in the downtown area. There is no industry definition or standard for determining a network or non-network system, however, and EPC's distribution system has a variety of

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Case Name:
Nova Scotia Power Inc. (Re)

**IN THE MATTER OF the Public Utilities Act, and
IN THE MATTER OF an Application by
Nova Scotia Power Incorporated for
Approval of its Annual Capital Expenditure
Plan ("ACE Plan") for 2012**

[2012] N.S.U.R.B.D. No. 52

2012 NSUARB 53

No. NSUARB-P-128.12

Nova Scotia Utility and Review Board

**Panel: Roberta J. Clarke, Q.C., Panel
Chair; Kulvinder S. Dhillon, P.Eng.,
Member; Murray E. Doehler, CA, P.Eng., Member**

Heard: February 13-14, 2012.

Final submissions: March 9, 2012.

Decision: May 4, 2012.

(182 paras.)

Board Summary:

Decision: ACE Plan approved with exceptions. Directions given for future capital expenditure filings and reports.

Appearances:

NOVA SCOTIA POWER INCORPORATED

René Gallant, LL.B., Nicole Godbout, LL.B.

CONSUMER ADVOCATE

William L. Mahody, LL.B.

SMALL BUSINESS ADVOCATE

and judgment brought to those. For example, capitalizing the recoating system on a 60-year-old transformer that we know is going to be replaced next year when the substation is rebuilt is not a -- even though it makes all the criteria, it's not a prudent capital expenditure; that transformer's life is over.

So we need people with the experience of Mark and others who are ultimately making sure that it fits into all of the pieces of the program and how the pieces fit together. So it's a complicated and comprehensive program but it's designed to result in spending no more than we absolutely have to.

Mr. Outhouse: And of course, that's ultimately the challenge for the Board. As you say, it's a complicated program. In effect what the ACE Plan does is put the Board in the position of having to approve in sort of one fell swoop this array of programs which have come up through the system described by Mr. Savory and endorsed by his judgment and that of others. And obviously if there was an objective criteria to be applied it would be easier for everybody to know where they stood and that to allay the concerns of some, the rate base wasn't being padded, that NSPI wasn't embarked on a period of aggressive rate base building.

Without objective measures there has to be a fair bit of reliance on the judgment of the company. Do you agree?

Mr. Bennett: I agree that we're expected to do our job and make a prudent analysis of the performance of the system which is exactly what we're here today doing. We're bringing forward the projects that we believe really need to be done.

[Transcript, pp. 131-133]

119 One of the directives from the 2011 ACE Plan required NSPI to provide project rankings in the Application. Again, the Board views this information as helpful to all stakeholders; however, the Board observes that, for example, given the number of projects identified in the ranking category of "Business Sustainability", it may not be surprising that Intervenor express concerns about rate base building. NSPI may wish to consider whether future ACE Plan submissions could better explain this justification.

b) Reliability

120 NSPI identified improvements in reliability as a major focus of the 2012 ACE Plan. The Board identified over 30 projects in the Application which refer to either maintaining, improving, or increasing reliability. Projects are either for improved "system reliability", or for "customer reliability".

121 In some instances, capital projects are required for compliance with various regulatory requirements. In others, NSPI seeks to improve reliability as measured by System Average Interruption Duration Index ("SAIDI"), System Average Interruption Frequency Index ("SAIFI"), and/or Customer Average Interruption Duration Index ("CAIDI").

122 In response to questions from the SBA, Mr. Sidebottom confirmed that "reliability driven projects" are evaluated using \$/Avoided Customer Hours of Interruption ("ACHI"). The SBA pursued the issue of reliability planning with Mr. Sidebottom:

Mr. Blackburn: But I guess the question is does it [the ACE Plan] document all steps of Nova Scotia Power's reliability planning process; determine the reliability of the projects?

Mr. Sidebottom: No, there's a fairly extensive inspection program or condition assessment that's done. I spoke earlier today about the inspections that go on every second year, along with the analysis of the actual outages that occur with the customers. So, as you can imagine, as with any part of the engineering and assessment there are many detailed pieces that go into the thinking that roll up into these summary documents on a number of these things. And the ranking criteria is to help prioritize those which -- I think we've used, "bang for buck" several times in the last couple of days, but the best investment for our customers so that we get the most reliability improvement for the least invested dollar.

[Transcript, pp. 514-515]

123 Ms. Neal recommended that NSPI should:

...institute a systematic approach to investments in reliability. This should include presenting and justifying specific goals for reliability and customer satisfaction. In addition, the Company should be required to provide analyses indicating how much various investments will contribute to achieving its goals and at what cost.

[Exhibit N-7, p. 5]

124 Ms. Neal had reviewed NSPI's March 17, 2009 "Reliability Investment Strategy Report (2009-2014)" and concluded that "...the data does not indicate a consistent trend in reliability." (Exhibit N-7, p. 18). She observed that NSPI had identified strategies for reliability investments but had not identified specific goals or measures of interruption costs to justify spending and stated that:

...The Company has not provided detailed engineering and economic analysis that supports the allocation of investment to each strategic area, or its selection of projects within strategies. For instance, it has not provided analysis indicating which of the four strategies would provide the most net benefits in preventing outages due to vegetation contact, even though it has identified vegetation contact as the major cause of outages in major storm events.

[Exhibit N-7, p. 19]

125 Information provided by NSPI in response to IR-82, which compared NSPI's reliability indices to other Atlantic Canadian utilities, was questioned. Initially, NSPI had redacted all of the results, but in response to Undertaking U-18, re-filed the response without redacting NSPI's results. It said that it could not file the other provincial numbers because they are filed with the Canadian Electricity Association confidentially. NSPI stated that it had "experienced more significant events with greater impact than other Atlantic utilities." (Exhibit N-6, Response to IR-82).

126 In its Closing Submission, the SBA said:

SBA submits partial information is not adequate to show that NSPI's proposed reliability investments are least-cost solutions to meeting a specific reliability goal. The SBA continues to recommend NSPI provide more documentation of its reliability investment planning, showing the alternatives NSPI evaluated, the reasons certain alternatives were selected, and how the

investment is aligned with NSPI's long-term reliability plan.

[SBA Closing Submission, p. 9]

127 The CA submitted that the Board should direct NSPI to file comparative reliability data:

The Consumer Advocate understands that utilities from New Brunswick and Newfoundland each provide their CEA statistics as part of public filings. If that is the case, Nova Scotia Power should be publicly filing whatever comparative data is available. Ratepayers in Nova Scotia have been called upon to contribute to significant reliability spending increases and they are entitled to know how Nova Scotia Power's reliability compares with other Atlantic Canadian utilities.

[CA Closing Submission, p. 4]

128 In its Reply Submission, NSPI suggested that the CA provided no evidence that the comparative information is needed for approval of the ACE Plan. It further said that it was open to the CA to file any such data which might be available in the public domain.

129 Additionally, in its Reply Evidence (Exhibit N-10, p. 13), NSPI confirmed that NSPI has a systematic approach for evaluating reliability-driven projects, as Mr. Sidebottom testified, by calculation of the lowest \$/ACHL.

c) Safety

130 The Board understands that safety is a criterion to which NSPI justifiably gives a very high priority. A number of projects were included in the 2012 ACE Plan for this reason. According to the Application, NSPI views capital investments on the basis of health and safety as non-discretionary (Exhibit N-1, p. 45).

131 Ms. Neal identified safety as a focus of the ACE Plan. However, she took issue in particular with projects identified as required for dam safety, stating in her direct evidence that:

...The requested spending level for 2012 is a very significant portion of total capital expenditures. From the information provided, it is not apparent that NSPI has a consistent, prudent approach to improving dam safety. It has identified several dams that do not meet minimum safety guidelines and requested approval to address these issues, but the language cited above ("NSPI has carried out dam safety related work on a priority basis based on risk") suggests that there are more dams with safety concerns that have not yet been included in ACE Plans. NSPI has not provided a full list of these identified projects or an analysis of the risk of dam failure. From NSPI's responses to discovery, we know that at least one of the major dam safety projects was identified as a need in 2009 (CI 40282, discussed above).

If there are more dams that do not meet safety standards and are at risk of failure, it could be argued that NSPI is not doing enough to address the risk. But the incremental approach taken by NSPI suggests that at least some of the improvements may not be critical. Therefore, NSPI should be required to submit to the Board a comprehensive dam improvement plan identifying the dams known to be at risk of failure, quantifying that risk, and proposing a multi-year schedule for improvement projects. Such improvement plans should regularly be filed for Board approval subsequent to each major dam inspection.

[Exhibit N-7, p. 17]

132 Ms. Neal was challenged on cross-examination by Counsel for NSPI and confirmed she had not reviewed materials made available at NSPI's offices regarding its dam safety program. She also confirmed that she had not reviewed any IR responses from earlier ACE Plan applications which discussed work required to meet Canadian Dam Safety Association standards.

133 At the hearing, Mr. Gallant produced for Ms. Neal's review an IR response from the 2010 ACE Plan application which included a summary report of required dam projects. Ms. Neal had not seen this document previously, and said:

It appears at first glance to be in line with the type of recommendation that I made in terms of asking for more information about the company's risk analysis, but it is only a page or so. It would potentially also be nice to see perhaps a little bit more detail on the company's methodology and so forth. So I wouldn't necessarily say I'm entirely satisfied based on this. It's hard for me to say.

[Transcript, p. 371]

134 While the Board observes that Ms. Neal's evidence was compromised by not taking the opportunity to review the information which NSPI made available at its offices, the Board understands that at the heart of her concerns are issues of the sufficiency of both risk and economic analyses and the resulting timing of ACE Plan projects. The Board explores these elsewhere in this Decision.

d) Adequacy of Economic Analysis

135 As part of the justification for projects submitted in the ACE Plan, NSPI undertakes and provides economic analyses. However, NSPI acknowledged that some projects are justified on grounds other than economics, such as safety, or in the case of investment in software, better management.

136 Ms. Neal was critical of the level of economic analysis undertaken by NSPI. In her direct evidence, she recommended that, among other things:

...justification for projects should include:

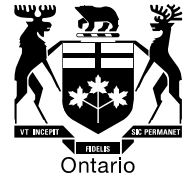
- 1) Evidence relied upon to conclude that parts are obsolete;
- 2) Evidence of damage to equipment or structures requiring replacement;
- 3) Reconciliation of all dollars spent on multi-year projects; and
- 4) Complete economic analysis of all alternatives, including consideration of alternative timing of investments.

[Exhibit N-7, p. 21]

137 The SBA submitted that there was insufficient evidence before the Board to determine the reasonableness and transparency of the costs of the ACE Plan projects due to the lack of appropriate analysis.

138 Both Avon and the CA supported Ms. Neal's recommendations in their Closing Submissions, as did Bowater in its letter of comment.

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EB-2011-0140

IN THE MATTER OF sections 70 and 78 of the *Ontario Energy Board Act 1998*, S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF a Board-initiated proceeding to designate an electricity transmitter to undertake development work for a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie Line.

BEFORE: Cynthia Chaplin
Presiding Member and Vice-Chair

Cathy Spoel
Member

PHASE 1 PARTIAL DECISION AND ORDER

PRODUCTION OF DOCUMENTS

June 14, 2012

INTRODUCTION

The Ontario Energy Board initiated a proceeding to designate an electricity transmitter to undertake development work for a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie line. The Board assigned File No. EB-2011-0140 to the designation proceeding. Seven transmitters registered their interest in the designation process.

The East-West Tie line will run between Thunder Bay and Wawa, and connect to the bulk transmission system in Northern Ontario. Both Hydro One Networks Inc. ("HONI") and Great Lakes Power Transmission LP ("GLPT") operate transmission systems in Northern Ontario.

Following an all parties meeting on March 23, 2012, HONI and GLPT each provided a list of documents in their possession which may be relevant to the development of the East-West Tie line. The lists are included as Appendices A and B to this decision. The Board approved an issues list for Phase 1 of this proceeding (which was included as Appendix A to Procedural Order No. 2 dated April 16, 2012). Issue 19 on the Issues List reads as follows:

What information should HONI Networks Inc. and Great Lakes Power Transmission LP be required to disclose?

These two utilities, and all other parties, filed submissions in response to the Board's procedural order. Several of the registered transmitters and other intervenors emphasized the need for the Board to ensure that all potential designation applicants have equal access to information held by HONI and GLPT, in order to provide the foundation for a fair designation process. These concerns are heightened in this case as a result of the relationship between one of the registered transmitters, EWT LP, and HONI and GLPT.

Having considered the submissions of all parties, the Board finds it desirable to make an early, partial decision on issue 19.

HONI DOCUMENTS

HONI, in its Phase 1 submission, indicated it was generally prepared to file the documents listed in Appendix A. However, HONI raised two concerns related to the disclosure of some of the documents.

Confidentiality issues

Four of the documents on HONI's list; namely 1b, c, d and e, consist of reports or plans prepared for HONI by independent consultants. HONI submits that these documents contain information that is commercially sensitive. In one case, a confidentiality

agreement between HONI and the consultant prevents HONI from offering to provide the report. Two further types of documents, easements with landowners and real estate agreements with First Nations, disclose contractual arrangements with landowners and First Nation groups. HONI recommends that these documents not be produced due to the confidential nature of these arrangements.

As set out in the Board's *Practice Direction on Confidential Filings* (the "*Practice Direction*"), it is the Board's general policy 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. The *Practice Direction* seeks to balance these objectives with the need to protect information properly designated as confidential. In the context of this proceeding, confidentiality concerns should not prevent access by the Board and parties to this proceeding to information in the possession of HONI and GLPT relevant to the development of the East-West Tie line. The fairness of the process is a primary consideration in this case. Moreover, the Board is not bound by confidentiality agreements entered into by the utilities it regulates, and regulated utilities may be ordered to produce documents that are the subject of such agreements. The *Practice Direction* provides adequate mechanisms for the protection of confidential material.

Process issues

With respect to two documents on its list, the HONI Project Definition Report (1a) and the SNC Lavalin Study Estimates Report (1b), HONI recommended that the Board not require production on the basis that:

...the comprehensive and detailed nature of the information contained in [the two documents] could unintentionally skew the proposals by building on work previously completed by HONI. If this reduces the creativity and diversity of proposals, it could be inconsistent with the objectives of the designation process. Furthermore, it may also render it more difficult for the Board to differentiate and assess proponents based on the sophistication and merit of their filed plans. (*HONI submission dated May 7, 2012*).

The Board appreciates HONI's concern for maintaining the integrity of the designation process. However, the Board finds that the integrity of the designation process is best served by ensuring that there exists equal access to relevant information by all potential

applicants. Moreover, this interest outweighs any potential difficulties that may arise in the Board's assessment of designation plans as a result of those applicants receiving comprehensive information relating to the development of the East-West Tie line.

Production Required from HONI

The Board requires that HONI file with the Board and serve on all parties the following documents in their entirety, as the Board understands that there are no confidentiality concerns related to these documents:

- 1a) HONI Project Definition Report
- 1f) Inergi LP Map & Tiles
- 2a) Presentation on North and Central Transmission Projects
- 2b) Presentation on Transmission Expansion in NW Ontario
- 3a) GPS Coordinates of existing East-West Tie line tower structures
- 3b) Aerial "flyover" video of existing East-West Tie line
- 3c) Station graphics showing existing line entrances
- 4. Transmission line maintenance practices
- 5a) Categories of land rights and percentages
- 5b) Licences and permits
- 6. Historical outage data

The Board accepts HONI's submission that the following documents contain commercially sensitive confidential information:

- 1b) SNC Lavalin Study Estimates Report
- 1c) Dillon Consulting Limited Services Plan
- 1d) Stantec Inc. Environmental Assessment Plan
- 1e) Senes Consultants Limited Socio-Economic Assessment Plan

The Board requires the following with respect to these documents:

- i. In accordance with section 5.1.4(b) of the *Practice Direction*, a confidential unredacted version of each document must be filed with the Board and served on each person from whom the Board accepts a Declaration and Undertaking in this proceeding (see below).

- ii. A non-confidential version of each document, with the commercially sensitive information redacted, must be prepared in accordance with section 5.1.4(c)(i) of the *Practice Direction*, filed with the Board and served on all parties.

With respect to the agreements with private landowners (5c) and First Nations (7), the Board, in its *Rules of Practice and Procedure*, requires that personal information (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), not be disclosed to any person unless the Board determines that disclosure would be in accordance with the requirements of that Act. The Board will not require the disclosure of the personal information in these documents. The Board will also not require the disclosure of the amount of compensation paid under each agreement. However, the Board will require the filing of the agreements with the personal and compensation information redacted, as well as the filing of aggregated compensation information. This reflects the Board's view that the form of the agreements, and the aggregated information with respect to the costs under the agreements, are relevant to the preparation of an application for designation. The Board therefore requires the following with respect to these documents:

- i. HONI must file with the Board and serve on all parties copies of the agreements with private landowners and First Nations, with two types of information redacted: personal information and information relating to compensation amounts for the easements or land rights.
- ii. With respect to compensation amounts, HONI must file with the Board and serve on all parties a separate document setting out this cost information aggregated into suitable categories, such as by type of easement or geographic area, such that no individual compensation amount is revealed.

If any of the documents are voluminous, HONI may wish to consider the options outlined in the "Practical Considerations" section below.

GLPT DOCUMENTS

GLPT, in its Phase 1 submission, indicated that the majority of the items on its list (Appendix B to this decision and order) would be neither helpful to potential designation applicants nor relevant to the development of the East-West Tie line. Other parties argued that the determination of relevance is not GLPT's to make, and that the Board

should require production of all documents with even marginal relevance to the development of East-West Tie line.

Production Required from GLPT

As stated above, the Board finds that fairness of the designation process is an overriding consideration in this case. Although the Board accepts that some of the information listed by GLPT may eventually prove not to be of significant relevance to the development of the East-West Tie line, the Board requires GLPT to file with the Board and serve on all parties the following information for GLPT's W23K circuit: outage statistics, vegetation management program overview information, transmission line condition assessment program information and the PLS CADD "Plan and Profile" drawings. The Board will not require GLPT to produce this data for its entire system, as the Board accepts that the information for circuits other than W23K would not be relevant to the development of the East-West Tie line.

The Board also requires GLPT to file with the Board the LIDAR data for GLPT circuits emanating from, and the Ortho View of GLPT's circuits connected to, Anjigami TS and Wawa TS, and the GIS data related to the W23K transmission line. The Board appreciates GLPT's security concerns with respect to this data, and requires the following with respect to these documents:

- i. In accordance with section 5.1.4(b) of the *Practice Direction*, a confidential unredacted version of each document must be filed with the Board and served on each person from whom the Board accepts a Declaration and Undertaking in this proceeding (see below).
- ii A non-confidential version of each document, with the system security-sensitive information redacted, must be prepared in accordance with section 5.1.4(c) of the *Practice Direction*, filed with the Board and served on all parties. If the security concerns relate to the entire data sets, GLPT may file and serve a non-confidential description or summary of the data sets in lieu of a non-confidential, redacted version.

If any of the documents are voluminous, GLPT may wish to consider the options outlined in the "Practical Considerations" section below.

OTHER PRODUCTION ISSUES

The Board notes the submission of Great Lakes Power Transmission EWT LP (“GLPT EWT LP”), in which it describes information in its possession and requests that the Board not order production of either publicly available or strategic information that was gathered or prepared in contemplation of an application for designation by EWT LP. The Board also notes the argument made at page 14 of the reply submission of EWT LP, that Canadian Niagara Power Inc. (“CNPI”) should disclose any documents it may have in its possession relevant to the designation proceeding.

The Board’s Policy Framework for Transmission Project Development (EB-2010-0059) contemplated the participation in a designation process of incumbent transmitters under their existing licences. The Board, since that Policy, has not placed any restrictions on the manner through which incumbent transmitters may participate. To require a participating incumbent transmitter to reveal its strategic information to competing applicants could prevent incumbent transmitters from effectively competing for designation. On this question, the Board believes that fairness to all potential applicants dictates that neither CNPI nor GLPT EWT LP (through an order to GLPT) be required to produce strategic information created for the purpose of preparing a designation application.

ACCESS TO INFORMATION FILED IN CONFIDENCE

Representatives of parties to this proceeding who wish access to the confidential versions of the documents for which production has been ordered must file with the Board a Declaration and Undertaking as set out in section 6 of the Board’s *Practice Direction*. The form of Declaration and Undertaking provided in Appendix C to the *Practice Direction* must be used by a person that is external counsel of record or a consultant for a party. The Board may in appropriate cases accept a Declaration and Undertaking from a person who is neither external counsel to, nor a consultant for, a party. If any such person wishes access to the confidential information, the person must file with the Board a request for access to the information and set out the reasons why access cannot be restricted to external counsel of record or a consultant for the party. It will be of assistance to the Board if HONI and GLPT, in the cover letter for the filings required by this decision and order, outline any objections in principle they may have to the acceptance of a Declaration and Undertaking from persons who are neither external counsel to, nor a consultant for, a party. The Board will provide HONI and

GLPT with an opportunity to object to the acceptance of any Declaration and Undertakings the Board receives, pursuant to section 6.1.4 of the *Practice Direction*.

Persons who are granted access to confidential information should note that the Board considers violations of a Declaration and Undertaking given to the Board to be a matter of very serious concern. Such violations can be, and will continue to be, subject to sanctions imposed by the Board. Representatives of parties, before signing a Declaration and Undertaking, should carefully consider whether they require access to the information and are prepared to accept the responsibility for strict maintenance of confidentiality. For example, no information received in confidence should enter the public record as part of an application by any registered transmitter.

CONFIRMATION OF COMPLETENESS OF LISTS

Several parties submitted that HONI and GLPT should be required to either confirm that the lists they have provided disclose all information related to the East-West Tie line, or provide updated lists. The Board will require that counsel or a senior executive for each of HONI and GLPT confirm, by way of an affidavit filed with the filings ordered in this decision, that the utilities have disclosed all information in their possession related to the development of the East-West Tie line. If investigation by HONI or GLPT reveals that additional information of this nature exists which was not included on the original lists, an updated list must be filed and served on all parties, after which the Board will establish a process to determine relevance and address any confidentiality issues, if necessary.

PRACTICAL CONSIDERATIONS

The Board recognizes that some of the information for which it has ordered production may be voluminous, and it may not be practical to serve hard copies of this information on all parties. At the same time, it is important to the integrity of the East-West Tie line designation process that any party that needs to see the information may do so, subject to the confidentiality constraints as discussed above.

The Board will require that one complete electronic and two complete hard copies of the information be filed with the Board at the address below. If filing a hard copy is impractical due to the volume of the material, HONI or GLPT should provide the information in electronic form on a CD.

Where the material is confidential, the electronic version should not be filed through the Board's portal, but must be filed on a CD and clearly marked by the filer in accordance with section 5.1.4 of the *Practice Direction*. The filer must provide 2 CDs: one CD containing the redacted, non-confidential version, and one CD clearly marked as confidential, containing the unredacted, confidential version. Two hard copies of the confidential and non-confidential versions, clearly marked as required in the *Practice Direction*, must be filed, unless the volume of the material makes this requirement impractical.

Where providing a copy of the information to all parties is not practical, HONI and GLPT must make arrangements to allow parties to have access to the information, and to make copies if they wish, subject to the confidentiality constraints discussed above. Options include viewing the information at the utilities' offices, and/or arranging with Board staff for a secure electronic site through which parties can access the information. As some of the parties to this proceeding are based in the northern part of the province, accommodation must be made to allow these parties access to the information if it is needed. The Board will expect all parties to co-operate to facilitate reasonable access to the information, with the assistance of Board staff if necessary.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than **4:45 p.m.** on the required date.

THE BOARD ORDERS THAT:

1. On or before **June 28, 2012**, HONI shall file with the Board, and copy to all parties in this proceeding, all the documents listed in Appendix A to this decision and order, subject to the rulings in this decision and order with respect to confidentiality and practicality. In addition and at the same time, HONI shall file the aggregated compensation information as described in this decision and order.
2. On or before **June 28, 2012**, GLPT shall file with the Board and serve on all parties in this proceeding, all the documents listed in Appendix B to this decision and order, subject to the rulings in this decision and order with respect to confidentiality and practicality.
3. On or before **June 28, 2012**, HONI and GLPT must each file with the Board, and serve on all parties, an affidavit confirming that the lists they provided, (included in

this decision and order as Appendices A and B), contain all the information in their possession related to the development of the East-West Tie line.

4. On or before **July 6, 2012**, a party wishing to access any of the confidential unredacted versions of the documents listed in Appendices A and B shall execute and file with the Board a Declaration and Undertaking in accordance with section 6 of the *Practice Direction*. Where the person that is the representative of the party is neither external counsel to nor an expert or consultant for the party, the person must file with the Board a request for access to the information and set out the reasons why access cannot be restricted to external counsel of record or a consultant for the party.
5. The Board will notify HONI and GLPT no later than **July 11, 2012** of the persons from whom the Board intends to accept a Declaration and Undertaking. HONI and GLPT may object to the acceptance of a Declaration and Undertaking by filing the objection with the Board and serving it on the person to whom the objection relates on or before **July 18, 2012**. The person to whom the objection relates may reply to the objection on or before **July 25, 2012**.

The Board:

Ontario Energy Board

P.O. Box 2319

27th Floor

2300 Yonge Street

Toronto ON M4P 1E4

Attention: Board Secretary

Non-confidential Filings: <https://www.err.ontarioenergyboard.ca/>

E-mail: boardsec@ontarioenergyboard.ca

Tel: 1-888-632-6273 (Toll free)

Fax: 416-440-7656

DATED at Toronto, June 14, 2012

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli

Board Secretary

APPENDIX A

Hydro One Networks Inc.

East-West Tie – Documents List

Board File No: EB-2011-0140

EB-2011-0140

East-West Tie – Documents List

This list has been produced for discussion purposes only. The documents identified in this list will not necessarily be released by Hydro One Networks Inc. (“HONI”) in this proceeding.

1. Preliminary Development

- a) **HONI Project Definition Report**¹
 - **study estimates** for various project implementation options for proposed East-West Tie line
 - contains: scope of work; assumptions (line, station, environmental, real estate, corporate communication); technical comparison tables (line, station); risk assessment; preliminary schedule; cost breakdown (development, implementation)
 - prepared: June 4, 2010
- b) **SNC Lavalin Study Estimates Report**¹
 - **study estimates** for various line options and associated breaker installations and line terminations for proposed East-West Tie line
 - contains: engineering sketches; bill of major materials; assumptions; scope description; project schedule; cost estimate; work breakdown structure; analysis (contingency, risk, escalation)
 - prepared: May 19, 2010
- c) **Dillon Consulting Limited Services Plan**
 - **work plan and budget** for consultation activities for proposed East-West Tie line in relation to Terms of Reference and Individual Environmental Assessment, including Canadian Environment Assessment Agency screening, OEB section 92 submission activities, First Nations and Métis consultation, and Biodiversity Initiative activities
 - prepared: January 26, 2010
- d) **Stantec Inc. Environmental Assessment Plan**
 - **proposal** for consulting services for proposed East-West Tie line in relation to pre-EA work, Terms of Reference, Environmental Assessment, general support (CEAA screening, OEB application, Biodiversity Initiative, orthophotography, other permits/approvals)
 - contains: cost estimate and assumptions
 - prepared: February 9, 2010
- e) **Senes Consultants Limited Socio-Economic Assessment Plan**
 - **work plan** for activities for proposed East-West Tie line relating to: socio-economic, cultural and heritage sections of Terms of Reference and Environmental Assessment; socio-economic studies; conducting public information centres on socio-economic matters
 - prepared: January 26, 2010
- f) **Inergi LP Map & Tiles**
 - **map tiles** of existing East-West Tie line by sections
 - **overview map** of existing East-West Tie line
 - prepared: May 7, 2010

¹ Sensitivity around release timing and recipients.

2. **HONI Presentations**

- a) North and Central Transmission Projects
 - **presentation** on North-South transmission expansion, Algoma-Sudbury transmission expansion, East-West transmission tie, and Manitoulin Island enabler
 - prepared: January 27, 2010
- b) Transmission Expansion in NW Ontario
 - **presentation** on Northwest transmission expansion and East-West Tie expansion
 - prepared: April 22, 2010

3. **Existing Facilities**

- a) GPS Coordinates of existing East-West Tie line tower structures
 - **longitude and latitude** for each tower structure of existing line
- b) Aerial “flyover” video of existing East-West Tie line
 - **video** of aerial view of existing line (Wawa TS x Lakehead TS)
- c) Station graphics showing existing line entrances (Wawa TS, Marathon TS, Lakehead TS)
 - **photos** (top-down view) of transformer stations with line entrances superimposed

4. Typical transmission line maintenance practices

- **HONI’s typical practices** for transmission line maintenance and vegetation/right-of-way management

5. **Real Estate**

- a) Categories of land rights and percentages along existing East-West Tie line
 - **land type percentages** (Crown, park, private, First Nation)
- b) Licences and permits
 - **licences and permits** for provincial Crown lands and Pukaskwa National Park
- c) Other real estate info
 - **easements** with private landowners

6. Historical outage data (weather events)

- **line outage statistics** (forced momentary, forced sustained, planned outages) from 2002 to 2011 along existing line

7. Real Estate Agreements with First Nations

- **agreements** with First Nations for land rights along existing line

APPENDIX B

Great Lakes Power Transmission LP

East-West Tie – Documents List

Board File No: EB-2011-0140

March 26, 2012

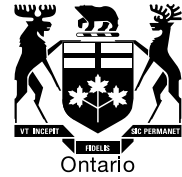
EB-2011-0140

Document List Requested of Great Lakes Power Transmission LP (GLPT)

GLPT has in its possession the following information that it can provide following approval from the Board for release:

- Outage statistics with respect to the W23K portion of its 230kV system
- Vegetation Management Program Overview
- Transmission Line Condition Assessment Program Overview
- LIDAR data for GLPT circuits emanating from Anjigami TS and Wawa TS
- PLS CADD “Plan and Profile” drawings for its 230kV circuit (W23K) connected to Wawa TS
- Ortho View of its 230kV circuit connected to Wawa TS and Anjigami TS
- GIS data related to W23K the transmission Line

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EB-2013-0321

IN THE MATTER OF the *Ontario Energy Board Act*,
1998, S. O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an application by Ontario
Power Generation Inc. pursuant to section 78.1 of the
Ontario Energy Board Act, 1998 for an order or orders
determining payment amounts for the output of
certain of its generating facilities.

**DECISION AND ORDER ON MOTIONS,
ISSUES LIST AND CONFIDENTIALITY,
AND PROCEDURAL ORDER NO. 9**

May 16, 2014

Ontario Power Generation Inc. ("OPG") filed an application, dated September 27, 2013, with the Ontario Energy Board under section 78.1 of the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, Schedule B seeking approval for increases in payment amounts for the output of its nuclear generating facilities and the currently prescribed hydroelectric generating facilities, to be effective January 1, 2014. The application also seeks approval for payment amounts for newly prescribed hydroelectric generating facilities, to be effective July 1, 2014.

Motions

The Association of Major Power Consumers in Ontario ("AMPCO"), the School Energy Coalition ("SEC") and Environmental Defence filed motions seeking full and adequate responses to certain interrogatories and/or technical conference undertakings. The Board held a motion hearing on May 9, 2014 to hear the submissions of parties. Both SEC and OPG noted at the start of hearing that OPG had provided responses to two of the interrogatories identified in the SEC motion, Exh L-6.2-SEC-84 and Exh L-6.8-SEC-

118; accordingly this decision will not address these interrogatory responses.

Exh L-1.2-AMPCO-5 and Exh L-5.1-AMPCO-23(d)

Interrogatory 1.2-AMPCO-5 requested that OPG consider the decline in generation related to coal units and Pickering and, "...discuss OPG's longer term 10 year business plan outlook including emerging issues and proposed spending levels beyond 2016 and include any supporting materials such as memorandums, reports and presentations to OPG's Board of Directors that address this issue." On March 19, 2014, OPG replied that information beyond the 2014-2015 test period was not relevant.

SEC supported AMPCO's motion on Exh L-1.2-AMPCO-5, stating that the information would provide context for pacing and prioritization of capital expense. SEC also observed that the long term information was especially important for the hydroelectric business as it moves to incentive regulation in the near term.

AMPCO referred to the longer planning horizon considered by the Renewed Regulatory Framework for electricity distributors ("RRFE"). AMPCO argued that a comparison to the RRFE is appropriate as OPG has a significant role to play in the Long-Term Energy Plan. AMPCO also noted that its members do not plan on a two year time frame. In reply, OPG stated that it has provided information for the period for which it seeks rates. The RRFE is applicable to electricity distributors on a 5 year rate cycle. It is not applicable to OPG and the incentive framework for OPG is yet to be established.

OPG submitted that AMPCO is not seeking just a 10 year plan, but a wide range of information and noted that long term forecasts can easily change. However, in AMPCO's view, the information it seeks is typically provided in a business plan presentation to a board of directors. OPG stated that the notion about pacing of capital expense was not supported by identification of specific capital and OM&A expenditures. OPG seeks approval to close certain items to rate base but is not seeking approval of its capital budget per se. OPG submitted that the information sought by AMPCO and SEC is of almost no probative value.

The Board agrees with AMPCO that understanding OPG's longer term business plan outlook would provide additional context to the proposed capital and operating expenditures for the period for which payments are to be set. However, the Board also agrees with OPG that a long term outlook, such as the 10 year period for which

information is being sought, becomes increasingly speculative and uninformative. OPG has already provided a business plan which includes discussion of emerging issues and proposed spending levels for the period 2014 to 2016, in other words, one year beyond the period under review for which payment amounts are to be set. The Board believes this is sufficient context for the setting of payment amounts for 2014 and 2015.

Interrogatory 5.1-AMPCO-23(d) referred to Exh N1-1-1, Attachment 4 which is OPG's 2014-2016 business plan. AMPCO sought an explanation for the 2016 hydroelectric production forecast compared to the 2015 plan, found at page 3. AMPCO argued that if it was important enough to provide the data, it is important enough to inquire into the information. OPG stated that the inquiry is irrelevant to the determination of payment amounts for the test period.

The Board agrees that an explanation for the 2016 forecast as it compares to the 2015 hydroelectric production forecast should be disclosed. This forecast is available and the explanation is relevant to understanding the context of future hydroelectric production. This is consistent with the decision concerning disclosure of the planning outlook for 2016 and the Board believes the forecast and accompanying explanation of hydroelectric production in 2016 may be useful.

Exh L-3.1-SEC-25

SEC sought information related to actual debt:equity ratios, however, OPG replied that for regulatory accounting, reporting and ratemaking, it applies the approved 53:47 debt:equity ratio. Following amendment of O. Reg. 53/05, OPG did not conduct an internal analysis of the effect of the newly regulated hydroelectric facilities on capital structure. OPG retained Foster Associates to assess business risk as a result of the regulation amendment.

SEC submitted that the actual information is important to understand the risk related to the newly regulated facilities. While OPG has filed an external analysis of business risk, SEC states that one way to measure the reasonableness of that evidence is to look at the actual equity structure.

The Board is not prepared to order the production of documents, if any exist, which deal with the corporate capital structure or the forecast of actual debt:equity ratios. The

corporate capital structure includes non-regulated assets and the period 2014-2018 goes beyond the period for setting rates.

Exh L-6.8-SEC-116 and Exh L-1.2-CCC-5

These interrogatories sought production of a KPMG report prepared for the Ministry of Energy, which assessed OPG benchmarking studies. OPG has not produced the report as it has not secured permission from the Ministry. SEC noted that OPG has confirmed that they are in possession of the report and that OPG refers to the report in its response to the Auditor General's ("AG") findings. SEC argued that ownership of the document is not at issue, and cited Rule 26.02(d) of the Board's *Rules of Practice and Procedure*, which refers to documents in a party's possession.

OPG submitted that it wants to produce the document but has not been given authorization. SEC submitted that the information is critical and should be provided before the settlement conference.

The Board is very interested in reviewing the KPMG Efficiency Review report, and appreciates the efforts that OPG has taken to obtain approval to disclose this report. The Board encourages OPG to continue its dialogue with the Ministry in this regard. It is the Board's expectation that the report will be provided and placed on the public record once it receives authorization from the Ministry of Energy. However, the Board notes Rule 26.02(d) and will revisit the issue if the document is not produced prior to the hearing.

Exh L-1.1-CME-1

CME sought production of information provided to and received from OPG's Board of Directors regarding the Auditor General ("AG") Report. OPG declined on the basis that the AG's Report was issued after the application and the application update. SEC argued that the AG's findings on human resources costs are significant and OPG's response to the AG's findings will have an effect on test year budgets. The information is relevant, probative and important for the purpose of cross examination. While OPG has provided information regarding the actions it has taken, these are not necessarily the actions it should take or what was provided to the OPG Board of Directors.

In OPG's view, an appropriate line of inquiry is what OPG is doing in the test period that is responsive to issues raised by the AG. OPG noted that it has responded to several questions from parties on these matters.

The Board finds that the responses provided by OPG in response to the AG's Report, as provided at the Technical Conference, are sufficient at this juncture. The Board does not require the communication to and from the OPG Board of Directors with respect to the AG Report. Parties will have the opportunity to question OPG on its responses and to ask OPG for updates at the oral hearing.

Exh L-1.4-SEC-20

SEC sought disclosure of information provided to OPG's Board of Directors in approving the application. OPG declined to produce the documents on the basis of relevance and litigation privilege, referring to the Board's decision in the previous cost of service proceeding, EB-2010-0008¹ which did not provide the relief sought by parties.

SEC is not seeking hearing strategies or OPG analysis of intervenor positions, but the trade-offs between cost control and price increase considered when the OPG Board of Directors approved the current application. SEC states the current proceeding is an administrative proceeding and that the Board need not make a ruling with respect to litigation privilege. In the EB-2011-0120 proceeding (the "CANDAS proceeding"), the Board did not agree that the CANDAS proceeding was considered litigation for the purposes of litigation privilege.² OPG commented that the Board's findings on litigation privilege in the CANDAS proceeding were obiter, as there was a reasonable apprehension of a court proceeding.³

In OPG's view, the scope of litigation privilege is broad and includes the authorization to commence a proceeding. OPG referred to *Blank v. Canada*⁴ in which the Supreme Court stated that, "Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial or hear an administrative proceeding by the adversarial advocate." OPG further stated that there have been many cases in which it has been determined that litigation privilege applies to administrative tribunals. The current proceeding is adversarial, unlike the CANDAS

¹ EB-2010-0008, Tr. Vol. 1, pages 113-114

² EB-2011-0120, Decision and Order, page 17, February 22, 2012

³ Ibid page 14

⁴ *Blank v. Canada* (Department of Justice), 2006 SCC 39

proceeding, and the applicant and intervenors are entitled to a zone of privacy in which to frame their case. In OPG's view, this provides efficiency to the process. OPG stated that the Board need not decide on the issue of litigation privilege, but could follow the EB-2010-0008 decision on the same materials.

SEC argued that the current proceeding differs from EB-2010-0008 proceeding in which payment amount increases of 6.2% were sought. SEC estimates that the current proceeding seeks increases of 20 to 30%. In SEC's view, the CANDAS proceeding was adversarial and the current proceeding is less so as the Board can choose neither the applicant nor the intervenors positions in establishing payment amounts.

The Board has determined that it does not need to see the requested documents provided to OPG's Board of Directors in approving this application. OPG is on the record testifying that the application was approved by its Board – that is sufficient, and the documents seeking that approval are of no probative value to the Board in determining payment amounts. Parties are free to examine OPG on options presented to the Board of Directors during the oral hearing. Given the Board's determination that the requested documents are not relevant, the Board does not need to make a determination as to whether the documents requested are protected by litigation privilege.

Exh L-1.2-SEC-4

OPG's Memorandum of Agreement with its shareholder requires timely reporting on major developments and issues. SEC sought production of the last five reports. OPG declined as the documents form no part of the application and major developments and issues are addressed in the application. SEC commented that OPG has wide latitude in deciding what to include in the application, and that evidence should be tested for reasonableness.

The primary method by which OPG informs the shareholder is through the business planning process, and the 2013-2015 and 2014-2016 business plans have been filed in the current proceeding. Different levels of the OPG organization report regularly to the Ministry on a wide range of subjects. It would be a significant task to sort that communication into major issues that relate to the test period payment amounts. SEC replied that it would be reasonable to provide a summary of the last five relevant reports.

The Board does not see the relevance of the communications between OPG and the Ministry of Energy as it pertains to this proceeding. The Board agrees with OPG that this would be a very time consuming exercise and the connection between these materials and the determination of payment amounts is tenuous, at best.

Exh L-2.1-ED-2, Exh L-2.1-ED-3, Exh L-2.1-ED-4

These three interrogatories sought information regarding rate base determination for the newly regulated hydroelectric facilities. It is Environmental Defence's position that the rate base proposed for the newly regulated facilities could result in windfall income as assessment at market value is higher than original capital cost. Environmental Defence acknowledges that the Board is required by O. Reg. 53/05 to accept certain values for these assets as determined in the most recently audited financial statements. However, the information should be provided for the sake of transparency and public accountability. Further, the identification of a gap would justify a lower rate of return.

OPG observed that O. Reg. 53/05 requirements regarding rate base for the newly regulated facilities is no different than the O. Reg. 53/05 requirements for the currently regulated facilities. OPG also commented that the amount recorded on OPG's financial statements did not change as a result of the regulation amendment. OPG argued that in terms of transparency, OPG's financial statements are publicly available. OPG also argued that there is no legal way under the fair return standard to cut OPG's rate of return on the basis of a legislative choice relating to the value of particular assets.

As the requirements of O. Reg 53/05 are very clear about the valuation of assets and liabilities that the Board must accept upon regulating the newly regulated hydroelectric facilities, no further disclosure is required by the Board at this time. To the extent that parties want to test whether the value of the newly regulated assets included in rate base affects business risk or the deemed rate of return, parties will be able to examine this within issue 3.1.

Exh L-4.7-ED-7

In lieu of Darlington capacity factor for each year of operating life, OPG has provided unit capability factor from 2005 to 2013 as it is not required to provide earlier historic information. Environmental Defence seeks the former as the LUEC calculation assumes an 88% capacity factor. In support of its position, Environmental Defence

referred to a decision on motion in the Bruce to Milton proceeding (EB-2007-0050) in which the Board found that historical information would assist the Board.

OPG noted that unit capability factors are the industry recognized measurement. In OPG's factum, filed on May 8, 2014, OPG provided Darlington capacity factors from 2005, when OPG became subject to rate regulation, to 2013. OPG argued that Environmental Defence's interest in the data prior to 2005 and the basis for the LUEC calculation is to provide an opinion on Darlington refurbishment. As the Board is not tasked with supply mix choices, the historical information prior to 2005 is not relevant. In OPG's view the comparison with the Bruce to Milton proceeding is not appropriate as the Board does consider the economics of projects in leave to construct applications.

The Board finds that the disclosure of the net capacity factor from 2005 is sufficient for the issues the Board must determine in this proceeding.

Exh L-4.7-ED-8, Exh L-4.7-ED-9 and Exh 6.3-ED-15

These interrogatories seek comparisons of Darlington and Pickering with other generation alternatives. Environmental Defence acknowledges that the Board is not being asked to decide on the future of Darlington or the continued operations of Pickering, however, a comparison with generation alternatives is a factor the Board can consider in setting payment amounts and rate of return.

OPG is not engaged in any of the generation alternatives listed in the interrogatories and it is not equipped to provide the information. OPG argued that Environmental Defence is inviting the Board to consider supply mix choices and to punish OPG financially for choices it has not made.

OPG noted the Board reliance on hydroelectric and nuclear benchmarking in the two previous cost of service proceedings and stated that this is a relevant line of inquiry.

The Board agrees with OPG's submissions that the information required to perform these calculations is in the control of the OPA. Therefore, OPG is not required to provide the requested comparisons.

Exh L-4.12-ED-14

A summary of previous Ontario Hydro and OPG projects, prepared by the Ontario Clean Air Alliance Research Inc., was appended to this interrogatory. Environmental Defence sought OPG's assessment of accuracy of the summary. Environmental Defence states that the information is from public sources, many from OPG's own documents.

In OPG's view, it has provided information on Darlington Refurbishment and contracting strategies, and comparisons with previous projects is not relevant. OPG estimated that there were at least 28 footnotes to check and noted that non-OPG sources would need to be retrieved and reviewed. In OPG's view, Environmental Defence has the option to lead the evidence and provide a witness.

The Board is of the opinion that OPG has the capability and expertise to respond to the issues cited in the report filed by Environmental Defence, which was produced by the Clean Air Alliance. However, the Board also agrees with OPG that the interrogatory, as framed, would be onerous to respond to and more detailed than necessary. The Board's understanding is that the purpose of Environmental Defence's request is to review OPG's track record in terms of project management and cost overruns. It appears to the Board that an easier way to solicit this evidence, without OPG verifying every source in the appendix, is to reframe the interrogatory as, "Does OPG have any basis/evidence to dispute the information contained in the Clean Air Alliance Report, Appendix A page 17, with respect to cost overruns?" The Board orders OPG to respond to this reframed question prior to the commencement of the hearing.

Exh L-6.3-ED-15

In addition to generation alternatives as noted above, this interrogatory sought OM&A costs for Pickering from 2010 to 2015. Environmental Defence submitted that the response excluded fuel and some administrative costs and seems to understate some costs, which Environmental Defence attributed in part to an allocation issue between Darlington and Pickering.

OPG replied that JT1.14 provides Pickering fuel costs and explains the cost allocation. OPG has a Board approved allocation methodology and is not required to apply another allocation. Environmental Defence argued that OPG has not addressed the issue which was to reconcile the numbers that Environmental Defence provided and, if incorrect, explain why they were incorrect.

The information that Environmental Defence seeks is found in several sources in the evidence. The Board directs OPG to assist Environmental Defence by assembling the data that Environmental Defence seeks in calculating Pickering operating costs for 2010 to 2015. It is the Board's expectation that the parties will co-operate to achieve final resolution of this interrogatory and related undertakings.

Exh L-4.7-ED-5

Environmental Defence requested the cost of the Darlington Refurbishment Project in 2014 dollars as it is helpful for comparison purposes. OPG replied that it has presented the financial information in "in-year" dollars and has responded to 4.7-ED-5 and to the corresponding undertaking JT2.1.

The Board sees no reason why OPG should not respond to this interrogatory to ensure the integrity of the comparison and therefore orders OPG to provide the costs related to the Darlington Refurbishment Project in 2014 dollars.

Exh L-4.12-ED-11 and Undertaking JT2.2

Undertaking JT2.2 relates to a breakdown of costs for the Darlington Refurbishment Project and various overrun scenarios and the percentage of contractor cost overruns that are passed onto OPG.

Environmental Defence stated that OPG had not done what was requested and queried the calculations. OPG replied that the answers are not deficient and that the undertaking response explains the calculations.

The Board finds that OPG has responded to the interrogatory and that parties may seek further clarification during the proceeding.

Prioritization of Issues

On February 19, 2014, the Board issued Procedural Order No. 3 and the final, unprioritized issue list. In Procedural Order No. 4, issued on March 21, 2014, the Board made provision for submissions on categorizing issues into primary and secondary issues following the interrogatory process.

Submissions were filed by Board staff, Green Energy Coalition (“GEC”), the Society of Energy Professionals (the “Society”), Environmental Defence, Sustainability Journal and OPG.

SEC, Consumers Council of Canada (“CCC”), AMPCO, Canadian Manufacturers & Exporters (“CME”) and Energy Probe Research Foundation (“Energy Probe”) submitted that, due to the volume of interrogatory responses, issue prioritization would be more appropriate following the technical conference or settlement conference. In Procedural Order No. 5, issued on April 3, 2014, the Board provided for the filing of additional submissions on issues prioritization to follow the technical conference and the filing of the related undertakings. All submissions previously filed would be retained for the Board’s consideration.

On May 7, 2014, a submission was filed by AMPCO, CCC, CME, Energy Probe, London Property Management Association, SEC and the Vulnerable Energy Consumers Coalition (the “Group of Intervenors”). Additional submissions were filed by GEC and Sustainability Journal, and reply was filed by OPG. A late submission was filed by Lake Ontario Waterkeeper (“Waterkeeper”) to which OPG was unable to reply.

At the motion hearing on May 9, 2014, the Board informed parties that it had deemed a subset of issues primary and that this subset of issues would be removed from the settlement discussions and would proceed to oral hearing. Those issues are: 1.4, 4.7, 4.11, 6.1, 6.2, 6.3, 6.4, 6.8, 6.9, 6.10, 9.6, 11.1, 11.3 and 12.1.

As noted in OPG’s reply submission, all parties agreed that the following issues should be designated as secondary issues: 3.2, 6.13, 6.14, 6.15, 7.1, 7.2, 10.1 and 11.2. The Board agrees that these issues should be secondary issues.

OPG’s reply submission also identified issues that all the parties agreed should be designated as primary issues: 1.1, 1.2, 2.1, 4.4, 4.5, 4.9, 4.10, 4.12, 5.4 and 5.5. The Board will designate these issues as primary issues. The remaining issues are addressed below.

1. GENERAL

- 1.3 Has OPG appropriately applied USGAAP accounting requirements, including identification of all accounting treatment differences from its last payment order proceeding?

Due to OPG's proposed changes to pension and OPEB costs, the Group of Intervenor submitted that it would want to cross examine on USGAAP conversion. OPG replied that the matter was discussed extensively in the EB-2012-0002 proceeding on deferral and variance accounts and USGAAP. OPG stated that the changes in pension and OPEB costs in this proceeding have nothing to do with the conversion to USGAAP.

3. CAPITAL STRUCTURE AND COST OF CAPITAL

- 3.1 What is the appropriate capital structure and rate of return on equity for the currently regulated facilities and newly regulated facilities?

The Group of Intervenor submitted that the inclusion of the newly regulated hydroelectric facilities raises the issue of the appropriate capital structure and return on equity and that the issue will require cross examination. Board staff submitted that, as technology specific cost of capital was extensively reviewed in the EB-2010-0008 cost of service proceeding and as no intervenor evidence has been filed, a written hearing would be reasonable. OPG acknowledges that the newly regulated hydroelectric facilities presents a change circumstance, however OPG has filed evidence addressing why this change does not warrant a change in the current capital structure.

4. CAPITAL PROJECTS

Regulated Hydroelectric

- 4.1 Do the costs associated with the regulated hydroelectric projects that are subject to section 6(2)4 of O. Reg. 53/05 and proposed for recovery (excluding the Niagara Tunnel Project), meet the requirements of that section?
- 4.2 Are the proposed regulated hydroelectric capital expenditures and/or financial commitments reasonable?
- 4.3 Are the proposed test period in-service additions for regulated hydroelectric projects (excluding the Niagara Tunnel Project) appropriate?

With respect to issues 4.1 to 4.5, the Group of Intervenor submitted that the “biggest single impact on the payment amounts is the Applicant’s significant capital spending plan.” Board staff submitted that issue 4.1 should be a secondary issue as no interrogatories were filed under this issue. OPG replied that other than Niagara Tunnel, there are no issues in respect of previously and newly regulated hydroelectric facilities that would warrant consideration in an oral hearing.

4. CAPITAL PROJECTS

Nuclear

- 4.6 Do the costs associated with the nuclear projects that are subject to section 6(2)4 of O. Reg. 53/05 and proposed for recovery, meet the requirements of that section?
- 4.8 Are the proposed test period in-service additions for nuclear projects (excluding those for the Darlington Refurbishment Project) appropriate?

With respect to issues 4.6 to 4.12, the Group of Intervenor submitted that level of nuclear capital spending, Darlington Refurbishment and other capital projects should be considered a primary issue. Board staff submitted that issue 4.6 should be a secondary issue as no interrogatories were filed under this issue. OPG replied that the Group of Intervenor’s submission focused on Darlington Refurbishment and provided no reasons why spending on other nuclear areas should be made a primary issue. OPG has provided extensive evidence on nuclear capital projects and that its approach to budgeting, planning and capitalization follows that previously reviewed and approved by the Board.

5. PRODUCTION FORECASTS

Regulated Hydroelectric

- 5.1 Is the proposed regulated hydroelectric production forecast appropriate?
- 5.1(a) Could the storage of energy improve the efficiency of hydroelectric generating stations?
- 5.2 Is the estimate of surplus baseload generation appropriate?
- 5.3 Has the incentive mechanism encouraged appropriate use of the regulated hydroelectric facilities to supply energy in response to market prices?

Due to the importance of the hydroelectric production forecast in the determination of payment amounts, the Group of Intervenor submitted that this is a primary issue. The Group of Intervenor submitted that issues 5.2 to 5.4 should be considered primary as well given OPG's proposed new hydroelectric incentive mechanism and the consideration of surplus baseload generation. OPG replied that, given the hydroelectric water conditions variance account, the Group of Intervenor's claim about the significant impact of hydroelectric production forecast on cost is incorrect. OPG also replied that the proposed changes to the incentive mechanism and treatment of surplus baseload generation are unlikely to have a material financial impact.

Sustainability Journal submitted that, "Some of the relevant [energy storage] technologies are new so the Board and Intervenor should be given the opportunity to ask questions about these new technologies at the hearing. Written exchanges would not be suitable for such explanations, particularly as they offer the potential for quickly reversing the general trend towards higher electricity prices in Ontario." OPG replied that due to the late emergence of issue 5.1(a) and the lack of evidence, this issue is best addressed through written submissions.

6. OPERATING COSTS

Nuclear

- 6.5 Is the forecast of nuclear fuel costs appropriate? Has OPG responded appropriately to the suggestions and recommendations in the Uranium Procurement Program Assessment report?
- 6.6 Are the test period expenditures related to continued operations for Pickering Units 5 to 8 appropriate?
- 6.7 Is the test period Operations, Maintenance and Administration budget for the Darlington Refurbishment Project appropriate?

The Society submitted that issues 6.1 to 6.10 should be categorized as primary as all of the issues concern operating costs. The Society anticipates substantial interest in staffing and compensation which might affect Society membership. Oral cross examination is required to ensure a factual record.

The Group of Intervenor submitted that given the proposed level of spending related to OM&A costs that issues 6.1 to 6.10 should be considered primary issues. It was noted that there was Board direction from the previous proceeding regarding nuclear fuel cost.

OPG replied that it has complied with Board direction to file an independent review of nuclear fuel procurement and that it has adopted most of the recommendations.

GEC submitted that the LTEP refers to the possible earlier shutdown of Pickering units, and that the related expenditure plan must be considered. OPG replied that issue 6.6 should be secondary as the Board fully considered Pickering Continued Operations in the previous cost of service proceeding. A consideration of earlier shutdown is beyond the test period.

OPG submitted that the Darlington Refurbishment OM&A expenditures in the test period are relatively small and variances are trued up through the capacity refurbishment variance account. Waterkeeper submitted that issue 6.7 be included as a priority issue as it provides an opportunity for the Board to assess the reasonableness of OPG's proposed environmental monitoring and mitigation costs for Darlington Refurbishment. As the Waterkeeper submission was filed late, OPG did not have an opportunity to respond.

6. OPERATING COSTS

Depreciation

6.11 Is the proposed test period depreciation expense appropriate?

6.12 Are the depreciation studies and associated proposed changes to depreciation expense appropriate?

As above, GEC submitted that there is a high likelihood that Pickering will close earlier than the 2020 timeframe, and the depreciation schedule must be considered. In OPG's view, GEC is using depreciation to challenge Pickering Continued Operations and Darlington Refurbishment. OPG stated that such a challenge is beyond the scope of the proceeding and designating the depreciation issues as primary would do nothing to change that.

7. OTHER REVENUES

Bruce Nuclear Generating Station

7.3 Are the test period costs related to the Bruce Nuclear Generating Station, and costs and revenues related to the Bruce lease appropriate?

The Group of Intervenor submitted that the calculation of Bruce net revenues is complex and material and that the adoption of USGAAP raises concerns requiring further exploration through oral cross examination. OPG replied that the methodology for determination of Bruce net revenues has not changed and that the impact of adoption of USGAAP was fully discussed in EB-2012-0002.

8. NUCLEAR WASTE MANAGEMENT AND DECOMMISSIONING LIABILITIES

- 8.1 Is the revenue requirement methodology for recovering nuclear liabilities in relation to nuclear waste management and decommissioning costs appropriate? If not, what alternative methodology should be considered?
- 8.2 Is the revenue requirement impact of the nuclear liabilities appropriately determined?

As OPG's nuclear asset retirement obligations and costs are significant and as there is a new Ontario Nuclear Funds Agreement ("ONFA") Reference Plan, the Group of Intervenor submitted that these issues merit further examination in an oral hearing. Based on review of methodology in the previous cost of service proceeding, EB-2010-0008 and review of the current ONFA Reference Plan in EB-2012-0002, and as no intervenor evidence has been filed, Board staff submitted that issue 8.1 should be a secondary issue. OPG replies that it continues to apply the approved methodology to recover costs and that determination of nuclear liabilities is unchanged from previous cases.

9. DEFERRAL AND VARIANCE ACCOUNTS

- 9.1 Is the nature or type of costs recorded in the deferral and variance accounts appropriate?
- 9.2 Are the balances for recovery in each of the deferral and variance accounts appropriate?
- 9.3 Are the proposed disposition amounts appropriate?
- 9.4 Is the disposition methodology appropriate?
- 9.5 Is the proposed continuation of deferral and variance accounts appropriate?
- 9.7 Is OPG's proposal to make existing hydroelectric variance accounts applicable to the newly regulated hydroelectric generation facilities appropriate?
- 9.8 Is the proposal to discontinue the Hydroelectric Incentive Mechanism Variance Account appropriate?

9.9 What other deferral accounts, if any, should be established for the test period?

As the deferral and variance accounts are numerous and complex and as the 2013 year-end balance is significant, the Group of Intervenors submitted that issues 9.1 to 9.9 should be categorized as primary. Board staff submitted that the operation of the majority of accounts was examined in detail in EB-2012-0002. As OPG only seeks clearance of four accounts, Board staff submitted that written hearing would be appropriate for issues 9.1 to 9.6. OPG replied that given the recent examination in EB-2012-0002, there is no reason why deferral and variance account issues not designated for oral hearing cannot be addressed in writing.

Board Findings on Prioritization of Issues

The Board has considered the submissions of the parties on the remaining issues. Any unsettled primary issues will proceed by way of oral hearing as the Board believes that it will benefit from cross examination to test the evidence. Any unsettled secondary issues will proceed by way of written submissions. A secondary issue does not imply that an issue is of secondary importance; a secondary issue may be efficiently dealt with by way of written submissions. The Board has therefore decided that of the remaining issues 3.1, 5.1(a) and 6.7 should be designated as primary issues.

Confidential Filings

In the Decision and Order on Confidential Filings and Procedural Order No. 8 issued on May 6, 2014, the Board directed OPG to file public versions of audit reports provided in interrogatory response Exh L-4.7-SEC-51 that were free of any potential attribution. OPG subsequently filed the audit reports, free of any redactions for the public record.

In Procedural Order No. 8, the Board also required OPG to provide further explanation of the rationale for the confidential treatment of Exh L-7.1-Staff-176 relating to hydroelectric ancillary services revenue and Exh L-6.3-Staff-76 related to nuclear fuel costs. OPG has since been advised that the IESO does not object to the public disclosure of the ancillary services revenue. At the motion hearing, OPG restated its concern that disclosure of the nuclear fuel costs will result in higher prices when contracts are renegotiated and that the ratepayers will ultimately be harmed.

The Board is not convinced that there will be harm to OPG or ratepayers in disclosing costs related to a contract that ends in 2021. Presumably the renegotiation of contract terms and prices would not commence until 2019 at the earliest. By then, many factors will have changed, and the Board does not see how keeping information confidential about a contract that expires in 2021 is harmful to OPG. OPG shall file an unredacted version of Exh L-6.3-Staff-76 for the public record.

On May 8, 2014, OPG requested confidential treatment for 6 technical conference undertakings and provided the reasons why it sought confidential treatment.

The Board will make provision for submissions on the request for confidential treatment for these undertakings. The documents will be considered confidential until the Board renders a decision.

OPG has reviewed the confidential version of the transcript from the motion hearing held on May 9, 2014. OPG has confirmed that no redactions are required. The entire transcript will be made available on the public record.

Hearing Plan and Settlement Proposal

It is the Board's expectation that parties will work with Board staff to develop a hearing plan. As five days have been set for the settlement conference, the Board expects parties to use some of this time for discussion on and development of a hearing plan. The plan will be filed with the Board no later than June 5, 2014.

Any settlement proposal arising from the settlement conference shall also be filed on June 5, 2014.

The Board considers it necessary to make provision for the following matters related to this proceeding.

THE BOARD ORDERS THAT:

1. The final Prioritized Issues List (attached as Appendix A) is approved for this proceeding.

2. Board staff and parties wishing to make submissions on the request for confidential treatment of technical conference undertakings shall file such submissions with the Board and deliver them to OPG and all other parties on or before **May 26, 2014**.
3. If OPG wishes to respond to any submissions on its request for confidential treatment of technical conference undertakings, it shall file such submissions with the Board and deliver them to the relevant intervenor and all other parties on or before **June 2, 2014**.

All filings to the Board must quote the file number, **EB-2013-0321**, be made through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Violet Binette at violet.binette@ontarioenergyboard.ca and Board Counsel, Michael Millar at michael.millar@ontarioenergyboard.ca.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary
E-mail: boardsec@ontarioenergyboard.ca

Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto, May 16, 2014

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

ONTARIO POWER GENERATION INC. 2014-2015 PAYMENT AMOUNTS

EB-2013-0321

FINAL ISSUES LIST (PRIORITIZED)

**Ontario Power Generation Inc.
2014-2015 Payment Amounts for
Prescribed Generating Facilities
EB-2013-0321**

FINAL ISSUES LIST (PRIORITIZED)

1. GENERAL

- 1.1 Primary - Has OPG responded appropriately to all relevant Board directions from previous proceedings?
- 1.2 Primary - Are OPG's economic and business planning assumptions for 2014-2015 appropriate?
- 1.3 Secondary - Has OPG appropriately applied USGAAP accounting requirements, including identification of all accounting treatment differences from its last payment order proceeding?
- 1.4 Oral Hearing: Is the overall increase in 2014 and 2015 revenue requirement reasonable given the overall bill impact on customers?

2. RATE BASE

- 2.1 Primary - Are the amounts proposed for rate base appropriate?

3. CAPITAL STRUCTURE AND COST OF CAPITAL

- 3.1 Primary - What is the appropriate capital structure and rate of return on equity for the currently regulated facilities and newly regulated facilities?
- 3.2 Secondary - Are OPG's proposed costs for its long-term and short-term debt components of its capital structure appropriate?

4. CAPITAL PROJECTS

Regulated Hydroelectric

- 4.1 Secondary - Do the costs associated with the regulated hydroelectric projects that are subject to section 6(2)4 of O. Reg. 53/05 and proposed for recovery (excluding the Niagara Tunnel Project), meet the requirements of that section?
- 4.2 Secondary - Are the proposed regulated hydroelectric capital expenditures and/or financial commitments reasonable?

- 4.3 Secondary - Are the proposed test period in-service additions for regulated hydroelectric projects (excluding the Niagara Tunnel Project) appropriate?
- 4.4 Primary - Do the costs associated with the Niagara Tunnel Project that are subject to section 6(2)4 of O. Reg. 53/05 and proposed for recovery, meet the requirements of that section?
- 4.5 Primary - Are the proposed test period in-service additions for the Niagara Tunnel Project reasonable?

Nuclear

- 4.6 Secondary - Do the costs associated with the nuclear projects that are subject to section 6(2)4 of O. Reg. 53/05 and proposed for recovery, meet the requirements of that section?
- 4.7 Oral Hearing: Are the proposed nuclear capital expenditures and/or financial commitments reasonable?
- 4.8 Secondary - Are the proposed test period in-service additions for nuclear projects (excluding those for the Darlington Refurbishment Project) appropriate?
- 4.9 Primary - Are the proposed test period in-service additions for the Darlington Refurbishment Project) appropriate?
- 4.10 Primary - Are the proposed test period capital expenditures associated with the Darlington Refurbishment Project reasonable?
- 4.11 Oral Hearing: Are the commercial and contracting strategies used in the Darlington Refurbishment Project reasonable?
- 4.12 Primary - Does OPG's nuclear refurbishment process align appropriately with the principles stated in the Government of Ontario's Long Term Energy Plan issued on December 2, 2013?

5. PRODUCTION FORECASTS

Regulated Hydroelectric

- 5.1 Secondary - Is the proposed regulated hydroelectric production forecast appropriate?
- 5.1(a) Primary - Could the storage of energy improve the efficiency of hydroelectric generating stations?
- 5.2 Secondary - Is the estimate of surplus baseload generation appropriate?
- 5.3 Secondary - Has the incentive mechanism encouraged appropriate use of the regulated hydroelectric facilities to supply energy in response to market prices?
- 5.4 Primary - Is the proposed new incentive mechanism appropriate?

Nuclear

5.5 Primary - Is the proposed nuclear production forecast appropriate?

6. OPERATING COSTS

Regulated Hydroelectric

- 6.1 Oral Hearing: Is the test period Operations, Maintenance and Administration budget for the regulated hydroelectric facilities appropriate?
- 6.2 Oral Hearing: Is the benchmarking methodology reasonable? Are the benchmarking results and targets flowing from those results for the regulated hydroelectric facilities reasonable?

Nuclear

- 6.3 Oral Hearing: Is the test period Operations, Maintenance and Administration budget for the nuclear facilities appropriate?
- 6.4 Oral Hearing: Is the benchmarking methodology reasonable? Are the benchmarking results and targets flowing from those results for the nuclear facilities reasonable?
- 6.5 Secondary - Is the forecast of nuclear fuel costs appropriate? Has OPG responded appropriately to the suggestions and recommendations in the Uranium Procurement Program Assessment report?
- 6.6 Secondary - Are the test period expenditures related to continued operations for Pickering Units 5 to 8 appropriate?
- 6.7 Primary - Is the test period Operations, Maintenance and Administration budget for the Darlington Refurbishment Project appropriate?

Corporate Costs

- 6.8 Oral Hearing: Are the 2014 and 2015 human resource related costs (wages, salaries, benefits, incentive payments, FTEs and pension costs) appropriate?
- 6.9 Oral Hearing: Are the corporate costs allocated to the regulated hydroelectric and nuclear businesses appropriate?
- 6.10 Oral Hearing: Are the centrally held costs allocated to the regulated hydroelectric business and nuclear business appropriate?

Depreciation

- 6.11 Secondary - Is the proposed test period depreciation expense appropriate?
- 6.12 Secondary - Are the depreciation studies and associated proposed changes to depreciation expense appropriate?

Income and Property Taxes

- 6.13 Secondary - Are the amounts proposed to be included in the test period revenue requirement for income and property taxes appropriate?

Other Costs

- 6.14 Secondary - Are the asset service fee amounts charged to the regulated hydroelectric and nuclear businesses appropriate?
- 6.15 Secondary - Are the amounts proposed to be included in the test period revenue requirement for other operating cost items appropriate?

7. OTHER REVENUES

Regulated Hydroelectric

- 7.1 Secondary - Are the proposed test period revenues from ancillary services, segregated mode of operation and water transactions appropriate?

Nuclear

- 7.2 Secondary - Are the forecasts of nuclear business non-energy revenues appropriate?

Bruce Nuclear Generating Station

- 7.3 Secondary - Are the test period costs related to the Bruce Nuclear Generating Station, and costs and revenues related to the Bruce lease appropriate?

8. NUCLEAR WASTE MANAGEMENT AND DECOMMISSIONING LIABILITIES

- 8.1 Secondary - Is the revenue requirement methodology for recovering nuclear liabilities in relation to nuclear waste management and decommissioning costs appropriate? If not, what alternative methodology should be considered?
- 8.2 Secondary - Is the revenue requirement impact of the nuclear liabilities appropriately determined?

9. DEFERRAL AND VARIANCE ACCOUNTS

- 9.1 Secondary - Is the nature or type of costs recorded in the deferral and variance accounts appropriate?
- 9.2 Secondary - Are the balances for recovery in each of the deferral and variance accounts appropriate?
- 9.3 Secondary - Are the proposed disposition amounts appropriate?

- 9.4 Secondary - Is the disposition methodology appropriate?
- 9.5 Secondary - Is the proposed continuation of deferral and variance accounts appropriate?
- 9.6 Oral Hearing: Is OPG's proposal to not clear deferral and variance account balances in this proceeding (other than the four accounts directed for clearance in EB-2012-0002) appropriate?
- 9.7 Secondary - Is OPG's proposal to make existing hydroelectric variance accounts applicable to the newly regulated hydroelectric generation facilities appropriate?
- 9.8 Secondary - Is the proposal to discontinue the Hydroelectric Incentive Mechanism Variance Account appropriate?
- 9.9 Secondary - What other deferral accounts, if any, should be established for OPG?

10.REPORTING AND RECORD KEEPING REQUIREMENTS

- 10.1 Secondary - What additional reporting and record keeping requirements should be established for OPG?

11.METHODOLOGIES FOR SETTING PAYMENT AMOUNTS

- 11.1 Oral Hearing: Has OPG responded appropriately to Board direction on establishing incentive regulation?
- 11.2 Secondary - Is the design of the regulated hydroelectric and nuclear payment amounts appropriate?
- 11.3 Oral Hearing: To what extent, if any, should OPG implement mitigation of any rate increases determined by the Board? If mitigation should be implemented, what is the appropriate mechanism that should be used?

12.IMPLEMENTATION

- 12.1 Oral Hearing: Are the effective dates for new payment amounts and riders appropriate?

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EB-2011-0099

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by E.L.K. Energy
Inc. for an order approving just and reasonable rates and
other charges for electricity distribution to be effective
October 1, 2012.

BEFORE: Paula Conboy
Presiding Member

DECISION ON CONFIDENTIALITY
March 19, 2013

E.L.K. Energy Inc. ("E.L.K.") filed an application with the Ontario Energy Board (the "Board") on October 24, 2012 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to the rates that E.L.K. charges for electricity distribution, to be effective October 1, 2012.

In Procedural Order No. 4 the Board invited submissions on E.L.K.'s request to remove the response to AMPCO IR No. 17(b), i.e. the MEARIE salary survey (the "salary survey") from the record of this proceeding.

The Board asked parties to frame their submissions as follows:

It appears that there are two issues. The salary survey was filed in direct response to an interrogatory. In requesting an order removing the document from the record entirely, and to have parties destroy the copy of the document sent to them, E.L.K. is in effect providing a refusal to answer the interrogatory. In general, the test the Board must consider under such circumstances is whether the document is relevant to the issues in the proceeding, and whether its probative value is outweighed by any prejudice it might cause the applicant. The Board invites parties to file submissions on whether E.L.K.'s request to have the document

removed from the record entirely, and whether it should order all copies that were circulated to be destroyed.

The second issue is, in the event that the Board does not order the document removed from the record and all circulated copies destroyed, should the salary survey be treated as confidential? If so, what rules should govern access to the document?

The Board received submissions from the School Energy Coalition ("SEC"), EnWin Utilities Ltd. ("Enwin"), Energy Probe Research Foundation ("Energy Probe") and the Association of Major Power Consumers in Ontario ("AMPCO") on February 25, 2013 and a reply submission from E.L.K. on March 4, 2013. Energy Probe and AMPCO supported SEC's submission.

Submissions

Issue 1: Should the salary survey be removed for the record entirely having considered the salary survey's relevance to the issues in the proceeding and whether its probative value may be outweighed by any prejudice it might cause E.L.K. and; should the Board order the destruction of all copies that were circulated?

SEC submitted that E.L.K. cannot refuse to file the salary survey since it is clearly relevant to the Application and to other rate applications before the Board, noting that there is no material prejudice to E.L.K. or any other person from its disclosure. SEC argued that evidence pertaining to compensation is relevant since compensation is the single most critical component driving rates and the management of compensation is indicative of how well a utility is being managed. SEC asserted that there is no prejudice to E.L.K. since it cannot argue prejudice concerning material that it sought to rely on in the first place. With respect to the MEARIE Group ("MEARIE"), SEC saw no prejudice to it since the information contained in the survey is not proprietary to MEARIE, and even if it were, this is offset by the fact that MEARIE told the participating utilities that they could use the results in their rate applications. SEC noted that a MEARIE management salary survey was filed on the public record in the London Hydro's 2013 rates application (EB-2012-0146). Referencing a case currently before the Ontario Court of Appeal¹ concerning the use of such documents as salary surveys to inform its decision-making, SEC noted that a Board decision approving the removal of the salary survey would be inconsistent with the position it is taking in that case.

¹ *Ontario Power Generation et. al. v. Ontario Energy Board*, Court File No. C55633

EnWin argued that that the onus is on the intervenors requesting the salary survey to make their case. In that E.L.K. owns the information, EnWin submitted that E.L.K. should only be compelled to disclose the information if it is necessary for the Board's determination of reasonable rates. EnWin disputed the relevance of the requested information and argued that there is alternative information on the record sufficient for the Board's deliberations in setting reasonable rates. EnWin quoted from a number of sources regarding the need for relevance and the balancing of interests when it comes compelling a regulated utility to disclose information.

E.L.K indicated that the salary survey was filed in error. The company also submitted that MEARIE claims copyright in the salary survey and to date has not authorized the reproduction of its salary survey by E.L.K.

With respect to the treatment of a MEARIE management salary survey filed in the London Hydro's 2013 rates application (EB-2012-0146) , E.L.K. stated that it is not aware of the basis for, or the circumstances surrounding, the apparent disclosure by London Hydro of a different version of the survey. Regardless, E.L.K argued that the treatment is not relevant to the matter at issue in this proceeding. E.L.K. repeated that there is a risk of prejudice to it and others if the Board denies removal of the salary survey from the evidentiary record. A claim by MEARIE in respect of the disclosure of the salary survey would result in significant cost to E.L.K. both monetarily and in time and resources.

E.K.L. submitted that the prejudice to E.L.K. and MEARIE, the owners of the salary survey, outweighs the limited probative value the salary survey may have in this Application. E.L.K. agreed with EnWin and questioned the relevance of the information in the salary survey since it did not rely on the salary survey to support the applied for management and executive salaries and benefits. E.L.K. indicated that in any case it would defend its proposals without reference to the salary survey. E.L.K disputed SEC's characterization of the relative importance of the salary information contained in the survey and offered alternative sources of near- equivalent information. E.L.K. submitted that, similar to the Board's decision regarding AMPCO IR. No. 17(I), the Board should view the information as immaterial because the focus of the salary survey is on a multitude of positions rather than at an aggregated level as required by the Filing Requirements.

For the reasons given, E.L.K concluded that the Board should determine that the salary survey not be placed on the record of this proceeding in any form and that all copies in possession of parties to the proceeding be destroyed.

Board Findings

Is the Salary Survey Relevant to the Proceeding?

The Board finds that the salary survey is relevant to the Application and the setting of just and reasonable rates.

E.L.K. relied on the salary survey to demonstrate the reasonableness of its management compensation costs in its Application² and therefore must have itself considered this evidence to be relevant. Indeed it seems that one of the reasons that the salary survey was prepared in the first place was to be used as evidence in LDC rate filings before the Board.³ Salaries are a significant component of the revenue requirement. Benchmarking is a tool commonly used by the Board to determine the reasonableness of costs. The Board has relied on precisely this type of salary benchmarking data to set rates in other proceedings.⁴ There can be little question that the salary survey is relevant to this proceeding.

The Board is not convinced that any prejudice attendant on allowing the salary survey into evidence outweighs its probative value. In relying on and specifically referencing the salary survey in its pre-filed evidence, the Applicant must have realized that a party would likely ask to see it. Whether the Applicant had filed the document in error or not, it is entirely possible that the Board would have ordered its production. As a matter of general regulatory practice, it would not normally be open to an applicant to rely on a document but then refuse to produce it. A similar, more detailed MEARIE salary survey was recently filed in a London Hydro rates case (EB-2012-0146), apparently without controversy. As noted above, MEARIE itself appears to have contemplated that the salary survey would be used to support rate filings.

The Board therefore finds that the salary survey is relevant to the proceeding, and that it will be placed on the official record.

² Exhibit 4-Tab2 Schedule 6 p.1

³ See attachment to SEC submission dated February 25, 2013

⁴ See, for example, the Board's decision in Hydro One Networks Inc.'s 2010 Transmission rates case, EB-2010-0002.

Issue 2: In the event the Board determines that the salary survey is to remain on the record, should the salary survey be treated as confidential and what rules should govern access to the document?

SEC submitted that a document, such as the salary survey, paid for entirely by amounts recovered from ratepayers, relating solely to entities regulated by the Board, and having as its primary purpose comparisons of regulated costs for use in LDC rate applications should be a public document. In SEC's submission the salary survey is not in fact a confidential document as a matter of law, as it is in the public domain, and was intended to be.

SEC cited *Coco v. A N Clark [Engineers] Ltd. [1969] RPC 41*, a decision of Mr. Justice Megarry, for the basic rule on the ability to claim a document as confidential: that the person purporting to have the right to make that claim (in this case, MEARIE) must have treated the document as confidential and protected it from public disclosure and that when a document enters the public domain – i.e. it becomes known to members of the public – it can no longer be the subject of a confidentiality claim. SEC submitted that since MEARIE circulated the survey to 49 participating utilities, E.L.K. referred to it in its evidence, a similar survey forms part of the public evidence without contention in London Hydro's 2013 rates application (EB-2012-0146) and MEARIE worked with the Board in the development of the salary survey, it is impossible to conclude that MEARIE treated the salary survey as confidential as a matter of law.

SEC submitted that there also are other reasons related to the Board practices, policies and principles which support SEC's position that the salary survey should form part of the public record. These included that MEARIE and its parent, the EDA, are entirely funded by regulated electricity distributors, all of the gathered information pertains to the costs of entities regulated by the Board, the purpose of the survey is a comparison of costs to promote better managerial decisions as well as support E.L.K.'s Application.

In the event that the Board denies E.L.K.'s request that the salary survey be removed from the record of this proceeding, E.L.K submitted that the salary survey should be treated with the strictest confidence and in compliance with the Board's *Practice Direction on Confidential Filings*.

Board Findings*Should the Salary Survey be kept Confidential?*

It is the Board's general practice that all documents should be part of the public record unless there is a good reason for affording them confidential treatment. The onus rests with the party seeking confidential treatment. The Board's *Practice Direction on Confidential Filings* provides some general guidance on the types of information the Board may consider confidential.

The salary survey contains aggregated data on management salary and other compensation levels from 49 Ontario LDCs. The results are presented in a way that does not reveal the individual data from any LDC, nor does it reveal the compensation of any individual employee.

The Applicant's chief argument for keeping the salary survey confidential is that MEARIE has not consented to its release, and that MEARIE has always intended this document to be kept off of the record. This is difficult to reconcile with the fact that MEARIE appears to have intended that the salary survey be used to support rate filings, and the fact that a similar survey was filed on the public record in the London Hydro case.

Regardless, the fact that the party preparing a document wishes to have it kept confidential is not determinative. Nor does the fact that a document may be copyrighted prevent it from entering the public record. The Board has consistently allowed this type of information to form part of the public record in the past. There does not appear to be any serious concern relating to any of the considerations identified in Appendix B or Appendix C of the Practice Direction.

The Board therefore finds that the salary survey will form part of the public record to this proceeding. The Board's interim decision to treat the salary survey as confidential is rescinded.

DATED at Toronto, **March 19, 2013**

ONTARIO ENERGY BOARD

Original Signed By

Paula Conboy
Presiding Member

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EB-2013-0115
EB-2013-0159
EB-2013-0174

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF applications by Burlington Hydro Inc., Oakville Hydro Electricity Distribution Inc., and Veridian Connections Inc. for orders approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2014.

DECISION AND ORDER ON CONFIDENTIALITY
May 29, 2014

Pursuant to section 21 (5) of the *Ontario Energy Board Act, 1998*, the Board has combined its Decision on Confidentiality relating to requests for confidential treatment of certain documents in three separate cost of service proceedings. The three proceedings are Burlington Hydro Inc. ("Burlington Hydro", EB-2013-0115), Oakville Hydro Electricity Distribution Inc. ("Oakville Hydro", EB-2013-0159) and Veridian Connections Inc. ("Veridian", EB-2013-0174). The Board has decided to proceed with one Decision as there are similar issues and similar documents for which confidentiality is being claimed.

Background to Confidentiality Requests

In each of the three proceedings, the School Energy Coalition ("SEC") filed Notices of Motion asking the Board to require the distributors to provide full and adequate responses to certain interrogatories by producing copies of certain documents and surveys.

All documents were filed on a confidential basis.

Burlington Hydro

In the Burlington Hydro proceeding, SEC filed a Notice of Motion seeking an order requiring Burlington Hydro to provide a full and adequate response to interrogatory 2.1-SEC-5 and/or 2.1-SEC-4, by producing a benchmarking survey prepared by MEARIE (the “MEARIE Benchmarking Report”). In accordance with Procedural Order No. 4, Burlington Hydro filed the MEARIE Benchmarking Report on a confidential basis.

Burlington Hydro also requested confidential treatment for a compensation study conducted in November, 2011 that SEC requested in interrogatory 4.1-SEC-9 (the “Hay Study”); and the forecast wage increase for Burlington Hydro’s unionized workforce after the expiry of its current collective agreements in response to interrogatory 4.2-SEC-17.

Oakville Hydro

In the Oakville Hydro proceeding, SEC’s Notice of Motion sought an order requiring Oakville Hydro to provide a full and adequate response to interrogatory 2.1-SEC-3, by producing copies of two surveys/studies. The first is the MEARIE Benchmarking Report. The second document sought contained a benchmarking report and data models prepared by the Canadian Electricity Association (“CEA”), (the “CEA Report”). The MEARIE Benchmarking Report was filed with the Board on a confidential basis in accordance with Procedural Order No 6.

In order to be permitted to make submissions on the Motion, the CEA filed a letter requesting intervenor status. The CEA indicated that it is the owner of copyright of the CEA Report and data models that could be disclosed if the Motion were granted. SEC and the CEA subsequently determined that the CEA Report and data models did not address the issues SEC was pursuing. As a result, SEC withdrew its request for disclosure. Therefore a decision on the CEA Report and data models is not required. However, SEC’s request for the MEARIE Benchmarking Report remains outstanding.

Oakville Hydro also requested confidential treatment of another document, the PeopleFirst Salary Survey, filed in response to interrogatory 4.2-Staff-29.

Veridian

Veridian requested confidential treatment of the MEARIE Benchmarking Report and the MEARIE Management Salary Survey filed in response to interrogatories 2.1-SEC-2 and 4.2-SEC-11 .

Organization of the Decision

The Board received submissions from SEC and Board staff as well as reply submissions from the affected distributors on whether the confidentiality claims in each proceeding should be accepted.

The Board will first address the MEARIE Benchmarking Report. The Board will then address the outstanding confidentiality claims in the Burlington Hydro, Oakville Hydro and Veridian proceedings.

Request for Confidential Treatment of the MEARIE Benchmarking Report

The individual parties' positions were consistent in all three cases. In both the Burlington Hydro and Veridian cases, MEARIE filed a letter as part of the applicant's reply submissions opposing placing the MEARIE Benchmarking Report on the public record.

In all three proceedings, Board staff and SEC opposed the confidential treatment of the MEARIE Benchmarking Report. The following summarizes the arguments raised by Burlington Hydro, Oakville Hydro and Veridian in favour of confidential treatment and the collective submissions of Board staff and SEC opposing confidential treatment.

Summary of Arguments – Confidential Treatment of the MEARIE Benchmarking Report*Effect on Participation*

In opposing public disclosure of the MEARIE Benchmarking Report, submissions were made by MEARIE in both the Burlington and Veridian proceedings in the form of a letter attached to the Responding submission of the utility. In the event the report was made

public, MEARIE submitted that distributors may not wish to continue participating in benchmarking activities, having been assured that their information would remain confidential. Without the participation of numerous distributors in such surveys, the results would then be of limited value. It was further noted that private benchmarking is useful to distributors for reasons other than regulatory review and the threat of public disclosure should not effectively preclude distributors from participating in benchmarking as a management tool. It was further submitted that removing the “security” of confidentiality risks inadvertently compromising the Board’s benchmarking objectives under the Renewed Regulatory Framework for Electricity Distributors (“RRFE”) ¹ because fewer distributors would be willing to participate in benchmarking activities.

SEC argued that the risk of distributors declining to participate in benchmarking if the MEARIE Benchmarking Report was made public is a speculative risk. In SEC’s submission, distributors should be commended for participating in benchmarking activities, given the Board’s expectations regarding benchmarking as part of its RRFE. SEC stated that it expected that the Board’s expectations would result in more participation in benchmarking activities rather than less.

Economic and Financial Impact to MEARIE

Distributors submitted that continued access to benchmarking information is entirely dependent on third parties being financially incented to collect and analyze such information. They argued that public disclosure of this benchmarking information, despite the fact that it may contain confidentiality agreements, would cause third parties such as MEARIE to refrain from conducting these studies, as their work product would be publicly disseminated without the corresponding and necessary financial recovery. Further, distributors submitted that publicly revealing MEARIE’s approach, methodology and organization of information would give competitors an unfair competitive advantage, in that they would be able to co-opt MEARIE’s proprietary approach in competing to provide similar information and analysis to the market. MEARIE added that, as specialists with respect to the material, they are paid to add value to the preparation of benchmarking surveys and reports. The distributors argued that the reduction in revenue source would be exacerbated through the decreased participation of distributors who provided their data in the survey on the understanding that they would remain confidential.

¹ *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance Based Approach*, October 18, 2012, pages 56,59

SEC noted that no evidence of potential financial loss had been presented. SEC argued that an order from the Board requiring disclosure would send a strong signal to distributors regarding the importance of benchmarking, thus encouraging participation and resulting in revenues for MEARIE. As benchmarking becomes more prevalent, it would be to MEARIE's advantage through their relationship with the industry to maintain oversight of this activity. SEC further submitted that, even if MEARIE suffered some financial loss, the public interest in producing this information, paid for by ratepayers, comparing Board regulated utilities, outweighs any potential harm.

Availability of Data Used in Benchmarking

Both Board Staff and SEC noted that the data collected in the Benchmarking Report appeared to be the same as data that is publicly available through the annual Yearbook of Electricity Distributors or that would normally be publicly disclosed during distributors' cost of service rate applications. Distributors replied that a "great deal" of the information contained in the MEARIE Benchmarking Report is not publicly available.

Data Protected by Federal Copyright Law

MEARIE submitted that it was the owner of copyright in both their reports and models, and that reproduction of these materials without their consent would infringe on their copyright, contrary to the *Copyright Act*.

Board staff submitted that, as a matter of public policy, the economic interests of copyright owners do not apply when the rules of practice and procedure provide for disclosure of copies of relevant documents. The Association of Major Power Consumers of Ontario filed a letter with the Board on April 8, 2014 making a similar submission. Board staff noted that an exception to the *Copyright Act* relates to "fair dealing for the purpose of research, private study, education, parody or satire"². Further, Board staff noted that the Supreme Court has confirmed that the concept of "research" should be interpreted broadly; Board staff submitted that documents in a regulatory proceeding would be included in such an interpretation.

² *Copyright Act*, R.S.C. 1985, Section 29, c. C-42

Further, Board staff submitted that the overriding consideration of whether a document shall become part of a public record is neither the terms of its copyright nor the preferences of the applicant, but the document's content and relevance to the matters at issue in the proceeding. Referencing the Board's Decision in (EB-2011-0099):

... the fact that the party preparing a document wishes to have it kept confidential is not determinative. Nor does the fact that a document may be copyrighted prevent it from entering the public record. The Board has consistently allowed this type of information to form part of the public record in the past.

Significance of Benchmarking to Regulatory Environment

All parties were in agreement that the Board's increased reliance on benchmarking has been reaffirmed as part of its RRFE. Board staff argued that while there may not appear to be any direct references in the evidence to the confidential material, benchmarking information is specifically important in addressing Issue 2.1³ in the Board approved Issues List and that the MEARIE Benchmarking Report provides valuable information regarding distributors' performance relative to their peers.

Agreements with MEARIE

Board staff submitted that, while it recognized the distributors' argument that they have agreed with third parties not to disclose the information, the Board has consistently allowed this type of information to form part of the public record. Board staff noted that the overriding consideration whether a document should become part of the public record is its content and relevance to the proceeding. Given the Board's view of the importance of benchmarking, Board staff argued that distributors should be particularly cognizant of the likelihood that such information may reasonably be required to be produced as part of the regulatory process.

³ Issue 2.1 on the Board's approved issues list is: Does the applicant's performance in the areas of: (1) delivering on Board-approved plans from its most recent cost of service decision; (2) reliability performance; (3) service quality, and (4) efficiency benchmarking, support the application?

SEC also noted that the confidentiality agreements in these cases raise broader concerns, insofar as distributors who enter into these types of agreements face a conflict between their obligations to third parties and their obligation to provide all relevant information to their regulator. SEC further noted that the Board's regulatory philosophy is based on a strong goal of transparency, and that the Practice Direction places the onus on the party requesting confidentiality to demonstrate that confidential treatment is warranted. SEC urged the Board to send a strong message to distributors that entering into such agreements is not appropriate.

Board Findings on Confidentiality of the MEARIE Benchmarking Report

The request for confidentiality of the MEARIE Benchmarking Report is denied.

As set out in the Board's *Practice Direction on Confidential Filings*, it is the Board's general policy 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. The Practice Direction seeks to balance these objectives with the need to protect information that has been properly designated as confidential. In short, placing materials on the public record is the rule and confidentiality is the exception. The onus is on the person requesting confidentiality to demonstrate why confidentiality is appropriate.

The Board recognizes that the distributors have non-disclosure agreements with MEARIE. However, as noted by this Board in previous decisions, applicants must be cognizant of the fact that it is up to the Board to determine confidentiality and that when regulated entities enter into confidentiality agreements with third parties that extend to the provision of information and documents, the utility knows or ought to know that they may reasonably be required to produce the documents as part of the regulatory process⁴.

The Board is not persuaded that disclosure of the MEARIE Benchmarking Report will result in reduced distributor participation in such studies. As clearly articulated in the Board's RRFE report, the Board is increasing its reliance on the use of benchmarking in

⁴ EB-2011-0123, EB-2011-0140, EB-2011-0099

setting distributors rates. Participation in benchmarking studies is driven by the objective of management to better run their business. The Board finds that publication of the benchmarking studies will not have a dampening effect on the value that benchmarking information provides to utilities.

The Board finds that MEARIE has not substantiated the claim that financial or economic loss would occur as a result of making the MEARIE Benchmarking Report public. Based on the submissions provided, the Board is not convinced that public disclosure of the report could reasonably be expected to prejudice the economic interest of, significantly prejudice the competitive position of, cause undue financial loss to, or be injurious to the financial interest of MEARIE.

Further, the Board does not agree that there is anything in the MEARIE Benchmarking Report that reveals any unique and proprietary approach, methodology or organization of information that, as suggested by the distributors, would give MEARIE's potential competitors an advantage.

The Board agrees with Board Staff and SEC's submissions that most if not all the data is already publicly available or would be reasonably disclosed during distributors' cost of service rate applications. Simply stating that a "great deal" of the information contained in the MEARIE Benchmarking Report is not publicly available, does not discharge the distributors' onus that confidential treatment is warranted.

Burlington Hydro – additional documents.

Burlington Hydro requested confidential treatment of portions of its response to interrogatory 4.1-SEC-9 which contained a summary table ("Summary Table") from a compensation study commissioned by Burlington Hydro ("Hay Study"). Burlington Hydro submitted that it is contractually bound not to publicly disclose Hay Group's proprietary or commercially sensitive information. While Burlington Hydro obtained Hay Group's authorization to file the Summary Table on a confidential basis, the company submitted that the Hay Group would not permit Burlington Hydro to file any other information either publicly or confidentially. The Summary Table compares average salary information for Burlington Hydro's executive, manager and professional/administration groups to aggregated average data compiled from both an industrial market sample and a selected utilities sample. No individual salary information is provided.

Board staff submitted that Burlington Hydro had specifically relied on the Hay Study to support its proposed compensation levels for management and non-union staff. As such, the Summary Table is clearly relevant to the proceeding and should be placed on the public record nor should it be retracted. Board staff submitted that while Burlington Hydro may have agreed to not disclose the information, the Board has consistently allowed this type of information to form part of the public record in the past.

SEC took the position that the Summary Table contained important benchmarking information that will allow the public to see how Burlington Hydro's compensation compares to other utilities and other companies. SEC further argued that the information contained in the document is not proprietary models, information about data collecting techniques or individual data points. Rather it contains high level information, aggregated by position category and by comparator category. Finally, SEC argued that the document itself seemed to have been created as a way for the Board to see the information without needing to review the underlying report which was produced in November 2011.

Burlington Hydro argued that the Hay Study should remain confidential for the same reasons it set out for why the MEARIE Benchmarking Report should remain confidential.

Burlington Hydro argued that it had specifically asserted that it was placing the Summary Table on the record voluntarily on the condition that it remain confidential, and that it would seek to withdraw it if confidentiality was not afforded.

The Board finds that the Summary Table of the Hay Study is relevant to the proceeding, and that it will be placed on the public record. The Summary Table demonstrates the reasonableness of Burlington Hydro's compensation costs and is relevant to the application and the setting of just and reasonable rates. The Board has relied on precisely this type of salary benchmarking data to set rates in other proceedings. The Summary Table provides a high level aggregation of information and does not identify other participants' details. This information is of interest, not only to the Board and intervenors, but to the ratepayers at large who funded these studies. The Board finds that the probative value of this information outweighs any potential prejudice it might cause Burlington Hydro or any other party.

The Board is not persuaded that disclosure of the Summary Table will result in reduced distributor participation in such studies. As clearly articulated in the Board's RRFE report, the Board is increasing its reliance on the use of benchmarking in setting distributors rates. Further, there is nothing in the Summary Table that the Board finds reveals any unique and proprietary approach, methodology or organization of information that, as suggested by Burlington, would give the Hay Group's potential competitors an advantage.

The Board, therefore, orders the placement of the Hay Study Summary Table on the public record and will not allow Burlington Hydro to withdraw it.

Burlington Hydro also requested confidential treatment of the wage increase it forecasts for its unionized workforce after the expiry of the current collective agreement, filed in response to interrogatory 4.2-SEC-17. Burlington Hydro sought confidential treatment of this information to preserve its bargaining position with respect to collective agreement negotiations that will commence in the second quarter of 2014.

No one disputed that this information be held in confidence. Board staff submitted that, while the targeted wage increase for unionized employees is clearly relevant to an examination of Burlington Hydro's forecast costs, the potential increased cost to ratepayers which could result from disclosure of this target in negotiations outweighs its probative value.

The Board finds that this information will remain confidential. While the Board's strong preference is to make information available on the public record, in this case, the Board concludes that the specific harm resulting from public disclosure could outweigh the benefit.

Oakville Hydro – additional document

With respect to the PeopleFirst Survey filed in response to 4.2-Staff-29, the document contains comparisons and recommendations for salary ranges and adjustments, incentive payments and benefits for Oakville Hydro and its affiliate. The Board did not seek submissions on whether the information should remain confidential as it contains information pertaining to individual compensation levels and is the type of information that the Board often deems to be confidential.

Veridian – additional document

With respect to the MEARIE Management Salary Survey, filed in response to interrogatory 4.2-SEC-11, the document contains aggregate comparative data for salary adjustments, compensation rates, incentive payments and benefits. An accompanying Survey Report Addendum compiles this data by region, revenues, customer base and number of employees. Individual LDC data is not included in the reports.

Veridian sought confidential treatment and SEC opposed. Both parties argued their positions on the same grounds as those presented for the MEARIE Benchmarking Report. The Board finds that confidential treatment of this information is not warranted.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. The MEARIE Benchmarking Report be placed on the public record in each of EB-2013-0115, EB-2013-0159 and EB-2013-0174 on or before **June 30, 2014**;
2. The Hay Study Summary Table be placed on the public record in EB-2013-0115 on or before **June 30, 2014**;
3. Burlington Hydro's response to interrogatory 4.2-SEC-17 in EB-2013-0115 shall be treated as confidential;
4. Oakville Hydro's response to interrogatory 4.2-Staff-29 in EB-2013-0159 shall be treated as confidential;
5. The MEARIE Management Salary Survey be placed on the public record in EB-2013-0174 on or before **June 30, 2014**.

All filings to the Board must quote the file number, EB-2013-0115/EB-2013-0159/EB-2013-0174, be made through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/service/>, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at

<http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

ADDRESS

Ontario Energy Board
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Fax: 416-440-7656

DATED at Toronto, **May 29, 2014**

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

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Indexed as:

RJR-MacDonald Inc. v. Canada (Attorney General)

RJR-MacDonald Inc., Applicant;

v.

**The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada**

And between

Imperial Tobacco Ltd., Applicant;

v.

**The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada**

[1994] 1 S.C.R. 311

[1994] S.C.J. No. 17

File Nos.: 23460, 23490.

Supreme Court of Canada

1993: October 4 / 1994: March 3.

**Present: Lamer C.J. and La Forest, L'Heureux-Dubé,
Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.**

APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice -- Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed -- Leave to appeal granted shortly after applications to stay heard -- Whether the applications for relief from compliance with regulations should be granted -- Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18. -- Tobacco Products Control Regulations, amendment, SOR/93-389 -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) -- Rules of the Supreme Court of Canada, SOR/83-74, s.

27 -- *Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.*

The Tobacco Products Control Act regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was ultra vires Parliament and that it violates the right to freedom of expression in s. 2(b) of the Canadian Charter of Rights and Freedoms. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The Tobacco Products Control Regulations, amendment, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the Tobacco Products Control Regulations, amendment should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court of Canada Act and r. 27 of the Rules of the Supreme Court of Canada.

The words "other relief" in r. 27 of the Supreme Court Rules are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the Supreme Court Act was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* which established that the distinction between "suspension" and

"exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the Canadian Charter of Rights and Freedoms. A Charter remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part American Cyanamid test (adopted in Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*) should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving Charter rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory

relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

Cases Cited

Applied: *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110; considered: *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396; referred to: *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135; *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127; *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269; *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619; *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574; *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294; *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392; *R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228; *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577; *Hubbard v. Pitt*, [1976] Q.B. 142; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280; *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59; *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791; *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304; *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158; *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix; *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373; *R. v. Oakes*, [1986] 1 S.C.R. 103.

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Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1).
 Code of Civil Procedure of Québec, art. 523.
 Constitution Act, 1867, s. 91.
 Fisheries Act, R.S.C. 1970 c. F-14.
 Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).
 Rules of the Supreme Court of Canada, SOR/83-74, s. 27.
 Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(a).
 Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18.
 Tobacco Products Control Regulations, amendment, SOR/93-389.

Authors Cited

Canada. Minister of National Health and Welfare. Regulatory Impact Analysis Statement. (Statement following Tobacco Products Control Regulations, amendment, SOR/93-389.) In Canada Gazette, Part II, Vol. 127, No. 16, p. 3284.

Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy". In Jeffrey Berryman, ed. Remedies: Issues and Perspectives. Scarborough, Ont.: Carswell, 1991, 271.

Sharpe, Robert J. Injunctions and Specific Performance, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf).

APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR-MacDonald Inc.

Simon V. Potter, for the applicant Imperial Tobacco Inc.

Claude Joyal and Yves Leboeuf, for the respondent.

W. Ian C. Binnie, Q.C., and Colin Baxter, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Solicitors for the applicant RJR-MacDonald Inc.: Mackenzie, Gervais, Montreal.

Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.

Solicitors for the respondent: Côté & Ouellet, Montreal.

Solicitors for the interveners on the application for interlocutory relief Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

The judgment of the Court on the applications for interlocutory relief was delivered by

SOPINKA AND CORY JJ.:--

I. Factual Background

1 These applications for relief from compliance with certain Tobacco Products Control Regulations, amendment, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the Tobacco Products Control Act, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors

who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(f) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(b) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed \$100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the Tobacco Products Control Act on the grounds that it is ultra vires the Parliament of Canada and invalid as it violates s. 2(b) of the Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was ultra vires the Parliament of Canada and that it contravened the Charter. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the Tobacco Products Control Act. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not ultra vires the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(b) of the Charter but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the Charter. Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the Charter. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: Tobacco Products Control Regulations, amendment, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about \$30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the Supreme Court Act, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

- (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
- (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
- (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

14 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

15 Chabot J. concluded that the dominant characteristic of the Tobacco Products Control Act was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the Tobacco Products Control Act as a law regulating advertising of a particular product, a matter within provincial legislative competence.

16 Chabot J. found that, with respect to s. 2(b) of the Charter, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that Charter guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

17 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that advertising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

18 In deciding whether or not to exercise its broad power under art. 523 of the Code of Civil Procedure of Québec to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.

We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.

...

Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

19 LeBel J.A. characterized the Tobacco Products Control Act as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

20 LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

21 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(b) of the Charter but found that it was justified under s. 1 of the Charter. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the Oakes test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

22 Brossard J.A. agreed with LeBel J.A. that the Tobacco Products Control Act should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

23 However, he did not think that the violation of s. 2(b) of the Charter could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

24 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

25 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the Constitution Act, 1867 and justified under s. 1 of the Charter. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

26 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

27 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of

the Supreme Court Act and r. 27 of the Rules of the Supreme Court of Canada.

Supreme Court Act

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

28 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see Rules of the Supreme Court of Canada, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(a) of that section provides that the rules may be enacted:

97. ... (a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General* (Can.), [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

29 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should,

therefore, be interpreted to confer the same broad powers that are included in r. 27.

30 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

31 This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

32 While the above passage appears to answer the submission of the respondents on this motion that Labatt was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in Labatt reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

33 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*,

[1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

34 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the Charter. A Charter remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

35 The applicants rely upon the following grounds:

1. The challenged Tobacco Products Control Regulations, amendment were promulgated pursuant to ss. 9 and 17 of the Tobacco Products Control Act, S.C. 1988, c. 20.
2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the Canadian Charter of Rights and Freedoms.
3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.
4. The tests for granting of a stay are met in this case:
 - (i) There is a serious constitutional issue to be determined.
 - (ii) Compliance with the new regulations will cause irreparable harm.
 - (iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

36 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, *supra*. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

37 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

38 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

39 On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For

the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.

40 Are there, then, special considerations or tests which must be applied by the courts when Charter violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

41 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores*, at p. 127, Beetz J. expressed the position in these words:

A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

42 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

43 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

44 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong prima facie case" on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

45 In *Metropolitan Stores*, Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in Charter cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

46 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following dicta of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269, at p. 272:

The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of

the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd.* (No. 2) (1972), 2 O.R. 619 (C.A.), at p. 620:

Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

47 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in Charter cases.

48 The Charter protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged Charter violation to review the matter carefully. This is so even when other courts have concluded that no Charter breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the American Cyanamid 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

49 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, supra, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

51 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

52 In *Trieiger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

53 In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

54 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

55 The second exception to the American Cyanamid prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores*, at p. 133:

There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience

are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

56 The suggestion has been made in the private law context that a third exception to the American Cyanamid "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong prima facie case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in Charter cases. Even if the facts upon which the Charter breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

57 Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

58 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

59 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

60 The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases.

61 This Court has on several occasions accepted the principle that damages may be awarded for a breach of Charter rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the Charter. In light of the uncertain state of the law regarding the award of damages for a Charter breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following

a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

62 The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

63 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

64 The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

65 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

66 It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its

favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

67 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that these women would suffer irreparable harm, such evidence would not indicate any irreparable harm to these applicants, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

68 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

69 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

- (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

70 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co. Re.*, (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The public interest is equally well served, in the same sense, by any appeal. . . .

71 In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

72 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

73 Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.

74 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

75 In the course of discussing the balance of convenience in *American Cyanamid*, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the Charter is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

76 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a Charter case.

77 As indicated in *Metropolitan Stores*, the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

78 At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

79 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

80 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

81 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

82 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the Charter. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

83 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

84 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

85 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

86 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies.

Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of \$50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondly, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

87 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the Tobacco Products Control Act. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores*. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation".

88 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores*:

Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: ... the protection of public health It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

89 The regulations under attack were adopted pursuant to s. 3 of the Tobacco Products Control Act which states:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

- (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
- (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
- (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

90 The Regulatory Impact Analysis Statement, in the *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

91 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

92 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

93 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

94 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

31



EB-2012-0414

IN THE MATTER OF the *Ontario Energy Board Act 1998*,
S.O.1998, c.15, (Schedule B) (the “OEB Act”);

AND IN THE MATTER OF an Application by the
Electricity Distributors Association (“EDA”) for a stay of the
Decision and Order of the Ontario Energy Board (“the
Board”) in proceeding EB-2011-0120, pending the EDA’s
appeal of the Decision and Order to the Superior Court of
Justice (Divisional Court)

BEFORE: Christine Long
Presiding Member

Ellen Fry
Member

DECISION

March 7, 2013

Introduction

This is a decision of the Board concerning an application by the EDA for a stay of the Board’s decision (the “CANDAS Decision”) in proceeding EB-2011-0120 (the “CANDAS Proceeding”), pending an appeal of the CANDAS Decision to the Divisional Court (the “Divisional Court Appeal”).

In the CANDAS Proceeding the Canadian Distributed Antenna Systems Coalition (“CANDAS”) applied, among other things, for a determination that the Board’s decision in RP-2003-0249 (the “CCTA Decision”) applies to the attachment of wireless equipment. In the CANDAS Decision the Board did make this determination, confirming

that the CCTA Decision gives access for wireless equipment to the power poles of Ontario electricity distributors for all Canadian carriers as defined in the *Telecommunications Act*, S.C. 1993, c. 38 and all cable companies operating in Ontario, at the rate of \$22.35 per pole per year.

The EDA, which was an intervenor in the CANDAS Proceeding, has appealed the CANDAS Decision to the Divisional Court by Notice of Appeal dated October 12, 2012. This proceeding of the Board (the “Stay Application”) is an application by the EDA for a stay of the CANDAS Decision pending the outcome of the Divisional Court Appeal.

In this proceeding the Board has granted intervenor status to the Vulnerable Energy Consumers Coalition (“VECC”). The Board received written submissions from the EDA, VECC and Board staff. VECC’s written submissions stated that VECC concurred with the written submissions of Board staff. The Board held an oral hearing on January 23, 2013, at which the EDA, VECC and Board staff made oral submissions. CANDAS filed a letter stating that it endorsed the submissions of Board staff and did not participate in the oral hearing.

While EDA’s counsel indicated that the EDA represents all electricity distributors in Ontario, the Board notes that Toronto Hydro-Electric Systems Limited (“THESL”) has stated that it is not challenging the CANDAS Decision. Accordingly, the Board considers that for purposes of the Stay Application, THESL is not represented by EDA counsel. The Board notes that although the CANDAS Decision and CCTA Decision apply to all Ontario electricity distributors, the main impetus for the CANDAS Proceeding was a dispute between THESL and CANDAS.

Jurisdiction

The EDA’s application is made pursuant to subsection 33(6) of the OEB Act, which provides as follows:

(6) ... every order made by the Board takes effect at the time prescribed in the order, and its operation is not stayed by an appeal, unless the Board orders otherwise...

All parties agree that the Board has jurisdiction under subsection 33(6) to deal with this application, and the Board concurs.

Test for Granting a Stay

All parties agree that the test the Board should apply to determine whether the Stay Application should be granted is the test set out by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)*¹. As set out in *RJR MacDonald*, all three stages of a three-stage test must be satisfied in order to grant the Stay Application. In order for the Stay Application to succeed, the Board must determine:

- 1) That there is a serious question to be tried;
- 2) That the EDA would suffer irreparable harm if the Stay Application were refused;
and
- 3) That the “balance of inconvenience” favours the EDA.

1) Serious Question to be Tried

The Board is required to make a preliminary assessment of the merits of the Divisional Court Appeal to determine if there is a serious question to be tried. The threshold for this assessment is a low one. The test will be satisfied if the grounds for the appeal are not vexatious or frivolous.

The EDA bases the Divisional Court Appeal on two grounds. Its first ground is that, in its view, the Board declined to consider whether to refrain from exercising its authority, pursuant to subsection 29(1) of the OEB Act. Its second ground is that, in its view, the Board failed to consider the objectives set out in subsection 1(1) of the OEB Act in reaching its decision.

¹ [1994] 1 S.C.R. 311

Subsection 29(1)

Subsection 29(1) of the OEB Act provides as follows:

On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.

During the CANDAS Proceeding, THESL brought a motion asking the Board, pursuant to subsection 29(1) of the Act, to refrain from exercising its powers, on the basis that sufficient competition existed or would exist in the market for siting wireless attachments sufficient to satisfy the public interest. The Board denied the motion and determined that this issue (“Forbearance”) would not be heard as part of the CANDAS Proceeding because it dealt with issues outside the scope of the application brought by CANDAS.

Board staff submits that because the Board left open the possibility that a Forbearance application could be made at a later date, the Board has not precluded a hearing on this matter. Board staff takes the position that by appealing the CANDAS Decision to the Divisional Court, instead of bringing an application under subsection 29(1) to the Board, the EDA has not taken the steps available to have the Board address Forbearance. Therefore, Board staff submits this is not a serious question to be tried.

The EDA disagrees with Board staff’s submission. The EDA takes the position that the wording of subsection 29(1) required the Board to deal with the issue of Forbearance in the proceeding in which it was raised. In its view, the Board does not have the statutory authority to defer dealing with Forbearance to a later proceeding.

The Board’s preliminary assessment of the merits of this ground of appeal, based on the submissions in this proceeding, is that this ground of appeal is unlikely to succeed.

The application for the CANDAS proceeding was filed by CANDAS as applicant on April 25, 2011 and the CANDAS Decision was rendered on September 13, 2012. During that time period, there were many procedural steps. Ultimately, the Board decided to proceed by dealing with the first claim for relief in the application by CANDAS: “Does the CCTA Decision apply to the attachment of wireless equipment ...to distribution poles”?

The Board decided not to hear the motion by THESL concerning Forbearance and articulated its reason for this decision as follows:

Having concluded that the CCTA Order does apply to wireless attachments, the Board concludes that these issues relating to forbearance will not be heard within the CANDAS application. CANDAS has sought particular relief and the Board has addressed these issues. THESL’s Motion raises other, different issues, which while related to the CANDAS application, have broader implications and considerations. Therefore the Board denies the motion on the basis that it is out of scope in the context of this proceeding. The Board will therefore not hear the motion on its merits at this time.²

The Board is master of its own procedure and is at liberty to organize its proceedings as it considers appropriate. It is for the Board, not the parties, to determine how the Board’s proceedings are arranged, within the framework set by the OEB Act.

In making its decision in the CANDAS Proceeding, the Board did not refuse to exercise its jurisdiction under s 29(1) to consider Forbearance. It simply decided that it would not consider Forbearance as part of the CANDAS Proceeding, because this was outside the scope of the application before it. The Board left the door open to considering Forbearance in a future proceeding initiated concerning that issue.

² CANDAS Decision, p.20

The EDA submits that the wording of subsection 29(1) compels the Board to exercise its jurisdiction under subsection 29(1) in any proceeding where a party so requests. The Board's preliminary assessment is that this argument is not supported by the wording of subsection 29(1). However, taking into account the fact that the wording of subsection 29(1) does not address this issue directly, and that the threshold to satisfy this stage of the *RJR MacDonald* test is a low one, the Board concludes that EDA has established that there is a serious question to be tried.

Subsection 1(1)

Given that the Board has concluded that there is a serious question to be tried concerning subsection 29(1) of the OEB Act, it does not find it necessary to consider the issue argued by the EDA concerning subsection 1(1) of the OEB Act.

Accordingly, for the reasons outlined above, the Board is of the view that the EDA has established that there is a serious question to be tried in the Divisional Court Appeal and has met the first stage of the *RJR MacDonald* test.

2) Irreparable Harm

The Board is required to determine whether the EDA would suffer irreparable harm if the Stay Application were refused. The question is whether refusing the Stay Application would so adversely affect the EDA's interests that the harm could not be remedied if the Divisional Court Appeal decision does not accord with the Stay Application decision. "Irreparable" refers to the nature of the harm, rather than its magnitude, being harm that either cannot be quantified in monetary terms or that cannot be cured, usually because one party cannot collect damages from the other.

The EDA submits that its members would suffer irreparable harm if the Stay Application is not granted and the Divisional Court Appeal succeeds. This is because in its view, unlike the current situation, EDA members would be required to enter into agreements to attach wireless equipment to their poles. However, in its view if the Divisional Court Appeal succeeds, at that point EDA members could not

- (a) Set aside the attachment agreements;
- (b) Remove the wireless attachments; or
- (c) Recover engineering and administrative costs incurred in processing the applications to attach.

The EDA submits that EDA members would not be able to provide for these contingencies contractually, because in its view the model agreement that is being used for attachment has been prescribed by Board decision. However, the EDA did submit that the Board could potentially address this issue by ordering that contracts contain provisions to deal with the contingency of a successful Divisional Court Appeal.

Board staff submit that there would be no irreparable harm to EDA members because in their view

- (a) The CANDAS Decision merely confirms the *status quo*, namely that the CCTA Decision applies to the attachment of wireless equipment;
- (b) The Board indicated in the CANDAS Decision that if EDA members incur costs for the attachment of wireless equipment that exceed the annual rate per pole established by the Board, they can apply to the Board for different rates; and
- (c) EDA members can make contractual provision for the possibility that the Divisional Court Appeal will succeed, because the Board has not prescribed the form of the model attachment agreement that EDA members are using.

In the view of the Board, the CANDAS decision merely confirms the correct interpretation of the CCTA Decision, which is clear on its face. Accordingly, viewing the CANDAS Decision from a strictly legal perspective, the Board agrees with Board staff that it merely confirms the *status quo*. However, it is apparent that nonetheless some members of the EDA have refrained from accepting wireless attachments. Therefore, viewing the situation in operational terms rather than purely legal terms, the Board agrees with the EDA that the CANDAS Decision does change the *status quo*. Accordingly, the Board does not accept the argument of Board staff that there is not irreparable harm on the basis that there has been no change to the *status quo*.

However, it is clear from the CANDAS Decision that, as submitted by Board staff, the model agreement for wireless attachments being used by EDA members has not been prescribed by the Board and hence can be varied contractually by the parties entering into attachment agreements.

In the CANDAS Decision, the Board stated that;

The Board accepted the agreement reached by the parties during settlement discussions that they should negotiate terms and conditions of access after the Board had determined whether access would be granted and, if so, the rate. The parties subsequently negotiated a model joint use [attachment] agreement. This agreement was filed with the Board but was never formally approved by the Board....

....a model joint use [attachment] agreement was negotiated and filed with the Board on August 3, 2005, but was not approved by the Board....

....The Board in the CCTA Decision left it to the parties to negotiate the terms and conditions of access (but not the charge) and indicated that if an agreement could not be reached then the Board would take further steps. As indicated, the Board did not approve the model joint use [attachment] agreement³

Therefore it is clear that EDA members could negotiate contractual terms to address the contingency of a successful appeal. These terms could include removing wireless attachments and/or rescinding attachment agreements, on appropriate terms, if the Divisional Court Appeal succeeds. Financial terms could be included to the extent that they are directed to making the distributors financially whole if a contract is rescinded as a result of a successful appeal. It would not be permissible to include financial terms that varied the pole access rate of \$22.35 per pole per year that has been established by the Board. However, as submitted by Board staff, the Board has indicated that

³ EB-2011-0120, pp5, 14, 15

individual electricity distributors could apply to have this rate varied if they consider it to be inappropriate.

Accordingly, the EDA has not established that EDA members would suffer irreparable harm if the Stay Application is not granted and has not met the second stage of the *RJR MacDonald* test.

3) Balance of Inconvenience

The Board is required to determine whether the “balance of inconvenience” favours the EDA. In other words, it must determine whether the EDA or CANDAS would suffer greater harm from the granting or refusal of the Stay Application pending the decision of the Divisional Court Appeal on its merits.

The EDA submits that generally the *status quo* should be maintained if it can be done without prejudicing the interest of the successful party. The Board does not agree. The EDA bases these submissions on *International Corona Resources Ltd. v. Lac Minerals Ltd.*, a 1986 Ontario Court of Appeal case.⁴ However, in *RJR MacDonald*, which was decided subsequent to the *International Corona Resources* case, the Supreme Court expressed doubt concerning the usefulness of this approach:

In the course of discussing the balance of convenience in *American Cyanamid*, Lord Diplock stated at p. 408 that when everything else is equal, “It is a counsel of prudence to ...preserve the status quo”. This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights....⁵

The EDA submits that electricity distributors
...stand to be more inconvenienced by the operation of the [CANDAS] Decision
than telecommunications carriers would be by a stay. Allowing the wireless

⁴ *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1986] O.J. No.2128

⁵ *RJR MacDonald*, p.23

telecommunications carriers to secure attachment rights and attach represents a significant change from the current *status quo*. The attachment of wireless telecommunications equipment to utility poles would also be very costly, time-consuming, and irreversible even should the appeal succeed.

... In contrast, there is no basis to believe that any delay in attaching equipment pending the disposition of the appeal would cause any harm to telecommunications carriers.

... Moreover, any delay suffered by a would-be applicant for access is likely to be minimal. The Divisional Court Office has advised that a hearing date for the appeal is likely to be set in February or March 2013....It is unlikely that a delay of a few months will seriously prejudice the interests of any would-be applicant for access to utility poles, and there is no evidence that any party will suffer such prejudice if attachments are not allowed pending the disposition of the appeal.⁶

Board staff submits that if the Divisional Court Appeal is successful, the delay suffered by CANDAS members seeking to make wireless attachments would be greater than the few months argued by EDA counsel. Board staff submits that this is because a Board proceeding under section 29 is likely to be complex and consequently require significant time to reach decision.

If the Board grants the Stay Application, some or all EDA members will consider that they do not need to permit wireless attachments by CANDAS members in the period prior to the Divisional Court Appeal decision (the "Interim Period") and to incur the associated engineering, administrative and reconfiguration costs. EDA members that hold that view will also not consider themselves confined to charging the Board-approved fees for any wireless attachments they do permit. On the other hand, CANDAS members may not be able to obtain agreement from those EDA members to make wireless attachments, and may be required to pay fees in excess of the Board-

⁶ EDA Submissions, pp 7-8

approved fees for any that are permitted. Both the EDA and CANDAS will be faced with the possibility that the outcome of the Divisional Court Appeal will change the situation that exists in the Interim Period.

Little evidence was provided concerning the likely financial impact on EDA members if they permitted wireless attachments at Board-approved rates during the Interim Period.

The evidence does not indicate whether a significant number of CANDAS members are likely to seek new wireless attachments in the Interim Period or whether a significant number of EDA members are likely to receive wireless attachment requests in the Interim Period.

There was also little evidence concerning the engineering, administrative and reconfiguration costs associated with new wireless attachments. The Board requested that EDA counsel provide references to any evidence in the CANDAS Proceeding concerning engineering, administrative and reconfiguration costs. However, EDA counsel was able to refer the Board to evidence concerning THESL only. The evidence in the CANDAS Proceeding does not indicate to what extent the operations of other EDA members (which number over 70 and vary considerably in size) are comparable to the operations of THESL with regard to the impact of wireless attachment requests. In addition, the relevance of this evidence is potentially limited by the fact that THESL has indicated it does not wish to participate in the Divisional Court Appeal.

The EDA also did not submit evidence concerning the difference between the rates approved by the Board and likely market rates for wireless attachments.

On the other hand, little or no evidence was available concerning the likely financial impact on CANDAS members if wireless attachments could not be made at Board-approved rates during the Interim Period. VECC and Board staff did not submit evidence in this regard or direct the Board's attention to any such evidence in the CANDAS Proceeding.

The Board agrees with Board staff that in the event of a successful appeal the length of the Interim Period is likely to be more than a few months. However, the evidence does not indicate whether a longer Interim Period would impact more on the inconvenience to CANDAS members or to EDA members.

Considering the above factors and the fact that the burden of proof rests with the EDA as the applicant, the Board finds that the EDA has not established that EDA members would suffer greater harm during the Interim Period from refusal of the Stay Application than CANDAS members would suffer from granting it.

Accordingly, the EDA has not established that the “balance of inconvenience” favours the EDA and has not met the third stage of the *RJR MacDonald* test.

Decision by the Board

The Board concludes that EDA has satisfied only one stage of the three-stage test required by *RJR MacDonald*. Therefore, the Board does not grant the application by the EDA for a stay of the CANDAS Decision pending the outcome of the Divisional Court Appeal.

Costs

During the oral submission phase of the proceeding, VECC requested costs. VECC was granted intervenor status in the Stay Application because it was an intervenor in the CANDAS Proceeding. Intervenors in the CANDAS Proceeding were granted costs and therefore the Board grants VECC's costs in the Stay Application. The Board expects that costs claimed by VECC will be reflective of the fact that VECC's written submissions were brief and that the oral hearing was less than a day. Costs will be borne by the EDA, as the applicant.

VECC shall submit its claim for costs by March 14, 2013. The EDA shall file any submissions with respect to costs by March 25, 2013. VECC shall file any reply submissions by April 1, 2013.

DATED at Toronto, March 7, 2013

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

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B

Statutory Powers Procedure Act, RSO 1990, c S.22

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Statutory Powers Procedure Act

R.S.O. 1990, CHAPTER S.22

Consolidation Period: From June 1, 2011 to the [e-Laws currency date](#).

Last amendment: 2009, c. 33, Sched. 6, s. 87.

Interpretation

1. (1) In this Act,

“electronic hearing” means a hearing held by conference telephone or some other form of electronic technology allowing persons to hear one another; (“audience électronique”)

“hearing” means a hearing in any proceeding; (“audience”)

“licence” includes any permit, certificate, approval, registration or similar form of permission required by law; (“autorisation”)

“municipality” has the same meaning as in the [Municipal Affairs Act](#); (“municipalité”)

“oral hearing” means a hearing at which the parties or their representatives attend before the tribunal in person; (“audience orale”)

“proceeding” means a proceeding to which this Act applies; (“instance”)

“representative” means, in respect of a proceeding to which this Act applies, a person authorized under the [Law Society Act](#) to represent a person in that proceeding; (“représentant”)

“statutory power of decision” means a power or right, conferred by or under a statute, to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person is legally entitled thereto or not; (“compétence légale de décision”)

“tribunal” means one or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a statute; (“tribunal”)

“written hearing” means a hearing held by means of the exchange of documents, whether in written form or by electronic means. (“audience écrite”) [R.S.O. 1990, c. S.22, s. 1 \(1\)](#); 1994, c. 27, s. 56 (1-3); 2002, c. 17, Sched. F, Table; 2006, c. 21, Sched. C, s. 134 (1, 2).

Meaning of “person” extended

(2) A municipality, an unincorporated association of employers, a trade union or council of trade unions who may be a party to a proceeding in the exercise of a statutory power of decision under the statute conferring the power shall be deemed to be a person for the purpose of any provision of this Act or of any rule made under this Act that applies to

than an oral hearing is likely to cause the party significant prejudice.

Same

(3) Subsection (2) does not apply if the only purpose of the hearing is to deal with procedural matters.

Participants to be able to hear one another

(4) In an electronic hearing, all the parties and the members of the tribunal participating in the hearing must be able to hear one another and any witnesses throughout the hearing. 1994, c. 27, s. 56 (10).

Different kinds of hearings in one proceeding

5.2.1 A tribunal may, in a proceeding, hold any combination of written, electronic and oral hearings. 1997, c. 23, s. 13 (8).

Pre-hearing conferences

5.3(1) If the tribunal's rules made under [section 25.1](#) deal with pre-hearing conferences, the tribunal may direct the parties to participate in a pre-hearing conference to consider,

- (a) the settlement of any or all of the issues;
- (b) the simplification of the issues;
- (c) facts or evidence that may be agreed upon;
- (d) the dates by which any steps in the proceeding are to be taken or begun;
- (e) the estimated duration of the hearing; and
- (f) any other matter that may assist in the just and most expeditious disposition of the proceeding. 1994, c. 27, s. 56 (11); 1997, c. 23, s. 13 (9).

Other Acts and regulations

(1.1) The tribunal's power to direct the parties to participate in a pre-hearing conference is subject to any other Act or regulation that applies to the proceeding. 1997, c. 23, s. 13 (10).

Who presides

(2) The chair of the tribunal may designate a member of the tribunal or any other person to preside at the pre-hearing conference.

Orders

(3) A member who presides at a pre-hearing conference may make such orders as he or she considers necessary or advisable with respect to the conduct of the proceeding, including adding parties.

Disqualification

(4) A member who presides at a pre-hearing conference at which the parties attempt to settle issues shall not preside at the hearing of the proceeding unless the parties consent. 1994, c. 27, s. 56 (11).

Application of s. 5.2

(5) [Section 5.2](#) applies to a pre-hearing conference, with necessary modifications. 1997, c. 23, s. 13 (10).

Disclosure

5.4(1) If the tribunal's rules made under [section 25.1](#) deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

- (a) the exchange of documents;
- (b) the oral or written examination of a party;
- (c) the exchange of witness statements and reports of expert witnesses;
- (d) the provision of particulars;
- (e) any other form of disclosure. 1994, c. 27, s. 56 (12); 1997, c. 23, s. 13 (11).

Other Acts and regulations

(1.1) The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding. 1997, c. 23, s. 13 (12).

Exception, privileged information

(2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information. 1994, c. 27, s. 56 (12).

Notice of hearing

6.(1) The parties to a proceeding shall be given reasonable notice of the hearing by the tribunal. R.S.O. 1990, c. S.22, s. 6 (1).

Statutory authority

(2) A notice of a hearing shall include a reference to the statutory authority under which the hearing will be held.

Oral hearing

(3) A notice of an oral hearing shall include,

- (a) a statement of the time, place and purpose of the hearing; and
- (b) a statement that if the party notified does not attend at the hearing, the tribunal may proceed in the party's absence and the party will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13).

Written hearing

(4) A notice of a written hearing shall include,

- (a) a statement of the date and purpose of the hearing, and details about the manner in which the hearing will be held;
- (b) a statement that the hearing shall not be held as a written hearing if the party satisfies the tribunal that there is good reason for not holding a written hearing (in which case the tribunal is required to hold it as an electronic or oral hearing) and an indication of the procedure to be followed for that purpose;
- (c) a statement that if the party notified neither acts under clause (b) nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13); 1997, c. 23, s. 13 (13); 1999, c. 12, Sched. B, s. 16 (5).

Electronic hearing

(5) A notice of an electronic hearing shall include,

- (a) a statement of the time and purpose of the hearing, and details about the manner in which the hearing will be held;
- (b) a statement that the only purpose of the hearing is to deal with procedural matters, if that is the case;
- (c) if clause (b) does not apply, a statement that the party notified may, by satisfying the tribunal that holding the hearing as an electronic hearing is likely to cause the party significant prejudice, require the tribunal to hold the hearing as an oral hearing, and an indication of the procedure to be followed for that purpose; and
- (d) a statement that if the party notified neither acts under clause (c), if applicable, nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13).

Effect of non-attendance at hearing after due notice

7.(1) Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding. R.S.O. 1990, c. S.22, s. 7; 1994, c. 27, s. 56 (14).

Same, written hearings

(2) Where notice of a written hearing has been given to a party to a proceeding in accordance with this Act and the party neither acts under clause 6 (4) (b) nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party is not entitled to any further notice in the proceeding.

Same, electronic hearings

(3) Where notice of an electronic hearing has been given to a party to a proceeding in accordance with this Act and the party neither acts under clause 6 (5) (c), if applicable, nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party is not entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (15).

Where character, etc., of a party is in issue

8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto. R.S.O.

Right to representation

10. A party to a proceeding may be represented by a representative. 2006, c. 21, Sched. C, s. 134 (3).

Examination of witnesses

10.1 A party to a proceeding may, at an oral or electronic hearing,

- (a) call and examine witnesses and present evidence and submissions; and
- (b) conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding. 1994, c. 27, s. 56 (20).

Rights of witnesses to representation

11. (1) A witness at an oral or electronic hearing is entitled to be advised by a representative as to his or her rights, but such representative may take no other part in the hearing without leave of the tribunal. 2006, c. 21, Sched. C, s. 134 (4).

Idem

(2) Where an oral hearing is closed to the public, the witness's representative is not entitled to be present except when that witness is giving evidence. [R.S.O. 1990, c. S.22, s. 11 \(2\)](#); 1994, c. 27, s. 56 (22); 2006, c. 21, Sched. C, s. 134 (5).

Summonses

12. (1) A tribunal may require any person, including a party, by summons,

- (a) to give evidence on oath or affirmation at an oral or electronic hearing; and
- (b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal,

relevant to the subject-matter of the proceeding and admissible at a hearing. [R.S.O. 1990, c. S.22, s. 12 \(1\)](#); 1994, c. 27, s. 56 (23).

Form and service of summons

(2) A summons issued under subsection (1) shall be in the prescribed form (in English or French) and,

- (a) where the tribunal consists of one person, shall be signed by him or her;
- (b) where the tribunal consists of more than one person, shall be signed by the chair of the tribunal or in such other manner as documents on behalf of the tribunal may be signed under the statute constituting the tribunal. 1994, c. 27, s. 56 (24).

Same

(3) The summons shall be served personally on the person summoned. 1994, c. 27, s. 56 (24).

Fees and allowances

(3.1) The person summoned is entitled to receive the same fees or allowances for attending at or otherwise participating in the hearing as are paid to a person summoned to attend before the Superior Court of Justice. 1994, c. 27, s. 56 (24); 2006, c. 19, Sched. C, s. 1 (1).

Bench warrant

(4) A judge of the Superior Court of Justice may issue a warrant against a person if the judge is satisfied that,

- (a) a summons was served on the person under this section;
- (b) the person has failed to attend or to remain in attendance at the hearing (in the case of an oral hearing) or has failed otherwise to participate in the hearing (in the case of an electronic hearing) in accordance with the summons; and
- (c) the person's attendance or participation is material to the ends of justice. 1994, c. 27, s. 56 (25); 2006, c. 19, Sched. C, s. 1 (1).

Same

(4.1) The warrant shall be in the prescribed form (in English or French), directed to any police officer, and shall require the person to be apprehended anywhere within Ontario, brought before the tribunal forthwith and,

- (a) detained in custody as the judge may order until the person's presence as a witness is no longer required; or
- (b) in the judge's discretion, released on a recognizance, with or without sureties, conditioned for attendance or participation to give evidence. 1994, c. 27, s. 56 (25).

c. 23, s. 13 (20).

Time for review

(2) The review shall take place within a reasonable time after the decision or order is made.

Conflict

(3) In the event of a conflict between this section and any other Act, the other Act prevails. 1994, c. 27, s. 56 (36).

Administration of oaths

22. A member of a tribunal has power to administer oaths and affirmations for the purpose of any of its proceedings and the tribunal may require evidence before it to be given under oath or affirmation. [R.S.O. 1990, c. S.22, s. 22](#).

Powers re control of proceedings

Abuse of processes

23. (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes. [R.S.O. 1990, c. S.22, s. 23 \(1\)](#).

Limitation on examination

(2) A tribunal may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding. 1994, c. 27, s. 56 (37).

Exclusion of representatives

(3) A tribunal may exclude from a hearing anyone, other than a person licensed under the [Law Society Act](#), appearing on behalf of a party or as an adviser to a witness if it finds that such person is not competent properly to represent or to advise the party or witness, or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser. 2006, c. 21, Sched. C, s. 134 (7).

Notice, etc.

24. (1) Where a tribunal is of the opinion that because the parties to any proceeding before it are so numerous or for any other reason, it is impracticable,

- (a) to give notice of the hearing; or
- (b) to send its decision and the material mentioned in [section 18](#),

to all or any of the parties individually, the tribunal may, instead of doing so, cause reasonable notice of the hearing or of its decision to be given to such parties by public advertisement or otherwise as the tribunal may direct.

Contents of notice

(2) A notice of a decision given by a tribunal under clause (1) (b) shall inform the parties of the place where copies of the decision and the reasons therefor, if reasons were given, may be obtained. [R.S.O. 1990, c. S.22, s. 24](#).

Appeal operates as stay, exception

25. (1) An appeal from a decision of a tribunal to a court or other appellate body operates as a stay in the matter unless,

- (a) another Act or a regulation that applies to the proceeding expressly provides to the contrary; or
- (b) the tribunal or the court or other appellate body orders otherwise. 1997, c. 23, s. 13 (21).

Idem

(2) An application for judicial review under the [Judicial Review Procedure Act](#), or the bringing of proceedings specified in subsection 2 (1) of that Act is not an appeal within the meaning of subsection (1). [R.S.O. 1990, c. S.22, s. 25 \(2\)](#).

Control of process

25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,

- (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
- (b) establish rules under [section 25.1](#). 1999, c. 12, Sched. B, s. 16 (8).

Rules

25.1 (1) A tribunal may make rules governing the practice and procedure before it. 1994, c. 27, s. 56 (38).

Application

(2) The rules may be of general or particular application. 1994, c. 27, s. 56 (38).

Consistency with Acts

(3) The rules shall be consistent with this Act and with the other Acts to which they relate. 1994, c. 27, s. 56 (38).

Public access

(4) The tribunal shall make the rules available to the public in English and in French. 1994, c. 27, s. 56 (38).

Legislation Act, 2006, Part III

(5) Rules adopted under this section are not regulations as defined in Part III (Regulations) of the [Legislation Act, 2006](#). 1994, c. 27, s. 56 (38); 2006, c. 21, Sched. F, s. 136 (1).

Additional power

(6) The power conferred by this section is in addition to any power to adopt rules that the tribunal may have under another Act. 1994, c. 27, s. 56 (38).

Regulations

26. The Lieutenant Governor in Council may make regulations prescribing forms for the purpose of [section 12](#). 1994, c. 27, s. 56 (41).

Rules, etc., available to public

27. A tribunal shall make any rules or guidelines established under this or any other Act available for examination by the public. 1999, c. 12, Sched. B, s. 16 (9).

Substantial compliance

28. Substantial compliance with requirements respecting the content of forms, notices or documents under this Act or any rule made under this or any other Act is sufficient. 1999, c. 12, Sched. B, s. 16 (9).

29.-31. Repealed: 1994, c. 27, s. 56 (40).

Conflict

32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply despite anything in this Act, the provisions of this Act prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith. [R.S.O. 1990, c. S.22, s. 32](#); 1994, c. 27, s. 56 (42).

33., 34. Repealed: 1994, c. 27, s. 56 (43).

FORMS 1, 2 Repealed: 1994, c. 27, s. 56 (44).

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Ontario Energy Board Act, 1998, SO 1998, c 15, Sch B

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Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15 SCHEDULE B

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PART I GENERAL

Board objectives, electricity

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1.

Facilitation of integrated power system plans

(2) In exercising its powers and performing its duties under this or any other Act in relation to electricity, the Board shall facilitate the implementation of all integrated power system plans approved under the [Electricity Act, 1998](#). 2004, c. 23, Sched. B, s. 1.

Board objectives, gas

2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

1. To facilitate competition in the sale of gas to users.
2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
3. To facilitate rational expansion of transmission and distribution systems.

Board. 2003, c. 3, s. 19; 2006, c. 21, Sched. F, s. 136 (1).

16.-17. Repealed: 2003, c. 3, s. 19.

Transfer of authority or licence

18. (1) No authority given by the Board under this or any other Act shall be transferred or assigned without leave of the Board. 1998, c. 15, Sched. B, s. 18 (1).

Same

(2) A licence issued under this Act is not transferable or assignable without leave of the Board. 1998, c. 15, Sched. B, s. 18 (2).

Board's powers, general

Power to determine law and fact

19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1).

Order

(2) The Board shall make any determination in a proceeding by order. 1998, c. 15, Sched. B, s. 19 (2); 2001, c. 9, Sched. F, s. 2 (1).

Reference

(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c. 15, Sched. B, s. 19 (3).

Additional powers and duties

(4) The Board of its own motion may, and if so directed by the Minister under [section 28](#) or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).

Exception

(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the [Electricity Act, 1998](#) or any other Act. 1998, c. 15, Sched. B, s. 19 (5).

Jurisdiction exclusive

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

Powers, procedures applicable to all matters

20. Subject to any provision to the contrary in this or any other Act, the powers and procedures of the Board set out in this Part apply to all matters before the Board under this or any other Act. 1998, c. 15, Sched. B, s. 20.

Board's powers, miscellaneous

21. (1) The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act. 1998, c. 15, Sched. B, s. 21 (1).

Hearing upon notice

(2) Subject to any provision to the contrary in this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such manner and to such persons as the Board may direct. 1998, c. 15, Sched. B, s. 21 (2).

(3) Repealed: 2000, c. 26, Sched. D, s. 2 (2).

No hearing

(4) Despite [section 4.1](#) of the [Statutory Powers Procedure Act](#), the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,

(a) no person requests a hearing within a reasonable time set by the Board after the Board gives notice of the right to request a hearing; or

(b) the Board determines that no person, other than the applicant, appellant or licence holder will be adversely affected in a material way by the outcome of the proceeding and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing.

activities described in paragraph 1, 3 or 4.

6. Business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor, including providing meter installation and reading services, providing billing services and carrying on activities authorized under [section 42](#) of the *Electricity Act, 1998*.
7. Managing or operating, on behalf of a municipal corporation which owns shares in the distributor, the provision of a public utility as defined in [section 1](#) of the *Public Utilities Act* or sewage services.
8. Renting or selling hot water heaters.
9. Providing services related to the promotion of energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources. 1998, c. 15, Sched. B, s. 73 (1); 2002, c. 23, s. 4 (9).

Limitation

(2) In acting under paragraph 7 of subsection (1), the distributor's affiliate shall not own or lease any works, pipes or other machinery or equipment used in the manufacture, processing or distribution of a public utility or in the provision of sewage services. 1998, c. 15, Sched. B, s. 73 (2).

Municipal corporation

(3) Subsection (1) does not restrict the activities of a municipal corporation. 1998, c. 15, Sched. B, s. 73 (3).

Amendment of licence

74. (1) The Board may, on the application of any person, amend a licence if it considers the amendment to be,
- (a) necessary to implement a directive issued under this Act; or
 - (b) in the public interest, having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*. 2004, c. 23, Sched. B, s. 13.

Further power to amend

(2) In addition to its power to amend a licence under subsection (1), the Board may amend a licence under [section 38](#) of the *Electricity Act, 1998*. 2004, c. 23, Sched. B, s. 13.

75. Repealed: 2003, c. 3, s. 49.

76. Repealed: 2003, c. 3, s. 50.

77. (1)-(4) Repealed: 2003, c. 3, s. 51 (1).

Cancellation of licence

(5) The Board may cancel a licence upon the request in writing of the licence holder. 1998, c. 15, Sched. B, s. 77 (5); 2003, c. 3, s. 51 (2).

(6) Repealed: 2000, c. 26, Sched. D, s. 2 (6).

Orders by Board, electricity rates

Order re: transmission of electricity

78. (1) No transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Order re: distribution of electricity

(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under [section 29](#) of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Order re the Smart Metering Entity

(2.1) The Smart Metering Entity shall not charge for meeting its obligations under Part IV.2 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract. 2006, c. 3, Sched. C, s. 5 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, [section 78](#) is amended by adding the following subsection:

Order re unit smart meter provider

(2.2) No unit smart meter provider shall charge for unit smart metering except in accordance with an order of the Board, which is not bound by the terms of any contract. 2010, c. 8, s. 38 (12).

See: 2010, c. 8, ss. 38 (12), 40.

Note: On a day to be named by proclamation of the Lieutenant Governor, [section 78](#) is amended by adding the following subsection:

Order re unit sub-meter provider

(2.3) No unit sub-meter provider shall charge for unit sub-metering except in accordance with an order of the Board, which is not bound by the terms of any contract. 2010, c. 8, s. 38 (13).

See: 2010, c. 8, ss. 38 (13), 40.

Rates

(3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity or such other activity as may be prescribed and for the retailing of electricity in order to meet a distributor's obligations under [section 29](#) of the *Electricity Act, 1998*. 2009, c. 12, Sched. D, s. 12 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (3) is amended by striking out “electricity or such other activity” and substituting “electricity, unit sub-metering or unit smart metering or such other activity”. See: 2010, c. 8, ss. 38 (14), 40.

Note: On a day to be named by proclamation of the Lieutenant Governor, [section 78](#) is amended by adding the following subsection:

Rates, unit sub-metering and unit smart-metering

(3.0.0.1) The Board shall, in accordance with rules prescribed by the regulations, make orders approving or fixing separate rates for unit sub-metering and for unit smart metering,

(a) for classes of consumers, as may be prescribed by regulation; and

(b) for different circumstances, as may be prescribed by regulation. 2010, c. 8, s. 38 (15).

See: 2010, c. 8, ss. 38 (15), 40.

Rates

(3.0.1) The Board may make orders approving or fixing just and reasonable rates for the Smart Metering Entity in order for it to meet its obligations under this Act or under Part IV.2 of the *Electricity Act, 1998*. 2006, c. 3, Sched. C, s. 5 (1).

Orders re deferral or variance accounts

(3.0.2) The Board may make orders permitting the Smart Metering Entity or distributors to establish one or more deferral or variance accounts related to costs associated with the smart metering initiative, in the circumstances prescribed in the regulations. 2006, c. 3, Sched. C, s. 5 (1).

Orders re recovery of smart metering initiative costs

(3.0.3) The Board may make orders relating to the ability of the Smart Metering Entity, distributors, retailers and other persons to recover costs associated with the smart metering initiative, in the situations or circumstances prescribed by regulation and the orders may require them to meet such conditions or requirements as may be prescribed, including providing for the time over which costs may be recovered. 2006, c. 3, Sched. C, s. 5 (1).

Orders re deferral or variance accounts, [s. 27.2](#)

(3.0.4) The Board may make orders permitting the IESO, distributors or other licensees to establish one or more deferral or variance accounts related to costs associated with complying with a directive issued under [section 27.2](#). 2009, c. 12, Sched. D, s. 12 (2); 2014, c. 7, Sched. 23, s. 6 (1).

Methods re incentives or recovery of costs

(3.0.5) The Board may, in approving or fixing just and reasonable rates or in exercising the power set out in [clause 70 \(2\)](#) (e), adopt methods that provide,

(a) incentives to a transmitter or a distributor in relation to the siting, design and construction of an expansion,

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Copyright Act, RSC 1985, c C-42

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Currency: Last updated from the Justice Laws Web Site on 2015-01-14

Copyright Act

R.S.C., 1985, c. C-42

An Act respecting copyright

SHORT TITLE

Short title

1. This Act may be cited as the *Copyright Act*.

R.S., c. C-30, s. 1.

INTERPRETATION

Definitions

2. In this Act,

“architectural work”

« *oeuvre architecturale* »

“architectural work” means any building or structure or any model of a building or structure;

“architectural work of art”

“architectural work of art” [Repealed, 1993, c. 44, s. 53]

“artistic work”

« *oeuvre artistique* »

“artistic work” includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works;

“Berne Convention country”

« *pays partie à la Convention de Berne* »

“Berne Convention country” means a country that is a party to the Convention for the Protection of Literary and Artistic Works concluded at Berne on September 9, 1886, or any one of its revisions, including the Paris Act of 1971;

“Board”

« *Commission* »

“Board” means the Copyright Board established by [subsection 66\(1\)](#);

“book”

« *livre* »

“book” means a volume or a part or division of a volume, in printed form, but does not include

- (a) a pamphlet,
- (b) a newspaper, review, magazine or other periodical,
- (c) a map, chart, plan or sheet music where the map, chart, plan or sheet music is separately published, and
- (d) an instruction or repair manual that accompanies a product or that is supplied as an accessory to a service;

“broadcaster”

« *radiodiffuseur* »

“broadcaster” means a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission;

“choreographic work”
« *oeuvre chorégraphique* »

“choreographic work” includes any work of choreography, whether or not it has any story line;

“cinematograph”

“cinematograph” [Repealed, 1997, c. 24, s. 1]

“cinematographic work”
« *oeuvre cinématographique* »

“cinematographic work” includes any work expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack;

“collective society”
« *société de gestion* »

“collective society” means a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by [section 19](#) or [81](#) for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and

(a) operates a licensing scheme, applicable in relation to a repertoire of works, performer’s performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or

(b) carries on the business of collecting and distributing royalties or levies payable pursuant to this Act;

“collective work”
« *recueil* »

“collective work” means

(a) an encyclopaedia, dictionary, year book or similar work,

(b) a newspaper, review, magazine or similar periodical, and

(c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated;

“commercially available”
« *accessible sur le marché* »

“commercially available” means, in relation to a work or other subject-matter,

(a) available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, or

(b) for which a licence to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort;

“communication signal”
« *signal de communication* »

“communication signal” means radio waves transmitted through space without any artificial guide, for reception by the public;

“compilation”
« *compilation* »

“compilation” means

(a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or

(b) a work resulting from the selection or arrangement of data;

“computer program”
« *programme d’ordinateur* »

“computer program” means a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result;

“copyright”
« *droit d’auteur* »

“copyright” means the rights described in

(a) [section 3](#), in the case of a work,

(b) [sections 15](#) and [26](#), in the case of a performer’s performance,

- (c) [section 18](#), in the case of a sound recording, or
- (d) [section 21](#), in the case of a communication signal;

“country”
« pays »

“country” includes any territory;

“defendant”
Version anglaise seulement

“defendant” includes a respondent to an application;

“delivery”

“delivery”[[Repealed, 1997, c. 24, s. 1](#)]

“dramatic work”
« oeuvre dramatique »

“dramatic work” includes

- (a) any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise,
- (b) any cinematographic work, and
- (c) any compilation of dramatic works;

“educational institution”
« établissement d’enseignement »

“educational institution” means

- (a) a non-profit institution licensed or recognized by or under an Act of Parliament or the legislature of a province to provide pre-school, elementary, secondary or post-secondary education,
- (b) a non-profit institution that is directed or controlled by a board of education regulated by or under an Act of the legislature of a province and that provides continuing, professional or vocational education or training,
- (c) a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraph (a) or (b), or
- (d) any other non-profit institution prescribed by regulation;

“engravings”
« gravure »

“engravings” includes etchings, lithographs, woodcuts, prints and other similar works, not being photographs;

“every original literary, dramatic, musical and artistic work”
« toute oeuvre littéraire, dramatique, musicale ou artistique originale »

“every original literary, dramatic, musical and artistic work” includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science;

“exclusive distributor”
« distributeur exclusif »

“exclusive distributor” means, in relation to a book, a person who

- (a) has, before or after the coming into force of this definition, been appointed in writing, by the owner or exclusive licensee of the copyright in the book in Canada, as
 - (i) the only distributor of the book in Canada or any part of Canada, or
 - (ii) the only distributor of the book in Canada or any part of Canada in respect of a particular sector of the market, and
- (b) meets the criteria established by regulations made under [section 2.6](#),

and, for greater certainty, if there are no regulations made under [section 2.6](#), then no person qualifies under this definition as an “exclusive distributor”;

“Her Majesty’s Realms and Territories”

“Her Majesty’s Realms and Territories”[[Repealed, 1997, c. 24, s. 1](#)]

“infringing”
« contrefaçon »

“infringing” means

- (a) in relation to a work in which copyright subsists, any copy, including any colourable imitation, made or dealt with in contravention of this Act,
- (b) in relation to a performer’s performance in respect of which copyright subsists, any fixation or

copy of a fixation of it made or dealt with in contravention of this Act,

(c) in relation to a sound recording in respect of which copyright subsists, any copy of it made or dealt with in contravention of this Act, or

(d) in relation to a communication signal in respect of which copyright subsists, any fixation or copy of a fixation of it made or dealt with in contravention of this Act.

The definition includes a copy that is imported in the circumstances set out in [paragraph 27\(2\)\(e\)](#) and [section 27.1](#) but does not otherwise include a copy made with the consent of the owner of the copyright in the country where the copy was made;

"lecture"
« *conférence* »

"lecture" includes address, speech and sermon;

"legal representatives"
« *représentants légaux* »

"legal representatives" includes heirs, executors, administrators, successors and assigns, or agents or attorneys who are thereunto duly authorized in writing;

"library, archive or museum"
« *bibliothèque, musée ou service d'archives* »

"library, archive or museum" means

(a) an institution, whether or not incorporated, that is not established or conducted for profit or that does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents and other materials that is open to the public or to researchers, or

(b) any other non-profit institution prescribed by regulation;

"literary work"
« *oeuvre littéraire* »

"literary work" includes tables, computer programs, and compilations of literary works;

"maker"
« *producteur* »

"maker" means

(a) in relation to a cinematographic work, the person by whom the arrangements necessary for the making of the work are undertaken, or

(b) in relation to a sound recording, the person by whom the arrangements necessary for the first fixation of the sounds are undertaken;

"Minister"
« *ministre* »

"Minister", except in [section 44.1](#), means the Minister of Industry;

"moral rights"
« *droits moraux* »

"moral rights" means the rights described in [subsection 14.1\(1\)](#);

"musical work"
« *oeuvre musicale* »

"musical work" means any work of music or musical composition, with or without words, and includes any compilation thereof;

"perceptual disability"
« *déficience perceptuelle* »

"perceptual disability" means a disability that prevents or inhibits a person from reading or hearing a literary, musical, dramatic or artistic work in its original format, and includes such a disability resulting from

(a) severe or total impairment of sight or hearing or the inability to focus or move one's eyes,

(b) the inability to hold or manipulate a book, or

(c) an impairment relating to comprehension;

"performance"
« *représentation* » ou « *exécution* »

"performance" means any acoustic or visual representation of a work, performer's performance, sound recording or communication signal, including a representation made by means of any mechanical instrument, radio receiving set or television receiving set;

"performer's performance"
« *prestation* »

"performer's performance" means any of the following when done by a performer:

(a) a performance of an artistic work, dramatic work or musical work, whether or not the work was previously fixed in any material form, and whether or not the work's term of copyright protection under this Act has expired,

(b) a recitation or reading of a literary work, whether or not the work's term of copyright protection under this Act has expired, or

(c) an improvisation of a dramatic work, musical work or literary work, whether or not the improvised work is based on a pre-existing work;

"photograph"

« *photographie* »

"photograph" includes photo-lithograph and any work expressed by any process analogous to photography;

"plaintiff"

Version anglaise seulement

"plaintiff" includes an applicant;

"plate"

« *planche* »

"plate" includes

(a) any stereotype or other plate, stone, block, mould, matrix, transfer or negative used or intended to be used for printing or reproducing copies of any work, and

(b) any matrix or other appliance used or intended to be used for making or reproducing sound recordings, performer's performances or communication signals;

"premises"

« *locaux* »

"premises" means, in relation to an educational institution, a place where education or training referred to in the definition "educational institution" is provided, controlled or supervised by the educational institution;

"receiving device"

"receiving device" **[Repealed, 1993, c. 44, s. 79]**

"Rome Convention country"

« *pays partie à la Convention de Rome* »

"Rome Convention country" means a country that is a party to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on October 26, 1961;

"sculpture"

« *sculpture* »

"sculpture" includes a cast or model;

"sound recording"

« *enregistrement sonore* »

"sound recording" means a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work;

"telecommunication"

« *télécommunication* »

"telecommunication" means any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system;

"treaty country"

« *pays signataire* »

"treaty country" means a Berne Convention country, UCC country or WTO Member;

"UCC country"

« *pays partie à la Convention universelle* »

"UCC country" means a country that is a party to the Universal Copyright Convention, adopted on September 6, 1952 in Geneva, Switzerland, or to that Convention as revised in Paris, France on July 24, 1971;

"WCT country"

« *pays partie au traité de l'ODA* »

"WCT country" means a country that is a party to the WIPO Copyright Treaty, adopted in Geneva on December 20, 1996;

"work"

« *oeuvre* »

"work" includes the title thereof when such title is original and distinctive;

"work of joint authorship"

« *oeuvre créée en collaboration* »

"work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors;

“work of sculpture”

“work of sculpture” [Repealed, 1997, c. 24, s. 1]

“WPPT country”

« pays partie au traité de l'OIEP »

“WPPT country” means a country that is a party to the WIPO Performances and Phonograms Treaty, adopted in Geneva on December 20, 1996;

“WTO Member”

« membre de l'OMC »

“WTO Member” means a Member of the World Trade Organization as defined in subsection 2(1) of the *World Trade Organization Agreement Implementation Act*.

R.S., 1985, c. C-42, s. 2; R.S., 1985, c. 10 (4th Supp.), s. 1; 1988, c. 65, s. 61; 1992, c. 1, s. 145(F); 1993, c. 23, s. 1, c. 44, ss. 53, 79; 1994, c. 47, s. 56; 1995, c. 1, s. 62; 1997, c. 24, s. 1; 2012, c. 20, s. 2.

Compilations

2.1 (1) A compilation containing two or more of the categories of literary, dramatic, musical or artistic works shall be deemed to be a compilation of the category making up the most substantial part of the compilation.

Idem

(2) The mere fact that a work is included in a compilation does not increase, decrease or otherwise affect the protection conferred by this Act in respect of the copyright in the work or the moral rights in respect of the work.

1993, c. 44, s. 54.

Definition of “maker”

2.11 For greater certainty, the arrangements referred to in paragraph (b) of the definition “maker” in section 2, as that term is used in section 19 and in the definition “eligible maker” in section 79, include arrangements for entering into contracts with performers, financial arrangements and technical arrangements required for the first fixation of the sounds for a sound recording.

1997, c. 24, s. 2.

Definition of “publication”

2.2 (1) For the purposes of this Act, “publication” means

(a) in relation to works,

(i) making copies of a work available to the public,

(ii) the construction of an architectural work, and

(iii) the incorporation of an artistic work into an architectural work, and

(b) in relation to sound recordings, making copies of a sound recording available to the public,

but does not include

(c) the performance in public, or the communication to the public by telecommunication, of a literary, dramatic, musical or artistic work or a sound recording, or

(d) the exhibition in public of an artistic work.

Issue of photographs and engravings

(2) For the purpose of subsection (1), the issue of photographs and engravings of sculptures and architectural works is not deemed to be publication of those works.

Where no consent of copyright owner

(3) For the purposes of this Act, other than in respect of infringement of copyright, a work or other subject-matter is not deemed to be published or performed in public or communicated to the public by telecommunication if that act is done without the consent of the owner of the copyright.

Unpublished works

(4) Where, in the case of an unpublished work, the making of the work is extended over a considerable period, the conditions of this Act conferring copyright are deemed to have been complied with if the author was, during any substantial part of that period, a subject or citizen of, or a person ordinarily resident in, a country to which this Act extends.

1997, c. 24, s. 2.

Telecommunication

2.3 A person who communicates a work or other subject-matter to the public by telecommunication does not by that act alone perform it in public, nor by that act alone is deemed to authorize its performance in public.

1997, c. 24, s. 2.

Communication to the public by telecommunication

2.4 (1) For the purposes of communication to the public by telecommunication,

(a) persons who occupy apartments, hotel rooms or dwelling units situated in the same building are part of the public, and a communication intended to be received exclusively by such persons is a

communication to the public;

(b) a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public; and

(c) where a person, as part of

(i) a network, within the meaning of the [Broadcasting Act](#), whose operations result in the communication of works or other subject-matter to the public, or

(ii) any programming undertaking whose operations result in the communication of works or other subject-matter to the public,

transmits by telecommunication a work or other subject-matter that is communicated to the public by another person who is not a retransmitter of a signal within the meaning of [subsection 31\(1\)](#), the transmission and communication of that work or other subject-matter by those persons constitute a single communication to the public for which those persons are jointly and severally liable.

Communication to the public by telecommunication

(1.1) For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.

Regulations

(2) The Governor in Council may make regulations defining “programming undertaking” for the purpose of paragraph (1)(c).

Exception

(3) A work is not communicated in the manner described in paragraph (1)(c) or 3(1)(f) where a signal carrying the work is retransmitted to a person who is a retransmitter within the meaning of [subsection 31\(1\)](#).

1997, c. 24, s. 2; 2002, c. 26, s. 1; 2012, c. 20, s. 3.

What constitutes rental

2.5 (1) For the purposes of [paragraphs 3\(1\)\(h\)](#) and [\(f\)](#), [15\(1\)\(c\)](#) and [18\(1\)\(c\)](#), an arrangement, whatever its form, constitutes a rental of a computer program or sound recording if, and only if,

(a) it is in substance a rental, having regard to all the circumstances; and

(b) it is entered into with motive of gain in relation to the overall operations of the person who rents out the computer program or sound recording, as the case may be.

Motive of gain

(2) For the purpose of paragraph (1)(b), a person who rents out a computer program or sound recording with the intention of recovering no more than the costs, including overhead, associated with the rental operations does not by that act alone have a motive of gain in relation to the rental operations.

1997, c. 24, s. 2.

Exclusive distributor

2.6 The Governor in Council may make regulations establishing distribution criteria for the purpose of paragraph (b) of the definition “exclusive distributor” in [section 2](#).

1997, c. 24, s. 2.

Exclusive licence

2.7 For the purposes of this Act, an exclusive licence is an authorization to do any act that is subject to copyright to the exclusion of all others including the copyright owner, whether the authorization is granted by the owner or an exclusive licensee claiming under the owner.

1997, c. 24, s. 2.

PART I COPYRIGHT AND MORAL RIGHTS IN WORKS

COPYRIGHT

Copyright in works

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a

dramatic work, by way of performance in public or otherwise,

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program,

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and

(j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

and to authorize any such acts.

Simultaneous fixing

(1.1) A work that is communicated in the manner described in paragraph (1)(f) is fixed even if it is fixed simultaneously with its communication.

(1.2) to (4) [Repealed, 1997, c. 24, s. 3]

R.S., 1985, c. C-42, s. 3; R.S., 1985, c. 10 (4th Supp.), s. 2; 1988, c. 65, s. 62; 1993, c. 23, s. 2, c. 44, s. 55; 1997, c. 24, s. 3; 2012, c. 20, s. 4.

4. [Repealed, 1997, c. 24, s. 4]

WORKS IN WHICH COPYRIGHT MAY SUBSIST

Conditions for subsistence of copyright

5. (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:

(a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country;

(b) in the case of a cinematographic work, whether published or unpublished, the maker, at the date of the making of the cinematographic work,

(i) if a corporation, had its headquarters in a treaty country, or

(ii) if a natural person, was a citizen or subject of, or a person ordinarily resident in, a treaty country; or

(c) in the case of a published work, including a cinematographic work,

(i) in relation to subparagraph 2.2(1)(a)(i), the first publication in such a quantity as to satisfy the reasonable demands of the public, having regard to the nature of the work, occurred in a treaty country, or

(ii) in relation to subparagraph 2.2(1)(a)(ii) or (iii), the first publication occurred in a treaty country.

Protection for older works

(1.01) For the purposes of subsection (1), a country that becomes a Berne Convention country or a WTO Member after the date of the making or publication of a work shall, as of becoming a Berne Convention country or WTO Member, as the case may be, be deemed to have been a Berne Convention country or WTO Member at the date of the making or publication of the work, subject to subsection (1.02) and section 33.

Limitation

(1.02) Subsection (1.01) does not confer copyright protection in Canada on a work whose term of copyright protection in the country referred to in that subsection had expired before that country became a Berne Convention country or WTO Member, as the case may be.

Application of subsections (1.01) and (1.02)

(1.03) Subsections (1.01) and (1.02) apply, and are deemed to have applied, regardless of whether the country in question became a Berne Convention country or a WTO Member before or after the coming into force of those subsections.

First publication

(1.1) The first publication described in subparagraph (1)(c)(i) or (ii) is deemed to have occurred in a treaty country notwithstanding that it in fact occurred previously elsewhere, if the interval between those two publications did not exceed thirty days.

(4) An exclusive distributor is deemed, for the purposes of entitlement to any of the remedies under Part IV in relation to an infringement under this section, to derive an interest in the copyright in question by licence.

Notice

(5) No exclusive distributor, copyright owner or exclusive licensee is entitled to a remedy under Part IV in relation to an infringement under this section unless, before the infringement occurred, notice has been given within the prescribed time and in the prescribed manner to the person referred to in subsection (1) or (2), as the case may be, that there is an exclusive distributor of the book.

Regulations

(6) The Governor in Council may, by regulation, establish terms and conditions for the importation of certain categories of books, including remaindered books, books intended solely for re-export and books imported by special order.

1997, c. 24, s. 15.

28. [Repealed, 1997, c. 24, s. 15]

28.01 [Repealed, 1997, c. 24, s. 16]

28.02 and 28.03 [Repealed, 1997, c. 24, s. 17]

MORAL RIGHTS INFRINGEMENT

Infringement generally

28.1 Any act or omission that is contrary to any of the moral rights of the author of a work or of the performer of a performer's performance is, in the absence of the author's or performer's consent, an infringement of those rights.

R.S., 1985, c. 10 (4th Supp.), s. 6; 2012, c. 20, s. 19.

Nature of right of integrity

28.2 (1) The author's or performer's right to the integrity of a work or performer's performance is infringed only if the work or the performance is, to the prejudice of its author's or performer's honour or reputation,

- (a) distorted, mutilated or otherwise modified; or
- (b) used in association with a product, service, cause or institution.

Where prejudice deemed

(2) In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

When work not distorted, etc.

(3) For the purposes of this section,

- (a) a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work, or
- (b) steps taken in good faith to restore or preserve the work

shall not, by that act alone, constitute a distortion, mutilation or other modification of the work.

R.S., 1985, c. 10 (4th Supp.), s. 6; 2012, c. 20, s. 20.

EXCEPTIONS

Fair Dealing

Research, private study, etc.

29. Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

R.S., 1985, c. C-42, s. 29; R.S., 1985, c. 10 (4th Supp.), s. 7; 1994, c. 47, s. 61; 1997, c. 24, s. 18; 2012, c. 20, s. 21.

Criticism or review

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

1997, c. 24, s. 18.

News reporting

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and

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Rules of Civil Procedure, RRO 1990, Reg 194

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Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

Consolidation Period: From January 1, 2015 to the [e-Laws currency date](#).

Last amendment: O. Reg. 259/14.

This is the English version of a bilingual regulation.

GENERAL MATTERS

RULE 1 CITATION, APPLICATION AND INTERPRETATION

CITATION

Title

1.01 (1) These rules may be cited as the [Rules of Civil Procedure](#). O. Reg. 575/07, s. 6 (1).

Subdivision

- (2) In these rules,
- (a) all the provisions identified by the same number to the left of the decimal point comprise a Rule (for example, [Rule 1](#), which consists of [rules 1.01](#) to [1.09](#));
 - (b) a provision identified by a number with a decimal point is a rule (for example, [rule 1.01](#)); and
 - (c) a rule may be subdivided into,
 - (i) subrules (for example, subrule 1.01 (2)),
 - (ii) clauses (for example, clause 1.01 (2) (c) or 2.02 (a)),
 - (iii) subclauses (for example, subclause 1.01 (2) (c) (iii) or 7.01 (c) (i)),
 - (iv) paragraphs (for example, paragraph 1 of [subrule 52.07 \(1\)](#)), and
 - (v) definitions (for example, the definition of “action” in [rule 1.03](#)). [R.R.O. 1990, Reg. 194, r. 1.01 \(2\)](#); O. Reg. 284/01, s. 1; O. Reg. 575/07, s. 6 (2).

Alternative Method of Referring to Rules

(3) In a proceeding in a court, it is sufficient to refer to a rule or subdivision of a rule as “rule” followed by the number of the rule, subrule, clause, subclause or paragraph (for example, [rule 1.01](#), [rule 1.01 \(2\)](#), [rule 1.01 \(2\) \(c\)](#), [rule](#)

Canada Principles Addressing Electronic Discovery” developed by and available from The Sedona Conference. O. Reg. 438/08, s. 25.

DUTY TO UPDATE PLAN

29.1.04 The parties shall ensure that the discovery plan is updated to reflect any changes in the information listed in subrule 29.1.03 (3). O. Reg. 438/08, s. 25.

FAILURE TO AGREE TO PLAN

29.1.05 On any motion under [Rules 30 to 35](#) relating to discovery, the court may refuse to grant any relief or to award any costs if the parties have failed to agree to or update a discovery plan in accordance with this Rule. O. Reg. 438/08, s. 25.

RULE 29.2 PROPORTIONALITY IN DISCOVERY

DEFINITION

29.2.01 In this Rule,

“document” has the same meaning as in [clause 30.01 \(1\)](#) (a). O. Reg. 438/08, s. 25.

APPLICATION

29.2.02 This Rule applies to any determination by the court under any of the following Rules as to whether a party or other person must answer a question or produce a document:

1. [Rule 30](#) (Discovery of Documents).
2. [Rule 31](#) (Examination for Discovery).
3. [Rule 34](#) (Procedure on Oral Examinations).
4. [Rule 35](#) (Examination for Discovery by Written Questions). O. Reg. 438/08, s. 25.

CONSIDERATIONS

General

29.2.03 (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

- (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
- (b) the expense associated with answering the question or producing the document would be unjustified;
- (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
- (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
- (e) the information or the document is readily available to the party requesting it from another source. O. Reg. 438/08, s. 25.

Overall Volume of Documents

(2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person. O. Reg. 438/08, s. 25.

RULE 30 DISCOVERY OF DOCUMENTS

INTERPRETATION

30.01 (1) In [rules 30.02 to 30.11](#),

- (a) “document” includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of

account, and data and information in electronic form; and

- (b) a document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled. [R.R.O. 1990, Reg. 194, r. 30.01 \(1\)](#); O. Reg. 427/01, s. 12; O. Reg. 132/04, s. 6.

(2) In subrule 30.02 (4),

- (a) a corporation is a subsidiary of another corporation where it is controlled directly or indirectly by the other corporation; and
- (b) a corporation is affiliated with another corporation where,
 - (i) one corporation is the subsidiary of the other,
 - (ii) both corporations are subsidiaries of the same corporation, or
 - (iii) both corporations are controlled directly or indirectly by the same person or persons. [R.R.O. 1990, Reg. 194, r. 30.01 \(2\)](#).

SCOPE OF DOCUMENTARY DISCOVERY

Disclosure

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in [rules 30.03 to 30.10](#), whether or not privilege is claimed in respect of the document. [R.R.O. 1990, Reg. 194, r. 30.02 \(1\)](#); O. Reg. 438/08, s. 26.

Production for Inspection

(2) Every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in [rules 30.03 to 30.10](#), unless privilege is claimed in respect of the document. [R.R.O. 1990, Reg. 194, r. 30.02 \(2\)](#); O. Reg. 438/08, s. 26.

Insurance Policy

(3) A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,

- (a) to satisfy all or part of a judgment in the action; or
- (b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment,

but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action. [R.R.O. 1990, Reg. 194, r. 30.02 \(3\)](#).

Subsidiary and Affiliated Corporations and Corporations Controlled by Party

(4) The court may order a party to disclose all relevant documents in the possession, control or power of the party's subsidiary or affiliated corporation or of a corporation controlled directly or indirectly by the party and to produce for inspection all such documents that are not privileged. [R.R.O. 1990, Reg. 194, r. 30.02 \(4\)](#).

AFFIDAVIT OF DOCUMENTS

Party to Serve Affidavit

30.03 (1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power. O. Reg. 438/08, s. 27 (1).

Contents

(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,

- (a) that are in the party's possession, control or power and that the party does not object to producing;
- (b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds

for the claim; and

- (c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location. [R.R.O. 1990, Reg. 194, r. 30.03 \(2\)](#); O. Reg. 438/08, s. 27 (2).

(3) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relevant to any matter in issue in the action other than those listed in the affidavit. [R.R.O. 1990, Reg. 194, r. 30.03 \(3\)](#); O. Reg. 438/08, s. 27 (3).

Lawyer's Certificate

(4) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,

- (a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and
- (b) what kinds of documents are likely to be relevant to the allegations made in the pleadings. O. Reg. 653/00, s. 3; O. Reg. 438/08, s. 27 (4).

Affidavit not to be Filed

(5) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial. [R.R.O. 1990, Reg. 194, r. 30.03 \(5\)](#).

INSPECTION OF DOCUMENTS

Request to Inspect

30.04 (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power. [R.R.O. 1990, Reg. 194, r. 30.04 \(1\)](#).

(2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party. [R.R.O. 1990, Reg. 194, r. 30.04 \(2\)](#).

(3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection. [R.R.O. 1990, Reg. 194, r. 30.04 \(3\)](#); O. Reg. 575/07, s. 1.

Documents to be Taken to Examination and Trial

(4) Unless the parties agree otherwise, all documents listed in a party's affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons or order, be taken to and produced at,

- (a) the examination for discovery of the party or of a person on behalf or in place of or in addition to the party; and
- (b) the trial of the action. [R.R.O. 1990, Reg. 194, r. 30.04 \(4\)](#).

Court may Order Production

(5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party. [R.R.O. 1990, Reg. 194, r. 30.04 \(5\)](#).

Court may Inspect to Determine Claim of Privilege

(6) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim. [R.R.O. 1990, Reg. 194, r. 30.04 \(6\)](#).

Copying of Documents

(7) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy of it at the party's own expense, if it can be reproduced, unless the person having possession or control of or power over the document agrees to make a copy, in which case the person shall be reimbursed for the cost of making the copy. [R.R.O. 1990, Reg. 194, r. 30.04 \(7\)](#).

Divided Disclosure or Production

(8) Where a document may become relevant only after the determination of an issue in the action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold disclosure or production until after the issue has been determined. [R.R.O. 1990, Reg. 194, r. 30.04 \(8\)](#).

DISCLOSURE OR PRODUCTION NOT ADMISSION OF RELEVANCE

30.05 The disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility. [R.R.O. 1990, Reg. 194, r. 30.05](#).

WHERE AFFIDAVIT INCOMPLETE OR PRIVILEGE IMPROPERLY CLAIMED

30.06 Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may,

- (a) order cross-examination on the affidavit of documents;
- (b) order service of a further and better affidavit of documents;
- (c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and
- (d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege. [R.R.O. 1990, Reg. 194, r. 30.06](#).

DOCUMENTS OR ERRORS SUBSEQUENTLY DISCOVERED

30.07 Where a party, after serving an affidavit of documents,

- (a) comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged; or
- (b) discovers that the affidavit is inaccurate or incomplete,

the party shall forthwith serve a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents. [R.R.O. 1990, Reg. 194, r. 30.07](#).

EFFECT OF FAILURE TO DISCLOSE OR PRODUCE FOR INSPECTION

Failure to Disclose or Produce Document

30.08 (1) Where a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with these rules, an order of the court or an undertaking,

- (a) if the document is favourable to the party's case, the party may not use the document at the trial, except with leave of the trial judge; or
- (b) if the document is not favourable to the party's case, the court may make such order as is just. [R.R.O. 1990, Reg. 194, r. 30.08 \(1\)](#); O. Reg. 504/00, s. 3.

Failure to Serve Affidavit or Produce Document

(2) Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the court under [rules 30.02 to 30.11](#), the court may,

- (a) revoke or suspend the party's right, if any, to initiate or continue an examination for discovery;
- (b) dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant; and
- (c) make such other order as is just. [R.R.O. 1990, Reg. 194, r. 30.08 \(2\)](#).

PRIVILEGED DOCUMENT NOT TO BE USED WITHOUT LEAVE

30.09 Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of the trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge. [R.R.O. 1990, Reg. 194, r. 30.09](#); O. Reg. 19/03, s. 7.

PRODUCTION FROM NON-PARTIES WITH LEAVE

Order for Inspection

30.10 (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

- (a) the document is relevant to a material issue in the action; and
- (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document. [R.R.O. 1990, Reg. 194, r. 30.10 \(1\)](#).

Notice of Motion

(2) A motion for an order under subrule (1) shall be made on notice,

- (a) to every other party; and
- (b) to the person not a party, served personally or by an alternative to personal service under [rule 16.03](#). [R.R.O. 1990, Reg. 194, r. 30.10 \(2\)](#).

Court may Inspect Document

(3) Where privilege is claimed for a document referred to in subrule (1), or where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue. [R.R.O. 1990, Reg. 194, r. 30.10 \(3\)](#).

Preparation of Certified Copy

(4) The court may give directions respecting the preparation of a certified copy of a document referred to in subrule (1) and the certified copy may be used for all purposes in place of the original. [R.R.O. 1990, Reg. 194, r. 30.10 \(4\)](#).

Cost of Producing Document

(5) The moving party is responsible for the reasonable cost incurred or to be incurred by the person not a party to produce a document referred to in subrule (1), unless the court orders otherwise. O. Reg. 260/05, s. 5.

DOCUMENT DEPOSITED FOR SAFE KEEPING

30.11 The court may order that a relevant document be deposited for safe keeping with the registrar and thereafter the document shall not be inspected by any person except with leave of the court. [R.R.O. 1990, Reg. 194, r. 30.11](#).

RULE 30.1 DEEMED UNDERTAKING

APPLICATION

30.1.01 (1) This Rule applies to,

- (a) evidence obtained under,
 - (i) [Rule 30](#) (documentary discovery),
 - (ii) [Rule 31](#) (examination for discovery),
 - (iii) [Rule 32](#) (inspection of property),
 - (iv) [Rule 33](#) (medical examination),
 - (v) [Rule 35](#) (examination for discovery by written questions); and
- (b) information obtained from evidence referred to in clause (a). O. Reg. 61/96, s. 2; O. Reg. 627/98, s. 3.

36

Canada Evidence Act, RSC 1985, c C-5

Current version: in force since Dec 6, 2014

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Canada Evidence Act

R.S.C., 1985, c. C-5

An Act respecting witnesses and evidence

SHORT TITLE

Short title

1. This Act may be cited as the *Canada Evidence Act*.

R.S., c. E-10, s. 1.

PART I

APPLICATION

Application

2. This Part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction.

R.S., c. E-10, s. 2.

WITNESSES

Interest or crime

3. A person is not incompetent to give evidence by reason of interest or crime.

R.S., c. E-10, s. 3.

Accused and spouse

4. (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

Accused and spouse

- (2) The wife or husband of a person charged with an offence under subsection 136(1) of the *Youth Criminal Justice Act* or with an offence under any of sections 151, 152, 153, 155 or 159, subsection 160(2) or (3), or sections 170 to 173, 179, 215, 218, 271 to 273, 279.01 to 279.03, 280 to 283, 286.1 to 286.3, 291 to 294 or 329 of the *Criminal Code*, or an attempt to commit any such offence, is a competent and compellable witness for the prosecution without the consent of the person charged.

Communications during marriage

- (3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

Offences against young persons

- (4) The wife or husband of a person charged with an offence against any of sections 220, 221, 235, 236, 237, 239, 240, 266, 267, 268 or 269 of the *Criminal Code* where the complainant or victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged.

Saving

- (5) Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

37.3 (1) A judge presiding at a criminal trial or other criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that order complies with the terms of any order made under any of [subsections 37\(4.1\) to \(6\)](#) in relation to that trial or proceeding or any judgment made on appeal of an order made under any of those subsections.

Potential orders

(2) The orders that may be made under subsection (1) include, but are not limited to, the following orders:

- (a) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence;
- (b) an order effecting a stay of the proceedings; and
- (c) an order finding against any party on any issue relating to information the disclosure of which is prohibited.

2001, c. 41, s. 43.

INTERNATIONAL RELATIONS AND NATIONAL DEFENCE AND NATIONAL SECURITY

Definitions

38. The following definitions apply in this section and in [sections 38.01 to 38.15](#).

"judge"

« *juge* »

"judge" means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice to conduct hearings under [section 38.04](#).

"participant"

« *participant* »

"participant" means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information.

"potentially injurious information"

« *renseignements potentiellement préjudiciables* »

"potentially injurious information" means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.

"proceeding"

« *instance* »

"proceeding" means a proceeding before a court, person or body with jurisdiction to compel the production of information.

"prosecutor"

« *poursuivant* »

"prosecutor" means an agent of the Attorney General of Canada or of the Attorney General of a province, the Director of Military Prosecutions under the [National Defence Act](#) or an individual who acts as a prosecutor in a proceeding.

"sensitive information"

« *renseignements sensibles* »

"sensitive information" means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.

R.S., 1985, c. C-5, s. 38; 2001, c. 41, ss. 43, 141; 2013, c. 9, s. 18(F).

Notice to Attorney General of Canada

38.01 (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

During a proceeding

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Notice of disclosure from official

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

During a proceeding

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Military proceedings

(5) In the case of a proceeding under Part III of the *National Defence Act*, notice under any of subsections (1) to (4) shall be given to both the Attorney General of Canada and the Minister of National Defence.

Exception

(6) This section does not apply when

- (a) the information is disclosed by a person to their solicitor in connection with a proceeding, if the information is relevant to that proceeding;
- (b) the information is disclosed to enable the Attorney General of Canada, the Minister of National Defence, a judge or a court hearing an appeal from, or a review of, an order of the judge to discharge their responsibilities under [section 38](#), this section and [sections 38.02 to 38.13](#), [38.15](#) and [38.16](#);
- (c) disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received; or
- (d) the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule.

Exception

(7) Subsections (1) and (2) do not apply to a participant if a government institution referred to in paragraph (6)(c) advises the participant that it is not necessary, in order to prevent disclosure of the information referred to in that paragraph, to give notice to the Attorney General of Canada under subsection (1) or to raise the matter with the person presiding under subsection (2).

Schedule

(8) The Governor in Council may, by order, add to or delete from the schedule a reference to any entity or purpose, or amend such a reference.

2001, c. 41, s. 43.

Disclosure prohibited

38.02 (1) Subject to [subsection 38.01\(6\)](#), no person shall disclose in connection with a proceeding

- (a) information about which notice is given under any of [subsections 38.01\(1\) to \(4\)](#);
- (b) the fact that notice is given to the Attorney General of Canada under any of [subsections 38.01\(1\) to \(4\)](#), or to the Attorney General of Canada and the Minister of National Defence under [subsection 38.01\(5\)](#);
- (c) the fact that an application is made to the Federal Court under [section 38.04](#) or that an appeal or review of an order made under any of [subsections 38.06\(1\) to \(3\)](#) in connection with the application is instituted; or
- (d) the fact that an agreement is entered into under [section 38.031](#) or [subsection 38.04\(6\)](#).

Entities

(1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.

Exceptions

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if

- (a) the Attorney General of Canada authorizes the disclosure in writing under [section 38.03](#) or by agreement under [section 38.031](#) or [subsection 38.04\(6\)](#); or
- (b) a judge authorizes the disclosure under [subsection 38.06\(1\)](#) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further appeal is available.

2001, c. 41, ss. 43, 141.

Authorization by Attorney General of Canada

38.03 (1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under [subsection 38.02\(1\)](#).

Military proceedings

(2) In the case of a proceeding under Part III of the *National Defence Act*, the Attorney General of Canada may authorize disclosure only with the agreement of the Minister of National Defence.

Notice

(3) The Attorney General of Canada shall, within 10 days after the day on which he or she first receives a notice about information under any of [subsections 38.01\(1\) to \(4\)](#), notify in writing every person who provided notice under [section 38.01](#) about that information of his or her decision with respect to disclosure of the information.

2001, c. 41, s. 43.

Disclosure agreement

38.031 (1) The Attorney General of Canada and a person who has given notice under [subsection 38.01\(1\)](#) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts referred to in [paragraphs 38.02\(1\)\(b\) to \(d\)](#) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court under [paragraph 38.04\(2\)\(c\)](#), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.

No application to Federal Court

(2) If an agreement is entered into under subsection (1), the person may not apply to the Federal Court under [paragraph 38.04\(2\)\(c\)](#) with respect to the information about which he or she gave notice to the Attorney General of Canada under [subsection 38.01\(1\)](#) or (2).

2001, c. 41, ss. 43, 141.

Application to Federal Court — Attorney General of Canada

38.04 (1) The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under any of [subsections 38.01\(1\) to \(4\)](#).

Application to Federal Court — general

(2) If, with respect to information about which notice was given under any of [subsections 38.01\(1\) to \(4\)](#), the Attorney General of Canada does not provide notice of a decision in accordance with [subsection 38.03\(3\)](#) or, other than by an agreement under [section 38.031](#), does not authorize the disclosure of the information or authorizes the disclosure of only part of the information or authorizes the disclosure subject to any conditions,

(a) the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under [subsection 38.01\(1\)](#) or (2) is a witness;

(b) a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and

(c) a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information.

Notice to Attorney General of Canada

(3) A person who applies to the Federal Court under paragraph (2)(b) or (c) shall provide notice of the application to the Attorney General of Canada.

Court records

(4) Subject to paragraph (5)(a.1), an application under this section is confidential. During the period when an application is confidential, the Chief Administrator of the Courts Administration Service may, subject to [section 38.12](#), take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

Procedure

(5) As soon as the Federal Court is seized of an application under this section, the judge

(a) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, with respect to making the application public;

(a.1) shall, if he or she decides that the application should be made public, make an order to that effect;

(a.2) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;

(b) shall decide whether it is necessary to hold any hearing of the matter;

(c) if he or she decides that a hearing should be held, shall

- (i) determine who should be given notice of the hearing,
 - (ii) order the Attorney General of Canada to notify those persons, and
 - (iii) determine the content and form of the notice; and
- (d) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.

Disclosure agreement

(6) After the Federal Court is seized of an application made under paragraph (2)(c) or, in the case of an appeal from, or a review of, an order of the judge made under any of [subsections 38.06\(1\) to \(3\)](#) in connection with that application, before the appeal or review is disposed of,

- (a) the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in [paragraphs 38.02\(1\)\(b\) to \(d\)](#) or part of the information or disclosure of the facts or information subject to conditions; and
- (b) if an agreement is entered into, the Court's consideration of the application or any hearing, review or appeal shall be terminated.

Termination of Court consideration, hearing, review or appeal

(7) Subject to subsection (6), after the Federal Court is seized of an application made under this section or, in the case of an appeal from, or a review of, an order of the judge made under any of [subsections 38.06\(1\) to \(3\)](#), before the appeal or review is disposed of, if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court's consideration of the application or any hearing, appeal or review shall be terminated in relation to that information, to the extent of the authorization or the withdrawal.

2001, c. 41, ss. 43, 141; 2013, c. 9, s. 19.

Report relating to proceedings

38.05 If he or she receives notice of a hearing under [paragraph 38.04\(5\)\(c\)](#), a person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside may, within 10 days after the day on which he or she receives the notice, provide the judge with a report concerning any matter relating to the proceeding that the person considers may be of assistance to the judge.

2001, c. 41, s. 43.

Disclosure order

38.06 (1) Unless the judge concludes that the disclosure of the information or facts referred to in [subsection 38.02\(1\)](#) would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information or facts.

Disclosure — conditions

(2) If the judge concludes that the disclosure of the information or facts would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all or part of the information or facts, a summary of the information or a written admission of facts relating to the information.

Order confirming prohibition

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure.

When determination takes effect

(3.01) An order of the judge that authorizes disclosure does not take effect until the time provided or granted to appeal the order has expired or, if the order is appealed, the time provided or granted to appeal a judgment of an appeal court that confirms the order has expired and no further appeal from a judgment that confirms the order is available.

Evidence

(3.1) The judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence.

Introduction into evidence

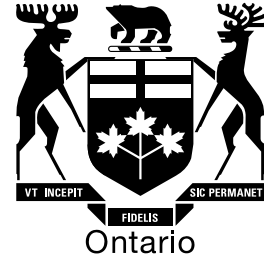
(4) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (2) but who may not be able to do so in a proceeding by reason of the rules of admissibility that apply in the proceeding may request from a judge an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that judge, as long as that form and those conditions comply with the order made under subsection (2).

Relevant factors

- (5) For the purpose of subsection (4), the judge shall consider all the factors that would be relevant for a

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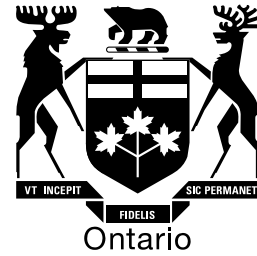
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Ontario Energy Board

Filing Requirements For Electricity Distribution Rate Applications - 2014 Edition for 2015 Rate Applications -

Last Revised on July 18, 2014
(Originally issued on November 14, 2006)



Ontario Energy Board

Filing Requirements For
Electricity Distribution Rate Applications
- 2014 Edition for 2015 Rates Applications -

Chapter 1

Overview

July 18, 2014

Chapter 1 Overview

This document provides information about the filing requirements for electricity distribution rate applications. It is designed to provide direction to applicants, and it is expected that applicants will file applications consistent with the filing requirements. If circumstances warrant, the Board may require an applicant to file evidence in addition to what is identified in the filing requirements.

The filing requirements apply only to electricity distributors. Unless specifically identified, the words “utility”, “utilities”, “applicant” or “applicants” in this document refer to electricity distributors.

Transmitters should consult the January 2, 2014 edition of the filing requirements for transmitters for guidance on rate applications.

References to a “party” or “parties” may, depending on the context, refer to the applicant, Board staff and any registered intervenors either individually or collectively.

Renewed Regulatory Framework for Electricity

On October 18, 2012, the Board released its *Report of the Board, Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach* (the “RRFE Report”) which introduced three rate-setting methods: (1) 4th Generation Incentive Rate-setting (“IR”), (2) Custom IR and (3) Annual IR Index.

Chapters Included in this Filing Requirement Document

This Filing Requirements document sets out the information that must be included in a rate application.

Chapter 1 outlines generic procedural matters and certain expectations of the Board from parties participating in the adjudication process pursuant to Chapters 2, 3 and 5.

Chapter 2 details the filing requirements for a cost of service rate application based on a forward test year that the Board will require from an electricity distribution company.

Chapter 3 details the filing requirements under the incentive regulation mechanism. This approach will be used for electricity distributors when there is no requirement to file a cost of service rate application. Chapter 3 includes specific guidance on requirements related to both the 4th Generation IR (now called “Price Cap IR”) and Annual IR Index approaches.

Chapter 5, which was issued by the Board on March 28, 2013, “*Consolidated Distribution System Plan Filing Requirements*,” sets out filing requirements for

consolidated distribution system plans. These filing requirements outline the information required by the Board to assess a distributor's planned expenditures on distribution system and other infrastructure. Distributors must review this Chapter and its cover letter, regardless of which rate-setting option they are contemplating, to ensure that they are meeting the specific requirements of this Chapter, which are applicable to all rate-setting methods listed above.

Completeness and Accuracy of an Application

An application to the Board must provide sufficient detail to enable the Board to make a determination as to whether the proposals are reasonable. The onus is on the applicant to substantiate the need for and reasonableness of the costs that are the basis of proposed new rates. A clearly written application that demonstrates the need for the proposed rates, complete with sufficient justification for those rates, is essential to facilitate an effective regulatory review and a timely decision. The filing requirements provide the minimum information that applicants must file for a complete application. However, applicants should provide any additional information that is necessary to justify the approvals being sought in the application.

The Board's examination of an application and its subsequent decision are based only on the evidence filed in that case. This regulatory process ensures that all interested parties to the proceeding have an opportunity to see the entire record, participate meaningfully in the proceeding and understand the reasons for a decision. Consequently, a complete and accurate evidentiary record is essential.

The purpose of the interrogatory process is to test the evidence before the Board, and not to seek information that should have been provided in the original application. The Board will consider an application complete if it meets all of the applicable filing requirements.

Applications must be accurate and information and data presented must be consistent across all exhibits, appendices and models. If an application does not meet all of these requirements, or if there are inconsistencies identified in the information or data presented, the Board may put the application in abeyance unless satisfactory justification for missing or inconsistent information has been provided, or until revised evidence is filed.

Certification of Evidence

Applications filed with the Board must be certified by a senior officer of the applicant that the evidence filed is accurate, consistent and complete to the best of his/her knowledge.

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Ontario Energy Board



Report of the Board

Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach

October 18, 2012

Table 1: Rate-Setting Overview - Elements of Three Methods

		4 th Generation IR	Custom IR	Annual IR Index
Setting of Rates				
“Going in” Rates		Determined in single forward test-year cost of service review	Determined in multi-year application review	No cost of service review, existing rates adjusted by the Annual Adjustment Mechanism
Form		Price Cap Index	Custom Index	Price Cap Index
Coverage		Comprehensive (i.e., Capital and OM&A)		
Annual Adjustment Mechanism	Inflation	Composite Index	Distributor-specific rate trend for the plan term to be determined by the Board, informed by: (1) the distributor’s forecasts (revenue and costs, inflation, productivity); (2) the Board’s inflation and productivity analyses; and (3) benchmarking to assess the reasonableness of the distributor’s forecasts	Composite Index
	Productivity	Peer Group X-factors comprised of: (1) Industry TFP growth potential; and (2) a stretch factor		Based on 4 th Generation IR X-factors
	Role of Benchmarking			To assess reasonableness of distributor cost forecasts and to assign stretch factor
Sharing of Benefits		Productivity factor		
		Stretch factor	Case-by-case	Highest 4 th Generation IR stretch factor
Term		5 years (rebasing plus 4 years).	Minimum term of 5 years.	No fixed term.
Incremental Capital Module		On application	N/A	N/A
Treatment of Unforeseen Events		The Board’s policies in relation to the treatment of unforeseen events, as set out in its July 14, 2008 EB-2007-0673 Report of the Board on 3rd Generation Incentive Regulation for Ontario’s Electricity Distributors , will continue under all three menu options.		
Deferral and Variance		Status quo	Status quo, plus as needed to track capital spending against plan	Disposition limited to Group 1 Separate application for Group 2
Performance Reporting and Monitoring		A regulatory review may be initiated if a distributor’s annual reports show performance outside of the ±300 basis points earnings dead band or if performance erodes to unacceptable levels.		

4 Performance Measurement and Continuous Improvement

The renewed regulatory framework is a comprehensive performance-based approach to regulation that promotes the achievement of performance outcomes that will benefit existing and future customers. The framework will align customer and utility interests, continue to support the achievement of important public policy objectives, and place a greater focus on delivering value for money.

The achievement of the performance outcomes will be supported by specific measures and targets and annual reporting. Distributor performance will be compared year over year, both to prior performance and to the performance of other distributors. To facilitate performance monitoring and distributor benchmarking, the Board will use a scorecard approach to link directly to the performance outcomes.

Under the renewed regulatory framework a distributor will be expected to continuously improve its understanding of the needs and expectations of its customers and its delivery of services, which in turn can lead to reduced costs for customers.

4.1 Monitoring Distributor Performance

Under the rate-setting approach described in Chapter 2, the Board will be setting rates under longer-term plans and allowing distributors to select the rate-setting method that best meets their needs and circumstances. Distributors will be required to undertake longer-term integrated planning that captures all categories of network planning, including those reflecting regional needs, as discussed in Chapter 3.

The Board has standards and measures for performance in place today;¹⁹ however, the Board needs to assess whether these continue to be appropriate in light of the performance outcomes defined by the Board and the new rate setting methods. The Board also needs to consider the consequences that might flow from performance that does not meet the standards.

Benchmarking will become increasingly important, as comparison among distributors is one means of analyzing whether a given distributor is as efficient as possible.

Stakeholder Views

There was general stakeholder support for meaningful, empirically-based standards, performance measures and regulatory mechanisms, provided that the implementation costs do not outweigh the value for customers. Desirable characteristics that were identified included: focus on what customers value; promoting alignment of distributor and customer interests; and ability to accommodate differences within the distribution sector.

Stakeholder suggestions for objectives to underpin the development of distributor customer service and cost performance standards and measures included furthering market development; revealing infrastructure investment planning effectiveness or cost performance; facilitating price transparency for customers; and improving existing customer service standards.

A number of stakeholders acknowledged the cost performance incentives that are inherent in incentive regulation. Caution was expressed about implementing direct financial incentives until Board-approved measures are in place. Stakeholders were divided on process incentives; some were supportive of streamlined regulatory processes for high-performing distributors while others were opposed to limits being

¹⁹ These are identified in the *Staff Discussion Paper on Defining & Measuring Performance of Electricity Transmitters & Distributors*.

placed on the review of applications based on the quality of evidence or the applicant's past performance.

The Board's Conclusions

Performance Outcomes and the Electricity Distributor Scorecard

The Board is establishing performance outcomes that it expects distributors to achieve in four distinct areas:

Customer Focus: services are provided in a manner that responds to identified customer preferences;

Operational Effectiveness: continuous improvement in productivity and cost performance is achieved; and utilities deliver on system reliability and quality objectives;

Public Policy Responsiveness: utilities deliver on obligations mandated by government (e.g., in legislation and in regulatory requirements imposed further to Ministerial directives to the Board); and

Financial Performance: financial viability is maintained; and savings from operational effectiveness are sustainable.

The Board concludes that a scorecard will be used to monitor individual distributor performance and to compare performance across the distribution sector. The scorecard effectively organizes performance information in a manner that facilitates evaluations and meaningful comparisons, which are critical to the Board's rate-setting approach under the renewed regulatory framework. Distributors will be required to report their progress against the scorecard on an annual basis.

A sample of a possible scorecard based on a simple sub-set of the Board's current standards and measures (such as the service quality requirements in the *Distribution System Code*) is provided below. The sample is provided for illustrative purposes only, as the Board has not yet determined content of the scorecard to be used. The Board expects that the scorecard will evolve as appropriate standards and measures are developed to assess distributor performance against the identified outcomes.

Figure 3: Sample Scorecard

Customer Focus	Operational Effectiveness	Public Policy Responsiveness	Financial Performance
<i>services provided in a manner that responds to identified customer preferences</i>	<i>continuous improvement in productivity and cost performance; and delivery on system reliability and quality objectives</i>	<i>delivery on obligations mandated by government (specific legislation or via directives to the Board)</i>	<i>financial viability maintained; and savings from operational effectiveness are sustainable</i>
<ul style="list-style-type: none"> • Customer complaints • Connection statistics • Connection of New Service • Reconnection • Telephone Accessibility • Appointments Met • Written Response to Enquiries • Emergency Response • Telephone Call Abandon Rate • Appointments Scheduling • Rescheduling a Missed Appointment 	<ul style="list-style-type: none"> • Distribution Losses • System Average Interruption Frequency Index (SAIFI) • System Average Interruption Duration Index (SAIDI) • Customer Average Interruption Duration Index (CAIDI) • Momentary Average Interruption Frequency Index (MAIFI) 	<ul style="list-style-type: none"> • Electricity Conservation (Kwh) • Peak Demand Reductions (kW) 	<ul style="list-style-type: none"> • Current Ratio • Debt Service Capability • Interest Coverage • OM&A Cost per Customer • Return on Equity

Standards and Measures

The Board will engage stakeholders in further consultation on the standards and measures to be included in the distributor scorecard. The standards and measures must be suitable for use by the Board in monitoring and assessing distributor performance against expected performance outcomes, in monitoring and assessing distributor progress towards the goals and objectives in the distributor's network investment plan, in comparing distributor performance across the sector and identifying trends, and in supporting rate-setting.

The Board has established a set of objectives to guide the consultation. Standards and measures should:

- be aligned with, and reflect a distributor's effectiveness in achieving, the performance outcomes listed in Chapter 1;
- be reflective of customer needs and expectations;
- encourage year-over-year performance gains;
- reveal current performance and signal future performance;
- reflect a distributor's effectiveness in prioritizing and pacing investment (with regard to total bill impacts) and implementing its capital plan;
- be measureable by each distributor, and be aligned with their reporting for their own internal purposes to the extent possible;
- consider the characteristics of a distributor's service territory; and
- be practical.

4.2 The Role of Benchmarking

The Board's regulatory oversight of electricity distributors is supported by benchmarking. Expanded use of benchmarking will be necessary to support the Board's renewed regulatory framework policies.

Stakeholder Views

There was general support for the continued development and use of benchmarking tools, with further empirical work on the distribution sector identified as a priority. It was noted that the cost of this exercise should not exceed its value, recognizing that there may be limits to the practical use of cost comparison and benchmarking information. Among suggestions offered for the further use and development of benchmarking tools were the use of external data, benchmarks and productivity trends to establish

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ONTARIO ENERGY BOARD

Rules of Practice and Procedure

**(Revised November 16, 2006, July 14, 2008, October 13, 2011, January 9, 2012,
January 17, 2013 and April 24, 2014)**

PART I - GENERAL

1. Application and Availability of Rules

- 1.01 These Rules apply to proceedings before the Board except enforcement proceedings. These Rules, other than the Rules set out in Part VII, also apply, with such modifications as the context may require, to all proceedings to be determined by an employee acting under delegated authority.
- 1.02 These Rules, in English and in French, are available for examination on the Board's website, or upon request from the Board Secretary.
- 1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or part of any Rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.

2. Interpretation of Rules

- 2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious, and efficient determination on the merits of every proceeding before the Board.
- 2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.
- 2.03 These Rules shall be interpreted in a manner that facilitates the introduction and use of electronic regulatory filing and, for greater certainty, the introduction and use of digital communication and storage media.
- 2.04 Unless the Board otherwise directs, any amendment to these Rules comes into force upon publication on the Board's website.

3. Definitions

- 3.01 In these Rules,

"affidavit" means written evidence under oath or affirmation;

ONTARIO ENERGY BOARD

Rules of Practice and Procedure

**(Revised November 16, 2006, July 14, 2008, October 13, 2011, January 9, 2012,
January 17, 2013 and April 24, 2014)**

23.03 Before the record of a proceeding is closed, the applicant in the proceeding must address the issues raised in letters of comment by way of a document filed in the proceeding.

23.04 In any proceeding, the Board may make arrangements to receive oral comment on the record of the proceeding.

23.05 A person who makes an oral comment shall not do so under oath or affirmation and shall not be subject to cross-examination, unless the Board directs otherwise.

24. Adjournments

24.01 The Board may adjourn a hearing on its own initiative, or upon motion by a party, and on conditions the Board considers appropriate.

24.02 Parties shall file and serve a motion to adjourn at least 10 calendar days in advance of the scheduled date of the hearing.

PART IV - PRE-HEARING PROCEDURES

25. Technical Conferences

25.01 The Board may direct the parties to participate in technical conferences for the purposes of reviewing and clarifying an application, an intervention, a reply, the evidence of a party, or matters connected with interrogatories.

25.02 The technical conferences may be transcribed, and the transcription, if any, shall be filed and form part of the record of the proceedings.

26. Interrogatories

26.01 In any proceeding, the Board may establish an interrogatory procedure to:

- (a) clarify evidence filed by a party;
- (b) simplify the issues;
- (c) permit a full and satisfactory understanding of the matters to be considered; or

ONTARIO ENERGY BOARD

Rules of Practice and Procedure

(Revised November 16, 2006, July 14, 2008, October 13, 2011, January 9, 2012, January 17, 2013 and April 24, 2014)

- (d) expedite the proceeding.

26.02 Interrogatories shall:

- (a) be directed to the party from whom the response is sought;
- (b) contain a specific reference to the evidence;
- (c) be grouped together according to the issues to which they relate;
- (d) contain specific requests for clarification of a party's evidence, documents or other information in the possession of the party and relevant to the proceeding;
- (e) be numbered using a continuous numbering system such that:
 - the format is [issue number] [acronym of party] [interrogatory number for that party]
 - the “issue number” corresponds to the issues list, or if there is no issues list in the proceeding, to the exhibit or chapter number or letter in the application;
 - the “acronym of party” corresponds to the Board-issued list of acronyms;
 - the “interrogatory number for that party” is sequential for that party despite a change in issue number (e.g. 2 Staff 4 represents Board staff's fourth interrogatory in total); and
 - if a supplementary round of interrogatories is ordered, the “interrogatory number for that party” remains sequential for that party and the suffix “s” is added to the interrogatory number;
- (f) be filed and served as directed by the Board; and
- (g) set out the date on which they are filed and served.

27. Responses to Interrogatories

27.01 Subject to **Rule 27.02**, where interrogatories have been directed and served on a party, that party shall:

- (a) provide a full and adequate response to each interrogatory;

ONTARIO ENERGY BOARD

Rules of Practice and Procedure

(Revised November 16, 2006, July 14, 2008, October 13, 2011, January 9, 2012, January 17, 2013 and April 24, 2014)

- (b) group the responses together according to the issue to which they relate;
- (c) repeat each question at the beginning of each response;
- (d) respond to each interrogatory on a separate page or pages;
- (e) number the responses as described in Rule 28.02(e) ;
- (f) specify the intended witness, witnesses or witness panel who prepared the response, if applicable;
- (g) file and serve the response as directed by the Board; and
- (h) set out the date on which the response is filed and served.

27.02 A party who is unable or unwilling to provide a full and adequate response to an interrogatory shall file and serve a response:

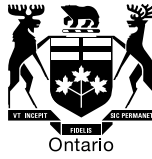
- (a) where the party contends that the interrogatory seeks information that is not relevant, setting out specific reasons in support of that contention;
- (b) where the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, setting out the reasons for the unavailability of such information, as well as any alternative available information in support of the response; or
- (c) otherwise explaining why such a response cannot be given.

A party may request that all or any part of a response to an interrogatory be held in confidence by the Board in accordance with **Rule 10**.

27.03 Where a party is not satisfied with the response provided, the party may bring a motion seeking direction from the Board.

27.04 Where a party fails to respond to an interrogatory made by Board staff, the matter may be referred to the Board.

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ONTARIO ENERGY BOARD

Practice Direction

On

Confidential Filings

Revised April 24, 2014

ONTARIO ENERGY BOARD

PRACTICE DIRECTION ON CONFIDENTIAL FILINGS

1. INTRODUCTION AND PURPOSE

The purpose of this Practice Direction on Confidential Filings is to establish uniform procedures for the filing of confidential materials in relation to all proceedings that come before the Ontario Energy Board. This Practice Direction is also intended to assist participants in the Board's proceedings in understanding how the Board will deal with such filings.

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. The Board therefore generally places materials it receives in the course of the exercise of its authority under the *Ontario Energy Board Act, 1998* and other legislation on the public record so that all interested parties can have equal access to those materials. That being said, the Board relies on full and complete disclosure of all relevant information in order to ensure that its decisions are well-informed, and recognizes that some of that information may be of a confidential nature and should be protected as such.

This Practice Direction seeks to strike a balance between the objectives of transparency and openness and the need to protect information that has been properly designated as confidential. The approach that underlies this Practice Direction is that the placing of materials on the public record is the rule, and confidentiality is the exception. The onus is on the person requesting confidentiality to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case.

The Board and parties to a proceeding are required to devote additional resources to the administration, management and adjudication of confidentiality requests and confidential filings. In this context, it is particularly important that all parties remain mindful that only materials that are clearly relevant to the proceeding should be filed, whether the party is filing materials at its own instance, is requesting information by way of interrogatory or is responding to an interrogatory. Parties are reminded that, under the Board's *Rules of Practice and Procedure*, a party that is in receipt of an interrogatory that it believes is not relevant to the proceeding may file and serve a response to the interrogatory that sets out the reasons for the party's belief that the requested information is not relevant. This process applies to all interrogatories, and is of particular significance in relation to confidential filings given the administrative issues associated with the management of those filings.

The Board's *Rules of Practice and Procedure* govern the conduct of all proceedings before the Board. Those *Rules* require compliance with this Practice Direction.

The Board will continue to monitor the effectiveness of its approach to confidential filings and will revise this Practice Direction on an as-needed basis.

2. APPLICATION

The procedures set out in this Practice Direction are to be followed by all participants in a proceeding before the Board, unless otherwise directed by the Board. This includes proceedings to be determined under delegated authority (see section 3.3) and proceedings commenced on the Board's own motion.

This Practice Direction is subordinate to existing law and regulations, including the *Freedom of Information and Protection of Privacy Act*, the *Ontario Energy Board Act, 1998*, and the *Statutory Powers Procedures Act*, Board instruments (i.e., licences, codes, rules and Board orders) and the Board's *Rules of Practice and Procedure*.

This Practice Direction does not address the manner in which Board members and Board staff will handle confidential information, which is an issue of the Board's internal processes. The Board has implemented internal procedures that are designed to ensure that confidential information is segregated from other information and is made available within the Board on a limited basis.

3. DEFINITIONS AND INTERPRETATION

3.1. Definitions

3.1.1. In this Practice Direction:

"Act" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Sched. B);

"ADR" means alternative dispute resolution;

"applicant" means a person who makes an application to the Board, and includes a person that is filing a notice under section 80 or 81 of the Act;

"application" when used in connection with a proceeding commenced by an application to the Board, means the commencement by a party of a proceeding before the Board, and includes a notice filed under section 80 or 81 of the Act;

“Board” means the Ontario Energy Board and includes any panels or delegates thereof;

“Board Secretary” means the Secretary of the Board and any Assistant Secretary appointed by the Board under the Act;

“business day” means any day which is not a holiday;

“document” or **“record”** includes a written document, film, audio tape, videotape, file, photograph, chart, graph, map, plan, survey, book of account, transcript, and any information stored by means of an electronic storage and retrieval system;

“FIPPA” means the *Freedom of Information and Protection of Privacy Act* (Ontario);

“hearing” means a hearing in any proceeding before the Board, and includes an electronic hearing, an oral hearing, and a written hearing;

“holiday” means any Saturday, Sunday, statutory holiday, and any day that the Board’s offices are closed for observance of a holiday within the meaning of the *Interpretation Act* (Ontario);

“party” includes an applicant, an appellant, any person granted intervenor status by the Board and any person ordered to produce information in a proceeding before the Board; and

“proceeding” means a process to decide a matter brought before the Board, including a matter commenced by application, notice of motion, notice of appeal, reference, request of the Minister, Order in Council or on the Board’s own motion.

3.1.2. Except as otherwise defined in section 3.1.1, words and expressions used in this Practice Direction shall have the meaning ascribed to them in the Act and the Board’s *Rules of Practice and Procedure*.

3.2. Interpretation

3.2.2. In this Practice Direction:

- (a) words importing the singular include the plural and vice versa;
- (b) words importing a gender include any gender;
- (c) words importing a person include (i) an individual, (ii) a company, sole proprietorship, partnership, trust, joint venture, association, corporation or

other private or public body corporate; and (iii) any government, government agency or body, regulatory agency or body or other body politic or collegiate;

- (d) where a word or phrase is defined in this Practice Direction, other parts of speech and grammatical forms of the word or phrase have a corresponding meaning;
- (e) a reference to a document (including a statutory instrument) or a provision of a document includes any amendment or supplement to, or any replacement of, that document or that provision; and
- (f) the expression “including” means including without limitation.

3.3. Matters Decided Under Delegated Authority

- 3.3.1. Under the authority of section 6 of the Act, the management committee of the Board has delegated certain powers or duties to an employee of the Board. In such cases, the delegate is responsible for making determinations in relation to confidential filings. The provisions of this Practice Direction otherwise apply in relation to confidential filings made in the context of a proceeding to be decided under delegated authority.

4. WHEN REQUEST FOR CONFIDENTIALITY IS NOT REQUIRED

4.1. Information Identified as Confidential in Board Templates and Filing Guidelines

- 4.1.1. The Board has developed certain templates and filing guidelines to assist applicants in preparing licensing and other applications. Certain of these templates and filing guidelines, including licence application forms for electricity licences and gas marketing licences, identify predefined categories of information that will be considered confidential in the normal course. Where a Board template or filing guideline indicates that information will be treated in confidence, no formal request for confidentiality under Part 5 is required. However, to the extent practicable, any such information should be clearly marked “confidential”.
- 4.1.2. Where a Board template or filing guideline indicates that information will be treated in confidence, the information will not be placed on the public record nor provided to any other party unless another party requests access to that information under section 4.1.4 and the Board rules in favour of that request.

- 4.1.3. In the absence of a request for confidentiality, all information that is not indicated on a template or in a filing guideline as being confidential will be included on the public record. An applicant that wishes information that would normally be included on the public record to be held confidential must follow the procedure set out in Part 5, and the Board will determine the request in accordance with Part 5.
- 4.1.4. Where a Board template or filing guideline indicates that information will be treated in confidence, a party may request access to that information by filing a request with the Board Secretary and serving a copy of the request on the applicant and each party. The request must address the matters identified in paragraph (b) of section 5.1.7. The applicant will have an opportunity to object to the request for access to confidential information. The applicant must file its objection with the Board Secretary and serve it on all parties within the time specified by the Board. The Board will determine the request for access to confidential information in accordance with Part 5.

4.2. Information filed Under the Board's Reporting and Record Keeping Requirements ("RRR")

- 4.2.1. The Board's *Natural Gas Reporting & Record Keeping Requirements: Rule for Natural Gas Utilities, Natural Gas Reporting and Record Keeping Requirements: Gas Marketer Licence Requirements and Electricity Reporting and Record Keeping Requirements* require that licensees and natural gas utilities file certain information with the Board on a regular basis. Each of these RRR identify information that the Board intends to treat in confidence. No formal request for confidentiality is required in relation to such information when it is filed with the Board as part of a regular RRR filing. However, to the extent practicable, any such information should be clearly marked "confidential". Where such information is filed as part of a regular RRR filing and is subsequently filed in a proceeding, Parts 5 and 6 apply.

4.3 Personal Information under FIPPA

- 4.3.1 Subject to limited exceptions, the Board is prohibited from releasing personal information, as that phrase is defined in FIPPA. When a person files a document or record that contains the personal information of another person who is not a party to the proceeding, the person filing the document or record must file two versions of the document or record in accordance with Rule 9A.01 of the Board's *Rules of Practice and Procedure*. As indicated in Rule 9A.02, the confidential, un-redacted version of the document or record will be held in confidence and neither that version of the document or record nor the personal information contained in it will be placed on the public record or provided to any other party, including a person from whom the Board has accepted a Declaration and

Undertaking under section 6.1, unless the Board determines that the information is not personal information or that the disclosure of the personal information would be in accordance with the requirements of FIPPA.

5. GENERAL PROCESS FOR CONFIDENTIALITY IN MATTERS BEFORE THE BOARD

The processes set out in this Part and in Part 6 are intended to allow for the protection of information that has been properly designated as confidential. The onus is on the person requesting confidential treatment to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case.

It is also the expectation of the Board that parties will make every effort to limit the scope of their requests for confidentiality to an extent commensurate with the commercial sensitivity of the information at issue or with any legislative obligations of confidentiality or non-disclosure, and to prepare meaningful redacted documents or summaries so as to maximize the information that is available on the public record. This will provide parties with a fair opportunity to present their cases and permit the Board to provide meaningful and well-documented reasons for its decisions.

The processes set out in this Part and in Part 6 contemplate that the Board will play a central role in directing and managing the exchange of confidential filings and related materials (such as the Declaration and Undertaking). A party that independently serves other parties with documents containing confidential information other than through or at the direction of the Board does so at its own risk.

5.1. Process for Confidentiality Requests

5.1.1. All filings must be made in accordance with the Board's *Rules of Practice and Procedure*, specifically, Rule 10 of the *Rules of Practice and Procedure*, which deals with confidential documents before the Board.

5.1.2. In accordance with Rule 10.01 of the Board's *Rules of Practice and Procedure*, a party may request that all or part of a document be held confidential.

5.1.3. A request for confidentiality must be addressed to the Board Secretary.

5.1.4. A request for confidentiality must include the following items:

- (a) a cover letter indicating the reasons for the confidentiality request, including the reasons why the information at issue is considered confidential and the reasons why public disclosure of that information would be detrimental;

- (b) a confidential, un-redacted version of the document containing all of the information for which confidentiality is requested. This version of the document should be marked “confidential” and should identify all portions of document for which confidentiality is claimed by using shading, square brackets or other appropriate markings. If confidential treatment is requested in relation to the entire document, the document should be printed on coloured paper; and
 - (c) either:
 - i. a non-confidential, redacted version of the document from which the information that is the subject of the confidentiality request has been deleted or stricken; or
 - ii. where the request for confidentiality relates to the entire document, a non-confidential description or summary of the document.
- 5.1.5. A copy of the cover letter requesting confidentiality, together with the non-confidential version or non-confidential description of the document (as applicable) must be served on all parties to the proceeding, and will be placed on the public record. The confidential, un-redacted version of the document will, subject to section 5.1.6, be kept confidential until the Board has made a determination on the confidentiality request.
- 5.1.6. A party to the proceeding may object to the request for confidentiality by filing an objection with the Board Secretary within the time specified by the Board. The objection must be served on all other parties to the proceeding, including the party that made the confidentiality request. Where the party requires access to the confidential version of the document in order to submit its objection, the party may request that the Board allow access for that purpose under suitable arrangements as to confidentiality. Such request shall be made in writing to the Board Secretary or, where the request is made during an oral hearing, directly to the Board. The party that made the confidentiality request may object to the request for access within the time and in the manner specified by the Board.
- 5.1.7. An objection to a request for confidentiality must address the following:
- (a) the reason why the party believes that the information that is the subject of the request for confidentiality is not confidential, in whole or in part, by reference to the grounds for confidentiality expressed by the party making the request for confidentiality; and

- (b) the reason why the party requires disclosure of the information that is the subject of the request for confidentiality and why access to the non-confidential version or description of the document (as applicable) is insufficient to enable the party to present its case.

5.1.8. The party requesting confidentiality will have an opportunity to reply to the objection. The replying party must file its reply with Board Secretary and serve it on all parties to the proceeding within the time specified by the Board.

5.1.9. The Board will then assess whether the request for confidentiality should be granted, and may determine that a request for confidentiality is not warranted regardless of whether any party has objected to the request. Some of the factors that the Board may consider in making this assessment are listed in Appendix A, including whether the Board has in the past assessed or maintained the same type of information as confidential. An illustrative list of the types of information that the Board has previously assessed or maintained as confidential is set out in Appendix B, and parties may anticipate that the Board will accord confidential treatment to these types of information in the normal course.

5.1.10. In determining the request for confidentiality, the Board may:

- (a) order the document placed on the public record, in whole or in part;
- (b) order the document be kept confidential, in whole or in part;
- (c) order that the non-confidential redacted version of the document or the non-confidential description or summary of the document (as applicable) be revised;
- (d) order that the confidential version of the document be disclosed under suitable arrangements as to confidentiality (see Part 6); or
- (e) make any other order that the Board finds to be in the public interest.

5.1.11. The Board will notify all parties of its decision in relation to a request for confidentiality.

5.1.12. Where the Board has ordered that information that is the subject of a confidentiality request be placed on the public record or disclosed to another party, in whole or in part, the person who filed the information will, subject to section 5.1.13, have a period of 5 business days in which it may request that the information be withdrawn. Such request shall be made in writing to the Board Secretary or, where the request is made during an oral hearing, directly to the Board. The Board may deny the request where the information is relevant to a

matter in issue and its probative value would outweigh any unfair prejudice, having regard to the record of the proceeding at the time of the request.

5.1.13. The ability to request the withdrawal of information under section 5.1.12 does not apply to information that was required to be produced by an order of the Board.

5.1.14. If the party that made the request for confidentiality indicates, within five business days of the date of receipt of the Board's order, that it intends to appeal or seek review of the decision, the Board will not place the document on the public record until the appeal or review has been concluded or the time for filing an appeal or review has expired without an appeal or review having been commenced. In the absence of such an indication, the Board will deal with the information in the manner set out in its order.

5.2. Confidentiality Requests Made Orally During an Oral Hearing

5.2.1. The provisions of section 5.1 generally apply to requests for confidentiality made in the context of an oral hearing. However, the Panel presiding over the oral hearing may take such action as it considers appropriate to expedite the process when there is an immediate need for information that the Panel needs to hear.

5.3. Interrogatories

5.3.1. A party may request that all or part of a response to an interrogatory be held confidential. The provisions of section 5.1 apply to requests for confidentiality made in relation to a response to an interrogatory, with such modifications as the context may require.

6. ARRANGEMENTS AS TO CONFIDENTIALITY

Where the Board has agreed to a request for confidentiality, the confidential information will not be placed on the public record. Representatives of parties to the proceeding will generally be given access to the confidential information provided that suitable arrangements as to confidentiality are made, although the Board may limit access to confidential information to those parties that the Board has determined require access to the confidential information in order to present their cases. This Part sets out the principal arrangements that the Board will use in allowing limited and conditional access to confidential information by representatives of parties.

The processes set out in this Part require that parties file a Declaration and Undertaking with the Board. Parties to a proceeding will be notified when the Board has accepted a Declaration and Undertaking from a person. Parties should not independently serve a Declaration and Undertaking on other parties.

The Board considers violations of a Declaration and Undertaking given to the Board under this Part to be a matter of very serious concern. Such violations can be, and will continue to be, subject to sanctions imposed by the Board. In appropriate cases, the Board may also refuse to accept further Declaration and Undertakings from persons whose future compliance with a Declaration and Undertaking is in question.

6.1 Declaration and Undertaking

6.1.1. The Board may determine that confidential information should, in whole or in part, be disclosed to one or more persons that have signed the form of Declaration and Undertaking attached to this Practice Direction. The Declaration and Undertaking is a binding commitment by the person: (i) not to disclose the confidential information except as permitted by the Board; (ii) to treat the confidential information in confidence; (iii) to return or destroy the confidential information following completion of the proceeding; and (iv) in the case of confidential information in electronic media, to expunge the confidential information from all electronic apparatus and data storage media under the person's direction or control, and to continue to abide by the terms of the Declaration and Undertaking in relation to such confidential information to the extent that it subsists in an electronic form and cannot reasonably be expunged in a manner that ensures that it cannot be retrieved. A signed Declaration and Undertaking must be filed with the Board and will be placed on the public record.

6.1.2. Subject to section 6.1.4, the Board will, except where there are compelling reasons for not doing so, accept a Declaration and Undertaking from the following:

- (a) counsel for a party; and
- (b) an expert or consultant for a party.

As a general rule, such counsel, expert or consultant cannot be a director or employee of a party.

6.1.3. Subject to section 6.1.4, the Board may accept a Declaration and Undertaking from other persons in appropriate cases. In such a case, a modified version of the form of Declaration and Undertaking will be made available to such person.

6.1.4 The Board shall notify the party that filed the confidential information that would be the subject-matter of a Declaration and Undertaking of the persons from whom a Declaration and Undertaking will be accepted. The party shall have an opportunity to object to the acceptance of a Declaration and Undertaking from such person in the manner and within the time specified by the Board. The

person to whom the objection relates shall have an opportunity to reply to the objection in the manner and within the time specified by the Board. The Board will then decide whether it will accept a Declaration and Undertaking from such person and may, as a condition of acceptance of the Declaration and Undertaking, impose such further conditions in relation to that person's access to the confidential information as the Board considers appropriate. Where the Board accepts a Declaration and Undertaking from a person, the Board will notify the other parties to the proceeding or direct that the other parties be notified accordingly. A person should not serve a Declaration and Undertaking on other parties unless directed by the Board to do so. A party is not required to serve confidential information on a person until such time as the party has been notified that the Board has accepted a Declaration and Undertaking from that person.

- 6.1.5. Where the Board determines that confidential information should be disclosed to one or more persons that have signed a Declaration and Undertaking, the Board may act as the conduit for the service of confidential information on such persons. In such cases, the confidential information need only be filed with the Board Secretary (in the appropriate number of copies), and the Board Secretary will attend to the distribution of the confidential information to persons that have signed a Declaration and Undertaking.
- 6.1.6. In accordance with the terms of the Declaration and Undertaking, confidential information must either be destroyed or expunged (as applicable) or returned to the Board Secretary for destruction promptly following the end of the proceeding for destruction. A person that chooses to destroy or expunge confidential information must file with the Board Secretary the form of Certification of Destruction attached to this Practice Direction.

6.2. Hearings in the Absence of the Public (*In Camera* Hearings)

- 6.2.1. Under section 9 of the *Statutory Powers Procedure Act* (Ontario), oral hearings are required to be open to the public except where the Board is of the opinion that "intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public", in which case the Board may hold the hearing in the absence of the public. It is therefore the Board's normal practice is to hold oral hearings in public to comply with this obligation and to facilitate transparency, openness, and accessibility of the Board's processes.
- 6.2.2. The Board recognizes that there may be some instances where the proceedings may need to be closed to the public. This situation could arise when there is a possibility that information that the Board has agreed is confidential will be

disclosed during an oral hearing. When this occurs, the Board will exclude from the hearing room all persons other than the following:

- (a) representatives of the Board (i.e., Board staff, Board consultants, etc.);
- (b) representatives of the party that filed the confidential information; and
- (c) persons that have signed and returned to the Board a Declaration and Undertaking, provided that the confidential information at issue is covered by the Declaration and Undertaking and that the Board has determined that the persons require access to the confidential information in order to present their cases.

The hearing will then proceed *in camera* for such time as the confidential information is the subject of the hearing or is being referred to.

- 6.2.3. When part of a hearing is conducted *in camera*, transcripts of the *in camera* portion of the hearing will be dealt with in the same manner as the confidential information at issue. Subject to section 6.2.5, copies of the transcript of the *in camera* portion of the hearing will only be provided to the party that provided the confidential information and to applicable persons that have signed and returned to the Board a Declaration and Undertaking.
- 6.2.4. The party that filed the confidential information that is the subject of an *in camera* portion of a hearing shall, within five business days or such other time as the Board may direct, review the transcript of that portion of the hearing and shall file with the Board:
 - (a) a redacted version of the transcript that identifies all portions of the transcript for which confidentiality is claimed, using shading, square brackets or other appropriate markings; or
 - (b) where the party believes that the entire transcript should be treated as confidential, a letter identifying why the party believes that to be the case and a summary of the transcript for the public record.
- 6.2.5. The Board will assess the filing made under section 6.2.4 and may, among such other action as the Board may take, do one or more of the following:
 - (a) provide a redacted version of a transcript prepared under section 6.2.4(a) or this section to all applicable persons that have signed and returned to the Board a Declaration and Undertaking, or direct that it be so provided;

- (b) direct that the party that filed a redacted version of a transcript under section 6.2.4(a) or this section prepare and file a revised redacted version of the transcript;
- (c) provide a summary of a transcript prepared under section 6.2.4(b) or this section to all parties to the proceeding, or direct that it be so provided;
- (d) direct that the party that filed a summary of a transcript under section 6.2.4(b) prepare and file a revised summary or a redacted version of the transcript;
- (e) direct that any public testimony that is given *in camera* be placed on the public record and provided to all parties to the proceeding; or
- (f) direct that a redacted version of the transcript suitable for being placed on the public record be prepared and provided to all parties to the proceeding.

6.3. Other

- 6.3.1. Where the Board has made arrangements for the disclosure of confidential information, the Board may give further directions to the parties from time to time to protect the confidential information from disclosure to persons that are not entitled to such disclosure. These directions may include the process for the filing and exchange of interrogatories that contain the confidential information and the manner in which confidential information may be addressed as part of closing arguments or final submissions.
- 6.3.2. Parties should make every effort to prepare their written argument such that the entirety of the document can be placed on the public record. Where it is necessary to make specific reference to confidential information in a written argument, the party filing the argument should either:
 - (a) file a public version of the written argument together with a confidential appendix that contains the confidential information; or
 - (b) file both an un-redacted confidential version of the written argument and a public, redacted version of the written argument from which all confidential information has been deleted.
- 6.3.3. Where the Board considers that a confidential appendix to, or a redacted version of, a written argument contains information that has not been determined by the Board to be confidential, the Board may order the party filing the written argument to file a revised appendix or redacted version.

7. ADR CONFERENCES

7.1.1. This Practice Direction does not apply to ADR conferences.¹ Confidentiality in the context of ADR conferences shall be governed by the Board's *Rules of Practice and Procedure*, Settlement Guidelines and any other applicable Practice Guidelines.

8. INSPECTIONS AND INVESTIGATIONS

Sections 110 and 111 of the Act contain provisions that address the confidentiality of documents, records and information obtained by an inspector under Part VII of the Act. Sections 112.0.5 and 112.0.6 of the Act are to the same effect in relation to information obtained by an investigator under Part VII.0.1 of the Act.

8.1.1. All documents, records and information obtained by an inspector during the course of an inspection under section 107 or 108 of the Act or obtained by an investigator under Part VII.0.1 of the Act are confidential. Generally speaking, such documents, records and information will not be disclosed to anyone other than Board staff or Board members. By way of exception, documents, records and information obtained during an inspection or investigation may be disclosed:

- (a) to counsel for the Board;
- (b) as may be required in connection with the administration of the Act or any other Act that gives powers or duties to the Board;
- (c) in any proceeding under the Act or any other Act that gives powers or duties to the Board;
- (d) with the consent of the owner of the document or record or the person that provided the information; and
- (e) where required by law.

8.1.2. No document, record or information obtained by an inspector under section 107 or 108 of the Act or obtained by an investigator under Part VII.0.1 of the Act will be introduced in evidence in a Board proceeding unless the Board has given notice to the owner of the document or record or the person who provided the

¹ For clarity, an ADR conference does not include a technical conference. Any confidentiality issues arising in relation to a technical conference will be addressed in accordance with Parts 5 and 6 of this Practice Direction.

information, and has given that person an opportunity to make representations with respect to the intended introduction of that evidence.

- 8.1.3. If any document, record, or other information obtained by an inspector or investigator is admitted into evidence in a proceeding before the Board, the Board may determine whether the document, record, or information should be kept confidential and, if so, whether and the extent to which the document, record or information should be disclosed under suitable arrangements as to confidentiality (see Part 6). The Board will determine the matter in accordance with Parts 5 and 6.

9. *FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

Participants in the Board's processes are reminded that the Board is subject to FIPPA. FIPPA addresses circumstances in which the Board may, upon request, be required to release information that is in its custody or under its control, and generally prohibits the Board from releasing personal information. Accordingly, the Board will have regard to its obligations under FIPPA when making determinations in relation to confidential filings (see section 4.3.1). A brief overview of the more relevant provisions of FIPPA is set out in Appendix C.

10. *ELECTRONIC INFORMATION*

The Board will not, without the consent of the party that filed the confidential information, transmit materials containing confidential information by electronic mail. Materials containing confidential information, including transcripts of in camera proceedings, may be made available only in paper form or on diskette or other machine-readable media.

11. *ACCESS TO CONFIDENTIAL INFORMATION OUTSIDE OF PROCEEDING*

Interested persons may wish to see confidential information at times other than during the proceeding in which the confidential information was filed. In such a case, the interested person may request access to that information by filing a request with the Board Secretary. The person that filed the confidential information will have an opportunity to object to the request for access to that information. The objection must be filed with the Board Secretary and served on the person requesting access. The Board will determine the request for access to confidential information in accordance with Part 5.

Appendix A

Considerations in Determining Requests for Confidentiality

The final determination of whether or not information will be kept confidential rests with the Board. The Board will strive to find a balance between the general public interest in transparency and openness and the need to protect confidential information. Some factors that the Board may consider in addressing confidentiality of filings made with the Board are:

- (a) the potential harm that could result from the disclosure of the information, including:
 - i. prejudice to any person's competitive position;
 - ii. whether the information could impede or diminish the capacity of a party to fulfill existing contractual obligations;
 - iii. whether the information could interfere significantly with negotiations being carried out by a party; and
 - iv. whether the disclosure would be likely to produce a significant loss or gain to any person;
- (b) whether the information consists of a trade secret or financial, commercial, scientific, or technical material that is consistently treated in a confidential manner by the person providing it to the Board;
- (c) whether the information pertains to public security;
- (d) whether the information is personal information;
- (e) whether the Information and Privacy Commissioner or a court of law has previously determined that a record should be publicly disclosed or kept confidential;
- (f) if an access request has previously been made for the information under FIPPA, whether the information was disclosed as a result of that request;
- (g) any other matters relating to FIPPA and FIPPA exemptions;
- (h) whether the type of information in question was previously held confidential by the Board; and

- (i) whether the information is required by legislation to be kept confidential.

Information that is in the public domain will not be considered confidential.

Appendix B

Types of Information that Have Previously Been Held Confidential

This Appendix contains an illustrative list of the types of information previously assessed or maintained by the Board as confidential, and parties may anticipate that the Board will accord confidential treatment to these types of information in the normal course.

1. Individual Personal Records

Personal records of employees or other members of entities seeking licenses that are either filed with the Board or otherwise obtained have previously been held confidential. Individual personal records include police, tax, CPIC, and other personal records.

2. Credit Checks

Personal credit checks. These are credit checks filed with the Board, or obtained by the Board, from a variety of commercial sources including Dunn & Bradstreet and Standard & Poor's.

3. Information Covered by Solicitor-client Privilege or Litigation Privilege

Advice with respect to litigation or other legal information protected by solicitor-client privilege or litigation privilege.

4. Tax Related Information

Information from a tax return or information gathered for the purpose of determining tax liability or collecting a tax.

5. Third Party Information under FIPPA

Third party information as described in section 17(1) of FIPPA, including vendor pricing information.

6. "Forward Looking" Financial Information

"Forward looking" financial information that has not been publicly disclosed and that Ontario securities law therefore requires be treated as confidential.

7. Information Identified as Confidential in Board Templates and Filing Guidelines

Information identified as being considered confidential in Board templates and filing guidelines, including licence application forms for electricity licences and gas marketing licences.

8. Information Filed Under the RRR

Information identified in the Board's *Natural Gas Reporting & Record Keeping Requirements: Rule for Natural Gas Utilities, Natural Gas Reporting and Record Keeping Requirements: Gas Marketer Licence Requirements and Electricity Reporting and Record Keeping Requirements* as being treated as confidential.

Appendix C

Summary of Pertinent FIPPA Provisions

FIPPA allows any person to request access to records or information in the custody or under the control of the Board.

Subject to limited exceptions, the Board is prohibited from releasing personal information.

Following receipt of a request, the Board must release non-personal information that is in its custody or under its control unless the information falls within one of the exemptions listed in the legislation. Some of the exemptions are mandatory (in which case the information must be withheld) and others are discretionary (in which case the information may be withheld). For example, records do not need to be released if disclosure would:

- (a) reveal advice to the government from a public servant or a consultant;
- (b) interfere with law enforcement;
- (c) reveal confidential information received from another government;
or
- (d) violate solicitor-client privilege.

The exemptions that are likely to be of most relevance in the context of confidential filings with the Board are those contained in section 17 of FIPPA, which relates to commercially sensitive third party information.

Under section 17(1), the Board must not, without the consent of the person to whom the information relates, disclose a record where:

- (a) the record reveals a trade secret or scientific, technical, commercial, financial or labour relations information;
- (b) the record was supplied in confidence implicitly or explicitly; and
- (c) disclosure of the record could reasonably be expected to have any of the following effects:
 - i. prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization;

- ii. result in similar information no longer being supplied to the Board where it is in the public interest that similar information continue to be so supplied;
- iii. result in undue loss or gain to any person, group, committee or financial institution or agency; or
- iv. reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Before granting a FIPPA request for access to a record that the Board has reason to believe might contain information referred to in section 17(1) of FIPPA, the Board must give written notice to the person to whom the information relates. That person then has an opportunity to make written representations as to why the record (or a part of the record) should not be disclosed. Where the Board subsequently decides to disclose the record (or a part of the record), the Board must again give written notice to the person to whom the information relates. That person then has an opportunity to appeal the decision to the Information and Privacy Commissioner.

Under section 17(2) of FIPPA, the Board must not, without the consent of the person to whom the information relates, disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.